Drafting International Commercial Contracts: A Primer
Outline

• By way of introduction
• Language issues
• Dispute resolution clauses
• Choice of law clauses
• Wrapping it up: contract drafting & review – which perspective?
By way of introduction

- Intl commercial agreements come in various shape:
  - Long term (e.g. joint venture agreement aimed at setting up and operating mobile telephone system)/ one shot (e.g. sale of brass fittings)
  - Commodity transaction / financial transactions (e.g. assignment of portfolio of receivables)
  - 2 or more parties
- Documentation of commercial agreements may also vary:
  - Sometimes purely oral agreement
  - Very often various one sided documents (e.g. purchase orders, acknowledgement, etc.) - often with general conditions
  - Ad hoc written agreement, specifically negotiated and drafted for one transaction
By way of introduction

Purpose of the seminar

• General issues common to all int'l commercial agreements
• Focus on drafting issues (with refresher on the law of int'l commercial agreements)
By way of introduction

• Starting point: what is different / special about int'l commercial agreements?
• **On the surface**: an agreement is an agreement, spelling out the rights and duties of parties, with as much care for details as possible
By way of introduction

• Three major differences between domestic and int'l agreements:
  – Language (minor issue)
  – Dispute resolution (major)
  – Applicable norms (major)
• Impact of these differences on drafting?
I. Language issues

• **Minor** issue with big potential impact
• English as the *lingua franca* of int'l commercial agreements – impact on drafting?

I. Legal English much more sophisticated than 'Euro-English'... (*e.g.* “execution of obligation” → “performance of obligation”)

II. Watch out for 'imports' (*e.g.* provision entitled “Frustration” : import of the English doctrine of frustration? / Recitals : “In consideration thereof...”)

Deusto IP - sept. 2010
I. Language issues

- **Link with dispute resolution**: exercise caution, take into account language skills of dispute resolution body

- **Agreement in two languages?**
  Language priority clause: “if any discrepancy appears between the various language versions of the present Agreement, the English version shall have priority in settling its true meaning”

Deusto IP - sept. 2010
II. Dispute resolution and applicable law

- Dispute resolution and applicable law: two fundamental issues – you cannot assume that it will be a 'home game according to your rules'.

- If there is a dispute or a need to refer to the law → could be at the other party's courts, according to local rules.
II. Dispute resolution and applicable law

- Location of dispute resolution ('home game' or not) : not necessarily decisive for the outcome of the dispute.
- Home game is, however, much more comfortable... and probably cheaper
- In any case : it is crucial that anyone entering a contract with int'l dimension, should know beforehand the rules of the game (which law, which court) —› you do not enter a restaurant without looking at the price list...
IIA. Dispute resolution clauses

- 1) What if agreement without a dispute resolution clause?
  - Risks:
    - Uncertainty on court with jurisdiction (e.g. art. 5(1) Brussels I Regulation)
    - Litigation battle (litigation on the place of litigation)
  - Why not use possibility to choose forum? Useful to preclude litigation on the forum, choose a favourable forum (e.g. expertise / language skills) and anticipate enforcement difficulties
IIA. Dispute resolution clauses

2) Choose yes... but what?
- Dispute resolution: 1st choice is between various dispute resolution techniques
  - Mediation (and other ADR-techniques)
  - Arbitration
  - Litigation in State Court
- Choice is influenced by various factors (e.g. neutrality - perceived and effective -, confidentiality (caution for expectations), costs, etc.)
IIA. Dispute resolution clauses

- Choice need not be exclusive: possibility to combine several methods – e.g. Med-Arb / Arb-Med, Arb/Court etc.
- Specific concerns for combined or multi-tier dispute resolution clause:
  - Make sure that the *link* between the various stages (negotiation, mediation, arbitration, …) is well defined. Parties must be able to determine when they may/must go from stage 1 to stage 2 etc.
  - Ensure that no ambiguity about disputes assigned to each method
IIA. Dispute resolution clauses

• Multi-tier dispute clause e.g.: CPR Institute for Dispute Resolution:

“The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement by mediation in accordance with the CPR Mediation Procedure...
... If the dispute has not been resolved pursuant to the aforesaid mediation procedure within 60 days of the commencement of such procedure (which period may be extended by mutual agreement), or if either party will not participate in a mediation, ... the controversy shall be settled by arbitration in accordance with the CPR Institute for Dispute Resolution Rules ... ”
IIA. Dispute resolution clauses

Once parties agree on one dispute resolution method (or combination thereof), choice may be fine tuned

e.g. arbitration: general choice for arbitration is not sufficient: institutional / ad hoc arbitration; one or three arbitrators; seat of arbitration (importance for setting aside proceedings); language of arbitration; scope of arbitration agreement; exclusion of appeals, etc.

