Outline

1. Fundamentals of international trade law (ITL)
2. Conciliation and the Court
3. Disputes in ITL
   a) Risk of forum shopping – remedy?
   b) Case study – real-world application
What is ITL?

- What it is not – public international law relating to trade relations
- What it is – law relating to private commercial contracts between international parties, encompassing:
  - International Sales Contracts
  - Payment and Trade Finance
  - Carriage of Goods by Sea
  - Marine Insurance

Freedom of contract

- Parties are ‘free’ to agree the terms of the sales contract, subject to domestic laws governing ‘local contracts’
- Exclusive jurisdiction clauses (arbitration, ADR)
Trade Terms

- Why are EXPRESS trade terms important?
  - Simplification of trade
  - Clarity
  - Convenience
  - INCOTERMS 2000 (standardisation, harmonisation)
    - INCOTERMS 3000: currently under review at ICC

Ex Warehouse...place (Ex Works; Ex Factory)

- INCOTERMS equivalent – EXW
- The parties agree that the seller will have completed performance by setting aside the goods and making them available for delivery by the buyer at the seller’s warehouse or premises in the seller’s country.
- Payment is due when the goods are set aside and made available for delivery.
- Buyer may refuse to pay and/or reject goods tendered under certain circumstances.
Ex ship; Arrival Contracts...dest. port

- INCOTERMS equivalent – DES
- The seller undertakes to deliver the goods all the way to the agreed port of arrival.
- The seller is obliged to secure the export licence, to arrange for transport and insurance. He is also to arrange the bill of lading for the buyer.

FAS (alongside ship)...port of shipment

- The goods are to be placed alongside the vessel whether she has entered port or not.
- The seller is obliged under the contract to perform the following duties
  - deliver the goods alongside the vessel
  - notify the buyer that this has been done
  - assist the buyer in obtaining export licence or other authorisation for export
  - bear the costs and bureaucracy leading to the delivery
  - provide checking operations
  - provide customary clean document as proof of delivery
FOB (on board)....port of shipment

- The buyer to ship the goods and the seller merely to put the goods on board the nominated ship.
- The seller has to deliver to the buyer a mate's receipt or other document which the buyer could hand over to the shipping company in exchange for the bill of lading.
- The buyer is responsible for customs clearance and port dues. The seller to bear the costs in delivering the goods on board the ship.
- The seller does NOT undertake to ensure that the goods arrive safely or indeed at all. The buyer will have to rely on marine insurance taken out by him or by the seller on his behalf, OR sue the shipping company for breach of contract or tort.

FOB: General Definition

- A contract where the seller agrees to load the goods onboard a vessel nominated by the buyer.
- The Buyer is the shipper of goods – it is he who ships the goods by entering into a contract of carriage with the Carrier.
- The Seller’s principal duty is to ensure that the goods are delivered to the port of loading to meet the nominated ship.
- Consider extended FOB
CIF (cost insurance freight)...dest. port

- The seller to ship the goods to the buyer’s port at the seller’s expense, duly insured under a contract of insurance covering the sea voyage or buying goods afloat and to transfer all rights under the contracts of sale, insurance and carriage to the buyer by delivery of the bill of lading, the insurance and shipping documents over to the buyer.
- Different from the extended fob in that the seller is not obliged to act as shipper, he can simply buy goods afloat. Further he is responsible for freight and insurance, and he MUST obtain the bill of lading for the buyer (in a fob sale he is merely required to use his best endeavours to do so).

Essential mechanisms

- Bill of Lading
- Documentary credits
  - Bills of Exchange
  - Letters of Credit
- Contract of carriage
- Insurance contract (embodied in policy)
Bill of lading

- The bill of lading has five characteristics:
  - as a document of title
  - as a receipt by the carrier
  - it evidences the apparent condition of the goods
  - it evidences the terms of the contract of carriage
  - as a vehicle for transferring the rights it represents

- A bill of lading is only transferable if it is clearly stated to be so, usually by a statement that the bill is deliverable to named consignee OR ORDER, or simply TO ORDER.

Documentary credits

- Buyer engages a bank to provide undertaking to seller that it will honour payment to him provided he presents shipping documents relating to the sale goods and meets other conditions of the letter of credit (‘L/C’).
  - enhances the seller’s certainty of receiving payment – credit risk
  - reinforces the buyer’s certainty that seller will not be paid until he has complied with the bank’s conditions for payment – delivery risk
L/C Procedure

- Buyer approaches bank to open L/C. Instructs the bank regarding the documents to be presented by seller to receive payment.
- Buyer’s bank (‘issuing bank’) instructs bank in seller’s country to act as correspondent to receive information regarding the documents to be presented by the seller to receive payment.
- Correspondent bank (‘advising bank’) advises seller of opening of L/C.
- Seller ships goods, and presents documents required under L/C facility and sales contract to correspondent bank. If paperwork complete, seller entitled to payment. Documents must conform exactly to those mentioned in L/C. Otherwise bank entitled to reject documents and withhold payment.

Charterparties

- Contract (of carriage) between ship owner and merchant
  - Time charter
    - Ship is let/hired for specific time period
  - Demise/bareboat charter
    - Ship owner takes responsibility for crewing and maintenance of vessel during charterparty
  - Voyage charter
    - Ship is let/hired for specific/agreed voyage
Charterparties: governing law?

- Express incorporation of statute?
  - UK COGSA 1992
  - US COGSA 1936

Conflict of laws?

- Parties are invariably located in different jurisdictions; risk of ‘conflict of laws’
  - From comity to (more modern?) international conventions
    - Hague Convention on Private International Law
    - ‘Brussels Regulation’
    - ‘Rome Convention’
  - Consider rules for assumption of jurisdiction
    - Lex situs
    - Lex causae or lex fori (forum non conveniens)
    - Lex domicili
    - Jurisdiction in rem or in personam
Conciliation: ADR

Subject to ‘correct’ assumption or granting of jurisdiction, the appropriate Court will:

- Encourage parties to consider use of conciliation and mediation
  - Non-adjudicative
  - Difficult to define ADR process/procedures
  - Vary from informal discussions to hearings in which parties represented by solicitors

- Parties must agree to ADR
  - Benefits?

Arbitration tribunals

- Express incorporation of arbitration clause?
  - Which jurisdiction?
  - Ad hoc clauses vs administrative (certainty of drafting)

- Modernisation of UK Arbitration Act 1996
  - Over 1,000 arbitration-related decisions since entry to force in 1997 (as at March 2009)

- Simplification?
  - London Court of International Arbitration
  - ICC Court of International Arbitration
  - Other arbitration institutions

- With regard for UNCITRAL, ICC rules
What this means for disputes in ITL...

- Consider the number of parties x contracts:
  - Buyer & Seller (‘cargo owner’)
  - Financier/Mortgagee?
  - Ship owner
    - Registration of vessel?
  - Charterer/Shipper (if different from Seller)
  - Insurance company – other parties with legal/equitable interests in vessel/cargo?
  - Arbitrator – substantive jurisdiction

Scenarios

- Two or more systems of law impacting on the parties → increased likelihood for confusion; cost; injustice or further conflict?
- Freedom of contract → choice of law → Forum shopping?!