International Business Law

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LIUC University – Castellanza

Aim of the course

The course is designed to provide a reference framework relating to international agreements, focusing on the main contracts of the trade practice, with emphasis on trust profiles. Particular attention will be devoted to the international agreements concerning mergers and acquisitions. International litigation will be dealt with during the last part of the course with the aim of supplying a complete overview of international agreements on the side of the disputes resolution.

The course will be fully held in the English language. This course may be of extreme benefit for all students who are interested in working in international law firms or internationally orientated companies.

Advantages of this course

- International Business Law is a field of law of primary importance for any jurisdiction. Evermore international business, globalisation and sophistication in trading techniques make knowledge about this field of law unavoidable.
- Therefore every decent lawyer must be familiar with principles of International Business to have a successful approach today.
- It has become a general requirement in many law firms for law students to know the principles of International Business Law.
- This course is highly suitable for Italian students as well as for foreign ones. A course in International Business Law is recognized throughout the world. This knowledge is not limited to a particular legal system, but can be used everywhere.

Examinations

- **There will be an oral and a written exam at the end of the course**.

- Evaluation will be made on the basis of both exams. Students will be encouraged to take an active role in class, to participate in the critical discussion of cases and materials and to work on several issues in small groups.

- Class participation and group exercises will count for evaluation purposes. Detailed information on the evaluation criteria will be provided at the beginning of the course.

Proposed further reading

It is recommended the reading of the following books:

1. **JASON CHUAN**, International Trade Law, Cavendish Publishing Questions & Answers, Second Edition, 1999.

2. **COMITATO NAZIONALE ITALIANO DELLA CAMERA DI COMMERCIO INTERNAZIONALE**, *Incoterms 2000*, Icc official rules for the interpretation of trade terms, bilingual edition (English – Italian), Publication CCI no. 560, 2000.

The reading of the books above indicated has to be considered as optional.

Some teaching materials will be provided by the lecturer.

For any queries

The Professor will be available for any questions concerning the course.

For any queries please use the contact details set out afterwards:

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Part 1. - General Principles of international agreements

1. **How to draw up an international agreement**

1.1. Law applicable to the international agreement (Lex Mercatoria)

1.2. International agreement structure: stipulation phase; performance phase; pathology and discontinuance of the agreement.

1.1 How to draw up an international agreement

1. Introduction

- Grown competition causes - especially small and medium sized businesses - to trade internationally.

- It is vital to understand the diversity of foreign markets and legal systems and gain protection from risks and any other pathology of business relations.

Usual contractual techniques are not applicable because:

- there is no common regulation (e.g. a civil code) for the interpretation of the contract, proceedings in case of default…

- there are many atypical contracts, not regulated by the civil code, as *leasing*, *factoring*, *franchising* or *merchandising* contracts.

PROPER LAW

PROPER LAW IDENTIFIES

Substantive law applicable where conflict of laws occurs, or which determines under which jurisdiction or system of law a case should be heard.

For example, in international sale of goods agreements, the law of the seller's country is normally the proper law in case of a dispute with a foreign buyer.

APPLICABLE (Proper) LAWCAN BE DERIVED FROM

- Lex Mercatoria
- Rules of International Private Law determine applicable law.
- Agreement of contracting parties on the applicable law.

LEX MERCATORIA

Lex mercatoria identifies that system of laws which is adopted by all commercial nations, and which, therefore, constitutes a part of the law of the land

Lex mercatoria refers to a body of oral, customary mercantile law which developed in medieval Europe and was administered quite uniformly across Europe by merchant judges, adjudicating disputes between merchants

In the contemporary world, some scholars believe that there exists a modern lex mercatoria, defined to include certain transnational trade usages and commercial customs recognized internationally by the mercantile community.

Lex mercatoria also extends to certain international conventions and even national laws pertaining to international economic relations. International commercial arbitration is frequently cited as a field in which the modern lex mercatoria is operative.

