



NALSAR UNIVERSITY OF LAW
HYDERABAD



SESSION-II

INTERNATIONAL CONTRACT LAW: NORMS AND DRAFTING GUIDELINES

by

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INTERNATIONAL CONTRACT LAW

- ❑ What is 'Contract Law'?
- ❑ What is 'International Contract Law'?
- ❑ Does the 'law' differ compared to India and International Contracts
- ❑ What is 'International Trade Management'?
- ❑ How to enter into an 'International Contract'?
- ❑ What are those precautions to be taken by the parties before entering into International Contract?
- ❑ If Boeing or Air Bus enter into an international contract with HAL or any private entity in India, then what is to be looked into?

INTRODUCTION

- Parties to any commercial contract, whether domestic or international, must consider quality control, compliance with governmental regulations, protection of intellectual property rights, and dispute resolution.
- The International aspect of the contract adds a level of complexity to negotiations, performance, and enforcement because the parties are distant, have diverse cultural backgrounds, and are subject to the laws of different countries.

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- ❑ International contracts must be understood within the context of the legal profession.
 - ❑ It is those two words ('it depends' and 'inform') that have led to the development of the complex language known to the general public as "legalese" (a language particular to the legal profession)
 - ❑ **Ex:** If a sales contract requires a buyer to inform a seller that the goods being purchased must meet certain specifications, a question may arise as to the meaning of the word "inform". An attorney for the buyer might say, "it depends". In this case, the seller should have known that the buyer had particular specifications because the seller previously filled five orders for the buyer for the same goods.

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- Then the attorney for the seller might say, “it depends.” In this case the buyer should have given written instructions because the buyer wrote the specifications on the previous five order forms. Thus, the attorney might turn the simple phrase “the buyer must inform the seller of any particular specifications for the goods” into legalese: “*the buyer, regardless of whether he or she has previously ordered any of the seller’s goods to conform with any specifications whatsoever, shall inform, whether in writing, orally, or otherwise, the seller of any and all specifications with which the buyer demands conformance of the goods that are the subject of this contract.*”

THE ROLE OF CONTRACTS IN INTERNATIONAL COMMERCE

- A ***contract*** is simply an agreement that defines a relationship between one or more parties.
- A ***commercial contract***, in its simplest terms, is merely an agreement made by two or more parties for the purpose of transacting business.

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- The creation of an international contract is a more complex process than the formation of a contract between parties from the same country.
 - In a cross-border transaction, the parties usually do not meet face-to-face, they have different societal values and practices, and the laws to which they are subject are imposed by different governments with distinct legal systems.

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- The role of a contract in an international commercial transaction is of particular importance with respect to the following aspects:
 - i) Balance of Power
 - ii) The Party who drafts the contract (risk of loss passes to buyer)
 - iii) The Party Familiar with Written Contracts (Time essence)
 - iv) Enforcement of One-sided Contracts
 - v) Cross-Border Rights and Obligations

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- vi) Differences in Business Practices
 - vii) International Laws (Ex: CISG)
 - viii) Preciseness and Predictability(defining rights and obligations)
 - ix) Personal Commitment (Timely Delivery, Quality Products)
Ex: When we agree to sell or buy goods internationally, we are also responsible for complying with import, export, customs, consumer product, marking, transport, and other trade-regulating laws of two or more countries. It is wise to ensure that the other party shares the same commitment.)
 - x) Governing Law

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- xi) Choice of Remedies
 - xii) Necessary Terms (In most countries, parties make their own bargains free of legal restraints. However, in most jurisdictions, the courts will enforce a contract only if the parties have agreed to four basic terms:
 - The Description of the goods in terms of type, Qty. and Quality
 - The Time of Delivery
 - The Time and means of Payment

ISSUES AFFECTING INTERNATIONAL CONTRACTS

- i. **Cultural Issues** (etiquette traditions, values, communication, and negotiating styles of a group of people)
- ii. **Role of Politics** governments throughout history have used direct and indirect trade barriers to force changes in the governments and policies of other countries.
- iii. **Regulatory Laws** (Parties must be familiar with laws)
- iv. **Internet Issues** (Sales can be made at electronic speed, suppliers can be sought worldwide, and classified advertising has taken on a global meaning).

