

International Development Law Organization

Development Lawyers Course

DLC 20E

International Sale of Goods

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CLASS OUTLINE:

**CONTRACTUAL ISSUES RELATED
TO DISPUTE RESOLUTION**

- GOVERNING LAW
- CHOICE OF FORUM
- JURISDICTION
- MEDIATION & ARBITRATION
- SETTLEMENTS AND RELEASES^{1/}

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I. ANTICIPATION OF CONTRACTUAL DISPUTES

The key method for avoiding contract of sale disputes is, of course, to recognize and deal with the areas of potential conflict when the contract is drafted before the conflict arises. However, there are

^{1/} Based, in part, on "Negotiating and Structuring International Commercial Transactions," American Bar Association.

contractual provisions that ought to be considered that can expedite and make more efficient the resolution of any disputes that may arise.

A. KEY PROVISIONS

1. **Mediation, Arbitration and/or Litigation:**
2. **Governing Law.** A clause which specifies the applicable law is essential. This provision binds the parties to a particular code of law, and avoids the uncertainty of conflicting laws under different conflict of laws rules.
3. **Forum / Location.** A clause which specifies the forum for dispute resolution is imperative. This provision enables the parties to select the exclusive method and forum for resolving whatever disputes may arise. It permits parties to decide among domestic and foreign tribunals or various institutional or *ad hoc* arbitration, and mediation alternatives.
4. **Enforcement/Termination.** A clause which defines when and how the contract may be enforced or terminated is significant. This provision removes performance obligations from various ambiguities which may arise, furnishes a clear bases to enforce or terminate the contract, and provides means to maintain the contract if provisions are determined to be ineffective.

B. GOVERNING LAW PROVISION

1. The courts in most other commercial countries generally honor a contractual provision which specifies the law which the parties agree will govern their relationship.
2. Choice of law stipulations may provide for the applicability of a particular country's law, general principles of law, or international law to the entire or only to certain parts of the contract.
3. It is generally recognized that the chosen law applies as it may change or be amended from time to time, but the parties may agree to negotiate new terms or use dispute resolution procedures if new law significantly affects the rights or obligations in the contract.
4. Party autonomy in the choice of law, however, is not unlimited. Besides the requirement that the transaction must have a connection to the law selected, there are other restrictions, some of which vary in different jurisdictions.
5. Recent developments in international law have expanded the opportunity for parties to select the law applicable to their commercial transactions. There is a decided trend toward permitting contracting parties freely to choose the law desired.
 - a. Under the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), parties are entirely free to remove their contract from a particular national law and instead subject it to this Convention, or exclude the Convention's application or "vary the effect of any of its provisions."
 - b. Despite these trends, it is necessary to ascertain the policy of the countries involved to be certain that the parties' choice is valid.

6. In making the law choice, parties should not overlook the possibility of unintended consequences. The reference to the laws of a particular state or country includes **all** the law. For example, an expensive choice of law would be made where the contractual choice resulted in prejudgment interest that might not otherwise be available.

C. CHOICE OF FORUM (Location) PROVISION

The choice of the forum for dispute resolution is as important as the choice of law provision. Each choice has advantages and disadvantages.

The forum choice traditionally has been between judicial and arbitration fora but in the last decade mediation has become a third alternative..

1. The Judicial Forum.

- a. If the parties decide to utilize a judicial forum, consideration should be given to the domestic courts of one of the parties or to the courts of a neutral country which has a connection to the transaction sufficient to sustain jurisdiction.
- b. While parties may waive personal jurisdiction objections, parties cannot confer subject matter jurisdiction on a court.
- c. In considering the selection of a judicial forum, it is important to weigh the extent to which a final judgment will be recognized and enforced. There is no universally applied international law or convention pertinent to the recognition and enforcement of a judgment by courts of foreign jurisdictions. The enforcement of foreign judgments is a matter of comity.

