Going Global: Essential International Law for Business Transactions

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Introduction

The role of a lawyer in international business transactions is a familiar one, but with some additional considerations. The fundamental requirements to understand the client's needs, to assist in identifying and allocating risks, and to ensure that the transaction and its documentation serve the client's strategic interests remain the same.

The differences derive partly from the fact that a second legal system potentially will govern aspects of the transaction, and unquestionably governs the activities of one of the parties. Equally importantly, the differences are based in the cultural norms expressed in the business behavior of the parties.

When working on a transborder transaction, lawyers should consistently ask "Do we need to confirm this is the way it is done in Country X?" whenever the question involves issues of commercial practice, or the potential application of foreign law. Uncovering the hidden assumptions that underlie the client's business proposal or the draft documents (especially where those documents were prepared for domestic transactions), is one of the most valuable services a lawyer can provide in this situation. At the same time, making sure that drafting decisions are not based on unstated (and unverified) assumptions is one of the more challenging, but necessary tasks.

The laws of two or more countries rarely mesh perfectly. The art of navigating a terrain of legal requirements that overlap and conflict in places, while leaving gaps in others, is an exercise in humility and a constant reminder of the need to include qualified professionals from the various disciplines and jurisdictions involved in the transaction.

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Communicating with those professionals, and with the foreign party to the transaction (where that can be done in compliance with professional standards) is often a challenge, because even when the question seems simple (*e.g.*, Will the choice of forum clause be respected?), the legal or commercial context of the question may be very different in the two systems.

Where is the "International" in International Business Transactions?

There is no judicial or legislative body with worldwide powers over commercial transactions. "International law," properly speaking, is almost exclusively concerned with the relations between sovereign powers, and not at all with private business transactions. Nevertheless, every transborder transaction implicates multiple laws adopted by and enforced in more than one country.

In certain instances, those laws have been adopted to comply with binding obligations between countries, at which point international law at the public level has direct effects on the ordering of private transactions.[2] In most other cases, however, the lawyer's role is in interpreting and translating the varying requirements of multiple legal regimes, to determine whether those requirements are inconsistent, in conflict, or congruent.

There is a considerable tendency at the legislative level to review developments in other countries when undertaking major reforms of regulatory regimes, and this can result in an ebb and flow of concepts across borders that cause familiar issues to arise anew, but against the background of different statutory enactments. Examples can be found in fields as disparate as antitrust (IP licensing[3] and private right of action[4]) civil procedure (class actions)[5]; and torts (product liability).[6]

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[2] As one example, the Foreign Corrupt Practices Act (15 U.S.C.A. §§78m, 77dd and 77ff) was amended in 1998 to comply with the terms of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Pub. Law 105-366, signed November 10, 1998). Similarly, the North American Free Trade Agreement was implemented in the United States by the passage of the NAFTA Implementation Act (Pub. Law 103-182, December 8, 1993).

[3] *Compare,* Antitrust Guidelines for the Licensing of Intellectual Property (U.S. Department of Justice and Federal Trade Commission, April 6, 1995) (http://www.usdoj.gov/atr/public/guidelines/0558.htm), with Commission Regulation (EC) No. 240/96 of 31 January 1996 on the application of Article 85(3)

"Translation" takes many forms in the practice of international business transactions. It can, of course involve the translation between languages, and for this purpose an experienced translator can be invaluable. It is equally important that the work of each translator be verified by having a different translator re-translate the text back into the original language. Without that further step, significant differences in meaning (*e.g.*, "should" vs. "will") can be overlooked[7]

A form of translating is also necessary in many cases between parties who are working entirely in English, and not only because that is the second (or third) language of one or more of the parties. There are many stories that can prove the old saying that America and England are two countries divided by a common language.[8] A lawyer who is fluent in two or more languages can provide a significant service to his or her clients, but it is even more important that the lawyer be conscious of the need to interpret business and negotiating behavior based on the backgrounds of the parties.

Client Expectations

Businesspeople in the United States often say "It's not binding if it's not in writing." The expression is inaccurate; written contracts are required only for certain subjects, and in commercial matters governed by the Uniform Commercial Code, the "writing"

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of the Treaty to certain categories of technology transfer agreements, 1996 O.J. L31 2, Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, 2004 O.J. L123 11, and Commission Notice, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, 2004 O.J. C101 2.

