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Drafting International Commercial Contracts : A Primer

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By way of introduction

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- Int'l commercial agreements come in vary different shape /
  - Long term (*e.g*. joint venture agreement) / one shot (*e.g*. one time sale of brass fittings)
  - Commodity transactions / financial transaction (*e.g.* assignment of portfolio of receivables)
  - Amount at stake, location of parties, etc.

By way of introduction

- When looking at legal aspects of cross-border commercial contracts, one common feature : starting point and first reference is always the contract (*i.e*. what parties have agreed, no matter how their agreement was recorded)
- In many situations, no need to go beyond the contract to resolve a dispute

By way of introduction

- Even if contract proves to be insufficient to settle a dispute (*e.g.* because it is incomplete, ambiguous or invalid), contract remains starting point
- Hence, one should start by examining the contract (1st stage) and then look at the rules applicable outside and beyond the contract (2nd stage)

By way of introduction

- Contract documentation of int'l commercial transactions may vary :
  - Sometimes purely *oral* agreement
  - Often various *one sided* documents (such as price quotation, purchase order, confirmation / acknowledgement, etc.)
  - One or two parties may use their pre-formatted *general conditions*
  - Ad hoc written agreement, negotiated and drafted specifically for one transaction)

By way of introduction

- Since it is impossible to study all possible contract clauses, their drafting and impact, focus of the class is on :
  - General clauses common to all int'l commercial agreements
  - Focus on *drafting* issues (with refresher on the law of int'l commercial agreements)

By way of introduction

- What we will cover:
- 1°) A primer on contract drafting
- 2°) 2 major provisions in all situations : choice of law / dispute resolution
- 3°) focus on micro-drafting : 2 standard provisions (COC and confidentiality)
- 4°) focus on macro-drafting : the joint venture agreement

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1°) A primer on contract drafting

I. A primer on drafting

- Various positions when faced with an int'l commercial agreement:
  - Drafting from scratch
  - Reviewing (draft) agreement
  - 'Delocalizing' existing agreement
- In all 3 situations : either 'full text' or general conditions (different if limited contractual documentation)

I. A primer on drafting

- In all situations : some 'do's and don'ts'
  - 1) Distinction between 'assisted drafting' and 'zero based drafting'
  - 2) Focus on the structure
  - 3) Some 'golden' drafting rules
  - 4) Drafting and language

I. A primer on drafting
1. The 'assisted' drafting

- Zero-based drafting or 'assisted' drafting?
  - Zero-based drafting : start from scratch and build up custom made legal documentation
  - Assisted drafting : start from a basis – *e.g.*
    - Models – either self-tailored (firm's know how) or not, either public (any web-site) or private (*e.g.* ICC), either institutionalized (form books in libraries) or not
    - Precedents
    - Checklist/outline : skeleton of contract (CISG/Unidroit Principles or other substantive body of law may be used to create a checklist of issues)

I. A primer on drafting
1. The 'assisted' drafting

- Dis/Advantages of zero-based drafting
  - Tailor made solution
  - Increase enforceability
  - Time consuming
  - 'Blank page syndrome' or 'trauma' - drafting contact language may be intimidating...

I. A primer on drafting
1. The 'assisted' drafting

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- Practice : natural temptation to use models/precedents...
  - Cost/time issue
  - Lawyers are inherently conservative – if it has worked before, why change it?
  - Concept of plagiarism is (in principle) not applicable to contract drafting

I. A primer on drafting
1. The 'assisted' drafting

- Assisted drafting is the rule, zero-based drafting the exception
- From client's and lawyer's point of view, to be commended... as starting point, not a finishing point – rely on other people's work at your own peril!

I. A primer on drafting
1. The 'assisted' drafting

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- Prefer checklists / outline to models (and use true models, drafted as such, with indications of possible variations and when variations should be considered) and models to precedents (*i.e.* a contract drafted and used for another transaction)

- Ideal solution : combine a checklist and model :
  - Checklist/outline : have I covered all important issues?
  - Model : actual drafting of provisions – combine inspiration from several models

I. A primer on drafting
1. The 'assisted' drafting

- Use models etc. intelligently - drafting issues for all checklists, models, etc. :
  - Don't take the solution for granted – a model is only good as its initial drafter...
  - Compare forms from different sources
  - Customize it – take into account deal-specific facts and issues - every transaction is unique (both the one you are contemplating and the one for which the model has been drafted)
  - Where does it come from (industry associations forms, which may be one-sided *vs* party-neutral form generated by ICC; firm precedent may be overwhelmingly in favor of one type of client...)
  - When was it drafted? Avoid using outdated models...
  - Delete metadata...