2. The Arbitration Forum (An Overview). (See Section II A, pages 5-8 below)

- a. Parties to international commercial contracts often favor dispute resolution by the arbitration process.
- b. Similar recognition is contained in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Arbitration Convention") (incorporated in the Federal Arbitration Act at 9 U.S.C. §§ 201-208).
- c. In contrast to the recognition and enforcement of judgments, the process for the recognition and enforcement of arbitral awards is accepted.
- d. Under the procedures specified in the Arbitration Convention, courts of the signatory countries are required to recognize and enforce arbitration awards. While Article V of the Arbitration Convention provides some grounds for refusing to enforce an award, those grounds are limited and arise infrequently. Those grounds include:
 - (1) lack of capacity of the parties to the agreement;
 - (2) lack of notice of the appointment of an arbitrator or of the proceedings or other inability to present the case;
 - (3) circumstances where the award covers matters beyond the scope of the arbitration submission, or the composition of the arbitral authority or procedure was not in accordance with the agreement of the parties; and
 - (4) grounds where the award for some reason is not binding on the parties or has been set aside or suspended by a competent authority.

3. **The Mediation Forum (An Overview).**

- a. The place of mediation can be (indeed ought to be) specified in the contract.

However, if mediation is a genuinely viable alternative in a give dispute then the parties ought to be able to agree to the mediation forum even after the dispute arises. If not, a successful mediation is highly unlikely.

II. THE MEDIATION ALTERNATIVE

III. THE ARBITRATION ALTERNATIVE

Arbitration is the most effective, commonly used means to resolve international business disputes.

Arbitration provisions ordinarily are included in commercial contracts as the exclusive means for dispute resolution.

The effectiveness of the arbitration process in large measure depends on the alternatives included in the choice of forum clause.

A. THE ARBITRATION FORUM

Among the most important issues is the decision regarding the type of arbitration. Parties have a choice between institutional or *ad hoc* arbitration; each has its own characteristics.

1. **Institutional Arbitration**. The International Chamber of Commerce, the London Court of International Arbitration, and the American Arbitration Association are the most familiar institutional fora, but there are numerous other institutional bodies, most notably the Japan Commercial Arbitration, the Stockholm Chamber of Commerce, the Inter-American Commission of Commercial Arbitration, and the International Centre for the Settlement of Investment Disputes. The services of these institutions vary, but they

include administration, procedural rules, technical expertise, arbitration experience, and support staff and facilities.

2. **Ad Hoc Arbitration.** *Ad hoc* arbitration is not under the auspices of any institution and requires the parties to agree to procedure rules and to furnish services normally provided by arbitration institutions. In terms of enforcement of an arbitration award, the Arbitration Convention recognizes the validity of both institutional and *ad hoc* arbitration: choice primarily depends on the type of contract involved, the preference of the parties, and the nature of potential disputes.
 - a. Some prefer *ad hoc* arbitration because it is private and frequently is less expensive.
 - b. The principal advantage of the selection of an institution is that it can provide administrative supervision under established rules, and awards rendered have the imprimatur of an internationally acknowledged institution.
 - c. If the parties select *ad hoc* arbitration, they must select the mechanism for appointing the arbitrators and the procedure rules. The parties are free to jointly designate a single arbitrator or a panel of arbitrators, or to agree on the procedure for appointing arbitrators when a dispute arises.
 - d. When *ad hoc* arbitration is chosen, it is particularly important to designate the procedure rules which will govern the proceeding. The Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") are readily accepted by parties to *ad hoc* arbitration. It should be noted, however, that parties can select the procedure rules of any institutional arbitration body.
 - e. Should the parties prefer institutional arbitration, the selection of the institution is important. Each institution has advantages and disadvantages. These may include cost, location, procedure rule limitations, case administration efficiency, and familiarity with the parties and subject matter of the transaction.