Lex Mercatoria

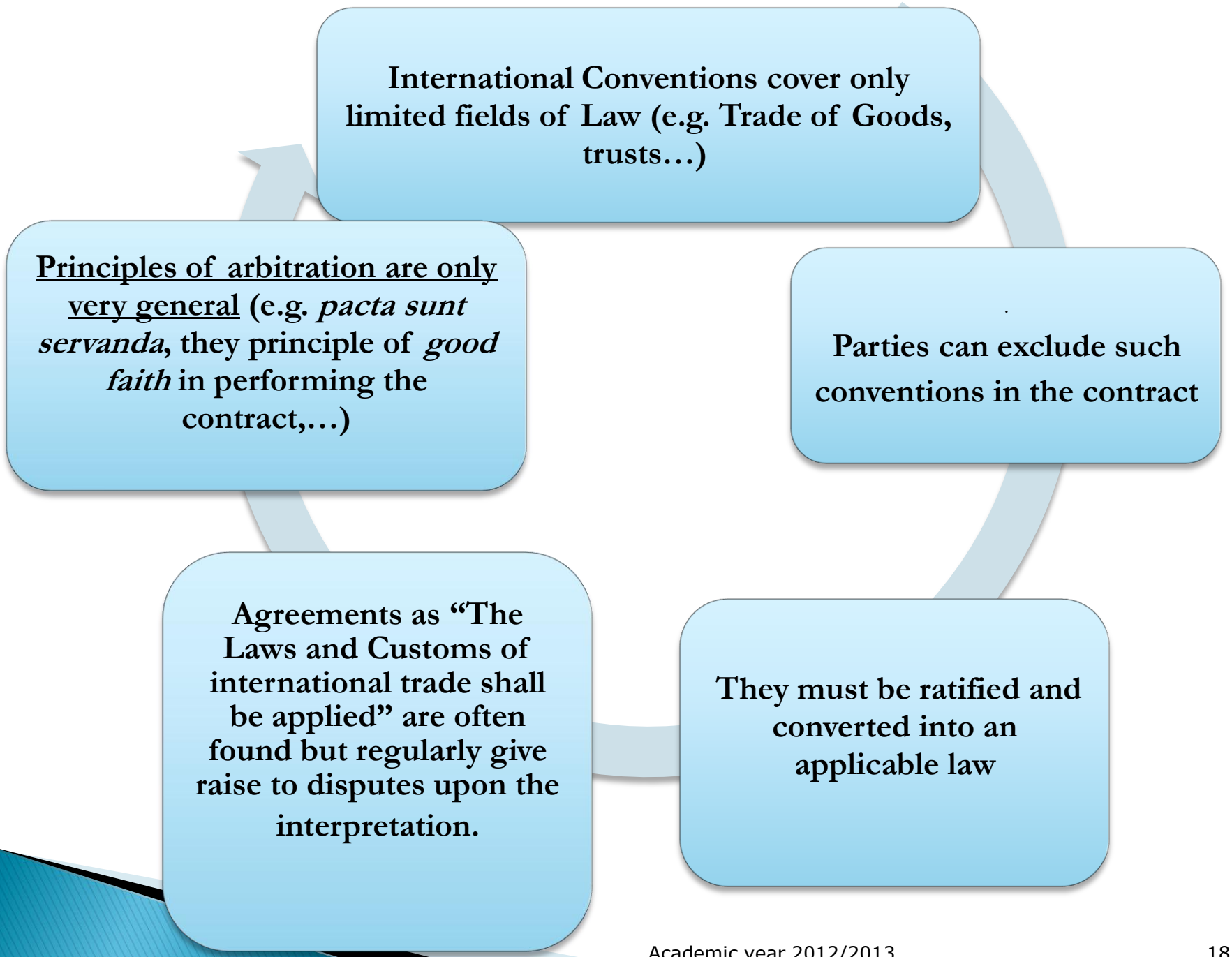
It refers to a series of rules with different characters such as:

1. international conventions (e.g. Vienna Convention of Trade of Goods)

2. general principles of arbitration

3. international customs (Incoterms)

NEGATIVE ASPECTS


International Conventions cover only limited fields of Law (e.g. Trade of Goods, trusts…)
Parties can exclude such conventions in the contract
They must be ratified and converted into an applicable law
Agreements as "The Laws and Customs of international trade shall be applied" are often found but regularly give raise to disputes upon the interpretation.
Principles of arbitration are only very general (e.g. pacta sunt servanda, they principle of good faith in performing the contract,…)

Agreement on applicable law

Parties may not want to agree on an unknown law.

An agreement on the law must be coordinated with an agreement on legal proceedings (courts of justice, courts of arbitration).

Agreement may not be possible (e.g.: Art 5 of the Chinese Foreign Economic Contract Law rules that only Chinese Law can be applied for joint venture contracts between a foreign investor and a Chinese company).

Choosing one system for law and proceedings gives a title for execution in the same legal system – can be disadvantageous if respondent has no assets in this jurisdiction.

As a result of negotiation parties often choose a neutral governing law.

Example: Agreement on applicable law

Article 55 – Disputes

"This Agreement shall be governed and interpreted according to Austrian law. Performance of the assumed obligation shall be interpreted by trade usages and in good faith, equity and honesty".

