

Working with International Contracts

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- Member of Kirton & McConkie's International and Corporate Practice Sections. His practice focuses on corporate and finance transactions, including mergers and acquisitions, public offerings and private placements of securities, international distribution, manufacturing and sales agreements, and matters relating to private equity. In addition, Mr. Grange has experience in alternative energy transactions (e.g., ethanol, bio-diesel, coal, natural gas, wind and geothermal), corporate governance, the pharmaceutical industry and medical devices. Mr. Grange also represents numerous network marketing companies both domestically and abroad. A substantial portion of Mr. Grange's experience is in Japan. Mr. Grange was an associate at Chadbourne & Parke in New York City prior to joining Kirton & McConkie in 2009.



Gabriel Sanchez

- Gabriel Sánchez lived and worked in Mexico as a practicing attorney from 2000 to 2002. Mr. Sanchez came to the International Practice Section of Kirton and McConkie in 2004, where his practice has focused on representing a variety of United States corporations doing business in Latin America which includes managing the process of establishing foreign subsidiaries and advising on importation and exportation issues. In addition Mr. Sanchez has Represent major developers and owners with respect to property, development, governmental land use approvals, construction, leasing, and day-to-day operations in Mexico.

What is an International Contract?

- An agreement for transactions in which at least two of the parties are of different nationalities or which prescribe acts of performance in more than one country.

What is an “Internationalized” Contract?

- A contract from which any one nation’s legal standards, system of dispute resolution, or commercial practices has been removed.
- We attempt to do this (i.e., create a transjurisdictional uniform commercial law) within the borders of the United States by appealing to the Uniform Commercial Code, which has been adopted (sometimes with modifications by almost all states, and the Restatements of the Law prepared by the American Law Institute.

Foreign National Governments

- Often Don’t Like “internationalized” contracts - why?
 - A desire by the country to maintain control over the contracts (and the parties) through its own laws and courts.
 - A fear that parties will chose (or a weaker party will be compelled to choose) some legal standard and/or an adjudicatory system that subverts or evades the national policies embodied in national laws which are enforced through national courts.

Contracting Parties

- Often DO like to internationalize their contracts - Why?
- Makes negotiations between contracting parties easier (e.g., choice of law and venue for dispute resolution.)
- Both parties will often insist that their country's law and venue be used. This is understandable as each party knows and is most comfortable with the nature of the laws and legal systems of their own country.
 - This can, and often is a "deal killer" if there isn't a middle-ground that can be reached.
- Expedites contract negotiations for a particular aspect of a transaction or regarding transactions in a particular industry.
- Trying to adapt your home country's laws and legal systems to work in a foreign jurisdiction can be frustrating and time consuming.
- When there are standard contracts, contractual provisions or contractual terms that have attained general international usage and have been defined clearly in the courts or elsewhere, using these as a basis for negotiations or simply adopting them and filling in the blanks or selecting from among standard optional provisions will greatly speed arrival at an agreement on the contract.

Contracting Parties

- In some industries, a quick agreement is an essential element in engaging in transactions and the universal use of standard contracts is of vital importance in those industries.
- Provides a means of escaping jurisdictions which are perceived to be unacceptable for one reason or another.
- Developed countries where laws are rudimentary, conflicting, corrupt, untested in the courts or otherwise inadequate.
- Even in developed countries can be problematic from a contract drafting standpoint (e.g., U.S. is widely thought of, outside of the American legal profession, to be exorbitantly expensive and distressingly slow and to too often render imperfect or unpredictable outcomes.)
- Provides greater flexibility in contracting parties' means of resolving contractual disputes, to maintain certain degrees of confidentiality of information or the progress of dispute resolution, or to refer such disputes to adjudicators with greater knowledge of their industry than would be possible through the use of national courts (e.g., international arbitration and related alternative dispute resolution.)

Commonly Overlooked Aspects of Internationalizing Contracts.

- Currency
- Official Language
- Designated Holidays
- Effects of customs duties and tariffs
- Export and other necessary international transaction authorizations from pertinent governments
- Cultural/Business attitudes and practices (e.g., signings and closings)
- Time Zones

Internationalizing vs. Localizing

- Localizing:
 - The process of taking a (hopefully) previously internationalized contract and ensuring that the contract does not violate local laws of the country that the performance of the contract will take place in.
 - U.S. trained lawyers can internationalize, but I would NEVER recommend localizing a contract without getting "local" counsel's advice at some level.
 - Be careful where you are "practicing" law.

