Drafting International Commercial Contracts: A Primer
By way of introduction

- Int'l commercial agreements come in vary different shape /
  - Long term (e.g. joint venture agreement) / one shot (e.g. one time sale of brass fittings)
  - Commodity transactions / financial transaction (e.g. assignment of portfolio of receivables)
  - Amount at stake, location of parties, etc.
By way of introduction

• When looking at legal aspects of cross-border commercial contracts, one common feature: starting point and first reference is always the contract (i.e. what parties have agreed, no matter how their agreement was recorded)

• In many situations, no need to go beyond the contract to resolve a dispute
By way of introduction

• Even if contract proves to be insufficient to settle a dispute (e.g. because it is incomplete, or invalid), contract remains starting point

• Hence, one should start by examining the contract before looking at the rules applicable outside and beyond the contract
By way of introduction

- Documentation of int'l commercial agreements may vary:
  - Sometimes purely *oral* agreement
  - Often various *one sided* documents (such as price quotation, purchase order, confirmation / acknowledgement, etc.)
  - One or two parties may use their pre-formatted *general conditions*
  - Ad hoc written agreement, negotiated and drafted specifically for one transaction)
By way of introduction

• Since it is impossible to study all possible contract clauses, their drafting and impact, focus of this module will be on:
  – 1°) Primer on contract drafting
  – 2°) Focus on macro-drafting: the joint venture agreement
  – 3°) Focus on micro-drafting: 1 standard provision (confidentiality)
By way of introduction

• Materials:
  – 1°) Case scenario
  – 2°) Term sheet
I. A primer on drafting

• Various positions when faced with an int'l commercial agreement:
  – Drafting from scratch
  – Reviewing (draft) agreement
  – 'Delocalizing' existing agreement

• In all 3 situations: either 'full text' or general conditions (different if limited contractual documentation)
II. A primer on drafting

• In all situations: some do's and don'ts
  – The 'assisted drafting' - using models, standardized clauses, etc.
  – Focus on the structure
  – Some 'golden' drafting rules
II. A primer on drafting -
1. the 'assisted' drafting

- Drafting from scratch: 'blank page syndrome' or 'trauma' / drafting contact language may be intimidating
- Natural temptation to use models – either self-tailored (firm's know how) or not, either public (any web-site) or private (e.g. ICC), either institutionalized (form books in libraries) or not
- Lawyers are inherently conservative... and concept of plagiarism is not applicable
II. A primer on drafting -
1. the 'assisted' drafting

- From client's and lawyer's point of view, to be commended... as starting point, not a finishing point – rely on other people's work at your own peril!
- Use models intelligently - Every transaction is unique (both the one you are contemplating and the one for which the model has been drafted)
- Difference between a true model (drafted as such, with indications of possible variations and when variations should be considered) and a precedent (i.e. a contract drafted and used for another transaction)
II. A primer on drafting - 1. the 'assisted' drafting

- Prefer checklists / outline to models (have I covered all issues?) – or combination of both
  - Checklist/outline: have I covered all important issues?
  - Model: actual drafting of provisions – combine inspiration from several models
  - Precedents: to be used with caution

Ideal: combine a checklist and model
II. A primer on drafting -
1. the 'assisted' drafting

- Be careful for *drafting inertia* – carrying over a provision from one text to the other, even though context is different...
- *E.g.* sovereign bonds under New York law, with a trustee (representing bondholders), trust indenture reserves the right to each individual bondholder to sue sovereign debtor for its individual share of a payment not made → individual right mandated by US law for corporate trust indenture (rationale: protect individual bondholder against collusion between debtor and majority of creditors); but not for sovereign bonds, but was carried over...
II. A primer on drafting -
1. the 'assisted' drafting

• Using standardized clauses – e.g. ICC arbitration clause or trade terms – e.g. FOB

• Very commendable, but:
  – Standardized clause: do not forget to tailor it…
  – Trade term: ICC's FOB is not the UCC's…
  – Be precise (Incoterms: ICC 2010 version)
II. A primer on drafting - 
2. Focus on the structure

• Structure of the agreement is key - especially since int'l agreements tend to be long and highly technical

• Structure: good starting point for drafting and for review - is the Agreement complete - has everything (or at least main risks) been covered?
II. A primer on drafting -
2. Focus on the structure

- Basic structure of int'l agreements
  1) Preamble (Recitals) : legal value / impact
  2) Introduction : date and place, description of parties
  3) Definitions : useful... to a certain point
  4) 'Body': depends on nature of agreement – mainly rights and
     obligations of parties ('Who does what when?')
  5) Breach and End (liability, exclusion, limitation, etc.) and termination
     (time frame, automatic and with notice)
  6) Boilerplate clauses (IP, Notices, Insurance, Force majeure,
     Confidentiality, Choice of law / Dispute resolution)
  7) Schedules: technical information (can be adapted / modified)
II. A primer on drafting -
2. Focus on the structure

- Preamble - e.g.
  “Party 1 is active in [specify field of activity ]; [or] has at its disposal [mention if appropriate one or several distinctive assets, abilities, specific know-how, or intellectual property rights necessary to its activity and/or to the object of the Agreement]; [or] has the following objectives [specify the objectives which this Party seeks to promote by the Agreement]; [or] is interested in [describe the development that the Party expects from this Agreement; its contractual expectations ].