I. A primer on drafting
1. The 'assisted' drafting

- Be careful for 'drafting inertia' – carrying over a provision from one text to the other, even though context is different...

- *E.g.* sovereign bonds under New York law, with a trustee (representing bondholders), trust indenture reserves the right to each individual bondholder to sue sovereign debtor for its individual share of a payment not made → individual right mandated by US law for corporate trust indenture (rationale : protect individual bondholder against collusion between debtor and majority of creditors); but not for sovereign bonds, but was carried over...

I. A primer on drafting
1. The 'assisted' drafting

- Using standardized clauses – *e.g.* ICC arbitration clause or trade terms – *e.g.* FOB
- Very commendable, but:
  - Standardized clause : do not forget to tailor it...
  - Trade term : ICC's FOB is not the UCC's...

I. A primer on drafting
2. Focus on the structure

- Structure of the agreement is *key* - especially since int'l agreements tend to be long and highly technical
- Structure: good starting point for drafting and for review - is the Agreement complete – has everything (or at least main risks) been covered?

I. A primer on drafting
2. Focus on the structure

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- Basic structure of int'l agreements (not universally accepted...)
  - 0) Title
  - 1) Preamble (Recitals) : legal value / impact
  - 2) Introduction : date and place, description of parties
  - 3) Definitions : useful... to a certain point
  - 4) Operative clauses :
    - '*Body*' : depends on nature of agreement – mainly rights and obligations of parties ('Who does what when?')
    - *Breach and End* (liability, exclusion, limitation, etc.) and termination (time frame, automatic and with notice)
    - *Boilerplate clauses* (IP, Notices, Insurance, Force majeure, Confidentiality, Choice of law / Dispute resolution)
  - 5) Closing and signature
  - 6) Schedules: technical information (can be adapted / modified)

I. A primer on drafting
2. Focus on the structure

- Preamble – *e.g.*

- "*Party 1 is active in [specify field of activity]; [or] has at its disposal [mention if appropriate one or several distinctive assets, abilities, specific know-how, or intellectual property rights necessary to its activity and/or to the object of the Agreement]; [or] has the following objectives [specify the objectives which this Party seeks to promote by the Agreement]; [or] is interested in [describe the development that the Party expects from this Agreement; its contractual expectations].*
- Party 2: ….
- *In the light of their activities, abilities and objectives, as described above, the Parties wish to jointly [specify in general terms the proposed Object of the Agreement]"*

I. A primer on drafting
2. Focus on the structure

- Legal consequence(s) of the Preamble? ('Whereas-clauses')
  - It does not aim to create rights and obligations for parties or state specific representations – rather statement of facts and background of the transaction
  - the Preamble only intends to provide background information. This information is not binding in the proper sense of the word, but it could be used in case of dispute to help interpret the agreement
  - What interpretative value will be given to recitals of the Preamble, will depend on the interpretation rules of the law governing the contract – *e.g.* if English law applies, misstatement of fact could be ground for action for misrepresentation or breach of warranty

I. A primer on drafting
2. Focus on the structure

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- Body (*e.g.* sales contract):
  - Specifications and warranties
  - Price term
  - Payment term
  - Security interest
  - Delivery term
  - Title, risk of loss and insurance

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I. A primer on drafting
3. 'Golden' drafting rules

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- Some 'golden' drafting rules :
  - Be brief
  - Use of ambiguous language
  - Use of superfluous language
  - Terms of art
  - Not a lawyer's monopoly

I. A primer on drafting
3. 'Golden' drafting rules
A. Be Brief

- § 1. Be Brief, Clear and Precise
- Noble ideal... Say what you want to say and no more
- It has been said that “the longer the clause, the greater the opportunity to pick at its wording” (Adrian Briggs)

I. A primer on drafting
3. 'Golden' drafting rules
B. Use of ambiguous language

- § 2 Use of ambiguous language : all forms of human communication are subject to misunderstandings and misinterpretation.... but these instances should be reduced to a minimum
- *e.g.* : “The price of each Widget shall be 5.00 dollars ...”

I. A primer on drafting
3. 'Golden' drafting rules
B. Use of ambiguous language

- Ambiguity may arise out of sequence of provisions – *e.g.* :
- "Article 13.1 - Parties may terminate the agreement when...
- Article 13.2 – Parties may terminate the agreement when...
- Article 13.3 – Party A may terminate the contract if Party B ....
- Article 13.4 – The Agreement may be terminated when..."

I. A primer on drafting
3. 'Golden' drafting rules
B. Use of ambiguous language

- Sometimes deliberate or purposeful ambiguity...
- *e.g*. “Seller will use reasonable/best efforts to...”
- Standard resting on the seller is vague – why use it?