In practice: useful to follow guidelines and models of institutions ('tried and tested')
IIA. Dispute resolution clauses

3) Will the choice be enforceable?
Test the provision... 3 stages:
• Direct test:
  – Will court/body chosen accept jurisdiction?
  – Look for all courts / other bodies which could take an interest in the dispute → will they recognize and uphold the agreement?
• Indirect test: refusal to recognize/enforce judgement / award (not necessarily linked to refusal to upheld choice of court clause)
Testing a Dispute Resolution Clause

<table>
<thead>
<tr>
<th>Who Tests?</th>
<th>Which rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court seized</td>
<td>e.g. : discretion?</td>
</tr>
<tr>
<td>Courts excluded</td>
<td>e.g. : unarbitrable matters?</td>
</tr>
<tr>
<td>Enforcement court(s)</td>
<td>e.g. : exclusive jurisdiction?</td>
</tr>
</tbody>
</table>
IIA. Dispute resolution clauses

• 3) Test the provision... examples:
  – Objective limitation: employment contracts: limitation on validity / enforceability of choice of court / arbitration agreements
  – Discretionary limitation: choice for courts of Belgium – discretion of court chosen under Art. 7 BCPIIL
IIA. Dispute resolution clauses

4) Choice for resolution by state court: should you always choose *home courts*?

I. If you can impose it: yes (save if potential enforcement problems, e.g. Russia, India)

II. Even better solution: one-sided facultative choice of court clause – 'English clause' (e.g. “All disputes arising out of or in relation with the present agreement shall be exclusively settled by the courts of Spain. However, Buyer reserves the right to bring proceedings before other courts of competent jurisdiction” - very frequent in bank/financial agreements)
IIA. Dispute resolution clauses

• III. If you cannot impose it: choice for other party's courts may sometimes be better than 'neutral' choice (from enforcement point of view) – except if bad reputation of other party's courts...
IIA. Dispute resolution clauses

• 5) Drafting proper: a few examples
IIA. Dispute resolution clauses

Example 1

“The place of jurisdiction and applicable law with respect to disputes arising out of this Agreement shall be (a) Frankfurt, Germany, and/or (b) Los Angeles, California [...]” (Turner Entertainment Co. v. Degeto Film GmbH et al., 25 F. 3d 1512 (CA 11th Cir. 1994)
Example 2

“Parties agree that any dispute which may arise out of or in connection with this Agreement may be submitted to the courts of England »
IIA. Dispute resolution clauses

Example 3

“The Seller will bring all claims before the courts of the Buyer and the Buyer will bring all claims before the courts of the Seller”
Example 4

“Parties agree that any dispute which may arise in connection with the interpretation or enforcement of this Agreement shall exclusively be submitted to the courts of England »
IIB. Choice of law provisions

- Drafting a choice of law provision: focus
  _ I. Why should we choose the law?
  _ II. Will it be enforced?
  _ III. May I split the choice? (pm)
  _ IV. Should I exclude conflict of laws provisions? (pm)
  _ V. May I freeze the law chosen? (pm)
  _ VI. Should I always insist on having my law applicable? What if both parties insist on choosing their own law?
  _ VII. May I directly opt in for a Convention? (pm)
  _ VIII. Is everything covered by law chosen? (pm)
• 1) Why is it relevant to determine which law applies?
• Agreement already spells out rights and duties of parties and the agreement is the law of parties (*pacta sunt servanda*)
IIB. Choice of law provisions

- Applicable law is relevant:
  I. Agreement *not complete* (e.g. contract concluded on the basis of general conditions)
  II. Agreement *not precise* → room for interpretation
  III. Agreement *void* (invalidity decided by applicable law)
IIB. Choice of law provisions

• Applicable law is relevant as:
  I. Yardstick to assess *validity* of the agreement
  II. Body of rules to *supplement* the contract and / or to *construe* the agreement
IIB. Choice of law provisions

- Determination of applicable law: in the hands of parties - choice of law provision
- Choice of law provision important since determination of applicable law in the absence of choice by parties not characterized by legal certainty
IIB. Choice of law provisions