- Party 2: ....

- In the light of their activities, abilities and objectives, as described above, the Parties wish to jointly [specify in general terms the proposed Object of the Agreement]”
II. A primer on drafting -
2. Focus on the structure

- Legal consequence of the Preamble?
  - It does not aim to create rights and obligations for parties or state specific representations
  - the Preamble only intends to provide background information. This information is not binding in the proper sense of the word, but it could be used in case of dispute to help interpret the agreement
  - What interpretative value will be given to recitals of the Preamble, will depend on the interpretation rules of the law governing the contract
II. A primer on drafting -
2. Focus on the structure

• Body - *e.g.* sales contract:
  − Specifications and warranties
  − Price term
  − Payment term
  − Security interest
  − Delivery term
  − Title, risk of loss and insurance
II. A primer on drafting -
2. Focus on the structure

• Different structure for general conditions – preamble, introduction, schedule, etc.: not necessary
• In substance same issues as for drafting contract, but specific concerns:
  – More one sided than contract (but keep a balance!)
  – Watch out for enforceability (specific requirements – use of conditions in practice)
II. A primer on drafting -
3. 'Golden' drafting rules

- Some 'golden' drafting rules:
  - Be brief
  - Use of ambiguous language
  - Use of superfluous language
  - Terms of art
  - Not a lawyer's monopoly
II. A primer on drafting - 3. 'Golden' drafting rules

• § 1. Be Brief, Clear and Precise
• Noble ideal...Say what you want to say and no more
• It has been said that “the longer the clause, the greater the opportunity to pick at its wording” (Adrian Briggs)
II. A primer on drafting -
3. 'Golden' drafting rules

• § 2  Use of ambiguous language: all forms of human communication are subject to misunderstandings and misinterpretation.... but these instances should be reduced to a minimum
  – “Seller may sell Buyer...”
  – “The price of each Widget shall be 5.00 dollars ...”
II. A primer on drafting -
3. 'Golden' drafting rules

• §2 Use of ambiguous language:
  – Ambiguity arising out of sequence of provisions (e.g. “Parties may terminate, parties may terminate, the contract may be terminated...”) or out of context
  – Deliberate or purposeful ambiguity... (e.g. “Seller will use reasonable efforts to...”)

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II. A primer on drafting - 3. 'Golden' drafting rules

• § 3 Use of superfluous language
• e.g. 'NOW, THEREFORE, in consideration of the promises and of the mutual covenants of the parties hereto to be faithfully performed as hereinafter specified, the parties hereto hereby covenant and agree as follows...’
II. A primer on drafting - 3. 'Golden' drafting rules

• § 3 Use of superfluous language
• —› 'In consideration of the mutual covenants of the parties to be faithfully performed, the parties agree as follows...'
II. A primer on drafting -
3. 'Golden' drafting rules

• § 3 Use of superfluous language – compare:
  – “Seller agrees to sell and Buyer agrees to buy 1,000 Widgets at USD 10.00 per widget”
  – “Seller agrees to sell, convey, transfer, assign and otherwise relinquish claim to and otherwise commit into the permanent possession and ownership of Buyer 1,000 Widgets...”
II. A primer on drafting -
3. 'Golden' drafting rules

- § 3 Use of superfluous language: some words often used because
they 'read/sound' good/lawyerly, without adding much content to the
agreement:

  - e.g. 'respective': as in “Parties shall perform their respective
obligations” (does the word 'respective' add anything to this
provision? Can one imagine Party A performing B's obligations?)
  - e.g. 'said': as in “Party A will deliver said Goods to Party B…”
  - e.g. 'aforementioned', 'hereby', 'such' ('directionary' words -
attempt to direct attention from one provision to another or part
of another; generally unnecessary)
II. A primer on drafting -
3. 'Golden' drafting rules

• § 4 Use of 'terms of art':
  
  _ common practice to include a section with definitions. Words defined used in the agreement with a capital letter

  _ Rule of thumb: definition is needed if there could be doubt among reasonable people (lawyers?) on what a term/word means - mostly technical terms: sale of 'crude oil' or of 'wheat': Origin? Quality? (percentage humidity in wheat; percentage sulfur in oil, etc.)
II. A primer on drafting - 3. 'Golden' drafting rules

• § 4 Use of 'terms of art' :
  
  _ No definition needed for terms/words for which no doubt possible for all parties concerned, because they have an inherent meaning - e.g. 'day', 'kilometer', 'Moscow, Russia', 'International Chamber of Commerce', etc.