Localizing

- A completely unrestricted right by the contracting parties to mutually agree to whatever contract and contractual terms they chose/negotiated does not exist in any country, of course.
- Example:
 - A Contract for illegal activities in the United States is unenforceable despite the fact that the contract has been thoroughly negotiated and agreed to by the contracting parties.
 - This highlights the need for someone familiar with local foreign laws, in say, Puerto Rico, to review the contract and ensure that it is enforceable and does not violate (or would not cause the parties to violate local law - e.g., public policy violations, tax considerations, etc.)
- **NOTE:** In cases where contractual provisions violate public policy of the relevant jurisdiction, negotiated provisions of contracts will often be ignored, and statutorily or judicially dictated provisions **will be substituted for them**.
- The extent of the parties' freedom to contract varies greatly from legal system to legal system, with common law legal systems usually providing the greatest latitude to the parties and the civil law legal systems often being quite restrictive.
- Some legal systems, such as the Islamic legal system, will permit zero latitude of choice -- at least for those aspects covered by the Islamic or other relevant law.

ICC, INCOTERMS AND CISG

- Industries, trade associations, and commercial organizations have created such legal and procedural contract standards that have become almost universally adopted and accepted.
- Examples:
 - International Chamber of Commerce ("ICC") and its International Contract Terms ("INCOTERMS") for commercial contracts and Uniform Customs and Practice for Documentary Credits 500 ("UCP 500") rules for letters of credit.
 - For certain international sales contracts, and international convention, the convention on contracts for the international sale of goods ("CISG"), will determine the legal interpretation and implementation of the contract, even if it is an oral contract, **UNLESS the parties explicitly make its terms INAPPLICABLE to the contract**.
 - It is noteworthy that many important industrial, developed and trading nations are NOT parties to the CISG, including Japan and the United Kingdom.

CISG

- Countries may adopt the CISG subject to certain permitted reservations and declarations. It will be necessary to determine if the country where the foreign contracting party conducts its relevant business has adopted the CISG and if it has made reservations or declarations to the CISG that materially alter its applicability to a particular contract.
- Examples:
 - Argentina, Belarus, Chile, Estonia, Hungary, Lithuania, the Russian Federation, and Ukraine have made declarations that any provisions of Article 11, Article 29, or Part II of the CISG which allows for a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form OTHER THAN IN A WRITING, does NOT apply where a party's place of business is, respectively, in the Argentine Republic, Belarus, Chile, Estonia, Hungary, the Russian Federation, and Ukraine.
 - Australia has declared that the CISG applies to all Australian states and its mainland territories and to all external territories except the territories of the Christmas Island, the Cocos (Keeling Islands, and the Ashmore and Cartier Islands.

CISG

- The CISG's rules closely follow Article 2 of the Uniform Commercial Code ("UCC"), which in one or another of its several revisions, has been enacted in all 50 states. Consequently, U.S. practitioners will be familiar with most of its terms and rules. However, several important distinctions between the UCC and the CISG should be highlighted:
 - **Specification of Price** - Under the CISG, a sales contract does not come into existence unless a price term or a provision for determining price is supplied in the agreement. By contrast, the UCC allows a contract to be formed even without specification of a sales price.
 - **Revocability of Offer** - Under the CISG, an offer becomes irrevocable if the offeree relies on it; under the UCC, an irrevocable offer must be in writing.
 - **Terms of Acceptance** - Under the CISG, acceptance occurs upon receipt thereof by the offeror; the majority of UCC jurisdictions hold that acceptance occurs when it is mailed or transmitted by the offeree to the offeror.
 - **"Battle of Forms"** - If a written offer is modified by the offeree and then returned to the offeror, the CISG deems this to be a rejection and counteroffer; under the UCC, a contract will be formed irrespective of whether the acceptance is a "mirror image" of the offer.
 - **Writing Requirement** - The CISG does not require that a sales contract be reduced to a writing; under the UCC's statute of frauds, the existence of many types of contracts may be proven only by reference to a writing.

ICC, INCOTERMS AND CISG

- The ICC, INCOTERMS and CISG exist to facilitate international agreements. They are not intended to compel the application of its terms to those agreements. It is important to note that IF a party is able to obtain a foreign contracting party's agreement to the application of the law of a preferred country because that law is more familiar to the first party, it may prefer such a choice of law. However, where the foreign party is unwilling to agree to the application of the preferred law, the CISG, for example, offers negotiators the opportunity to elect a neutral choice of governing law for the contract with which both parties are equally familiar.

