

10 THINGS YOU NEED TO KNOW ABOUT INTERNATIONAL CONTRACTS

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**This presentation/ document should not be taken as legal advice. It is recommended to speak with a lawyer for specific advice to your individual situation.*

Introduction

- At the end of the day, a 500 page contract won't save you from a thief. You want to make sure there is trust and confidence, but to the extent certain basics can be covered by agreement, you go a long way towards being in a better position to collect your money owed and otherwise protect your product.
- These are ten arbitrary items. There is no magic to the number and next year I might replace one of the items.
- Point is to sensitize you to what you as non-lawyers need to know.

1. Law is territorial.

- Your rights as a general matter stop at the border.
- Foreign (i.e., non-U.S. companies) have different laws and different legal systems. You cannot assume that dealing with a businessperson in another country is the same as dealing with someone from another state, only in a different language.
- Different laws apply, and so do different cultural attitudes not just towards business, but legal rights.
- Law matters: termination of agents, individual liability

Language Issues

- Different translations of English and idioms
- English English versus American English
- A Dane may “gor,” but an American may “walk,” “amble,” “stroll,” “perambulate,” “go”
- Cultural nuances: yes means maybe, maybe means no, up and down versus sideways headshakes, and so forth
- How many kisses and where do you start?
- Use of uncommon terms: “contract avoidance,” e.g.
- “Cutting the check” means issuing, not reducing amount: beware of idioms

2. Choice of Law Matters

- You can be in New Jersey, sign a contract with a British company that applies English law, and find that the New Jersey court will apply English law even if the case is heard in New Jersey.
- You can often choose the applicable law.
- International commercial contracts for the sale of goods can be subject to a separate treaty called the United Nations Contract for the International Sale of Goods, which operates differently in some ways than New Jersey law under the Uniform Commercial Code.

The “legal stuff” affects you

- E.g., choice of law is not esoteric.
- *Finnish Fur Sales Co., Ltd. v. Juliette Shulof Furs, Inc.*, 770 F. Supp. 139 (S.D.N.Y. 1991)(substantive law of New York contrasted with that of Finland; a corporate officer was liable for the corporation's debt under Finnish law, but not under New York law. Court concluded that Finnish law applied.)
- Choice of forum matters: case where contract in German and provided for arbitration in Germany; US businessman failed to translate, signed and was bound

3. One Size Does Not Fit All

- Understand the purpose of your contract
- Is it just for the sale of goods? Are there warranties? Will you be servicing the product?
- If you decide to utilize an agent, understand that some countries have laws that prevent you from terminating an agent at will without compensation.
- Review regularly your terms and conditions, and be careful if you are the seller, in shipping based on the buyer's purchase order terms. You may find that those govern instead of any you previously sent.

Why What Your Contract Says Matters

- Contracts will generally be enforced as parties wrote them, absent public policy or “unconscionability” issues
- Courts generally will not make better contracts for parties than they wrote for themselves
- Clarity versus ambiguity
- Get it in writing and make sure you agree on it
- Buy in from other side and chance to assess reliability
- Agreement to not decide has ramifications
- Can lead to application of CISG or even other law
- Surprises are for birthdays
- Be careful with Letters of Intent

What You Need to Know about CISG

- International parties may implicate the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), a treaty governing formation, breach and remedy issues in contracts
- Can apply to distributorships if predominantly or predominantly sales
- Can be disclaimed or modified
- Applies to commercial goods
- Subjective standards
- Oral contracts and understandings permitted
- Formation rules based on offer/counteroffer rather than rejection or UCC-style “knock-out” rule
- Buyer remedies include price reduction
- Concept of “fundamental” breach

4. Getting Paid

- Not only should your contract address the mechanism, but also what currency, and what happens if that currency value fluctuates against the dollar? Anticipate and address.
- Dealing with default and grace periods
- Letters of credit
- Currency: impact of fluctuation
- Export insurance
- Spectrum: Best for exporter: cash in advance, letter of credit, documentary collections, open account, consignment. Best for importer, in reverse.

Various Options

- Consignment Purchase
- Secured Transaction
- Cash-in-Advance (Pre-Payment)
- Open Account
- Documentary Collections
- Letters of Credit
- Factoring
- Forfaiting
- Export risk insurance
- Government programs and financing
- Passage of title and risk—shipping versus destination contracts
- Insurance requirements

5. Getting from Point A to B

- Logistics matter, particularly in where the risk of loss passes.
- Export insurance
- Does the buyer have insurance? Are you liable once the goods are at the port or on the ship?
- “Incoterms” can be incorporated into your agreement that reflect these issues. Incoterms 2010 (specify)--ICC
- They ARE 11 standardized DEFINITIONS to cover shipping and trade terms relating to risk, control, liability and financial responsibilities
- They are NOT a contract in themselves and do not address title
- Goal of alleviating or reducing confusion
- Alteration can turn contract into something else: delivery versus receipt
- Incoterms 2020 will revise 2010

Be Aware of Statutory Overlay

- Foreign Sovereign Immunities Act
- Foreign Corrupt Practices Act
- Cross-border environmental issues
- Export Administration Act (transaction-determinative—what, where goes, who receives, use)
- Anti-boycott laws
- Impact of treaties—Investment, e.g.