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3. 'Golden' drafting rules
B. Use of ambiguous language

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- Why 'reasonable / best efforts'?
  - Sometimes possible to describe standard with precision : *e.g.* Service Level Agreement with precise data on availability of servers, etc.
  - Sometimes too difficult and costly to describe with precision what standard seller must meet - parties may not want to expand resources in describing what type of efforts Seller is required to produce - “All Products supplied by X shall be suitably packed ... in accordance with X’s standard packaging procedure at the time of shipping” - 'standard' packaging procedure may leave room for interpretation; is however better than attempt to define precisely how products should be packaged...

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3. 'Golden' drafting rules
B. Use of ambiguous language

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- Precise description may not only be too costly, could also open room for disagreement between parties – while leaving a provision in studied ambiguity may make it possible to achieve an agreement

- Further : not all 'vague' standards are unworkable - *e.g.* reasonable/best efforts : not an empty standard – if no performance, party under best efforts standard should demonstrate that it did clearly undertake its best efforts, such as having its employees working overtime or in the week-end, going the extra mile on something etc.

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3. 'Golden' drafting rules
B. Use of ambiguous language

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- Ambiguity is inherent in use of language – words rarely have one single meaning, without any shades
- Absolute agreement between parties is therefore an illusion (distinction between what parties say and what they think they say) – “non-mutuality may range from subtle to gross differences in understanding”
- Difficulty is even more present when parties do not share one language

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3. 'Golden' drafting rules
B. Use of ambiguous language

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- Hence need for interpretation of the agreement

- Application : Company A, established in France, is requested to send price quotation to Company B, doing business from Italy. Request concerns electronic devices used in manufacturing automatic door opening systems
- Price quotation contains detailed list of price per item. It states “All contracts concluded under current price list”
- What if company B accepts the offer 45 days after receiving it – may A reply that contract concluded under revised price list in force when offer was accepted?

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3. 'Golden' drafting rules
B. Use of ambiguous language

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- Process of contract interpretation – difficulties
- 1) When does interpretation kicks in? When is there sufficient ambiguity? Enough that one party alleges that there is ambiguity? Or when 'reasonable person' accepts that a provision is ambiguous?

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3. 'Golden' drafting rules
B. Use of ambiguous language

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- 2) How to interpret? Interpretation method may vary depending on the jurisdiction
- Possible interpretation methods :
  - Stick to the letter of the agreement
  - Go beyond the letter and attempt to find the intention of parties (but how?)
  - Read contract as would a 'reasonable person' do...

I. A primer on drafting
3. 'Golden' drafting rules
B. Use of ambiguous language

- Two examples :
  - Swiss law : art. 18 Swiss Code of Obligations : primary means of interpretation is the factual consensus between the parties and not the wording they choose; if any such factual consensus can be demonstrated, it has precedence over literal interpretation
  - English law : modern approach to contractual construction is “neither uncompromisingly literal nor unswervingly purposive”; *Arbuthnott v Fagan* [1995] CLC 1396, 1340, per Lord Bingham MR - commercial contractual documents should be interpreted in a way which is commercially realistic rather than literalistic: “The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.” §Sirius International Insurance Co v FAI General Insurance Ltd & Ors [2004] 1 WLR 3251, at 3257, paragraph 18, per Lord Steyn)

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3. 'Golden' drafting rules
B. Use of ambiguous language

- One example : art. 8 CISG :
  - "(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
  - (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
  - (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

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3. 'Golden' drafting rules
B. Use of ambiguous language

- May court / arbitrator make reference to usages/customs in order to interpret contract?

- Not excluded – see art. 9 Unidroit Principles :

  - "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
  - (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

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3. 'Golden' drafting rules
B. Use of ambiguous language

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- May court / arbitrator make reference to 'the law of international contracts' in order to interpret contract?
- Not excluded
- However : most restatements of the law of international contracts remain very general – level of general principes (such as *pacta sunt servanda*, good faith, no abuse, no enforcement of unconscionable contracts, etc.) - difficult to apply to 'technical' problem

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3. 'Golden' drafting rules
B. Use of ambiguous language

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- May court / arbitrator make reference to 'good faith' in order to interpret contract?
- Not excluded – however different impact according to jurisdiction
  - Germany & Co : stronger role for good faith – may apply not only to enforcement but also interpretation of agreement
  - US : good faith only in performance and enforcement of agreement?
  - Unidroit Principles (§1.) : "(1) Each party must act in accordance with good faith and fair dealing in international trade"