  _ No need to define legal terms (e.g. 'termination' or 'arbitration') - unnecessary since the applicable law will provide a definition. Unless the special nature of the agreement requires a definition.
II. A primer on drafting - 3. 'Golden' drafting rules

• Necessary to include definitions of this type?
• e.g. “Headings and titles are used for convenience only in this Agreement and are not to be used in interpreting this Agreement; any reference to the singular includes the plural and vice versa, any reference to one gender includes each gender etc.”
II. A primer on drafting - 3. 'Golden' drafting rules

• § 5 Minor issues
• Numbering – which one would you prefer if you were the buyer?
  – “Buyer shall pay Seller 1,000 USD per Widget”
  – “Buyer shall pay Seller 1.000 USD per Widget”
• Prefer : “The Buyer shall pay Seller one thousand US dollars (1,000)…”
II. A primer on drafting -
3. 'Golden' drafting rules

• § 5 Minor issues - Dates
• Do you see a difference?
  – “Seller shall deliver the goods to Buyer on 4.11.2010...”
  – “Seller shall deliver the goods to Buyer on 11.4.2010...”
• Write the months in full?
II. A primer on drafting -
3. 'Golden' drafting rules

• § 5 Minor issues – Tense
• Rule of thumb: agreement must be drafted in the present tense
• Use of past tense is exceptional and should only be considered if specific reasons justify it
• Tendency to use future ('shall') because agreement contemplates actions to be undertaken at later stage
II. A primer on drafting -
3. 'Golden' drafting rules

- § 5 Minor issues - Tense
- 'Shall' construction may be avoided:
  - “The Parties shall keep confidential all business and technical information relating to and acquired in the course of the performance of the present Agreement”
  - “The Parties agree to keep confidential all business and technical information relating to and acquired in the course of the performance of the present Agreement”
II. A primer on drafting - 3. 'Golden' drafting rules

- § 5 Minor issues – Tense
- In any case, avoid 'must' (e.g. “Seller must pay the price...”) → essence of agreement is to create obligations, 'must' is redundant and creates impression that 'non must provisions' are not binding
II. A primer on drafting -
4. Language issues

• Language issues: minor issue with big potential impact...
• English as the *lingua franca* of int'l commercial agreements – impact on drafting?
II. A primer on drafting -
4. Language issues

• Legal English much more sophisticated than 'Euro-English'...

• e.g. 'The present Agreement has been executed / performed on 4.11.2009': execution —› signature; 'performance' —› actual realization by a party of its duties
II. A primer on drafting - 4. Language issues

• Legal English much more sophisticated than 'Euro-English'...
  e.g.
  – “All goods that have been destroyed during carriage shall be replaced at no cost”
  – “All goods, which have been destroyed during carriage, shall be replaced at no cost”
II. A primer on drafting -
4. Language issues

• “All goods...”
  – 1st drafting (“All goods that have been destroyed...”) : restrictive clause
  – 2nd drafting (“All goods, which have been destroyed...”) : non-restrictive clause, may be taken to mean that all goods have been destroyed and must be replaced
II. A primer on drafting -
4. Language issues

- Watch out for 'imports' - e.g.
  - Provision entitled “Frustration” : import of the English doctrine of frustration?
  - Recitals : “In consideration thereof...”
  - Exclusion of “indirect loss” or “consequential damages » : second limb of *Hedley v Baxendale*, only aims at 'damages arising from any special circumstances' (if known to the other party) - quaere lost profits?
II. A primer on drafting - 4. Language issues

- **Link with dispute resolution**: exercise caution, take into account language skills of dispute resolution body
- **Agreement drafted 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”
II. A primer on drafting -
4. Language issues

- Agreement translated in other language(s)
- “This contract may be translated into languages other than English. The English language version of this contract is the official version and shall be controlling in any dispute arising under this contract”
II. A primer on drafting -
4. Language issues

• “The original version of this Agreement has been drafted in English. Should this Agreement be translated into French, Dutch or any other language, the English version shall prevail among the Parties, to the fullest extent permitted by Belgian law, provided, however, that whenever French and/or Dutch translations of certain words or expressions are contained in the original English version of this Agreement, such translations shall be conclusive in determining the Belgian legal concept(s) to which the Parties intend to refer” (contract between US and Middle East companies, subject to Belgian law)
II. A primer on drafting - 5. Final word of advice...