PARTIES TO THE TRANSACTION

Example: Leasing of International Airliner

- ❑ Seller and Buyer
- ❑ Seller, Buyer, Insurance Company, Freight Forwards, Transport, Banks

Structure of a Simple Contract

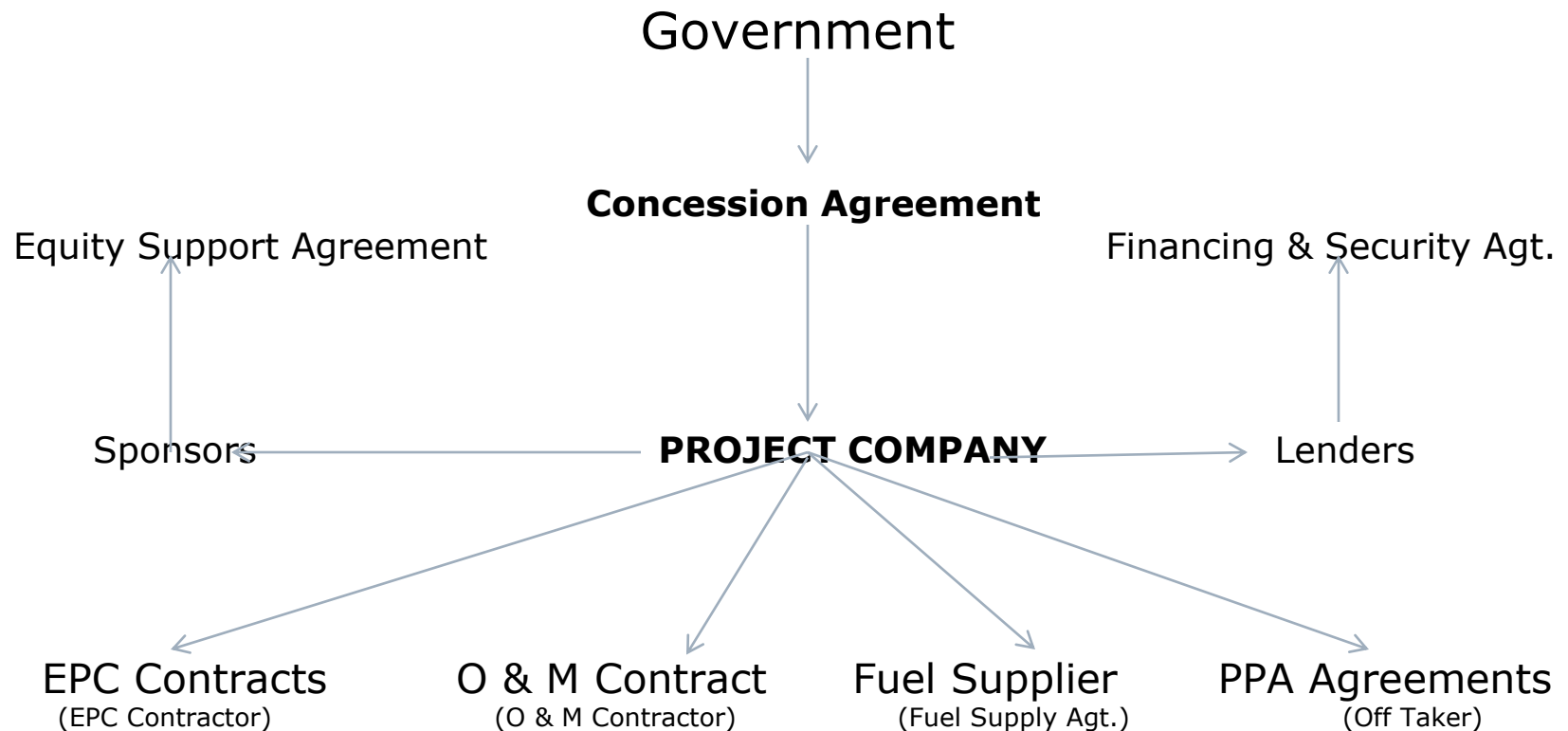
GIFT TRANSACTION

Donor → Donee

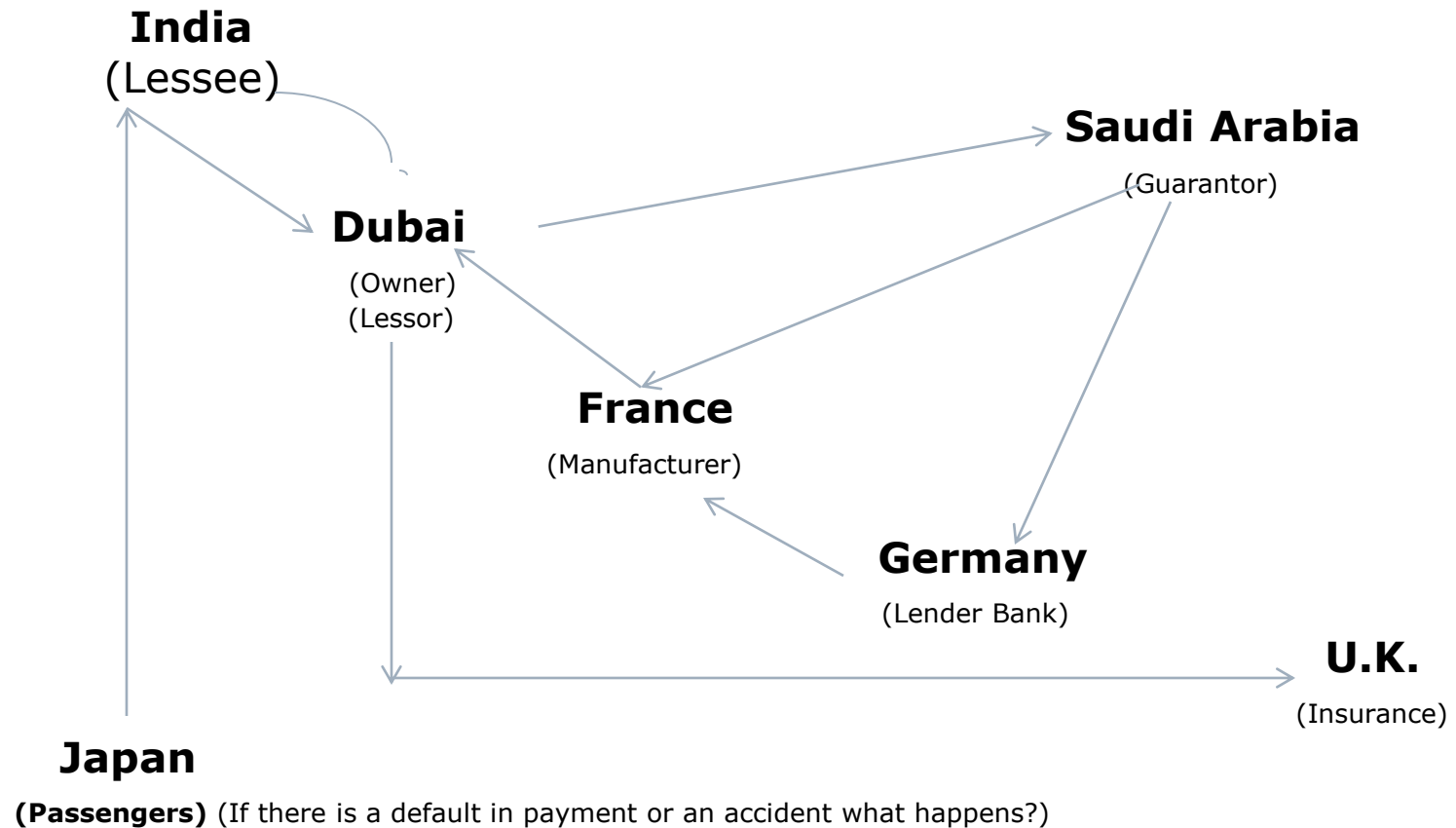
MORTGAGE TRANSACTION

Mortgagor → Mortgagee
Surety

The Contractual Structure of a Project-Financed Power Project using the EPC Contract



Aircraft Leasing and Financing Agreement



UNIDROIT PRINCIPLES

(Purpose of the Principles)

- These Principles set forth **general rules** for international commercial contracts.
- They shall be **applied when the parties have agreed** that their contract be governed by them.
- They may be applied when the parties have agreed that their contract be governed by general principles of law, the ***lex mercatoria*** or the like.
- They may be **applied when the parties have not chosen any law** to govern their contract.
- They may be used to interpret or supplement **international uniform law** instruments.
- They may be used to interpret or supplement **domestic law**.