I. A primer on drafting
3. 'Golden' drafting rules
C. Use of superfluous language

- § 3 Use of superfluous language
- e.g. '*NOW, THEREFORE, in consideration of the promises and of the mutual covenants of the parties hereto to be faithfully performed as hereinafter specified, the parties hereto hereby covenant and agree as follows...*"

I. A primer on drafting
3. 'Golden' drafting rules
C. Use of superfluous language

- § 3 Use of superfluous language
- —› '*In consideration of the mutual covenants of the parties to be faithfully performed, the parties agree as follows...*'

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3. 'Golden' drafting rules
C. Use of superfluous language

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- Compare :
  - “Seller agrees to sell and Buyer agrees to buy 1.000 Widgets at USD 10.00 per widget”
  - “Seller agrees to sell, convey, transfer, assign and otherwise relinquish claim to and otherwise commit into the permanent possession and ownership of Buyer 1.000 Widgets...”

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3. 'Golden' drafting rules
C. Use of superfluous language

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- Some words often used because they 'read/sound' good/lawyerly, without adding much content to the agreement:
  - *e.g.* '*respective*' : as in “Parties shall perform their respective obligations” (does the word 'respective' add anything to this provision? Can one imagine Party A performing B's obligations?)
  - *e.g*. '*said*' : as in “Party A will deliver said Goods to Party B...”
  - *e.g*. '*aforementioned*', '*hereby*', '*such*' ('directionary' words - attempt to direct attention from one provision to another or part of another; generally unnecessary)

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3. 'Golden' drafting rules
D. Use of terms of art, definitions,...

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- § 4 Use of 'terms of art' :
  - Common practice to include a section with definitions. Words defined used in the agreement with a capital letter
  - Rule of thumb : definition is needed if there could be doubt among reasonable people (lawyers?) on what a term/word means – *e.g.* “notice period of 3 months” → 90 days or 3 full months?

I. A primer on drafting
3. 'Golden' drafting rules
D. Use of terms of art, definitions,...

- Definition of technical terms related to the object of contract (*e.g.* : sale of 'crude oil' or of 'wheat' : define origin? Quality? Percentage humidity in wheat; percentage sulphur in oil, etc.)
- No definition, but specification in contract (or schedule)

I. A primer on drafting
3. 'Golden' drafting rules
D. Use of terms of art, definitions,...

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- No definition needed for terms/words for which no doubt possible for all parties concerned, because they have an inherent meaning - *e.g.* 'day', 'kilometer', 'Moscow, Russia', 'International Chamber of Commerce', etc.
- No need to define legal terms (*e.g.* 'termination' or 'arbitration') – unnecessary since the applicable law will provide a definition. Unless the special nature of the agreement requires a definition

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3. 'Golden' drafting rules
D. Use of terms of art, definitions,...

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- What to make of list of definitions included in many contracts?

- *E.g*. listing in definition of '*force majeure*' provision of series of events which qualify as force majeure : “If either Party is affected by Force Majeure defined as any event beyond the reasonable control of a party, such as fire, flood, earthquake, elements of nature, acts of war, terrorism, riots, rebellions or revolutions, strikes (excluding strike of its own personnel), and which could not have been prevented by reasonable precautions, alternative sources, work-around plans or other means ...”

I. A primer on drafting
3. 'Golden' drafting rules
D. Use of terms of art, definitions,...

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- What to make of definition by list?
  - List should be exemplative, not limitating (“such as...” / “such as but not limited to...”)
  - List should not replace definition of concept (in case of force majeure : “... event beyond the reasonable control of a party ... and which could not have been prevented by reasonable precautions...”)
  - List could be helpful in guiding interpretation of definition criteria

I. A primer on drafting
3. 'Golden' drafting rules
D. Use of terms of art, definitions,...

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- Necessary to include definitions of this type?
  - “Headings and titles are used for convenience only in this Agreement and are not to be used in interpreting this Agreement”
  - “Any reference to the singular includes the plural and vice versa”
  - “Any reference to one gender includes each gender”

I. A primer on drafting
3. 'Golden' drafting rules
E. Various minor issues

- § 5 Minor issues
- Numbering – which one would you prefer if you were the buyer?
  - "Buyer shall pay Seller 1,000 USD per Widget"
  - "Buyer shall pay Seller 1.000 USD per Widget"

I. A primer on drafting
3. 'Golden' drafting rules
E. Various minor issues

- Preference : “The Buyer shall pay Seller one thousand US dollars (1,000)...”

