



International Contracting

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1. Drafting and language issues

- Drafting authority
- Prevailing party vs minor party: how to deal with standards and templates
- Drafting in foreign language requires proper control of that language: in the international world, poor English is the standard, but natives have an advantage
- Equality of arms
- To be or not to be extensive about the intention of the parties, the goal of a clause etc.: mathematics vs. mutual understanding
- Translation of legal terms of the applicable jurisdiction
- Agree on language of notices regarding the execution of the contract
- Consideration is very important in common law systems



2. Co-operation with foreign counsel

- When dealing with contracts where other jurisdiction apply
- Common sense, general legal sense and experience vs full legal check within applicable jurisdiction
- The more foreign, the more need of local counsel
- Distinguish between the legal parts and the “operational” parts of the contract
- Agree on scope: what is to be opinionised and what not
- Agree on fees
- Charge directly to client or to counsel engaging other counsel.
- EU and International rules of referral



3. Bindingness and voidness; perception

- Common law systems: literal text is basically the only source for explanation of the contract
- Code Civil systems and Germanic systems: legal effect and explanation much more influenced by fairness and reasonableness and the circumstances under which the contract is concluded and executed; these can add to or derogate from literal text of contract, and even statute law
- Termination, voidness, and other legal events that lead to (partial) ending, non-bindingness or suspension of the contract. Be aware of differences in effect: *ex nunc* or *ex tunc*, payback obligations, obligations to finish certain running tasks or remainder of contract
- Force Majeure, description or (implicit) referral to local law
- Cultural influences on perception of bindingness
- Assignment possibilities



4. Securities

- Letter of Credit
- Bank guarantee
- Comfort letter
- Parent guarantee
- Advance
- Pay first, deliver later; deliver first, pay later
- Escrow
- Lien
- Mortgage



5. Law and Forum

- Law and forum of prevailing party
- Law and forum of neither party
- ‘Neutral’ law and forum: Swiss^{*)}, UK, small developed ‘neutral’ country
- Consider whether the chosen jurisdiction is effective (e.g. Germany), slow (e.g. Spain), corrupt, non existent etc.
- Consider the existence of execution treaties between country of forum and country of (possible) execution
- Be express in description of competent court, arbitrator(s) or arbitration institute^{**)}, Describe qualities arbitrator(s) should have
- Consider to agree on language of arbitration and place of arbitration
- In case of arbitration clause: describe every step except when arbitration institute chosen has a detailed set of arbitration rules that also set out the formation of the arbitration court

^{*)}There’s no such thing as Swiss law in general; always refer to a Kanton

^{**)}Note: some government courts in some countries (e.g. Russia) translate as “arbitration courts” but are in fact not what is generally understood to be arbitration, i.e. voluntary, private binding dispute resolution



6. Dispute resolution

- Describe when a dispute exists; it is advisable to make this dependent on an express written statement from either party
- Consider escalation clauses: obligations of parties to define dispute and have good faith talks before applying to forum agreed
- Consider the effect of implicit or explicit exclusion of any possibility to obtain short term urgent court orders
- Consider clauses that safeguard the execution of the work, especially if the dispute is 'only' of a financial nature
- Consider the choice of a good reputation international arbitration institute like the International Chamber of Commerce (general) or the WIPO (Intellectual Property). There are many more industry specialised international arbitration institutes.
- Consider choosing a procedure for urgent dispute resolution and/or economic dispute resolution (1 arbitrator, exclusion of appeal etc.)



7. Formalities

- Mostly dependent on nature of contract or transaction
- Authority and existence
- Power of attorney
- Corporate veil
- Notarisation, apostille
- Reading aloud



7. Execution

- After obtainment of judgement from chosen or competent forum
- The Hague Treaty
- European Execution Treaty
- Bilateral treaties
- No treaties (must proceed again locally)



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