The law applicable to international agreements

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Overview

• I. The case of SuperFoam Inc. v. ReMousse S.A.
• II. The law of international contracts
• III. Uniform rules
• IV. Selecting the Applicable law
The case of *SuperFoam Inc. v. ReMousse SA*

- SuperFoam Inc is established in Pennsylvania, it manufactures polyurethane foam products, which are used as semi-finished products in the automobile industry and as finished products in the bedding industry.
- ReMousse SA is involved in the same business, it is established in Nantes, France.
- Discussion between the executives of the two companies in charge of 'strategic sourcing' – on terms of possible deal.
- Exchange of e-mails followed by the issue of a 'Purchase Order' by ReMousse, in which reference is made to ReMousse's standard terms of contract (available on its web-site).
The case of *SuperFoam Inc. v. ReMousse SA*

- Deal: ReMousse will buy 200 containers of scrap foam every 3 months for 2009, at a fixed price of USD 0.699 per pound.
- After first delivery, market for scrap foam crashes – market price settles around USD 0.35 per pound.
- ReMousse insists on renegotiating the deal to bring it in line with market price.
- SuperFoam refuses and points out that the e-mails exchanged make it clear that the deal was done on a 'fixed price' basis.
Law of int'l commercial contracts

If discussions between parties fail and the disagreement matures in a real dispute, two classic questions arise:

- Dispute resolution
- Applicable norms

These questions also arise in domestic context...
What is so special about int'l agreements?
Law of int'l commercial contracts

What is so special about int'l agreements?

- **First question** (dispute resolution - who decides?): not limited to courts of one State – possibilities are numerous (arbitration, adjudication by national court, mediation and other ADR)

- **Second question**: what are the rules of the game? Again, int'l dimension opens up realm of possibilities (national law of ReMousse, SuperFoam or third law, *lex mercatoria*, etc.)
Focus: the 'rules of the game' 

- 'Extended' version: includes all possible rules (including practices and customs) which could have an impact on the outcome of the dispute – such as rules of evidence (e.g. witnesses?) or financial obstacles to litigation (e.g. *cautio iudicatum solvi*, possibility to work on the basis of a contingency fee agreement, fee shifting rule, etc.)

- Narrow version: law applicable to the contract proper (validity, enforcement, remedies, interpretation) → focus of this lecture
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Rules of the game: first focus = the contract (*pacta sunt servanda*)

- Parties decide to invest time and money and draft a contract (the 'deal')
- Or both parties rely on their general trade conditions
- In both cases, main issues are identical
1°) A few pointers on how to draft agreements / general conditions

- Using models? 'Yes but' : only as a source of inspiration (watch out for the source - ICC models (agency, franchising, sales, etc.), - use several models! - use models to make sure that you have covered all issues – use models intelligently...)

- Caveat for use of models drafted in another jurisdiction : danger of 'delocalizing' a model (in particular drafted by American/English lawyers)
Examples of difficulties with delocalizing contracts:

- “In consideration thereof ...” (in Preamble) or 1 dollar consideration clause...
- Debtor shall use its “best endeavours” : cannot be reduced to « reasonable endeavours » - best endeavours requires debtor to go all the way to reach the goal, even if suffers a loss
- 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) – quid lost profits?
- Provision entitled “Frustration” : import of the English doctrine of frustration?
Difficulty closely linked with delocalization: beware of English

- English is the *lingua franca* of int'l commercial agreements, but difference between plain Euro-English and sophisticated legal English may lead to difficulties

- Legal English much more sophisticated than 'Euro-English'... (e.g. “agreement will be executed” <> “performance of obligation”)

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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”
A few pointers on how to draft agreements / tc's

- Have you hit all the issues?
  - Preamble (legal value / impact?)
  - Definitions : useful... to a certain point
  - 'Body':
    - Rights and obligations of parties ('Who does what when?')
    - Liability (exclusion)
    - Termination – automatic and possibility of early exit with notice
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A few pointers on how to draft agreements / tc's

- **Boilerplate clauses**:  
  - IP  
  - Notices  
  - Insurance  
  - Force majeure  
  - Confidentiality  
  - Choice of law / dispute resolution

- **Schedules**: technical information (can be adapted / modified)
A few pointers on how to draft agreements / tc's

- Clear – logical – well drafted? (a lawyer's mind and a 'neutral / third party's look')
- Know your client's business!
- Litigation experience
Specific issue re use of general conditions:

- "One size fits all solution"
- More one sided than contract (but keep a balance!)
- Watch out for *binding character* (should general conditions be specifically communicated to the other party? – and specific problem if both parties have their own tc's? - 'battle of the forms')
- *Global coherence* with other documents exchanged between parties - price quotation, pro forma invoice, purchase order, confirmation / acknowledgment
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Probably the two single most important provisions in international agreements

- *Choice of court / arbitration*: already covered

- *Choice of law*: parties decide by themselves which law governs the contract (see lecture on Rome I Regulation)
What if the contract has not provided a solution for a specific problem?