International Boilerplate

- NO SUCH THING!!
- Negotiating Boilerplate Provisions - Tougher and more important than you think.
 - Being a "Bull in a China Shop" is not advisable.
 - Start with Governing Law - the entire contract will be dependent on this (i.e., how each provision will be interpreted is critical.)
 - Acts of God Provisions - Can be sensitive topic.
 - Force Majeure clauses - Negotiated allocation of risk (e.g., foreseeability vs. unforeseeability, impossibility of performance vs. increased cost and complete excuse of performance vs. delayed performance required.)
- Notice Provisions - U.S. Registered mail?
 - E-mail: Proceed with caution. Include as ONE of the options, as something more formal might be preferable. When is it "received"? Include read receipts?
- Severability Clauses - Determine and define "essential" provisions.
- International Arbitration - ADR of choice. Neutral Venue preferred.

International Dispute Resolution

- International business transactions vs domestic transactions
- International transactions have an additional dimension
- different nationalities;
- different cultures and methods of doing business;
- different commercial and legal systems.

Contract Provisions to Adequately Deal with Dispute Resolutions

- Recognize and deal with the areas of potential conflict when drafting contracts.
- Case # 1: Utah- Guadalajara Jalisco, Mexico (Broadcasting Agreement).
- A provision that specifies the applicable law
- Binds parties to a particular code of law.
- Avoids uncertainty of conflicting laws under different conflict of law rules.
- A provision that specifies the forum
- Allows parties to select the exclusive forum and method for resolving whatever disputes may arise.
- Allows parties to decide among domestic and foreign tribunals or institutional and ad hoc arbitration forums.

Choice of Law Provisions

- Most countries' courts will honor a contractual provision specifying governing law agreed upon by parties.
- Parties may choose from:
 - Law of a particular country/state
 - General principles of law
 - International law
 - Entire contract or to parts of contract.
- Applicable law as it may be changed or amended or as to the contract date.

Qualifications to Party Autonomy

- Attorney must be mindful of two important qualifications:
- Choice of law provisions cannot be invoked to defeat a choice of forum stipulation.
- Case #2: Utah-Paraguay (Maquila/manufacturing Agreement)
- The law chosen will incorporate the state's arbitration laws unless the parties specify otherwise.

Unintended Consequences When Choosing Applicable Law

- Know and understand applicable law.
- Case #3: Mississippi-Baja California, Mexico (Promise to Purchase Agreement, prejudgment interest of 12% per annum under Baja California law and no interest under Mississippi law).

Forum Selection Clauses

- Disputes should be resolved fairly, quickly, economically and without disrupting the business relationship.
- Judicial vs. Arbitration fora.
- Case #4: Utah-Acapulco, Guerrero Mexico (Distribution Agreement).
- Mediation at any phase during the dispute-- most international disputes are resolved by negotiation among the parties.

Judicial Forum

- Domestic courts of one of the parties vs. a neutral court (country/state).
- Foreign parties prefer to avoid US courts when possible.
- US parties should recognize that foreign jurisdictions have substantially different procedures.
- Mexico: Brief discovery, no jury trials, lengthily procedure, limited interaction with judge.

Arbitration Forum

- Arbitration allows parties to resolve disputes fairly, quickly and economically.
- Institutional vs. ad hoc
- Scope of arbitration
- New York Convention- incorporated in the Federal Arbitration Act at 9 U.S.C. §§ 201-208 (signatory states - US and all major commercial countries).
 - The purpose of the New York Convention is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which such agreements are observed and the awards rendered are enforced by the signatory states.
- An arbitration award is final and its enforcement is reliable.

Model Arbitration Clause

- Model Arbitration Clause
- Short form-American Arbitration Association.
- Long form- International Chamber of Commerce.

Enforcement of Judgments and Arbitral Awards

- Foreign Judgments in the United States
- American courts historically have recognized and enforced foreign judgments
- Foreign judgments may be enforced if:
 - There is a final judgment;
 - The foreign court had subject matter jurisdiction;
 - Proper and timely notice;
 - Defendant had opportunity to present a defense;
 - Regular proceedings and impartial tribunal.

Enforcement of Judgments and Arbitral Awards

- United States Judgments in Foreign Courts
- US creditors face burdens and uncertainties
- Bilateral treaties and New York Convention
- Arbitration Awards
- New York Convention
- A judicial proceeding is necessary to enforce an arbitration award.
- Enforcement of an arbitration award in Mexico

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