- They may serve as a **model for national and international legislators**.

SOME QUESTION REGARDING DRAFTING

- *Who has drafted or will draft/review the contract?*
- *What is the purpose of the contract?*
- *Whether it is a domestic or an international contract?*
- *Are all boilerplate terms effectively injected in the contract?*
- *Are all important terms carefully inserted in the contract?*
- *The construction of the contract – whether lengthy, bulky, or difficult to understand?*
- *Is there a correct arbitration clause in the contract?*

DRAFTING: PROVISIONS TO BE INCLUDED FOR A COMPLETE INTERNATIONAL CONTRACT

1. Contract Date
2. Identification of Parties
3. Goods-Description
4. Goods-Quantity
5. Goods-Price
6. Payment-Method of Payment
7. Payment-Medium of Exchange
8. Payment-Exchange Rate
9. Costs and Charges-Duties and Taxes
10. Costs and Charges-Insurance

11. Costs and Charges-Handling and Transport
12. Packaging Arrangements
13. Delivery-Date
14. Delivery-Place
15. Delivery-Transfer of Title
16. Transportation-Carrier
17. Transportation-Storage
18. Transportation-Notice Provisions
19. Transportation-Shipping Time
20. Transportation-insurance or Risk of Loss Protection

- 21. Import / Export Documentation
- 22. Invoice Preparation and Delivery
- 23. Re-exportation Prohibition
- 24. Inspection Rights
- 25. Indemnities
- 26. Intellectual Property Rights
- 27. Warranties
- 28. Enforcement and Remedies
- 29. Arbitration Provisions
- 30. Time is the Essence

- 31. Modification of Contract
- 32. Cancellation
- 33. Liquidated Damages
- 34. Attorneys' Fees
- 35. Force Majeure
- 36. Inurement and Assignment
- 37. Conditions Precedent
- 38. Governing Law
- 39. Choice of Forum
- 40. Severability of Provisions

- 41. Integration of Provisions
- 42. Notices
- 43. Authority to Bind
- 44. Independent Counsel
- 45. Acceptance and Execution

ANATOMY OF INTERNATIONAL CONTRACT

(Example: Purchase/Lease of an Aircraft)

1. Preamble
2. Interpretation and Definitions
3. Scope and Technical Specifications
4. Price
5. Terms of Payment
6. Price Variation
7. Bank Guarantees
8. Letters of Credit
9. Taxes and Duties
10. Scheduled Delivery Date
11. Force Majeure
12. Defaults, Liquidated Damages and Penalties

Contd...