B. SCOPE OF ARBITRATION

1. The parties need to consider whether they wish to arbitrate all disputes or only certain disputes.
2. Commercial agreements generally include provisions indicating a preference to submit all disputes to binding arbitration, but that is not required.
3. The purpose of a global, final award provision is to ensure that every conceivable dispute arising out of or in connection with the contract will be settled exclusively by arbitration, and that the award rendered by the arbitrators will be final and enforceable.
4. It is also useful to consider the possible need for ancillary relief, such as a temporary restraining order to prevent disposition of property or to prevent unlawful conduct pending the arbitration decision. Laws and arbitration rules vary on this subject. For this reason, parties should consider authorizing arbitrators to grant judicially enforceable preliminary relief.

C. LAW APPLICABLE TO MERITS AND TO PROCEEDING

1. In addition to the governing law provision applicable to the contract's interpretation, it is important for the arbitration clause itself to designate the law applicable to the arbitration.
2. There are a host of legal issues which may arise with respect to the interpretation of the arbitration clause, including procedural as well as substantive law issues.

3. If this choice of law clause is not included, then the most likely result will be that the law applicable to arbitration proceedings in the place of arbitration will be applied.

D. PLACE OF ARBITRATION

1. The choice of law is a matter also tied to the locale selected for arbitration and the choice of arbitrators.
2. The locale should be a place convenient for the parties where sources of the applicable law are readily available.
3. Although not mandatory, it is preferable for the place of arbitration to be in a country which is a party to the Arbitration Convention, in order to facilitate enforcement.
4. As a consequence, the situs of the arbitration should be where local law will not interfere with the exclusivity of the arbitration process.

E. OTHER CONSIDERATIONS IN DRAFTING AN ARBITRATION CLAUSE

1. There are a number of other practical considerations which should be resolved by the arbitration clause.
2. There is a decided lack of harmony on relief issues, such as:

- a. the currency in which an award will be rendered and enforced;
- b. whether prejudgment and postjudgment interest will be allowed and, if allowed, on what basis and what rate of interest;
- c. costs, including the cost of arbitration, and the cost of enforcement procedures; and
- d. attorney's fees.

These matters should be settled by the arbitration clause.

IV. THE LITIGATION ALTERNATIVE: JURISDICTION

- A. In the absence of effective arbitration or other dispute resolution alternatives, parties may resort to courts to adjudicate their differences.
- B. Litigation always is difficult and frequently results in an irreparable breach of relations among the parties.
- C. Among the most significant problems in international litigation is that one of the parties is a stranger, forced to litigate in a foreign country under unfamiliar rules. For the unwilling litigant, the foreign court frequently is viewed as bizarre and the rules applicable as unjust. For this reason, resort to litigation is the least satisfactory method to settle most international business disputes.

V. DRAFTING SETTLEMENT AGREEMENTS AND RELEASES

- A. It obviously is preferable to resolve disputes by a negotiated settlement which satisfies the obligation and discharges further liability.
- B. From the time a dispute first arises, the possibility of a settlement always should be considered.
- C. The time and expense involved in a protracted legal proceeding, whether the forum is judicial or non-judicial, encourage parties to work toward termination of a dispute prior to trial.
- D. In deciding whether to pursue settlement negotiations, many factors must be considered, including:
 - 1. The amount or extent of the matter at issue;
 - 2. The probability of success if the dispute is litigated, and
 - 3. The effects the settlement may have on other rights of the parties not expressly addressed in the settlement.
- E. The purpose of the settlement agreement should be to unambiguously terminate all or a very clearly defined part of the dispute.
- F. The agreement must be made with persons possessing the proper authority to bind the parties. A proper release is necessary, but caution should be exercised in the drafting of the precise release language. A release may be specific or general, releasing the party from only specifically enumerated claims, or releasing the party generally from any and all claims held by the other party.

- G. When dealing with corporate entities, the issue of authority to bind the corporation must be addressed as it would in any other contractual undertaking.

- H. If litigation or arbitration has commenced, the settlement should address the disposition of such adversary proceedings. If the litigation or arbitration is to be dismissed, or a final judgment or arbitration award entered, procedural rules must be considered in determining the effect of the dismissal, judgment or award.