- Contract drafting: not a lawyer's monopoly...
- Apart from 'legal science', contract is made of:
  - Knowledge about business concerned (client is the source! New client: spend some time discussing business)
  - What can go wrong (litigation experience – imagine worst case scenario)
III. Two major provisions - Introduction

• 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
III. Two major provisions - Introduction

• Three (major) differences between domestic and int'l agreements:
  – Language (see above)
  – Dispute resolution
  – Applicable norms (if contract is silent, ambiguous or validity issue)

• Impact of these differences on drafting?
III. Two major provisions - Introduction

- Dispute resolution and applicable law: two major 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
III. Two major provisions - Introduction

- 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...
III. Two major provisions -
1. Dispute resolution
A. In general

- Why include a Dispute Resolution Clause?
- Choice of dispute resolution method: crucial
  i) to avoid uncertainty and preclude litigation on the forum;
  ii) to choose a favourable forum (e.g. expertise/language skills);
  and iii) anticipate enforcement difficulties
III. Two major provisions -
1. Dispute resolution
   A. In general

• Which Dispute Resolution Method?
• Choice between various techniques
  – Mediation (and other ADR-techniques)
  – Arbitration
  – Litigation in state court
• Choice influenced by neutrality (perceived and effective), confidentiality (caution for expectations), expertise, flexibility, etc.
III. Two major provisions -
1. Dispute resolution
B. Fine tuning agreement

• Another layer of choice: once a choice has been made between the different dispute resolution techniques available, further refinements and choices are needed in order to make the best out of the dispute resolution method chosen.
III. Two major provisions -
1. Dispute resolution
B. Fine tuning agreement

- Drafting considerations in single dispute resolution clause
- *e.g.* arbitration: general choice for arbitration is not sufficient: institutional or 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')
III. Two major provisions -
1. Dispute resolution
B. Fine tuning agreement

e.g. mediation: choice between various options (examples drawn from ICC model clauses):
  - Optional ADR: 'The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules'
  - Obligation to consider ADR: 'In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules'
  - Obligation to submit dispute to ADR with an automatic expiration mechanism: 'In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, the parties shall have no further obligations under this paragraph.' Drafting considerations in single dispute resolution clause
III. Two major provisions -
1. Dispute resolution
C. Multi-tier dispute clauses

- Drafting considerations for combined or multi-tier dispute resolution clause (Med-Arb / Arb-Med, Arb/Court, etc.):
  - 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.
  - Complex clause: ensure that no ambiguity about disputes assigned to each method
III. Two major provisions -
1. Dispute resolution
C. Multi-tier dispute 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.
III. Two major provisions -
1. Dispute resolution
C. Multi-tier dispute clauses

... 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, (i) the controversy shall be settled by arbitration in accordance with the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration...”
III. Two major provisions -
1. Dispute resolution
C. Multi-tier dispute clauses

- Complex clause: choice for arbitration, with caveat for 'small' disputes: ensure that the separation is clear e.g.

“Dieses Vertragsverhältnis untersteht schweizerischem Recht. Sich aus oder im Zusammenhang mit dem vorliegenden Vertrag ergebenden Streitigkeiten mit einem Streitwert über CHF 100’000.- [...] werden durch ein Dreierschiedsgericht gemäss der Internationalen Schiedsgerichtsordnung der Internationalen Handelskammer unter Ausschluss der ordentlichen Gerichte entschieden. Jede Partei ernennt einen Schiedsrichter. Schiedsort is Zürich, Schweiz. Für Streitigkeiten mit einem Streitwert unter CHF 100’000.- sind, zur Vermeidung hoher Schiedsgerichtskosten, die ordentliche Gerichte zuständig”
III. Two major provisions -
1. Dispute resolution
C. Multi-tier dispute clauses

- **Rationale:**
  - General choice for arbitration (choice of contract management policy)
  - For small value disputes: state courts

- **Difficulty**: what is amount of dispute? Only amount of principal claim, or also includes interests, legal costs or possible counter claim?
III. Two major provisions -  
1. Dispute resolution  
C. Multi-tier dispute clauses

- Complex clause: necessary to make carve outs for specific issues, such as urgent relief?
- What if you need urgent relief (injunction) in another country than chosen for dispute resolution? *E.g.* license agreement grants Spanish company exclusive right to use a database of images owned by Texas based company. Agreement provides that “Licensee hereby irrevocably submits to the jurisdiction of the State courts of Dallas county”
III. Two major provisions -
1. Dispute resolution
C. Multi-tier dispute clauses

- *Quaere* if the licensor discovers that the Licensee uses images from a third party and wants to obtain an injunction to prohibit this. Obligation to go to Texas courts and then enforce judgment in Spain?

- Is it not better to make a carve out and specify that for urgent relief, one may go to any court? (e.g. “Licensee hereby irrevocably submits to the jurisdiction of the State courts of Dallas county ... provided however with respect to any action for injunctive or extraordinary relief [party A] may bring such action in Texas or other judicial forum in the United States or in the territory which has jurisdiction”).

