

NEXT CHALLENGE. NEXT LEVEL.
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CONTRACT CONSIDERATIONS
WHEN DEALING WITH FOREIGN
ENTITIES


PRESENTED TO
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Corporate Counsel
RESEARCH TRIANGLE AREA

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Contract Considerations when Dealing with Foreign Entities

Introductory Comments



GENERAL COMMENTS

CROSS-BORDER CONTRACTS

- ▶ Common law and civil law countries are different
 - ▶ Common law countries
 - ▶ Rely on judicial precedent
 - ▶ Civil law countries
 - ▶ Rely on statutory provisions
- ▶ Cultural differences can lead to legal differences
 - ▶ Implied duty of good faith
 - ▶ None under law English common law
 - ▶ U.S. follows civil law and has adopted this principle by evidence



GENERAL COMMENTS

CROSS-BORDER CONTRACTS

- ▶ Comparing U.S. contracts to other nations
 - ▶ U.S. Contracts tend to be:
 - ▶ Longer
 - ▶ More specific
 - ▶ Address more contingencies
 - ▶ Contain more boilerplate
 - ▶ European Contracts
 - ▶ Almost equal to the U.S.
 - ▶ Asian Contracts
 - ▶ Often very brief



Key Clauses That Matter in Contracts with Foreign Entities



CHOICE OF LAW

KEY CLAUSES THAT MATTER

- ▶ One of the most important yet potentially contentious terms to negotiate
 - ▶ Try and select a “neutral” body of law
 - ▶ Frequent “neutral” choices:
 - ▶ New York; England and Wales; Hong Kong
 - ▶ There may be limits on which law can be chosen; See Restatement (Second) Conflict of Laws
 - ▶ Sec. 187: Chosen state’s law will not apply if:
 - ▶ No substantial relationship to the parties and the transaction and no other reasonable basis for selection;




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CHOICE OF LAW


KEY CLAUSES THAT MATTER

Sample North Carolina Clause

GOVERNING LAW.

All matters arising out of or relating to this Agreement are governed by and construed in accordance with the internal laws of the State of North Carolina without giving effect to any choice or conflict of law provision or rule (whether of the State of North Carolina or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than those of the State of North Carolina.




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CHOICE OF LAW

KEY CLAUSES THAT MATTER

Sample Clause from International Contract

GOVERNING LAW.

The substantive laws of England and Wales (without regard to any choice of law provisions that would choose the law of another jurisdiction) shall govern this Agreement and determine any dispute, controversy, or claim, of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise, which arises out of, or relates to this Agreement ("**Dispute**"), including any Dispute concerning the existence, validity, interpretation, performance, breach, or termination of this Agreement or any Service Order between the Parties.



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CHOICE OF LAW

KEY CLAUSES THAT MATTER

- ▶ U.N. Convention on Contracts for the International Sale of Goods ("CISG")
 - ▶ 77 Countries have adopted
 - ▶ U.S. is a signatory but several other important jurisdictions are not
 - ▶ United Kingdom
 - ▶ Hong Kong is not (but China is)
 - ▶ Will apply In U.S. unless excluded
 - ▶ Sale of goods under N.Y. law
 - ▶ U.C.C. applies but so does CISG
 - ▶ CISG may defeat expectations of parties



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CHOICE OF LAW

KEY CLAUSES THAT MATTER

- ▶ Important CISG Provisions
 - ▶ Article 8
 - ▶ In determining intent
 - ▶ Allows evidence of pre-contract negotiations, practices
 - ▶ Article 9
 - ▶ Parties are bound by “usages to which they have agreed and by any practices which they have established...”
 - ▶ Implied that contract includes “usage of which the parties knew or ought to have known and which in international trade is widely known”
- ▶ CISG is frequently excluded by U.S. companies



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JURISDICTION AND VENUE

KEY CLAUSES THAT MATTER

- ▶ Consent to Jurisdiction
 - ▶ Another potentially contentious provision
 - ▶ Exclusive jurisdiction in a nearby forum can give one side a significant advantage
- ▶ Possible solutions:
 - ▶ Look for a neutral compromise
 - ▶ Forum that is equal distance between the parties
 - ▶ Require party commencing action to do so in other party's forum
 - ▶ If buyer sues seller it must do so in seller's country
 - ▶ Combine with arbitration or dispute resolution provision in a recognized arbitral center