[4] *See,* Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the European Communities on Damages Actions for Breaches of EU Antitrust Rules (April 2006) http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_green_paper_comments/aba.pdf.

[5] *See,* "EU Mulling European Version of US Class Action Suits," 13 March 2007, at http://www.eubusiness.com/Consumer/eu-consumers.72.

[6] *See,* Jorge Mosset Iturraspe, General Trends in South American Product Liability Law: An Overview, 20 Ariz. J. Int'l & Comp. Law 115, 131 (2003); R. Korzec, Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test, 20 B.C. Int'l & Comp. L. Rev. 227, 232 (1997).

[7] Machine translation (translation software) can be helpful as a first step, but requires careful review. One early, memorable example, was the translation in a missile technology specification of "miss distance" into Spanish as "Señorita Distancia." (http://www.tc-forum.org/topictr/tr07mach.htm). Strangely, this is the same error that was the subject of a story dating from the 1970's, allegedly committed by a human translator.

[8] During a meeting, Americans will speak of "tabling" a proposal when they intend to remove it from discussion, at least temporarily, while the English usage of the same term designates the proposal as one for immediate discussion.

that is needed to satisfy the Code is minimal. Nevertheless, there is a widespread business understanding that, while it is desirable to be known as someone who can be trusted on a handshake, parties should not count on being able to enforce oral agreements.

In other parts of the world, and under the Convention on Contracts for the International Sale of Goods (CISG)[9], there may be no need at all for a writing in order to have an enforceable contract. This can have practical effects on customer behavior in settings such as trade shows, where an oral agreement may be reached which one party considers a binding commitment, while the other believes they have only reached a point at which the matter will be turned over to their respective contracts negotiators to put into final, written form, and that no binding obligations will exist until that written agreement has been signed.[10]

In most civil law countries, a significant number of contracts outside the context of commercial transactions, (*e.g.*, for sale of real property, equity shares, incorporations) must be prepared by a notary, who is a trained lawyer performing a professional service, not at all like a notary public in the U.S. The formalities surrounding signature of those documents can be extensive, and the notary's fees can be considerable, especially in countries in which the amount of the fee varies with the value of the property being transferred.

Other legal requirements may apply in unexpected ways. For example, while the laws of most, if not all, U.S. states imply a covenant of good faith and fair dealing in every

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[9] United Nations Convention on Contracts for the International Sale of Goods (1980). For U.S. citation purposes, the UN-certified English text is published in 52 Federal Register 6262, 6264-6280 (March 2, 1987), and appears at United States Code Annotated, Title 15, Appendix (Supp. 1987). Online, it can be found at http://www.cisg.law.pace.edu/cisg/text/treaty.html.

[10] *See also, MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*, 144 F.3d 1384 (11th Cir. 1998) [preventing application of parol evidence rule to bar evidence of parties' subjective intent not to be bound by pre-printed terms of order form signed at trade show]. Related problems of contract formation continue to arise. *See, Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms*, 254 Fed. Appx. 646 [differences in formation of contract analysis under Washington U.C.C. and CISG may be critical in determining whether exclusion of liability relied upon by seller was included in contract].

contract, the civil law (and possibly the CISG) applies a similar obligation of good faith beginning during negotiations.[11]

The expectation that, once an agreement is embodied in a signed document, its terms are fixed and unalterable except in accordance with the terms of the written contract, is significantly stronger in U.S. business than in many other countries.[12] German courts assert the power to adjust obligations under a contract where a subsequent change in conditions has resulted in a severe imbalance in the respective burdens of the parties.[13] McDonald's famously experienced a strong, if differently motivated challenge to the sanctity of a twenty-year lease in Beijing, only two years into the term. After intense negotiation, a solution was reached, under which the world's largest McDonald's restaurant moved temporarily and returned to the same location in a newly-built commercial center, with some additional compensation.[14]

The more general Chinese business attitude that a contract is only the beginning of a commercial relationship expected to grow and develop over time often leads to requests for small (or not so small) adjustments soon after conclusion of the agreement.[15] Refusals will often be responded to with dismay, as if the refusal calls into question the good faith of the parties in having entered the agreement. A negotiating party who has held back some benefit that can be parceled out after the agreement has been entered into will be in a position to satisfy these demands, and to demand some favorable adjustment of its own, but a party that has allowed the

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[11] *See*, Albert H. Kritzker, Ed., "Pre-Contract Formation," http://cisgw3.law.pace.edu/cisg/biblio/kritzer1.html.