I. A primer on drafting
3. 'Golden' drafting rules
E. Various minor issues

- Dates - do you see a difference?
  - “Seller shall deliver the goods to Buyer on 4.11.2011...”
  - “Seller shall deliver the goods to Buyer on 11.4.2011...”
- Write the months in full?

I. A primer on drafting
3. 'Golden' drafting rules
E. Various minor issues

- Tense – what do you prefer?
  - "Buyer should pay the price ..."
  - "Buyer shall pay the price ...."
  - "Buyer must pay the price ..."

I. A primer on drafting
3. 'Golden' drafting rules
E. Various minor issues

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- Rule of thumb : agreement must be drafted in the *present* tense
- Use of past tense is exceptional and should only be considered if specific reasons justify it
- Tendency to use future ('shall') because agreement contemplates actions to be undertaken later

I. A primer on drafting
3. 'Golden' drafting rules
E. Various minor issues

- 'Shall' construction may be avoided:
  - “The Parties shall keep confidential all business and technical information relating to and acquired in the course of the performance of the present Agreement”
  - “The Parties agree to keep confidential all business and technical information relating to and acquired in the course of the performance of the present Agreement”

I. A primer on drafting
3. 'Golden' drafting rules
E. Various minor issues

- In any case, avoid 'must' (*e.g.* “Buyer must pay the price...”) → essence of agreement is to create obligations, 'must' is redundant and creates impression that 'non must provisions' are not binding

I. A primer on drafting
3. 'Golden' drafting rules
E. Various minor issues

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- Two recent trends in contract drafting:
  - Online assistance / contract management (*e.g.* *www.business-integrity.com*)
  - Outsourcing (document preparation in India – *e.g.* *www.legalsupportglobal.com*)

I. A primer on drafting
4. Language issues

- Language issues : minor issue with big potential impact...
- English as the *lingua franca* of int'l commercial agreements – impact on drafting?

I. A primer on drafting
4. Language issues

- Legal English much more sophisticated than 'Euro-English'...
- *e.g.* 'The present Agreement has been executed / performed on 4.11.2009' : execution' —› signature; 'performance' —› actual realization by a party of its duties

I. A primer on drafting
4. Language issues

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- Legal English much more sophisticated than 'Euro-English'... *e.g.*
  - "All goods that have been destroyed during carriage shall be replaced at no cost"
  - "All goods, which have been destroyed during carriage, shall be replaced at no cost"

I. A primer on drafting
4. Language issues

- "All goods..."
  - 1st drafting ("All goods that have been destroyed..") : restrictive clause
  - 2nd drafting ("All goods, which have been destroyed...") : non-restrictive clause, may be taken to mean that all goods have been destroyed and must be replaced

I. A primer on drafting
4. Language issues

- Watch out for 'imports' - *e.g.*
  - Provision entitled “Frustration” : import of the English doctrine of frustration?
  - Recitals : “In consideration thereof...”
  - 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) – *quaere* lost profits?

I. A primer on drafting
4. Language issues

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- Link with dispute resolution : exercise caution, take into account language skills of dispute resolution body
- Agreement drafted 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*"

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I. A primer on drafting
4. Language issues

- Agreement translated in other language(s)
- "*This contract may be translated into languages other than English. The English language version of this contract is the official version and shall be controlling in any dispute arising under this contract*"

I. A primer on drafting
4. Language issues

- "*The original version of this Agreement has been drafted in English. Should this Agreement be translated into French, Dutch or any other language, the English version shall prevail among the Parties, to the fullest extent permitted by Belgian law, provided, however, that <u>whenever French and/or Dutch translations of certain words or expressions are contained in the original English version of this Agreement, such translations shall be conclusive in determining the Belgian legal concept(s) to which the Parties intend to refer</u>*" (contract between US and Middle East companies, subject to Belgian law)

I. A primer on drafting
5. General conditions

- What about general conditions?
- General conditions very useful for contract management purpose (manage all contracts with one single instrument)
- From drafting perspective : any difference when drafting general conditions and contract?

I. A primer on drafting
5. General conditions

- 1) 1st difference : different structure for general conditions – preamble, introduction, schedule, etc. : not necessary

I. A primer on drafting
5. General conditions

- 2) As far as substance is concerned, same issues as for drafting contract, but one specific concern : general conditions are drafted unilaterally by one party
- General conditions may be more *one sided* than contract - but keep a balance! No overreaching!)s
- Scrutiny of general conditions: no common standards:
  - French / Belgian law: only for B to C
  - German law: § 305 BGB (no limitation of '*Kardinalpflichten*'; 'surprising' clause)
  - English law: 'red hand' rule (term must have been 'fair and reasonable')

I. A primer on drafting
5. General conditions

- 3) Content of general conditions: no 'recycling' of standard content – tailored made to company

I. A primer on drafting
5. General conditions

- 4) Watch out for *enforceability*
- Binding character of general conditions : in principle subject to classic rules on offer and acceptance (*e.g.* CISG; Unidroit)
- Additional requirement: accessibility of the standard terms (language / mere reference) - use of conditions in practice

I. A primer on drafting
5. General conditions

- What if two parties use their own standardized forms – general conditions? '*Battle of the forms*'
- Solution?
  - CISG : 'last shot theory' (art. 19 : "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer")
  - § 2.1.22 Unidroit Principles (2010) : "Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract"t?