- 13. Export Licence
- 14. Inspection and Acceptance
- 15. Shipment
- 16. Passing of Title and Risk
- 17. Warranty
- 18. Patents and Copyrights
- 19. Indemnities
- 20. Spares and Spares Policy
- 21. Options
- 22. Resolution of Disputes
- 23. Termination

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- 24. Assignment
 - 25. Amendments
 - 26. Confidentiality
 - 27. Notices
 - 28. Governing Laws
 - 29. Survival
 - 30. Effective Date

TENDERS AND TENDERING PROCEDURE

- ❑ Meaning of Tenders (Making an offer by the public)
- ❑ Importance of Tenders (Governmental activities spreading at large)
- ❑ Object of floating Tenders (the best price: lowest or highest)
- ❑ Why Tenders floated by Govt.? (??????)
- ❑ Is it mandatory to float T) (What is Swiss Approach?)
- ❑ Notice Inviting Tenders (NIT): Must be free from ambiguity in terms and conditions, etc.)
- ❑ Tendering Methods: (Open/Limited/Single)
- ❑ Tender Committees Technical – Financial –Purchase/Stores

❑ Basic Rule of Procedure:	Rejection of late tenders
❑ Earnest Money Deposit (EMD)	Forfeiture Clause
❑ Form and Content of Tender	(Two Envelop System)(Tech/N.T)
❑ Negotiations	Is it a 'Principle' or 'Precedent'
❑ Evaluation of Tenders	Carried on by Committees
❑ Acceptance of Tenders	Two ways (Directly)/(Subject to)
❑ Once Accepted	LOA is issued
❑ Does LOA becomes legal binding?	Yes (legal binding means contract)
❑ Tenders-Guidelines governed by:	Central Vigilance Commission

TENDER STAGE

□ Tender stage in public procurement can be sub-divided under four headings:

1. Preparation of Tender Document
2. Inviting and opening of tenders
3. Pre-qualification
4. Evaluation of bids and award of work

1. Preparation of Tender Documents:

Case

Invited Single Bid Format instead of Two Bid Format or Two Envelopes:

Case: For a Power Package, the scope included design, engineering, supply, installation etc. as per the general requirement of a Power Sector PSU. As per the tender requirements, bidders were required to furnish their detailed design and engineering proposal to suit the requirements of the PSU. The PSU while being aware of the above fact, still invited offers in a single bid format, i.e. only techno-financial bids were invited in a single envelope. When the scope of work includes design, engineering etc., it is always desirable and advisable to invite offers in a two-bid format or two envelopes, i.e. technical and financial so as to properly evaluate the various options and design philosophy proposed by the various bidders and the price bids of only such bidders whose design and other technical proposals are as per tender requirements should be opened.

2. Inviting and Opening of Tenders: (Open Tender is to ensure Transparency). Normally three modes of tendering are adopted. Namely:

- i) Open Tenders
- ii) Limited Tenders
- iii) Single Tender / Nomination Basis

❑ Note: **The following have stressed for Transparency in Tenders)**

- Supreme Court in *Meerut vs Al Faheem Meat Exports Pvt. Ltd*
- *Central Vigilance Commission (CVC)*

3. Opening of Tenders

- Open the bids in presence of bidders.
- Attest and account for corrections, omissions, insertions, overwriting
- Prepare 'on the spot summary' in tender opening register

4. Pre-qualification

- Keep the PQ criteria neither too stringent nor too lax.
- Prepare the PQ criteria specific to the requirement of the work in clear terms.
- Notify the evaluation criteria in the PQ document.
- Verify PQ credentials.
- Evaluate the bids exactly as per the notified criteria
- Retender if relaxation in PQ criteria is necessary.

❑ **Guidelines:**

- Transparency in Tendering System
- Receipt and Opening of Tenders
- Members of Tender Committee
- Tender Process
- Tenders
- Shortcomings in Bid Documents
- Irregularities in the Award of Contracts
- Notice Inviting Tenders
- Clause about Submission of Samples
- Delays in Payments
- Appointment of Consultants
- Mobilization of Advances
- Transparency through effective use of Websites

Thanks To One and All

END SLIDE

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