[12] This expectation is bolstered by provisions that exclude oral amendments to the agreement and deny any waiver by conduct, which are nearly universal in negotiated agreements under U.S. practice. A typical clause might read: "No alteration, modification, or amendment of any of the terms of this Agreement shall be valid unless in writing and signed by all the parties hereto. No waiver of a breach of any provision of this Agreement or a default under any of its provisions shall be deemed a waiver of such provision or of any subsequent breach or default of any kind or nature unless in writing and signed by the waiving party."

[13] B. Markesinis, THE GERMAN LAW OF OBLIGATIONS. VOL. I. THE LAW OF CONTRACTS AND RESTITUTION: A COMPARATIVE INTRODUCTION (Oxford: Clarendon Press, 1997), p. 532.

[14] Yi-Min Lin, BETWEEN POLITICS AND MARKETS (Cambridge, 2001), pp. 77-78; Michael Hoevel, "The Institutional Political Economy of State-Led Economic Reform: Early Urban Land Development and the Construction of Oriental Plaza in Beijing, China," Development Studies Institute, London School of Economics and Political Science (February, 2007) (http://www.lse.ac.uk/collections/DESTIN/pdf/WP81.pdf).

[15] K. Bucknall, CHINESE BUSINESS CULTURE AND ETIQUETTE (C&M Online Media, Inc., 2002), pp. 115-117.

negotiation to proceed to conclusion on terms that really are its bottom line will find itself forced to fall back on the wording of the agreement, possibly endangering the goodwill of the new relationship.

Cultural considerations will strongly impact the dispute resolution provisions of any contract for international business. When dealing with a party from a background that frowns upon litigation, the contract may need to include detailed escalation provisions to allow the parties several opportunities to negotiate at successively higher levels, before turning to an outside neutral conciliator, mediator, and eventually arbitrator.[16]

The intersection of legal and business norms will also affect very basic aspects of the lawyer's job, such as the length and level of detail to be included in the contract provisions. Traditionally, contracts drafted under the civil law (code-based) systems tend to be quite short, since the code provisions provide a comprehensive structure governing the parties' relations. Today, foreign companies and their counsel have much greater familiarity with the length of agreements in the U.S.-style, but a shorter first draft will still be appreciated. American contract drafting tends to try to anticipate every possible contingency and provide a rule for each situation, but if the opposite party is frustrated by the need to work through detailed provisions regarding seemingly unlikely scenarios, it will look to obtain some kind of benefit in return. The reality is often that the result called for by the contract language would be only marginally different from, or more certain than, the likely result under governing law, and there can be significant gains in business goodwill from providing a first draft that is noticeably less extensive than the typical U.S.-style contract.

Working with Foreign Counsel and Outsourcing

It is important to work with knowledgeable and trustworthy lawyers in other countries, but sometime the first question is whether a "lawyer" is necessary. It is

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[16] To some extent, this is recognized in the rules of dispute resolution providers such as the American Arbitration Association, whose International Dispute Resolution Procedures provide for mediation followed by arbitration (http://www.adr.org/sp.asp?id=33994). The AAA's recommended provision is: "If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation in accordance with the International Mediation Rules of the International Centre for Dispute Resolution before resorting to [arbitration, litigation or some other dispute resolution procedure]."

often said that Japan has a far lower ratio of lawyers to the general population, and it is true that the number of *bengoshi* is quite low.[17] The actual tasks performed by U.S. lawyers however, may be done by many other professionals in the Japanese system[18]