Self regulatory contracts

- With as many details as possible in order to minimize the application of a legal system and its unknown clauses and proceedings. An absolute exclusion of a legal system is impossible. Many rules are furthermore compulsory (e.g.: EU Law, forced hereditary rules).
- Provides remedies and sanctions (e.g.: liquidated damages clause).
- Such contracts are complicated and expensive and must therefore be in relation to the significance of the business (big deal – big contract).

The scope of the contract:

legal purpose

vs

business purpose

The contract is an instrument to insure certain results and to achieve the profit that the parties expected from their commercial relation.

- The contract must set out the common way the parties intend to follow in order to get their targets.
- The contract must anticipate predictable obstacles to the business relation and offer alternatives or remedies.
- The best contract is the one that doesn't require continuous interpretation, supplementation or improvements.

1.2 International agreement structure

It is possible to distinguish 3 main phases within the international agreements:

A. stipulation phase

B. performance phase

C. pathology and discontinuance of the agreement

These phases should be recognized in the arrangement of the contract:

- Arrangement of the content of the agreement
- Description of the performances of the parties
- Identification of possible cases of non-performance
- Clauses that limit or exclude responsibility (force majeure, hardship)
- Remedies for the fulfilling party (e.g.: penal clauses, liquidated damages, performance bonds). All in subordination to the legal proceedings.

1.2.A Stipulation phase – structure of a contractual clause:

Description of the primary obligation

First exception to the primary obligation

Second exception to the primary obligation

Eventually: limitations of the right to use exceptions.

Basic structure of a contract:

- I. Title
- II. Parties
- III. Premises
- IV. Object of contract
- V. Default of contract
- VI. Remedies

I. Title of contract, cover page, index

- These parts are used for a quick recognition of the contract and easy handling. E.g.:

Sale and purchase agreement

Representations, Warranties and Indemnifications

confirm and guarantee facts and circumstances established before signing the contract

- Serve as a basis for signing the contract.

  i.e.: the principle of pre-contractual good faith, quality and legal capacities of the parties, availability of certain rights, other liabilities originating from previous activity.

- These guarantees mostly finish with an Indemnification clause, i.e. the obligation to pay damages, if the said representations or warranties proved to be untrue or not existing.

- They normally are no contractual terms. That means that there is no breach of contract but only a right for damages if they are untrue (for "misrepresentation").

- The obligation to pay damages may be limited in time.

Example Indemnifications

- **Art. 14 - Indemnifications**

  The Vendor shall indemnify and save Italia harmless from and against any loss, cost, damage, expense or liability whatsoever, if any, suffered by Italia and resulting from or arising out any breach and/or untruthness and/or incorrectness of any representation or warranty set out above subject to a written claim has been notified by Italia to the Vendor within twenty four (24) months from the Closing Date and provided always that such term shall not apply to any tax liability referred to in article 13.6 above, for which the Vendor shall continue to be liable also after the lapsing of the above twenty four (24) months period.

Conditional Agreements

- Sometimes the execution of the contract is subject to the realisation of suspensive conditions or may be dissolved at the realisation of resolving conditions (also called conditions precedent).
- There must be provisions for the case that such conditions are or are not realised.
- Conditions may cover parts of the contract but also the entire coming into force of the contract and form part of the contract (-> breach of contract)

Closing

- Sometimes the performance of the contract needs preliminary work to be done, such as establishing a company (e.g.: for joint ventures) or acquiring parts of a company.
- The coming into force of the principal obligations of the contract are then postponed to the termination of the so called Interim Period.
- The termination of this Interim Period is called Closing.
- Representatives of all parties may form an Interim Committee to carry out this preliminary work.

1.2.B Performance Phase

1. This part of the contract determines the core business relation, the targets the parties want to reach and the main obligations.
2. It should be as complete as possible, leaving nothing for granted.
3. •It can be divided into principal and subsidiary obligations. i.e.: Sale of goods: Price and good as principal obligations and mode of shipment, guarantees, responsibilities and technical assistance as subsidiary obligations.

Example:

- ***Article 3 – Scope of the Agreement***

  2.1. ***The supplier shall perform or cause to be performed the supplies described in Annex B.*** *The goods object of supply may at any time be increased or reduced at the buyer's option and in such case the related contract price and corresponding schedule will be adjusted in accordance with the provisions of this agreement.*

  2.2. ***The supplier shall complete the whole supplies under this agreement in accordance with the time schedule referred to and within the time stated in Annex C.***

1.2.C Pathology phase and discontinuance of the agreement.