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III. Two major provisions -
1. Dispute resolution
C. Multi-tier dispute clauses

• In reality, problem of construction of choice of court clause — can it be said that if the clause is drafted in general terms (“All disputes arising out of or in relation to…”), parties have not meant to cover requests for provisional and protective measures?
III. Two major provisions -
1. Dispute resolution
D. Enforcing dispute resolution clauses

- Test the provision... 3 stages:
  - Direct test:
    - i) Will court chosen accept jurisdiction? (arbitration: generally less an issue)
    - ii) Look for all courts / other bodies which could take an interest in the dispute → will they recognize and uphold the agreement? Sometimes analysis reveals that agreement will be upheld by court/body chosen, but not by other court / body (or otherwise)
  - Indirect test: refusal to recognize/enforce judgement / award (not necessarily linked to refusal to uphold choice of court clause - no systematic review of indirect jurisdiction)
III. Two major provisions -
1. Dispute resolution
D. Enforcing dispute resolution clauses

<table>
<thead>
<tr>
<th>Who Tests?</th>
<th>Which rules</th>
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<tbody>
<tr>
<td>Court seized</td>
<td>e.g. : discretion?</td>
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<tr>
<td>Courts excluded</td>
<td>e.g. : unarbitrable matters?</td>
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<tr>
<td>Enforcement court(s)</td>
<td>e.g. : exclusive jurisdiction?</td>
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</table>
III. Two major provisions -
1. Dispute resolution
D. Enforcing dispute resolution clauses

- Basis of the test - 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 BCPIL
III. Two major provisions -
1. Dispute resolution
E. Choice for the Home Courts?

• Choice for resolution by state court: should you always choose *home courts*?
• If you can impose it: yes (save if potential enforcement problems, e.g. Russia – or so goes the rumor...)
III. Two major provisions -
1. Dispute resolution
E. Choice for the Home Courts?

• Even better solution: one sided facultative choice of court clause – 'English clause' or 'asymmetrical clause' (should be drafted with special care)

• e.g. “All disputes arising out of or in relation with the present agreement shall be exclusively settled by the courts of Frankfurt, Germany. However, Buyer reserves the right to bring proceedings before other courts of competent jurisdiction”
III. Two major provisions -
1. Dispute resolution
E. Choice for the Home Courts?

• If you cannot impose your home courts?
• 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...
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

• 1) How precise should choice be?

  – At very least choice for a specific country (not: “The Seller's Courts”)
  – Preferred option: choice for a distinct region/jurisdiction (e.g. “the courts of Paris, France”)
  – Watch out for dual-layered court systems (e.g. US - Switzerland)
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

- 2) Be as clear as possible...
- Some counter-examples
III. Two major provisions - 
1. Dispute resolution
F. Drafting issues

• 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)
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

- **Example 2**

“In the event of litigation initiated in Belgium, the Belgian courts that will have jurisdiction will, in principle, be those where the registered office of Fortis SA/NV is located if Fortis SA/NV is defendant, and will be designated according to the nature of the litigation, unless otherwise provided by Belgian rules, applicable treaties or jurisdiction or arbitration clauses” (section 8.1.2 Share issue by Fortis in Sept. 2007I : not a real choice of court, only effect is that if Belgian courts are seized and have jurisdiction, case must be brought before courts of Brussels...)

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III. Two major provisions -
1. Dispute resolution
F. Drafting issues

• **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”
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

• 3) Exclusive or non exclusive?

“Parties agree that any dispute which may arise out of or in connection with this Agreement may be submitted to the courts of England”
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

• **Exclusive or non exclusive jurisdiction clauses**
  – Exclusive clause is *mandatory* and excludes all other courts; non-exclusive clause is merely *permissive* (permits but does not require dispute to be solved before court chosen)
  – Choice between the 2?
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

• *Choice between exclusive or non exclusive jurisdiction clauses*
  – Exclusive clause: clarity, prevents multiple/parallel litigation; less litigation tactics; doubt on enforceability?
  – Non exclusive clause: leaves flexibility (seeking relief in another jurisdiction)?
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

- Drafting implications
  - Europe: presumption that clause is exclusive (unless specifically agreed otherwise)
  - Other jurisdictions: no such presumption – courts will only regard clause as exclusive if affirmative showing to that extent (“exclusively” / “only”)
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

• 4) How to determine scope of agreement?

“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”
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

- **Scope of choice of court agreement**
  - Intention of parties is controlling – application of general principles of contract law and interpretation (but in some jurisdictions: restrictive interpretation)
  - May encompass non contractual disputes (e.g. tort claims – claim based on unfair competition)
  - Preference should go to broad scope: “all disputes arising under, out of or in connection with this agreement”
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

- **Scope of choice of court agreement - example**
  “The Court of Brussels, Belgium, are to have jurisdiction to settle any dispute which may arise out of or in connection with the Agency Agreement and the Bonds and any non-contractual obligations arising out of or in connection with the Bonds...” (section 14.2 bond issue by GBL June 2010) – covering non-contractual obligations because liability of issuer in relation to prospectus may be characterized as non-contractual
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

- **Scope of choice of court agreement - exclusions/carve outs**

  “Nothing in this Agreement shall prevent either party from applying to a court that would otherwise have jurisdiction for provisional or interim relief, including but not limited to any claim for preliminary injunctive relief”