At the other extreme, in South American countries, there are no bar exams, and any graduate of a law faculty can enter private practice using the term *abogado*.[19] It may also be worth noting that in most civil law jurisdictions, a professional is called the local equivalent of "attorney" only if self-employed or employed by other attorneys. In-house counsel are not considered to be "lawyers," and communications between them and their clients may not qualify for attorney client privilege in the event of an investigation or lawsuit.[20] The same may be true for communications between a non-U.S. company and its U.S. lawyers, unless they are also qualified to practice in the jurisdiction where the privilege is being raised.[21]

Locating foreign counsel can be done through networks, both personal and institutional (*e.g.*, bar associations, industry and trade groups). U.S. Consulates located in the relevant country can sometimes be helpful. There are of course an ever-expanding number of publications containing professional listings for lawyers. In addition to Martindale-Hubbell,[22] some of the best known are Chambers[23] and Legal 500.[24]

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[17] Estimated at 25,000 in 2006, by Alan Childress, Professor at Tulane University Law School, but predicted to expand greatly as a result of reforms in the Japanese system of legal education, *see,* http://lawprofessors.typepad.com/legal_profession/2006/10/japanese_lawyer.html.

[18] These include patent agents, tax agents and judicial scriveners.

[19] Roberto G. MacLean (Pontificia Universidad Católica del Perú in Lima, Peru), "The Structure of Legal Education in Peru: Notes for a Diagnostic", at http://www.aals.org/2000international/english/Peru.htm.

[20] See, *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd., v. Commission* (Joined Cases T-125/03 and T-253/03) (17 September 2007), at ¶¶117-118; J. Triplett Mackintosh and Kristen M. Angus, Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege, 38 Int'l Law. 35, 46 (2004).

[21] *Australian Mining & Smelting Europe Ltd. v. E.C. Commission*, Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264, at ¶35; Eric Gippini-Fournier, Legal Professional Privilege in Competition Proceedings before the European Commission: Beyond the Cursory Glance, 28 Fordham Int'l L.J. 967, 1007 (2005).

[22] In print, Martindale-Hubbell provides multiple volumes listing lawyers outside the U.S. by country. Online, searches can be done by country at www.martindale.com. Using the "Advanced Search" option, the website can also be searched for lawyers in the United States who have listed practice areas that include the law of a foreign country, by inserting the adjectival form of the nationality in the search box labeled "Other" (example: "German" or "Japanese").

When discussing potential engagements on behalf of clients, the U.S. lawyer will have to clear conflicts of interest carefully, as the rules applied in other countries do not always take into account past representation of adverse clients, or they may allow for simultaneous adverse representation on unrelated matters without express waiver of a conflict from the client.

It is also important to recognize that the role often played by a U.S. lawyer, as part of a team developing and implementing a strategy for a business client, is not a familiar one for many lawyers outside this country. Even the ordinary interaction of a U.S. business person and lawyer, in which the client describes a situation and asks for advice and options on addressing that set of facts, is not typical in a civil law system, where the lawyer's role is more commonly restricted to responding to specific questions as framed by the client.[25]

Seeking guidance from a foreign attorney on matters governed by the law of a country in which that lawyer is qualified to practice is very different from outsourcing aspects of legal work that ultimately depend on the judgment and training of the U.S. lawyer. Outsourcing of tasks such as document review, legal research and preparation of filings to persons located in other countries who are not attorneys licensed to practice in the U.S. jurisdiction in which their work product will be used (whether or not they are qualified to practice as lawyers in their home jurisdictions) has been conditionally approved in formal opinions of various bar associations. The exact requirements vary, but include the U.S. attorney's responsibility to: (1) supervise the work and remain ultimately responsible for its accuracy; (2) ensure there are no conflicts of interest; (3) maintain client confidences; (4) bill appropriately; and (5) obtain the client's consent to the outsourcing, or at least disclose the fact of the intended outsourcing.[26] A separate, but important issue is to avoid violating the prohibitions on the export of

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[23] http://www.chambersandpartners.com/.
[24] http://www.legal500.com/.
[25] *See*, Letterman's Guide to International Business, §1:61 (Clark Boardman)
[26] *Compare*, San Diego County Bar Association Ethics Op. 2007-1, Los Angeles County Bar Association Opinion No. 518, Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2006-3, and American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 08-451.

technical information contained in the Export Administration Regulations and other export controls.[27]

Key Points in Negotiating Transborder Transactions

There are certain issues which arise in most, if not all transborder transactions, and the lawyer is well-advised to review each of these with his or her client to determine whether they have already been taken into account, and whether the resolution agreed upon by the parties will fairly serve their interests.