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DISPUTE RESOLUTION

KEY CLAUSES THAT MATTER

- ▶ Dispute Resolution Escalation Clauses
 - ▶ Provide for meetings – discussions that escalate the dispute to senior managers or CEO/MD
 - ▶ Often used as a condition precedent to litigation or arbitration
 - ▶ Can be particularized for specific relationships
 - ▶ Meeting between certain people or with certain technical people
 - ▶ Meeting at certain locations



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DISPUTE RESOLUTION

KEY CLAUSES THAT MATTER

Sample Dispute Resolution Clause

Company and Contractor desire that this Agreement operate between them fairly and reasonably. If, during the term of this Agreement, a Dispute arises between Company and Contractor which is not resolved by good faith discussions between the Parties within thirty (30) days from the date the Dispute arises, then the matter shall be referred to senior officers of the respective Parties, who shall endeavor in good faith to resolve such Dispute expeditiously. Neither Party shall seek arbitration of any Dispute arising in connection with this Agreement until a period of at least sixty (60) days has elapsed since the Dispute was referred to such senior officers. The pendency of a Dispute shall not delay progress of the Services or relieve either Party from its duty to perform under this Agreement.



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DISPUTE RESOLUTION

ARBITRATION

- ▶ E.U.
 - ▶ Tend to favor arbitration
 - ▶ No familiarity with jury system
 - ▶ Usually under the I.C.C., LCIA or Stockholm Chamber
 - ▶ Important to specify language
- ▶ Asia
 - ▶ Arbitration also well recognized
 - ▶ Hong Kong International Arbitration Center
 - ▶ Singapore
 - ▶ China International Economic and Trade Arbitration Commission (CIETAC)
- ▶ Problems with Arbitration
 - ▶ Expensive
 - ▶ Can be time consuming - difficult to obtain early judgment
 - ▶ Frequently a compromise



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DISPUTE RESOLUTION

ARBITRATION

- ▶ Arbitration may be non-binding
- ▶ Enforceability
 - ▶ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)
 - ▶ Signatories include:
 - ▶ Brazil
 - ▶ China
 - ▶ European countries
 - ▶ Russia
 - ▶ United Kingdom



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DISPUTE RESOLUTION

ARBITRATION

Sample Arbitration Clause

Subject to Article 10 and upon written notice by one Party to the other initiating an arbitration proceeding, any Dispute arising out of or relating to this Agreement shall be finally settled by binding arbitration. All Disputes shall be submitted to the London Court of International Arbitration ("LCIA") and arbitrated in accordance with the Arbitration Rules of the LCIA (the "Rules"). Controversies involving Disputes of US\$750,000 or less shall be arbitrated before one (1) Arbitrator. Controversies involving Disputes of more than US\$750,000 shall be arbitrated before three (3) Arbitrators. Subject to the Rules, for Disputes that will be arbitrated before three (3) Arbitrators, each Party shall nominate an Arbitrator within thirty (30) days of the notice of arbitration, and the LCIA will appoint the presiding Arbitrator. Each Arbitrator nominated by a Party must be a practicing lawyer, solicitor or barrister, and have at least ten (10) years of experience as an arbitrator. The place of arbitration shall be London, England. The language of the arbitration shall be English. Judgment on an award may be entered by any court of competent jurisdiction. The Parties agree that any Dispute and any negotiations, mediation and arbitration proceedings between the Parties in relation to any Dispute, and any information, documents or materials produced for the purposes of, or used in, negotiations, mediation or arbitration of any Dispute, shall be confidential and will not be disclosed to any third party (provided that Company may disclose such information to its co-venturers, Affiliates and Joint Interest Owners) except to the extent that such information, documents, or material are publicly available (other than as a result of a violation of this provision by the receiving Party) as may be required by law or the stock exchange rules of a Party or any of its Affiliates.



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INDEMNITY

KEY CLAUSES THAT MATTER

- ▶ Indemnity Provisions
 - ▶ To what extent are you holding the other party harmless?
 - ▶ Limited to third party claims?
- ▶ Limitations on indemnity
 - ▶ EU companies generally do not have broad indemnity provisions
 - ▶ I.P. indemnity is usually accepted and included
 - ▶ Indemnity issues are frequently heavily negotiated
 - ▶ One negotiating technique is the use of indemnity "buckets"
 - ▶ Different indemnity limits for different indemnity claims
- ▶ Questions that arise from indemnity clauses
 - ▶ Do they abrogate limitations of liability?



