NALSAR UNIVERSITY OF LAW HYDERABAD

Presentation on:

INTERNATIONAL CONTRACTS & DRAFTING

Module II:

International Contract Law: Norms And Drafting Guidelines

by

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Contract and International Contract

- Meaning of Contract
- Meaning of International Contract
- Meaning of Commercial Contracts
- The Principles and domestic contracts between private persons.

UNIDROIT PRINCIPLES 2016
Preamble
(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.

Contract Management

Owner

Tenders (Domestic/International)

Contract (Domestic/International)

Drafting (Anatomy-Domestic/International)

Contract Administration

Contract Management

Contractor

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PART-I

1. International Contracts

Introduction

- International Contracts is intended to give an understanding of commercial agreements between parties trading across country borders.

- Ex: Parties to any commercial contract, whether domestic or international, must consider quality control, compliance with government 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.
- Development of the complex language known to the general public as “legalese”, “It depends”.
- Legal practitioners are trained to consider all options, and therefore they strive to state explicitly every possibility, leaving no room for argument or doubt.
- Ex: If a sales contract requires a buyer to inform a seller that the goods being purchased must meet certain specifications because the seller previously filled five order for the buyer for the same goods. Then an attorney for the seller might say, “it depends”. In this case seller should have known that the buyer had particular specifications because the seller previously filled five orders for the buyer for the same goods. Then an 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 orders form.

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- Thus the attorneys 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".

Chapter-I
The Role of Contracts in International Commerce

- Contracts are so much a part of living in a society.
- Every person makes a contract every day.
- A contract is simply an agreement that defines a relationship between one or more parties.
- A *commercial contract*, in simplest terms, is merely an agreement made by two or more parties for the purpose of transacting business.
- The creation of an international contract is a more complex process than the formation of a contract between parties from the same country and culture.
- 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.

The role of a contract in an international commercial transaction is of particular importance with respect to the following aspects:

- *Balance of Power:* The essence of a contract is the mutual understanding reached by two parties who hold adverse positions against each other. Ex: Standard Form Contract (Take it or leave it).
- *Passing of Risk:* The Party who drafts the contract makes himself that- Risk of loss passes to the buyer at the first possible moment of the transfer.
- *Time is of the essence*-The party familiar with written contract.
- *Enforcement on one side:* The balance of power can work against the stronger party in a contract negotiations.

- ***Cross-Border Rights and Obligations:*** It is important to establish clearly the rights and obligations of each party – if ambiguous-parties will not be able to perform without first modifying the terms-enforcement will be unpredictable because court must believe the intent of the parties.
- ***Differences in Business Practices:*** For contracts made between the parties within the same country, missing o indefinite terms may be filled in by local laws or practices. But it is not so at international level, because the intentions of the parties cannot be implied. Hence, International Contract must spell out in definite terms the rights and obligations of each party.
- ***International Laws:*** In recognition of the difficulties that parties face in contracting across country boundaries, the international community has

begun to adopt systems of laws and rules to be applied instead of local laws in transactions between parties located in different countries.

Ex: UN Convention on the International Sale of Goods (CISG)

- ***Preciseness and Predictability:*** To avoid an unfavourable and uncertain result, it is best to define your rights and obligations in a written contract when you are dealing across country borders. In the event of a breach, there is a greater chance that a court will enforce explicit terms (unless the provisions are unconscioinable) and thus the parties can more closely predict the outcome.

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- ***Personal Commitment:*** When dealing with a distant party in another country, you may be uncertain of the extent to which that party is making a commitment to perform the contract. Culture – oral or written, or handshake. Gaining evidence of commitment in cross-border transactions, in which parties usually operate by different business practices, can be more difficult than in domestic transactions, in which the parties typically share the same business practices.

  When we agree to sell or buy goods internationally, you 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.

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- ***Governing Law:*** When trading internationally, parties frequently assume that they can operate in accordance with their own domestic laws and practices. This assumption is erroneous and can lead to grave misunderstandings. When a person trades across country borders, you are subject to not only the laws of your own country but to the laws of other countries where you do business. You need not physically enter another country to become subject to its laws-merely selling goods by mail or electronic means may establish a sufficient connection to bring you within the jurisdiction of another country's courts.

  Ex: those involving land transactions.