Payment. What currency will the transaction be conducted in? If payment is not due immediately, either because credit terms have been granted, or because the goods or services will not be provided at the time the agreement is entered into, then there are risks of currency fluctuation that should be taken into account. Hedging transactions may be appropriate, and credit risk insurance, not widely used in the United States, should be considered.[28] The parties may also agree to share in the risk of significant exchange rate fluctuations.[29]

Credit and financing. Selling on open credit terms can be risky when enforcement of the debt would have to be done in the buyer's country. Similarly, payment of any significant portion of the purchase price in advance presents a risk for the buyer, who will have to compel a refund or the seller's performance under the contract in the event of a breach. Financing mechanisms involving third parties, such as letters of

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[27] *See*, Notice by United States Patent and Trademark Office regarding Scope of Foreign Filing Licenses, 73 Fed. Reg. 42781 (July 23, 2008), and Advisory Opinion dated January 11, 2006 from the United States Department of Commerce, Bureau of Industry and Security, available at http://www.bis.doc.gov/policiesandregulations/advisoryopinions/jan11_2006.pdf. *See also*, n. 38, below.

[28] The Export-Import Bank, a U.S. government agency, provides coverage to exporters against the commercial risks of non-payment (*e.g.*, bankruptcy of the buyer), and some political risks (*e.g.*, war or currency inconvertibility) http://www.export.gov/finance/exp_risk_mitigation.asp. Commercial insurers are also active in this market, and a list of brokers is maintained by Ex-Im Bank, at http://www.exim.gov/news/brokers_list.cfm. A different U.S. government agency, the Overseas Private Investment Corporation (OPIC) provides political risk insurance, including coverage for the risks of government interference with contracts or the resolution of disputes, currency inconvertibility, expropriation, and political violence (http://www.opic.gov/insurance/index.asp).

[29] As an example: "Notwithstanding any other provision of this Agreement, the parties agree that the prices of the Products will be increased or decreased by the amount of any fluctuation in the exchange rate between the Euro and the U.S. dollar, but only to the extent that such variation exceeds +/- 5 (five) percent of the rate fixed on the Effective Date of this Agreement (or the date on which any adjusted price has taken effect)."

credit, are common, but the competition for sales in many markets means that the bank fees and opportunity cost of having capital tied up by those instruments are significant enough that many parties now reject them. The length of time before a purchase must be paid for is largely a function of the business culture, and an important competitive point. In a system where most business is done on 270 day terms, an offer to sell on 30 or 90 day terms will not be attractive.

Shipping Terms. The familiar terms, such as C.I.F. and F.O.B. can have different meanings in different countries.[30] Any sale of goods across borders should be governed expressly by INCOTERMS 2000, which are readily available from the International Chamber of Commerce, and explain in detail the responsibilities of both parties.[31] Under INCOTERMS, an F.O.B. delivery is always made at the port of shipment (never at the port of destination), and is used only with ocean or inland water transport. Since the buyer will most likely not be available to inspect the goods before they are shipped, it is common to include a reference to a third-party inspection service that will verify the goods are in conformity with the specifications provided by the buyer.[32]

Subject matter. It may seem exceptional that the parties could be unaware of the fundamental characteristics of the product or services they are exchanging, but the potential for varying definitions and expectations surrounding goods and services are worth exploring. In some cases, references to "ordinary" or "usual" in connection with the level of after-sales support or the number of defects permitted within any single shipment can be a clue that the parties have not clarified their intentions. In other cases, there may be little in the contract to identify the issue. Many lawyers will dimly remember the "chicken" case from their law school contracts course.[33]

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[30] For example, while "F.O.B." means free on board in both the United Kingdom and the United States, in the former, the term is used only with reference to a vessel, while in the latter, it can refer to any named place under U.C.C. §2-319.