  “All disputes relating to this Agreement shall be resolved exclusively in the courts of Germany, provided that claims alleging unlicensed or otherwise unauthorized use of the [Trademark] may be asserted in any court of competent authority”
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

- Ancillary agreements - provisions which often go together with choice of court (or other dispute resolution agreements)

- 1st: waiver of sovereign immunity (if contract with a sovereign State and provided waiver is possible and necessary, i.e. not if contract purely commercial)

  “To the extent that the Borrower may in any jurisdiction claim for itself or its assets immunity from suit, execution, attachment or other legal process and to the extent that in any such jurisdiction there may be attributed to itself or its assets such immunity, the Borrower hereby irrevocably agrees not to claim and irrevocably waives such immunity to the full extent permitted by the laws of such jurisdiction”
III. Two major provisions -
1. Dispute resolution
F. Drafting issues

- **Ancillary agreements** – 2nd service of process clause

- Contractual arrangement on service of process, whereby one party (foreign company) appoints a third, local party to accept service. Consequence: Bypassing int'l agreements on service of process? (e.g. 1965 Hague Convention)

- “Company A hereby irrevocably appoints [agent] as his agent for the service of process in England in connection with this Agreement. Service of process on [the agent] shall be deemed, for all purposes, to be due and effective service and service shall be deemed completed whether or not forwarded to or received by Company A”
III. Two major provisions -
1. Dispute resolution
G. Post contract survival?

• Post-contractual validity of the Dispute Resolution Clause?
  – What if one of the parties assign or otherwise transfer the Agreement?
  – What if one party terminates the agreement?
III. Two major provisions -
1. Dispute resolution
G. Post contract survival?

- Rule: choice of court and arbitration agreements remain valid notwithstanding any sale, take-over or divestment
- Third parties taking over part of a business, become by this operation the new contractual partner and are as such bound by the choice of court or arbitration agreement
- Unnecessary to provide expressly in the agreement that the choice of court or arbitration agreement will remain binding and enforceable even after the contract has been transferred
III. Two major provisions -
1. Dispute resolution
G. Post contract survival?

- Same rule applies in case of termination of agreement – separability of dispute resolution agreement
- Less certainty in case of invalidity of agreement
- In order to avoid any uncertainty:
- “A and B agree that in the event of the Agreement between the parties, or any part thereof, being held to be invalid, unenforceable, illegal, discharged or otherwise of no effect, the provisions of this Clause shall continue to apply to all and any legal proceedings which fall or would have fallen within its scope had the Agreement been valid and enforceable in every respect (Adrian Briggs, Agreements on jurisdiction and choice of law, OUP, 2008, 160).
III. Two major provisions -
2. Choice of Law provision
A. Why choose the law?

• 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*)
III. Two major provisions -
2. Choice of Law provision
A. Why choose the law?

• Applicable law is relevant:
  - Agreement *not complete* (e.g. contract concluded on the basis of general conditions)
  - Agreement *not precise* → room for interpretation
  - Agreement *void* (invalidity decided by applicable law)
III. Two major provisions -
2. Choice of Law provision
A. Why choose the law?

• Applicable law is relevant as:
  – Yardstick to assess *validity* of the agreement
  – Body of rules to *supplement* the contract and / or to *construe* the agreement
III. Two major provisions -
2. Choice of Law provision
A. Why choose the law?

• 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
III. Two major provisions -
2. Choice of Law provision
A. Why choose the law?

• 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
III. Two major provisions -
2. Choice of Law provision

A. Why choose the law?

- Determination of applicable law if no choice: European approach → characteristic performance (art. 4 Rome I Reg.): *quaere* of:
  - Barter contract
  - Bond issue: law of issuer or of bond holder?
III. Two major provisions -
2. Choice of Law provision
B. Drafting samples

• “The present agreement shall be governed by the laws of the United States”
• “The present agreement shall be exclusively governed by the law of the buyer”
• “All the parties irrevocably agree that all questions pertaining to the performance and interpretation of the present agreement shall be exclusively governed by the laws of New York”
III. Two major provisions -
2. Choice of Law provision

• Issues to be considered in drafting a choice of law provision:
  - Will it be enforced?
  - What law should be chosen?
  - May I split the choice?
  - Should I exclude conflict of laws provisions?
  - May I freeze the law chosen?
  - Relationship between law chosen and int'l conventions
  - Scope of choice of law clause
III. Two major provisions -
2. Choice of Law provision
C. Will it be enforced?

• Look at choice of law clause from various angles. Test: all courts (or other dispute resolution bodies) with jurisdiction

• Is it enough to look at reaction of court chosen? Only in so far as choice of court is valid and enforceable...
III. Two major provisions -
2. Choice of Law provision
C. Will it be enforced?

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

• Hence, presumptive enforceability of choice of law clauses
• However, important exceptions
• 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 – section 1-105(1) UCC: “reasonable relationship” - what with choice of law of 'neutral' jurisdiction?)
III. Two major provisions -
2. Choice of Law provision
C. Will it be enforced?