- e.g. SuperFoam and ReMousse: it may be that the parties signed agreement, which remains silent on possibility to renegotiate price
- e.g. agreement does not specify how buyer should complain about defects in the products delivered?
- e.g. which interest rate applies to late payment by buyer? (France: X %, US: Y %)
What if the solution provided by the contract is not valid?

- e.g. SuperFoam's tc's provide for a limitation of liability – exclusion of liability for damages caused by wilful intent or gross negligence – valid in your jurisdiction? If not valid, should the general limitation of liability specifically indicate that it does not apply to these damages?

**Preliminary question**: what law governs the validity of an agreement (has there been a meeting of the minds? Can parties really agree to this?)
In various hypothesis, one should go beyond the (formal) agreement:

- Agreement *not complete* (e.g. contract concluded on the basis of general conditions)
- Agreement *not precise* → room for interpretation
- Agreement *void*
- Special case: tc's used by parties do not *match* (SuperFoam's tc's: fixed price; ReMousse: renegotiation possible)
In these cases, answer to the question can be found in applicable 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
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What is applicable law?

- States agree on uniform rules e.g. CISG
- One national law is selected to govern the contract

Two different methods, which call for a detailed review
Law of int'l commercial contracts : uniform rules

• **Prime example**: European directives (e.g. on agency contract, time sharing contract, etc.)

• **Difficulties**:

  • Uniform rules only exist for certain matters (concern mainly consumer transactions or specific commercial transactions, no European 'Civil Code')

  • Most of the time, limited regional ambit (EU or other regional group such as OHADA)
Prime example outside EU framework: CISG

1980 CISG:
- Long history of application (see www.cisg.law.pace.edu)
- Only sales transactions (excluded: consumer sales, sale of various items such as electricity, etc.)
- Only applicable if the contract has a link with one or two CISG state:
  - both parties are established in a CISG country (art. 1(1)(a) CISG), or
  - contract is governed by the law of a CISG country (art. 1(1)(b) CISG)
• CISG: modern and balanced rules on sales contracts
  • 'fundamental breach' (art. 25 CISG)
  • possibility for party to avoid contract without waiting for court to do so (art. 49 and 64 CISG)
  • *anticipatory breach*: suspension and avoidance (art. 71-72 CISG)

• Not covered:
  • complex sale operations (art. 3 CISG)
  • issues of validity + transfer of ownership (art. 4 CISG)
  • applicable interest rate (art. 78 CISG)
Law of int'l commercial contracts: uniform rules

- Prime example outside EU framework: CISG

- Uniformity in practice? Probably not entirely (e.g. reasonable time in Art. 39 CISG: diverging national case law)

- CISG is not mandatory, can be excluded (art. 6)

- Why exclude / opt out of the CISG?
  - provides a modern set of default rules (compared to rules applicable in certain countries on anticipated breach, etc.)
  - only applicable by default
  - fear of the unknown?
Law of int'l commercial contracts: uniform rules

• Other example outside EU framework: Inco-terms

• Set of standard contract rules, dealing with main issues of international carriage (who bears the risk during carriage, who should select and pay carrier, insurance of the goods, etc.)

• 13 different Inco-terms (C, D, E and F-terms, depending on the division of labour between buyer and seller – D-terms put the heaviest load on the seller)

• Must be incorporated in the contract – no binding force except if parties have expressly referred to the Inco-terms
What if no uniform rules?

- Contract is silent / non-existent / not valid, no uniform rule (majority of cases), only solution = fall back on a national law

- Which national law? Two generally recognized principles (enshrined in 2008 Rome I Regulation)
  - First principle: selection of one applicable national law by the parties
  - Default principle: if no choice by parties, selection of applicable law by default rule
Choice of law:

*Be as precise / clear as possible: 3 pathological examples*

“The present agreement shall be governed by the laws of the United States”
Choice of law:

Be as precise / clear as possible: 3 pathological examples

« The present agreement shall be governed by the law of the State where the main establishment of the buyer is located »
Law of int'l commercial contracts: selecting the applicable law

Choice of law:

*Be as precise / clear as possible*: 3 pathological examples

« 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 »