I. A primer on drafting
6. Final word of advice...

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- Contract drafting : not a lawyer's monopoly...
- Apart from 'legal science', contract is made of:
  - Knowledge about business concerned (client is the source! New client : spend some time discussing business)
  - What can go wrong (litigation experience – imagine worst case scenario)

I. A primer on drafting
6. Final word of advice...

- Contract drafting : not a lawyer's monopoly...
- Apart from 'legal science', contract is made of:
  - Knowledge about business concerned (client is the source! New client : spend some time discussing business)
  - What can go wrong (litigation experience – imagine worst case scenario)

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Menu

- 1°) A primer on contract drafting
- **2°) 2 major provisions in all situations : choice of law / dispute resolution**
- 3°) focus on micro-drafting : 2 standard provisions (COC and confidentiality)
- 4°) focus on macro-drafting : the joint venture agreement

II. Two major provisions
1. Introduction

- What is different / special about int'l commercial agreements?
- <u>On the surface</u> : an agreement is an agreement... spelling out the rights and duties of parties, with as much care for details as possible

II. Two major provisions
1. Introduction

- Three (major) differences between domestic and int'l agreements:
  - Language (see above)
  - Dispute resolution
  - Applicable norms (if contract is silent, ambiguous or validity issue)
- Impact of these differences on drafting?

II. Two major provisions
1. Introduction

- Dispute resolution and applicable law : two major issues – you cannot assume that it will be a '*home game according to your rules*'
- If there is a dispute or a need to refer to the law —› could be at the other party's courts, according to local rules

II. Two major provisions
1. Introduction

- Location of dispute resolution ('home game' or not) : not necessarily decisive for the outcome of the dispute.
- Home game is, however, much more comfortable... and probably cheaper
- In any case : it is crucial that anyone entering a contract with int'l dimension, should know beforehand the rules of the game (which law, which court) —› you do not enter a restaurant without looking at the price list...

II. Two major provisions
1. Introduction

- Hence focus on two important provisions of contract :
  - Dispute resolution clause
  - Choice of applicable law
- Analysis based on a case

II. Two major provisions
2. The case

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- Two companies, one based in Germany ('Rhuner'), the other in the UK ('BestOrganics'), are negotiating a co-promotion agreement
- Purpose: allow Rhuner to participate in the marketing and distribution of the chemical products manufactured by BestOrganics
- Products are the result of the joint research efforts of the two companies

II. Two major provisions
2. The case

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- The agreement outlines how both parties would cooperate in order to promote the products in certain countries
- The agreement provides for the development and formulation of joint co-promotion plans, detailing the parties' promotion strategies, resource allocation principles and projected sales
- The cooperation further includes the sharing of information and know-how relating to promotional activities as well as the joint use and development of promotional and training materials.

II. Two major provisions
2. The case

- You are advising Rhuner (DE) in the process of negotiations
- Rhuner is represented in the negotiations by Mr Gartner, VP Human Chemical Division
- BestOrganics has submitted a draft agreement

II. Two major provisions
3. Dispute resolution
A. The alternatives

- Mr. Gartner first points to section 23 of the draft – which provides that disputes should be submitted to English courts
- Mr Gartner does not like the idea of going to English courts
- He suspects BestOrganics will not accept a change to German courts
- What other solutions could you suggest ?

II. Two major provisions
3. Dispute resolution
A. The alternatives

- If Rhuner is not confortable with English courts, alternative solutions include:
  - Choice for 'neutral' courts
  - Arbitration
- Choice is influenced by various factors (*e.g.* : neutrality - perceived and effective -, confidentiality - caution for expectations-, costs, enforcement, etc.)

II. Two major provisions
3. Dispute resolution
A. The alternatives

- Has BestOrganics made a wise choice by selecting its own jurisdiction?
- If you can impose your *home courts*, this should be done - save if potential enforcement problems in other country concerned by agreement, *e.g*. India – or so goes the rumor...