- **The "pathology" concerns possible defaults and is commonly inserted after describing the principal obligations**.
- It lists remedies and possibilities for the terminations of the contract.
- The contract may be terminated by performance, by expiration of the terms of validity, by a new agreement between the parties, by notice of termination (esp. long term agreements) or in case of default.

Termination without notice

- In case an important characteristic of the other party gets lost. E.g.:

- *21.2* - **Termination without period of notice**

  Italia shall be entitled to terminate this agreement, at any time and without previous notice, if (i) International is declared bankrupt or becomes insolvent or makes an assignment for the benefit of creditors, or (ii) International enters into liquidation, either voluntary or involuntary, or (iii) International is acquired by or merged with or transfers its assets to a competitor of Italia.

Termination by default

- The contract should balance the wish to save the contract with the need to stop the default.
- Therefore it is important to state what kind of defaults give right to terminate the contract (all or only significant ones).
- Termination may be possible for default of single obligations, cited in single clauses, mostly for default of representations and warranties or generally with an open clause, that cites examples without being limited to them. See example.

Default and change of circumstances – force majeure and hardship

- Concerns external circumstances that have not been and could not have been predicted when the contract was signed, the circumstances can not be resisted and make performance of one party impossible or unsustainable.
- Also if most jurisdictions contain rules for major force or hardship, the uncertainty of expressions like "unpredictable", "irresistible" and "impossible or unsustainable" cause contractors to include a special clause.
- The clause first of all shall define major force.

Example – FORCE MAJEURE

- *Article 23* – **Force majeure**

  23.1. A Party to this agreement is not liable for failure to perform any of its obligations insofar as it can prove (i) that the failure was due to an impediment outside its control, and (ii) that it could not reasonably be expected to have taken the impediment, and its effects upon its ability to perform, into account at the time of the signing of this agreement; and (iii) that it could not reasonably have avoided or overcome it or at least its effects. For the purposes of this clause a "force majeure impediment" shall include, but shall not be limited to fires, floods, war, riots and legal prohibitions.

Hardship

- **In a situation of "hardship" the parties find themselves before an unpredicted change of circumstances that outbalances the assumed obligations.**

- This must not always lead to the termination of the contract.
- The parties often agree to try to adopt the contract to the new circumstances and resolve it only if such adoption proves unsuccessful.

Hardship and third party

- Sometimes the parties agree to bring the case before an expert to advise them. i.e.:

- *25.4. Failing an agreement between the parties on the revision of this agreement and of any relevant ancillary agreement within 90 (ninety) days from the request, each party may bring before an expert to be appointed by mutual agreement, who will advise the revision of the agreement which he deems fit, on an equitable basis, in order to ensure that neither party suffers excessive prejudice from the occurrence of the hardship event.*

Remedies

It is possible to differ between internal and external remedies.

Internal remedies take place between the contracting parties and appear in form of liquidated damages and other penal clauses with different variations.

External remedies include the assistance of a third party, mostly a bank, to provide guarantees such as performance bonds or insurances

LIQUIDATED DAMAGES CLAUSE

- **Such a clause provides payment of a certain sum of money or the performance of an obligation in case one party is in default of his contractual obligations** (mainly *mora debitoris* or non-fulfilment).

- They don't replace compensation for damages legally owed – there is no need for costly legal proceedings.

- They are owed simply because of the party's default and often do not depend on any proof of real damages or any relation between the default and the damage.

- Though, depending on the legal system, there might be a need to prove the event of damage, without having to prove the amount.

Example

- ***Article 5 – Liquidated damages***

In the case of delay in delivering the products the seller undertakes to pay to the buyer an amount equal to 0.2% of the value of the supplies not timeously delivered for each week of delay, and up to a maximum amount not exceeding 5% of the value of the products under delivery.

Main functions for such a clause are: intimidation of the debtor to perform his obligations and easy liquidation of the real damage.

Some legal systems allow such a clause with the possibility for a judge to reduce the owed payment if in apparent excess (Italy), some transform such clauses into a simple fee owed to the creditor because of the default (US), others allow penal clauses with the intend not only the gain damages but to deter the debtor (*in terrorem* Denmark), again others don't allow them if not as pre-quantification of a future damage (Belgium).

The UK system differs rigidly between penalty and liquidated damages and allows only clauses, that provide a reasonable pre-quantification of the damage.

It is therefore necessary to check the legal system that will judge this clause and to check a possible interaction such a clause might have on other obligations (restitution of goods, payment of debt)