  Options: Left to the jurisdiction of the court which may or may not respect the Choice of law the parties agreed.

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- ***Enforcement:*** As we move from a domestic to an international setting, enforcement issues increases in complexity. Local laws and practices will usually determine the evidence required to prove contract terms. An oral contract may be sufficient in one country, while another may require in a written and even notarized agreement or contracts for the sale of goods with a total value exceeding the amount specified by law must be in writing to be enforceable, contracts for sale or lease of real property may have to be written to be enforced .
- ***Choice of Remedies:*** Most contracting parties expect that all will go smoothly and that both parties will mutually benefit from the transaction. These positive expectations are more likely to be realized if you have provided for contingencies. Even in the simplest of transactions, you must think about the possible problems that may develop later. (*How to resolve the disputes)*

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- ***Necessary Terms:*** In most countries, parties to commercial transactions may 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, quantity and quality
  - The time of delivery
  - The Price
  - The time and means of payment

  Theses terms are considered essential because they cannot be easily implied by law-they are necessary parameters to the contractual relationship. Every international contract should provide for these terms.

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- ***International Trends:*** A current trend in the law of several nations, in international law among nations – is to recognize contract that are the basis of commercial transactions even if they fail to provide the essential terms.

  If a dispute arises and any of the essential terms are missing or ambiguous, the intent of the parties maybe implied from customary trade or financial practices. The bottom line is that judges, arbitrators, rule makers, and law makers prefer to uphold a bargain made by business folk-who are presumed to know what they are doing.

  In comparison, private individuals and consumers are given more protection against bad bargains that do not cover all of the essential agreement terms because there is a presumption that they are at the mercy of the business folks. In any event, it is best not to rely on trends or implied contract terms. Hence, one should always state the intent in clear ad definite written terms.

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- ***Payment and Delivery Terms:*** Two of the essential terms take on further significance in international contracts: *the payment terms and the delivery terms*. In international transactions, it is essential to establish the payment terms. It may be assumed in domestic transaction that the traders intend to *exchange goods for domestic currency*. When dealing cross-border, there will probably be a *choice of currencies.*

  Note: Currency is subject to foreign exchange restriction on currency.

  Payment terms should be clearly defined to ensure that the contract will be enforceable.

  In an international contact, a clear definition of the transport and delivery term is also essential.

Chapter-2
Issues Affecting International Contracts

- Cultural Issues
- Role of Politics
- Regulatory Laws
- Internet Issues

Chapter-3
Parties to the Transaction

- **Buyer:**
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  - The Buyer's Goals
  - The Buyer's Safeguards
  - The Buyer's Hidden Costs
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    - Customs Clearance
    - Insurance
    - Interruption of Business
    - Hospitality Costs
    - Third-Party Expenses
    - Lost Sales or Production Delays
    - Temporary Facilities and Replacement of Goods or Services

Contd…

- **Seller:**
  - The Seller’s Goals
  - The Seller’s Promotion
  - The Seller’s Hidden Costs
    - Product Adaptations
    - International Shipping
    - Customs Clearance
    - Insurance
    - Third-Party Expenses
      - Temporary Facilities
      - Mitigation Expenses

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Attorney for Buyer

Why should the Buyer consult an Attorney?

- The Legal Systems
- Importing and Exporting
- Contracts
- Protection against Liabilities and Losses

When to consult an Attorney

- In the beginning
- During a Transaction
- Finalizing your Purchase
- Enforcing or Renegotiating the Purchase

How to select an Attorney?

- Knowledgeable about international business, import and export issues,
- connected to business resources, frank in advising you to contact, diplomatic, cultural awareness, understanding the difficulties involved in negotiating across borders.

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Attorney for Seller:

Why should the Seller consult an Attorney?

- The Legal Systems
- Importing and Exporting
- Contracts
- Protection against Liabilities and Losses

When to seek Legal Advice?

- In the beginning
- During Transaction
- Finalizing your Sale
- Enforcing or Renegotiating the Sale

How to select an Attorney?

- Knowledge about international business, importing, exporting issues, connection in business, frank in advising to contact other professionals, diplomatic and culturally awareness etc.

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- **Advice an Attorney typically will not provide:**
  - Customs
  - Transport
  - Banking
  - Accounts and Tax Filings

PART-II

2. An Overview to UNIDROIT Principles-2010

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Contd…

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