• 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)
III. Two major provisions -  
2. Choice of Law provision  
C. Will it be enforced?

• Other important limitation on enforceability of choice of law: international mandatory rules
• Intl'y mandatory rules are substantive rules of national law which are deemed so important that they apply whatever law parties may have chosen to govern their agreement
III. Two major provisions -
2. Choice of Law provision
C. Will it be enforced?

- Distinction domestic and intl'y mandatory rules:
  - In both cases, substantive provisions of a given national law
  - Domestic mandatory rules (e.g. prohibition of exclusion of liability for one's wilful negligence) displace any substantive provision of the agreement which runs against them —→ you cannot contract out of these provisions in a domestic contract
III. Two major provisions -
2. Choice of Law provision
C. Will it be enforced?

• **Intl'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
III. Two major provisions -
2. Choice of Law provision
C. Will it be enforced?

• Examples int'l'y mandatory rules:
  - 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)
  - 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.")
III. Two major provisions -
2. Choice of Law provision
C. Will it be enforced?

- Mandatory rules trump law chosen by parties and the contract's provisions
- How to determine if mandatory rules apply? → uncertainty. Obtain advice from local counsel
- 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)
III. Two major provisions -
2. Choice of Law provision
D. What law should be chosen?

• Should I always choose for my law?
• In principle yes: makes it easier to manage contracts; familiarity and ease of access with one's own law
III. Two major provisions -
2. Choice of Law provision
D. What law should be chosen?

• What if both parties insist on choosing their own law?
  – No choice at all (fall-back provisions; e.g. Art. 4 Rome Regulation —> legal certainty reduced since escape clause)
  – Choice for a neutral law? (Swiss / Sweden —> ensure proper interaction with dispute resolution provisions)
  – Choice for Unidroit Principles, 'Equity and Fairness' or lex mercatoria?
III. Two major provisions -
2. Choice of Law provision
D. What law should be chosen?

- *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”
  - Probably only valid if one opts for arbitration (state courts: doubts)
  - Even then: caution, general principles of law are just that, not a developed code of law...
  - On special case: state contracts
III. Two major provisions -
2. Choice of Law provision
D. What law should be chosen?

- Choice for an international convention dealing with contracts? (e.g. choice by parties to a sales agreement, for the CISG – 1980 Vienna Sales Convention)
- Does this offer an easy way out of a deadlock between parties on the applicable law?
- Answer must be nuanced
III. Two major provisions - 
2. Choice of Law provision
D. What law should be chosen?

• CISG = limited legal framework; does not deal with all possible legal questions which could arise out of a contractual relationship (e.g. the Vienna Sales Convention does not deal with ownership issues, title to the goods)

• Choice for CISG does not therefore guarantee that if a dispute arises, the Convention will offer a solution for all possible questions
III. Two major provisions -

2. Choice of Law provision

D. What law should be chosen?

- Further, direct choice for CISG will not always be upheld

  - If the Convention is by its own terms applicable (because both seller and buyer are established in Contracting States) and the dispute is submitted to the courts of a Contracting State, the choice by parties does not matter much. The Convention will in any case apply

  - If the contract falls outside scope of application of the Convention, enforceability of a choice by parties for the CISG is doubtful
    - In some jurisdictions, courts will hold that parties may not directly opt in for the Convention. The choice will then be 'downgraded' to a mere reference of the Convention in the contract (trumped by mandatory provisions of law objectively applicable);
    - In other jurisdictions (and if the dispute is submitted to arbitration), a direct choice for the Convention will be upheld
III. Two major provisions -
2. Choice of Law provision
D. What law should be chosen?

- General guidelines
  - Choice for “developed, stable and commercially sophisticated law” (G.B. Born) (includes ease of access and well developed bar)
  - Choice for a 'favorable' law? “Beauty is in the eye of the beholder”...
  - Interaction with dispute resolution provision
III. Two major provisions -
2. Choice of Law provision
E. May I split the choice?

- 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)
- In both cases: caution required (is the red line between the 2 clear enough?)
- In some jurisdictions: validity of dépeçage doubtful
III. Two major provisions -
2. Choice of Law provision
E. May I split the choice?

• 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)
III. Two major provisions -
2. Choice of Law provision
E. May I split the choice?

• 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)
III. Two major provisions -
2. Choice of Law provision
F. Exclusions of conflict of laws rules?

• Should conflict of laws provisions of the law chosen be excluded?
• e.g. “The Agreement shall be governed by the laws of Italy, with the exclusion of its private international law rules”
III. Two major provisions - 2. Choice of Law provision

F. Exclusions of conflict of laws rules?

- 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)

- However, in most countries, *renvoi* is not accepted for contracts (e.g. art. 20 Rome I-Reg.). 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.

- 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...
III. Two major provisions -  
2. Choice of Law provision 
G. Stabilization clause

• May I freeze the law chosen? (e.g. “... the law of Uzbekistan, as it stands on 02.02.2009 ...”)
  