6. Resolving Disputes

- Will you be in arbitration or in the courts?
- Does everything require a full-scale trial or arbitration? Do you want to have a cooling off period?
- You need to think through how you want disputes—large and small—resolved. While no one wants to anticipate the worst, it is essential to do so.
- Different countries not only have different legal systems, but even if you are resolving the matter in the United States, you may need to think about enforcement and collection in other countries.
- Step by step approach: “cooling off” periods

Why Dispute Resolution Matters

- Anticipate dispute resolution
- Think through intermediate steps, what is material and non-material, and termination provisions
- Also think through the logistics of what happens during cure periods
- Consider limitations on damages and other relief
- Recovery of attorneys fees: “loser pays” jurisdictions versus American rule
- No treaty as yet for enforcement of foreign judgments, as with arbitration awards
- May get more discovery and motion practice
- Different approaches in civil law countries
- Comity issues: punitive damages example

7. Brand and IP Protection

- Protecting any intellectual property involved in the transaction, particularly if you are selling to a distributor
- Various treaty regimes exist
- Registration
 - Territorial Registration
 - US Registration
 - The Madrid System
 - The European Community Trade Mark
- Enforcement
 - Opposition and Cancellation
 - Infringement
 - Customs Enforcement
 - Proper Use
 - Licensing Issues

Intellectual Property

- How will the purpose of your agreement necessitate use of intellectual property?
- Have clear licensing provisions
- Protection of proprietary and other intellectual property; dealing with infringement
- Understand difference between patents, trademarks, copyrights and trade secrets, so appropriate protections and licenses can be drafted
- Due diligence and representations and warranties
- Registration and protection in local jurisdictions

8. Damages and Remedies

- Not all damages awarded in the United States are recognized in other countries; a notable example is punitive damages.
- Regardless of the choice of law other countries may not recognize certain damages as being against their public policy.
- Different understandings as to what are direct or actual damages, as opposed to consequential damages.
- Anticipate eventualities: all the “what ifs”
--e.g., what happens during grace periods?
- Currency fluctuation: who bears the risk?
- Force Majeure: what excuses performance and for how long

Types of Damages and Remedies

- Liquidated damages provision
- Injunctive relief
- Limitations on consequential damages
- “Willful misconduct” and “malice”
- Interest
- Enforcement/recognition issues
- Specific performance
- Limitation of damages and limitations of liability
- Cooling off periods and mediation
- Warranties: repair or replace; effect of disclaimers

9. Renewal and Termination

- Different countries may have different laws that curtail or limit your ability to terminate a contract, regardless of U.S. law.
- If there are going to be grace and cure periods, make sure that it is clear what obligations you have during that period.
- Evergreen renewals
- Subjective versus objective benchmarks
- What happens post termination?
- What happens between notice of termination and effective date?

Non-Contractual Behavior

- Parol refers to oral or extra-contract communications and behavior
- Industry practice or party's conduct and course of dealing may be relevant
- Contracts can be accepted by silence if course of conduct justifies
- Non-contract claims, such as fraud and reliance and misrepresentation, may result from behavior
- CISG recognizes subjective intent of parties

10. Assignments and Other Beneficiaries and Responsible Parties

- Different countries may have different views on what we call third party beneficiaries, those who are benefitting from a contract but not parties to it.
- If you are dealing with a non-US company that is trusted, you want to make sure that any assignment of the contract to another company meets with your approval—or you want to prohibit the assignment.
- Indemnification issues for alleviation or assumption of risk

Indemnification

- Indemnification clauses are critical to allocating risk in any business contract
- Failure to properly draft or negotiate these clauses can lead to your client being held responsible for unanticipated damages
- Worst-case scenario: your client may face litigation for another party's wrongdoing
- Common law provides right to seek contribution for other party's negligence.

Concluding Comments

- Each topic, and often each bullet point, can be a seminar in itself
- Main point is not to separate legal from business aspects of transaction: they interrelate
- Pay attention in negotiation to what is pushed back on; can provide insight to future problems.
- Do not ignore the red flags.
- No one wants to spend time in, as I heard someone say, the Crossbars Hotel (i.e., jail)
- And no one wants to be the “interesting case.”