- Determination of applicable law if no choice
  - Method may not be the same in all jurisdictions
    - Fixed rule premised on one connecting factor (such as place of contracting or place of performance – Art. 8-1 Lei de Introdução ao Código Civil Brasileiro)
    - Closest connection (Art. 7 Mexico Inter-American Convention or s. 188 Restatement Conflicts 2nd: “the law of the state which ... has the most significant relationship to the transaction and the parties ... ”)
  - Applicable method may not guarantee predictable result
IIB. Choice of law provisions

• Determination of applicable law if no choice: European approach → characteristic performance (art. 4 Rome I Reg.): *quaere* of:
  1. Barter contract
  2. Bond issue: law of issuer or of bond holder?
IIB. Choice of law provisions

2) Choice of law provision: will it be enforced?

Look at if from various angles. Test: all courts (or other dispute resolution bodies) with jurisdiction
IIB. Choice of law provisions

• Many jurisdiction recognize freedom to choose the law as a fundamental tenet of int'l contracts:
  I. Art. 3 Rome I Regulation
  II. Art. 7 1994 Mexico Inter-American Convention of March 17, 1994
  III. Section 1-301(c) § 2 UCC
  IV. Art. 7 Japanese PIL Law 21 June 2006 (Ho No Tekyo Ni Kansuru Tsusokuho)...

Deusto IP - sept. 2010
IIB. Choice of law provisions

- Sometimes, choice of law provision will be enforced, but only with some reservations (e.g. not if chosen law has no relevant connection to the contract)
- Sometimes unclear whether the choice of law provision will be upheld (e.g. position under Brazilian law - *Lei de Introdução ao Código Civil Brasileiro* - is apparently not settled)
IIB. Choice of law provisions

- Choice of law provision: will it be enforced?
- Take into account int'l'y mandatory rules (Art. 9 Rome I Reg.)
- Definition of int'l'y mandatory rules:
  “national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the ... State concerned as to require compliance therewith by all persons present on the national territory of that ... State and all legal relationships within that State” (ECJ, Arblade, § 30).
IIB. Choice of law provisions

- Distinction domestic and int'l'y mandatory rules:
  I. In both cases, substantive provisions of a given national law
  
  II. Difference lies in strength of the mandatory rules:
    - **Domestic** mandatory rules displace any substantive provision of the agreement which runs against them —> you cannot *contract out* of these provisions in a domestic contract (e.g. prohibition of exclusion of liability for one's wilful negligence)
    - **Int'l'y** mandatory rules displace both the content of the contract *and* the law chosen by parties —> you cannot contract out of these provisions even in an int'l contract governed by foreign law
IIB. Choice of law provisions

• Examples int'l'y mandatory rules:

I. Provisions protecting national cultural heritage and prohibiting export sales (e.g. Art. 25 of the Law of the PRC on the Protection of Cultural Relics of 19.11.1982 – prohibition of sale of artefacts to foreigners)

II. Provisions prohibiting certain commercial agreements (e.g. Art. 5 of the Tunisian Act nr 91-64 of 29.07.1991 “relative à la concurrence et aux prix” : "Sont prohibés, sauf cas exceptionnels autorisés par le ministre chargé du Commerce après avis du Conseil de la Concurrence, les contrats de concession et de représentation commerciale exclusive.")
IIB. Choice of law provisions

- Mandatory rules trump law chosen by parties and the contract's provisions
- How to determine if mandatory rules apply? —> uncertainty (legal opinion : reservations)
- Which mandatory rules? Those of the court (and possibly : of third countries) Keep in mind EU rules (e.g. EU competition rules applicable to distribution agreements, requirements to enjoy exemption for vertical agreements)
3) May I split the choice?

I. Difference between 2 kinds of 'dépeçage': 'partial' choice of law (refer part of a contract to a specified applicable law and leave the remainder of the contract to be governed by the objectively applicable law) and split choice of law (choice for concurrent laws)

II. In both cases: caution required (is the red line between the 2 clear enough?)

III. In some jurisdiction: validity of dépeçage doubtful
IIB. Choice of law provisions

- Split choice of law: drafting
- *E.g.* “The present agreement shall be governed by the laws of Belgium. However, if any provision of this agreement were to be invalid or not fully effective under Belgian law, the validity and effectiveness of this provision shall be solely governed by German law” (*rationale*: fear that a specific provision of the contract could be invalid under Belgian law: German law as fallback law)
IIB. Choice of law provisions

- Split choice of law: drafting
- *E.g.* “The present agreement shall be governed by the laws of Germany and German courts shall have jurisdiction. However, in so far as the mortgage provisions are concerned, French law shall be applicable and French courts shall have jurisdiction” (loan agreement German bank – German company, secured by mortgage on French immovable)

Deusto IP - sept. 2010 43
IIB. Choice of law provisions

4) Should I exclude conflict of laws provisions of the law chosen?