[31] I.C.C. Pub. No. 560 may be ordered from the ICC Bookstore at 212-703-5066. Information on other I.C.C. products is available at www.iccwbo.org.

[32] Inspection services operate in most areas. Some well-known ones are Intertek, http://www.intertek-cb.com/; Commodity Inspection Services BV, http://www.cis-inspections.com/; and Bureau Veritas, http://www.bureauveritas.com/.

[33] *Frigaliment Importing Co., Ltd. v. BNS International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) [Judge Friendly's opinion famously begins: "The issue is, what is chicken? Plaintiff says 'chicken'

Time and Distance. Goods (and service providers) may need to travel significant distances, be permitted to cross national borders, and will be exposed to risks during transportation. The distance between the parties will affect their decisions on credit terms, payment mechanisms, and dispute resolution.

Documentary Transactions. Many sales of goods across national borders are financed through a bank-issued letter of credit. This has implications for the shipping documents, and the inspections rights of the parties. The seller must obtain a negotiable bill of lading, made out to "Order of" the Consignee (typically, the bank that has issued the letter of credit). A straight bill of lading (without the "Order of" language) requires only that the person presenting the bill of lading to the carrier identify himself or herself as the person indicated as Consignee on the bill of lading, or an authorized representative of the Consignee. This is ineffective to protect the rights of the bank which has financed the transaction and will want to retain title to the goods by holding a negotiable bill of lading. The bank will not endorse the bill of lading to the buyer until it has been paid, or has adequate assurance of payment, and use of the negotiable bill of lading ensures that the carrier will not release the goods except in exchange for the original bill of lading, properly endorsed to the party claiming the goods. Sellers should insist on a *confirmed, irrevocable* letter of credit, in order to have the financial commitment of a local bank. The seller must be prepared to comply precisely with the terms of the letter of credit, because the bank's obligation is to purchase only those documents that conform exactly to the description in the letter of credit.[34] If the letter of credit varies from the seller's expectation under the contract for the sale of the goods, or requires a document that the seller will not be able to provide, the seller should immediately demand an amendment to the letter of credit. Waiting until the goods have been shipped will normally be too late, as letters of credit have expiration dates, and the buyer will have gained substantial leverage.

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means a young chicken, suitable for broiling and frying. Defendant says 'chicken' means any bird of that genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken' and plaintiff pejoratively terms 'fowl'."]

[34] *Hanil v. Pt. Bank Negara,* 2000 U.S. Dist. LEXIS 2444; 41 U.C.C. Rep. Serv. 2d (Callaghan) 618 (S.D.N.Y.) [no recovery under letter of credit where seller's name misspelled as "Sung Jin", rather than "Sung Jun"].

Enforcement and Dispute Resolution. The potential need to enforce an agreement under an unfamiliar legal system, in a distant location, subject to substantive and procedural rules that may favor the local party, should encourage most parties to provide for a neutral alternative, often arbitration. The choice of law is equally important, since the buyer and seller may have incentives to choose different national systems. For sales of goods, the impact is reduced somewhat by the applicability of the CISG, however, there is still room for national commercial law to be applied on important subjects such as the capacity of parties, validity of the contract and its terms, and the effect of the contract on the property in the goods that are sold.[35] One of the most common mistakes that parties and their attorneys make is to assume that the law they are most familiar with is the one which is best for them. Companies which enter the U.S. to do business through sales agents and distributors often maintain a uniform choice of their home-country law across all of their worldwide activities, even though U.S. law would provide them with far more flexibility to terminate the relationship, and at a far lower cost.

Expecting the Unexpected. Partly as a consequence of the extended time and distance involved in many transborder transactions, and partly due to the involvement of multiple governments, events that were unexpected, unforeseen or simply hoped-against seem to occur more frequently in international transactions than in similar domestic ones. Ships are delayed by typhoons or other natural events, unloading is delayed by labor stoppages, fire destroys the factory of a subcontractor, war or hostilities causes ordinary routes to close, or a government imposes currency restrictions without warning. All of these are examples of what can be addressed in advance in a *force majeure* clause, although it is not necessarily true that a party to an agreement will want to excuse performance due to each of these and other imaginable causes. The concept of excuse from performance due to serious unexpected events may already be a part of the national law which applies to the contract, but the definitions and application may be murky at best. [36] Parties can provide much more