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INDEMNITY

KEY CLAUSES THAT MATTER

Sample Indemnity Clause

Buyer [or Seller] shall defend, indemnify and hold harmless Seller, its affiliates, employees, agents, successors and assigns, from all costs and damages (including reasonable attorneys' fees) and from any and all claims or causes of action arising directly or indirectly out of Buyer's representations, warranties or obligations under this Agreement.



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ANTI-BRIBERY CONSIDERATIONS

KEY CLAUSES THAT MATTER

- ▶ U.S. Foreign Corrupt Practices Act
 - ▶ 11 U.S.C. § 78dd-1, *et seq.*
 - ▶ Anti-Bribery provisions
 - ▶ Prohibits anything of value going to a foreign official
 - ▶ Accounting requirements for publicly traded companies
- ▶ U.K. Anti-Bribery Act
 - ▶ Broader than the FCPA
 - ▶ Applies to companies that carry on business or part of its business in the United Kingdom
 - ▶ Prohibits bribes of any person not just a foreign official
 - ▶ Applies if it is made after a request or as a gift



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ANTI-BRIBERY CONSIDERATIONS

KEY CLAUSES THAT MATTER

Anti-Bribery Clause

Contractor warrants that none of Contractor, its Affiliates, or any of their respective employees, consultants, or agents has made and covenants that none of Contractor, its Affiliates or any of their respective subcontractors and its and their employees, consultants, or agents will make:

- (i) any offer, payment, or promise to pay any commissions or fees, or to grant any rebates or other remuneration or gratuity, or offer any other benefit or advantage, to any employee, director, officer, agent or other representative of Company or its Affiliates;
- (ii) any offer, payment, promise to pay or authorization of the payment of any money, or any offer, gift, loan, promise to give or authorization of the giving of anything of value, or offer any other benefit or advantage, directly or indirectly, to or for the use or benefit of any Official for the purpose of obtaining or retaining business or securing any improper advantage; or
- (iii) any offer, payment, gift, loan, promise or authorization to or for the use or benefit of any other Person if the Person making it knows, has a firm belief, or is aware that there is a probability that the other Person would use such offer, payment, gift, loan, promise or authorization for any of the purposes described above.



Considerations Outside the Contract Clauses



GETTING PAID BY FOREIGN COMPANIES

- ▶ Know thy Buyer/ Seller.
- ▶ Decrease Credit Risks Through Credit Checks
- ▶ Understand the debt collection laws in the countries where your buyer/ seller resides.
- ▶ Use of Credit Cards.
- ▶ Selling on Open Account
- ▶ Drafts or Bills of Exchange
 - ▶ Sight Drafts
 - ▶ Time Drafts and Date Drafts



GETTING PAID BY FOREIGN COMPANIES

- ▶ Full or partial advance payment.
- ▶ International letters of credit or commercial letters of credit
 - ▶ *Governed by international agreements and UCC*
- ▶ Employ documentary collection or escrow system.
- ▶ Consignment Sales.
- ▶ Foreign Currency
 - ▶ Quote prices and require payment in local currency
- ▶ Counter-trade and barter



EXPORT CONTROLS

- ▶ US laws and regulations restrict or prohibit certain exports or re-exports altogether. For other items, prior authorization from the appropriate US government agency must be obtained before a proposed export or re-export can proceed. These authorizations can be in the form of a:
 - ▶ License
 - ▶ Agreement
 - ▶ Exception
 - ▶ Exemption
 - ▶ Other approval



EXPORT CONTROLS

KEY DEFINITIONS

- ▶ Export: a shipment or transmission outside of the U.S. of items subject to U.S. export control laws
- ▶ Deemed Export: the release of controlled technology or source code to a FN inside the U.S.; the release is deemed to be an export to the FN's home country
- ▶ Re-Export: a shipment or transmission of E.E. export controlled items from one foreign country to another
- ▶ Deemed Re-Export: the release of controlled technology or source code to a third country national in a foreign country