II. Two major provisions
3. Dispute resolution
A. The alternatives

- If you *cannot* impose your home courts?
- Choice for other party's courts may sometimes be better than 'neutral' choice (from enforcement point of view) – except if bad reputation of other party's courts...

II. Two major provisions
3. Dispute resolution
A. The alternatives

- Another alternative : adapt the choice for English courts to make it *facultative* and not mandatory

- Facultative choice of court clause:

  - Two-sided ("*Disputes may be brought before the courts of England*")
  - One-sided – 'English clause' (*e.g.* "*All disputes ... shall be exclusively settled by the courts of England. However, BestOrganics reserves the right to bring proceedings before other courts of competent jurisdiction*"- very frequent in bank/ financial agreements)

II. Two major provisions
3. Dispute resolution
A. The alternatives

- *Exclusive or non exclusive jurisdiction clauses*
  - Exclusive clause is mandatory and excludes all other courts
  - non-exclusive (facultative) clause is merely *permissive* (permits but does not require dispute to be solved before court chosen)
- Choice between the 2?

II. Two major provisions
3. Dispute resolution
A. The alternatives

- *Choice between exclusive or non exclusive jurisdiction clauses*
  - Exclusive clause : clarity, prevents multiple/parallel litigation; less litigation tactics; doubt on enforceability?
  - Non exclusive (facultative) clause : leaves flexibility (seeking relief in another jurisdiction)?

II. Two major provisions
3. Dispute resolution
A. The alternatives

- *Drafting implications*
  - Europe : presumption that clause is exclusive (unless specifically agreed otherwise) – art. 23 Brussels I Reg. (*e.g.* '*Gerichtstand : Köln*' : exclusive or not?)
  - Other jurisdictions : no such presumption – courts will only regard clause as exclusive if affirmative showing to that extent (“exclusively” / “only”)

II. Two major provisions
3. Dispute resolution
B. Need for a clause?

- Mr Gartner is not happy with any of the alternatives and wonders if it is not easier to delete the choice of court clause altogether

II. Two major provisions
3. Dispute resolution
B. Need for a clause?

- Agreement *without* any dispute resolution clause is probably the worse solution

- Crucial that anyone entering a contract with int'l dimension, should know beforehand the rules of the game (which law, which court) —› you do not enter a restaurant without looking at the price list...
- Risks:
  - Uncertainty on court with jurisdiction (*e.g*. art. 5(1) Brussels I Regulation)
  - Litigation battle (litigation on the place of litigation)
  - Concurrent proceedings

II. Two major provisions
3. Dispute resolution
B. Need for a clause?

- Besides uncertainty on the forum and wish to preclude litigation on the forum, choice of dispute resolution method also crucial
  - to choose a favourable forum (*e.g.* expertise / language skills)
  - and anticipate enforcement difficulties

II. Two major provisions
3. Dispute resolution
C. Enforceability

- Mr. Gartner wonders whether, if agreement is concluded, Rhuner could nonetheless escape from section 23 and the jurisdiction of English courts in case of dispute

II. Two major provisions
3. Dispute resolution
C. Enforceability

- Principle : *pacta sunt servanda*
- Choice of court (and arbitration agreement) must be complied with and will be enforced by courts
- See *e.g.* art. 23 Brussels I Regulation / Art. II 1958 NY Convention

II. Two major provisions
3. Dispute resolution
C. Enforceability

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- However, choice of court / arbitration agreement must be tested
- 3 stages:
  - *Court chosen* - Will court/body chosen accept jurisdiction?
  - *Court excluded* - look for all courts / other bodies which could take an interest in the dispute —› will they recognize and uphold the agreement?
  - *Enforcement court* - refusal to recognize/enforce judgement / award (not necessarily linked to refusal to upheld choice of court clause)

II. Two major provisions
3. Dispute resolution
C. Enforceability

- In each stage, there may be limitations on enforceability of dispute resolution mechanism – *e.g.* :
  - Objective limitation : employment contracts : limitation on validity / enforceability of choice of court / arbitration agreements
  - Discretionary limitation - *e.g.* choice for courts of Belgium – discretion of court chosen under Art. 7 BCPIL

II. Two major provisions
3. Dispute resolution
C. Enforceability

- Mr. Gartner comes back to you and says he has found a way to escape the choice for English courts : in case of dispute, his company will immediately terminate the agreement
- Mr Gartner thinks that Rhuner will then be unable to rely on the choice of court since the contract does not exist anymore
- Can you confirm?

II. Two major provisions
3. Dispute resolution
C. Enforceability

- Post-contractual validity of the Dispute Resolution Clause?
  - What if one of the parties assign or otherwise transfer the Agreement?
  - What if one party terminates the agreement?