  - In general: 'stabilization' clauses not allowed - law chosen is taken as living object
  
  - 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
III. Two major provisions -
2. Choice of Law provision
H. Relationship with intl conventions

- *E.g.* sales agreement expressly subject to the laws of France. What does this mean in relation to the Vienna Sales Convention (CISG), which is in force in France? Is the Convention applicable to the contract or not?

- Question cannot be answered in general, but must be answered looking at each international convention in particular, since each convention has its own rules determining its scope of application

- We will be looking at this question focusing on the CISG
III. Two major provisions -

2. Choice of Law provision

H. Relationship with intl conventions

• 1st question: what if parties select the law of a State party to the CISG? Is the contract governed by the CISG?

• e.g. parties to a sales contract choose the law of France. Seller is established in France and buyer in the US (both are CISG contracting states). Is the contract governed by the Convention?
III. Two major provisions -
2. Choice of Law provision
H. Relationship with intl conventions

- Yes, the Convention is part of the law of France. If parties choose the law of France to govern their agreement, the agreement will be governed by the Convention (provided the contract is not excluded from the scope of application of the Convention).
- If parties wish to select the law of a Contracting State but do not want the Convention to apply, they should state this explicitly (e.g. : “This Agreement is governed by the laws of Spain. The provisions of the 1980 Vienna Sales Convention are expressly excluded”).
III. Two major provisions -

2. Choice of Law provision

H. Relationship with intl conventions

• 2nd question: what if parties select the law of a State which is not party to the CISG?
• Is there any risk that the contract would still be governed by the CISG?
• Depends on who has jurisdiction over disputes
III. Two major provisions -
2. Choice of Law provision

H. Relationship with intl conventions

- If choice for law of non contracting State and courts of non contracting State, no risk that the Convention is applied

- If disputes submitted to the court of a Contracting State, court will first determine whether the Convention may apply – by looking at the Convention's own rules of application

- Since the Vienna Sales Convention also applies if both parties are established in contracting states (art. 1(1)(a) CISG), it is not excluded that the Convention applies if it appears that both parties are indeed established in contracting states, notwithstanding the fact that parties selected the law of a non-Contracting State (e.g. contract between a Spanish seller and a French buyer, governed by English law, with a dispute referred to a French court)
III. Two major provisions -  
2. Choice of Law provision 
I. Scope of choice of law

- Question of the scope of the choice of law agreement mirrors the issue of the scope of the dispute resolution clause
- Scope of the choice of law provision should be expressed in *broad terms* (see above, discussion of scope of dispute clauses)
- Golden rule: streamline the scope of choice of court and choice of law so as to avoid any gap between the two
III. Two major provisions -
2. Choice of Law provision

I. Scope of choice of law

- In principle, choice only deals with *contractual issues* (performance, remedies, interpretation, etc.)
- Non contractual issues are not covered: e.g. capacity of parties, consequences of representation (contract concluded through agent), issues of procedure (such as admissible evidence, etc.)
- Sometimes difficult to know where one issue falls (e.g. statute of limitations, burden of proof, applicable interest rate)
III. Two major provisions -  
2. Choice of Law provision  
I. Scope of choice of law

- Contractual extension of the scope of the law chosen:  
  - “The Agency Agreement and the Bonds and any non-contractual obligations arising out of or in connection with the bonds are governed by, and shall be construed in accordance with, German law”
  - “This Agreement [and the documents to be entered into pursuant to it [save as expressly referred to therein]] shall be governed by and construed in accordance with [English] law”
IV. 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
IV. 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
IV. 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)
IV. Wrapping it up - Standards/method of review

• One possible method to review an agreement: enquire whether the *risks* incurred by parties are duly covered

• Sales agreement: what are the risks for the seller?
IV. Wrapping it up - Standards/method of review

• Sales agreement: what are the risks for the seller?
  – Deliver goods without getting paid (limited risk, i.e. seller can perfectly measure amount at stake)
  – Liability if the products delivered are defective (much more difficult to put a figure: could concern direct damage suffered by the client (the price paid for a defective product), but also indirect damage (loss of production suffered by the client, damage to other goods, etc.)
IV. Wrapping it up - Standards/methods of review

- Does contract sufficiently cover these risks?
- Seller's payment risk: 1) look at payment terms:
  - Payment term precisely defined?
  - Mechanism for late payment? Interests?
  - Exclusion of set-off and abatement?
IV. Wrapping it up - Standards/methods of review

- Does contract sufficiently cover these risks?
- Seller's payment risk: 2) look at payment guarantees
  - Advance cash payment? L/C?
  - Reservation of title?
IV. Wrapping it up - Standards/methods of review

• Does contract sufficiently cover these risks?
• Seller's payment risk: 3) long term agreements:
  – possibility to revise the price?
  – How: formula already fixed?
  – Need to negotiate on this?
  – Exit possibility?