EXPORT CONTROLS

- ▶ Three US government agencies have primary responsibility for administering US export control laws:
 - ▶ The Commerce Department's **Bureau of Industry and Security (BIS)**, which:
 - ▶ controls the export, re-export, or transfer of most commercial items, dual use items and certain munitions; and implements and enforces the Export Administration Regulations (EAR) (15 C.F.R. §§ 730.1 to 774.1 and see also The Export Administration Regulations).
 - ▶ The State Department's **Directorate of Defense Trade Controls (DDTC)**, which:
 - ▶ controls the export and re-export of defense articles and services; and implements and enforces the International Traffic in Arms Regulations (ITAR) (22 C.F.R. §§ 120.1 to 130.17 and see also The International Traffic in Arms Regulations).
 - ▶ The Department of Treasury's **Office of Foreign Assets Control (OFAC)**, which administers and enforces economic and trade sanctions (see Practice Note, Export Regulation: OFAC Economic and Trade Sanctions).



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WHO CONTROLS WHAT?

- ▶ State Department – controls defense articles, services and technology through the International Traffic in Arms Regulations (ITAR)
- ▶ Commerce Department – controls commercial and dual-use hardware, software and technology through the Export Administration Regulations (EAR)
- ▶ Treasury Department's Office of Foreign Asset Control – administers U.S. sanctions programs pursuant to various regulations, EOs and trade policies
- ▶ Uncertainties can be resolved by filing a Commodity Jurisdiction (CJ) request with State Department



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EXPORT CONTROLS

- ▶ U.S. Export Enforcement Coordination Center
 - ▶ Chaired by Dept. of Homeland Security, and is administered by Immigration and Customs Enforcement (ICE) and Homeland Security Investigations (HSI)
 - ▶ Established by EO 13558 to serve as the coordinating forum to help identify issues not resolved in criminal and administrative investigations in actions involving violations of U.S. export control.
 - ▶ In addition to the familiar EAR (Export Administration Regulations), ITAR (International Traffic in Arms Regulations) and FTR (Foreign Trade Regulations)
 - ▶ US Department of Commerce's Bureau of Industry and Security (BIS)
 - ▶ US Department of State's Directorate of Defense Trade Controls (DDTC)



ICE/HSI COORDINATION

EXPORT CONTROLS

Coordinates enforcement efforts between:

- The Department of Commerce,
- The Department of Defense,
- The Department of Energy,
- The Department of Homeland Security,
- The Department of Justice,
- The Department of State,
- The United States Postal Inspection Service
- The Department of the Treasury, and
- The Office of the Director of National Intelligence.



OFAC

OFFICE OF FOREIGN ASSETS CONTROL

- ▶ Under Treasury Department
 - ▶ History dates back to War of 1812, but was first formally established during WWII to engage in economic warfare against the Axis powers by blocking enemy assets and prohibiting foreign trade and financial transactions.
 - ▶ Modern OFAC was created in 1950 when President Truman blocked all Chinese and North Korean assets subject to U.S. jurisdiction.
 - ▶ Today administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.
 - ▶ Maintains Sanctions Lists that should be checked before dealing with new/unfamiliar companies and persons located overseas



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OFAC SANCTIONS

- ▶ OFAC publishes lists of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific.
- ▶ Easiest to check first SDN List – if on the SDN List, their assets are blocked and U.S. Persons are generally prohibited from dealing with them at all.
- ▶ <https://sanctionssearch.ofac.treas.gov/>



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STATUTORY PENALTIES

****ARE HUGE****

Significant statutes enforced are:

Statute	Violations the occurred on or before 11/2/2015	Violations that occurred after 11/2/2015
TWEA (Trading With the Enemy Act, 50 USC 4315)	\$65,000 per transaction	\$83,864 per transaction
IEEPA (International Emergency Economic Powers Act, 50 USC 1705)	The greater of \$250,000 per transaction or twice the amount of the underlying transaction	The greater of \$284,582 per transaction or twice the amount of the underlying transaction
FNKDA (Foreign Narcotics Kingpin Designation Act, 21 USC 1901-1908)	\$1,075,000 per transaction	\$1,414,020 per transaction



POTENTIAL COSTS OF NONCOMPLIANCE

- ▶ Noncompliance can result in disruption to business due to investigation, loss of reputation and business, and severe penalties for both the companies and individuals involved.
 - ▶ Civil Penalties: up to \$500,000 per violation for defense trade, or up to the greater of \$250,000 or twice the value of the transaction for dual-use items.
 - ▶ Criminal Penalties: up to \$1 million per violation and/or up to 20 years in jail.
 - ▶ Debarment from U.S. government contracting opportunities and loss of export privileges can also result from noncompliance.