[35] CISG, Article 4.
[36] U.C.C. §2-615 provides limited relief to a seller under circumstances in which it is "commercially impracticable" to perform its obligations under the contract, but the same right is not clearly afforded to the buyer, there is no time period specified after which the buyer is relieved of its obligations, and it is

specific guidance to a judge or arbitrator by listing the events which qualify for providing relief, and crucially, the length of time for which the event may provide relief. Following the expiration of that period, the *force majeure* clause should describe the effects, *e.g.*, termination of the agreement, with or without the recovery of damages. Article 79 of the CISG, where it is applicable, will provide a clearer set of guidelines than most national legal systems.[37]

Language. Even when an agreement has been negotiated and drafted entirely in one language, it may be helpful to state that this is the authentic language of the agreement. For any contract which has been accompanied by translations, whether they were designated as "for convenience" or otherwise, and even if those translations were provided only for the early drafts, there will be considerable uncertainty over the exact meaning of the agreement in the event of a dispute, unless the parties have stated their intentions regarding the authentic text of the agreement. Even when the signed document was printed in a dual-language, side-by-side format, it is possible to provide that one version is the authentic text. If not, it is worth specifying that the texts in both languages are equally valid, in order to avoid a costly fight about the issue later, although that will not preclude disputes about differences in meaning between the two versions. For practical reasons, the choice of language should take into consideration the site selected for the resolution of disputes. For example, if an agreement has been negotiated in English between companies based in the United

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very unclear whether any purely economic loss, even to the extent of bankruptcy, will ever qualify as a case for relief. *Compare, Neal Cooper Grain v. Texas Gulf Sulphur,* 508 F.2d 283 (7th Cir. 1974) [no relief to seller where Canadian government regulations imposed production restrictions and minimum price] with *Florida Power & Light Co. v. Westinghouse Electric Corp.,* 826 F.2d 239 (4th Cir. 1987) [cost of responding to change in government policy regarding nuclear fuel reprocessing divided between the parties].

[37] Article 79 CISG: (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. (3) The exemption provided by this article has effect for the period during which the impediment exists. (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt. (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

States and Italy, but litigation will take place in an Italian court, then an Italian translation will be needed in the case of any dispute. In that situation, it may make more sense to prepare an agreed translation at the time the contract is entered into, even if the English version has been designated as the "official" version.

Government Intervention. The sale of products and services across national boundaries implicates government regulation in ways that do not arise for domestic sales. Even under U.S. law, all exports potentially require a license,[38] imports are subject to duties and sometimes quotas,[39] and reporting requirements apply to both. Many countries have currency controls that may interfere with a buyer's ability to pay, or the seller's ability to repatriate profits earned in that country. In every case, there are domestic regulations and product standards to consider.[40]

Protection of Intellectual Property. With the exception of copyright, most intellectual property must be registered on a country-by-country basis, a burden that is eased somewhat by conventions that streamline the registration process or provide benefits in terms of priority of registration. The fundamental principle is that the owner of intellectual property has nothing of value to license or sell if the property is not protected in the country where it is to be exploited.

There are many other topics that may need to be discussed in any given situation. A checklist of items relevant to distributorships is attached, along with some examples of contract language that may prove helpful.

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[38] Exports of commercial products and technology are governed by the Export Administration Regulations (15 C.F.R. Part 730, *et seq.*) administered by the Bureau of Industry and Security at the Department of Commerce (*see*, http://www.bis.doc.gov/licensing/exportingbasics.htm), by the Department of State, Directorate of Defense Trade Controls for defense services and articles, and by numerous other federal agencies (*see*, http://www.bis.doc.gov/about/reslinks.htm for a list of agencies and their respective jurisdictions).

[39] The Harmonized Tariff Schedule of the United States can be consulted at http://www.usitc.gov/tata/index.htm.

[40] The National Institute of Standards and Technology maintains a list of U.S. standards and many European Union standards at http://ts.nist.gov/Standards/ssd.cfm, as well as references to standards in other regions of the world.