- e.g. “The Agreement shall be governed by the laws of Italy, with the exclusion of its private international law rules”
IIB. Choice of law provisions

4) Exclusion of the conflict of laws provisions of the law chosen

I. Goal is to avoid the application of the *renvoi* mechanism of the law selected (whereby account is taken of the conflict of laws rules of the applicable law)

II. However, in most countries, *renvoi* is not accepted for contracts. Even if *renvoi* were to be accepted, it is probable that the conflict rules of the law chosen would designate the law chosen by parties

III. There is therefore not much point in excluding the conflict of laws rules of the law chosen. But, if it does not help, it does not hurt...
IIB. Choice of law provisions

5) May I freeze the law chosen? (e.g. “... the law of Uzbekistan, as it stands on 02.02.2009 ...”)

I. In general: 'stabilization' clauses not allowed - law chosen is taken as living object

II. What you may do: specify that the law chosen shall at least comply with the general principles of law or international law (as 'regulator' of the law chosen) → relevant for State contracts
6) Should I always insist on having my law applicable?
   – In principle yes: makes it easier to manage contract
   – In practice: what if other party insists on having its own law govern the contract?
IIB. Choice of law provisions

• 6) Solutions for deadlock:
  I. No choice at all (fall-back provisions; e.g. Art. 4 Rome Regulation → legal certainty reduced since escape clause)
  II. Choice for a neutral law? (Swiss / Sweden → dispute resolution adapted!)
  III. Choice for Unidroit Principles, 'Equity and Fairness' or lex mercatoria?
IIB. Choice of law provisions

- *E.g.*: Article 32 ICC Model Int'l Franchising Contract: “This Agreement is governed by the rules and principles generally recognized in international trade together with the UNIDROIT principles on International Commercial Contracts”

I. Probably only valid if one opts for arbitration

II. Even then: caution, general principles of law are just that, not a developed code of law...

Deusto IP - sept. 2010 49
IIB. Choice of law provisions

7) May I directly *opt in* for an int'l Convention?

I. *E.g.* 1980 Vienna Sales Convention not applicable in Vietnam —→ sale of flat screen televisions from Vietnam to Germany, opt in for the CISG?

II. Answer is **mixed**: in some jurisdictions (and arbitration), choice is *upheld*; in other, choice is downgraded to mere *incorporation* of the Convention (trumped by mandatory provisions of law objectively applicable)
IIB. Choice of law provisions

• What if a Convention is applicable as such?

E.g. 1980 Vienna Sales Convention applicable to sales agreement between US company and company based in France —→ relationship to choice of law?
IIIB. Choice of law provisions

• What if a Convention is applicable as such?

I. Choice for the law of a Contracting State: Convention not displaced – except if expressly excluded (e.g.: “This Agreement is governed by the laws of Spain. The provisions of the Vienna Sales Convention are expressly excluded”).

II. Choice for the law of a non Contracting State: Convention displaced (art. 1 -1 (b) CISG)
• 8) Is everything covered by law chosen?

I. Choice only deals with *contractual issues* (performance, remedies, interpretation, statute of limitations)

II. Not covered: e.g. capacity of parties, consequences of representation (contract concluded through agent), issues of procedure (such as evidence, etc.)
III. Wrapping it up: standards of review

- What you know about language, dispute resolution and choice of law: sufficient for a first review of the contract
- Reviewing contract: perspective depends on law chosen and on the dispute resolution method
III. Wrapping it up: standards of review

- Different standard depending on the perspective
  - Agreement subject to local jurisdiction and local law: *full* review
  - Agreement subject to foreign jurisdiction and foreign law: *marginal* review, limited to enforceability of choice of court / dispute resolution clauses and potential impact of local mandatory rules
III. Wrapping it up: standards of review

- e.g. contract submitted to the laws of NY and courts of NY:
  1°) are the choice of court / choice of law provisions valid?
  2°) if yes, review by US law trained lawyer
  3°) review by non US lawyer: limited to int'l mandatory rules (Art. 9 Rome I Regulation)