CCL CATEGORIES

COMMERCE CONTROL LISTS

▶ The CCL is divided into ten broad categories of items:

- Nuclear materials, facilities, and equipment (and miscellaneous items).
- Special materials, chemicals, microorganisms, and toxins.
- Materials processing.
- Electronics.
- Computers.
- Telecommunications and information security.
- Sensors and lasers.
- Navigation and avionics.
- Marine.
- Aerospace and propulsion.



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HOT TOPICS IN EXPORT CONTROLS

▶ Technology Transfers – Technical data can be released through various means, uncertain sometimes

- ▶ Potential technology transfer scenarios –
 - ▶ Open access to controlled information on IT system (including access by IT administrators themselves)
 - ▶ FN employees working in U.S. that requires access to export controlled technology
 - ▶ FN employees sharing common work space
 - ▶ Marketing pitches and product demos to foreign nationals
 - ▶ Outsourcing document review
 - ▶ Foreign travel with controlled data and software on laptops
 - ▶ Contracts, specifications, bills of materials, etc.

▶ Encryption Exports



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HOW DO THEY FIND YOU?

EEIs ARE THE EASY WAY

- ▶ Commerce’s Census Bureau collects and publishes export trade statistics. Census administers the FTR (15 CFR 30.1 – 30.74), which includes the Automated Export System (AES)
- ▶ AES is used by exporters to transmit Electronic Export Information Filings (EEIs).
- ▶ EEIs are the electronic equivalent of Shipper’s Export Declarations previously collected by the Census Bureau.
- ▶ EEIs are also accessible by the BIS, DDTC, US Customs and Border Protection, and other agencies for enforcement of the US export laws and regulations.



HOW DO YOU FIND THEM

FINDING LOCAL COUNSEL

- ▶ Martindale Hubbell, Chambers, Legal 500
- ▶ Use existing contacts and their legal networks





CHALLENGING TRANSLATION ATTEMPTS

CROSS-BORDER CONTRACTS

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THE LATE PAYMENT CLAUSE

REWRITING CHALLENGING TRANSLATION ATTEMPTS

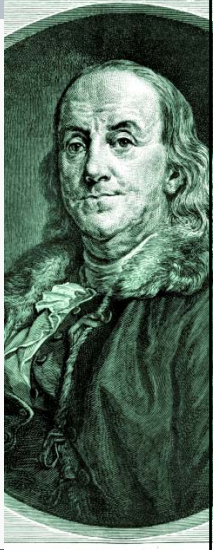
- ▶ If payment of any sum is delayed, the Price shall be increased by an amount equivalent to [insert interest rate] percent per month of the sum unpaid during the period of delay commencing on the due date and accruing until the payment is made in full, whether before or after judgement or arbitral award.
- ▶ Translation:
 - ▶ Amounts past due under this Contract will bear interest at the rate of ___ % per month, or the maximum amount permitted under law, whichever is less.




THE DISOBEDIENCE CLAUSE

REWRITING CHALLENGING TRANSLATION ATTEMPTS

- ▶ If any party disobeys any item of the agreement the obedient party has the right to ask for the reparation which is the 25% of the total business amount of this agreement.
- ▶ Translation
 - ▶ A breach will subject the party to a 25% penalty.



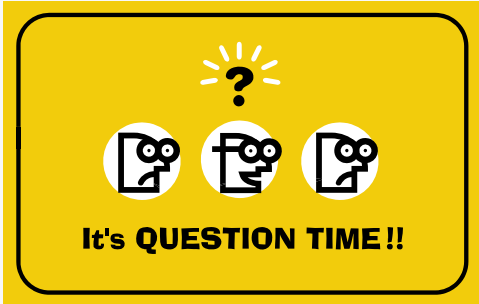
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CONCLUSION

CROSS-BORDER CONTRACTS

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It's QUESTION TIME !!

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NEXT CHALLENGE. NEXT LEVEL.

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