II. Two major provisions
3. Dispute resolution
C. Enforceability

- Rule : choice of court and arbitration agreements remain valid notwithstanding any sale, take-over or divestment
- Third parties taking over part of a business, become by this operation the new contractual partners and are as such bound by the choice of court or arbitration agreement
- Unnecessary to provide expressly in the agreement that the choice of court or arbitration agreement will remain binding and enforceable even after the contract has been transferred

II. Two major provisions
3. Dispute resolution
C. Enforceability

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- Same rule applies in case of *termination* of agreement – separability of dispute resolution agreement
- Less certainty in case of *invalidity* of agreement
- In order to avoid any uncertainty: “A and B agree that in the event of the Agreement between the parties, or any part thereof, being held to be invalid, unenforceable, illegal, discharged or otherwise of no effect, the provisions of this Clause shall continue to apply to all and any legal proceedings which fall or would have fallen within its scope had the Agreement been valid and enforceable in every respect (A. Briggs, *Agreements on jurisdiction and choice of law*, OUP, 2008, 160)

II. Two major provisions
3. Dispute resolution
D. Multi-tier clause

- Mr. Gartner finally concedes and accepts the choice for English courts
- Mr Gartner wonders, however, whether this could prevent Rhuner from suggesting recourse to mediation in case of a dispute

II. Two major provisions
3. Dispute resolution
D. Multi-tier clause

- Mediation *always* possible – even if not foreseen expressly in the agreement
- Probably better to include a mediation clause in the agreement – avoid 'cold feet' of other party when dispute arises

II. Two major provisions
3. Dispute resolution
D. Multi-tier clause

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- Specific concerns for combined or multi-tier dispute resolution clause (Med-Arb / Arb-Med, Arb/Court, etc.) :
  - Make sure that the *link* between the various stages (negotiation, mediation, arbitration, ...) is well defined. Parties must be able to determine when they may/must go from stage 1 to stage 2 etc.
  - Ensure that no ambiguity about disputes assigned to each method

II. Two major provisions
3. Dispute resolution
D. Multi-tier clause

- Multi-tier dispute clause *e.g.*: CPR Institute for Dispute Resolution:

  "The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement by mediation in accordance with the CPR Mediation Procedure...

II. Two major provisions
3. Dispute resolution
D. Multi-tier clause

- ... If the dispute has not been resolved pursuant to the aforesaid mediation procedure within 60 days of the commencement of such procedure (which period may be extended by mutual agreement), or if either party will not participate in a mediation, ... the controversy shall be settled by arbitration in accordance with the CPR Institute for Dispute Resolution Rules ... ”

II. Two major provisions
3. Dispute resolution
D. Multi-tier clause

- Another complex clause : choice for arbitration, with caveat for 'small' disputes: ensure that the separation is clear - *e.g.*
- *“All disputes arising out of or in relation with the present Agreement shall be settled by a panel of 3 arbitrators in accordance with the ICC Rules. Disputes with a value inferior to 100.000 CHF shall, however, be brought before the Swiss courts”*

II. Two major provisions
3. Dispute resolution
D. Multi-tier clause

- *Rationale:*
  - General choice for arbitration (choice of contract management policy)
  - For small value disputes : state courts (arbitration may be too expensive for such disputes)
- *Difficulty* : what is amount of dispute? Only amount of principal claim, or also includes interests, legal costs or possible counter claim?

II. Two major provisions
3. Dispute resolution
E. Drafting

- Mr. Gartner is willing to accept the choice for English courts, but requests that you verify whether it is necessary to state that the courts of *London* have jurisdiction – should it not be sufficient to state that 'English courts' have jurisdiction?

II. Two major provisions
3. Dispute resolution
E. Drafting

- How precise should choice of court be?
- At very least choice for a specific country (not : “The Seller's Courts”)
- Preferred option : choice for a distinct region/jurisdiction (*e.g.* “the courts of Paris, France”) - not necessary to select a specific town/court within a legal system
- Watch out for dual-layered court systems (*e.g.* US - Switzerland)

II. Two major provisions
3. Dispute resolution
E. Drafting

- Mr. Gartner is willing to accept the choice for English courts, but requests that you look at the language used and verify whether it may be improved

II. Two major provisions
3. Dispute resolution
E. Drafting

- *"BestOrganics will bring all claims before the courts of Rhuner and Rhuner will bring all claims before the courts of BestOrganics"*

II. Two major provisions
3. Dispute resolution
E. Drafting

- *“Parties agree that any dispute which may arise in connection with the interpretation or enforcement of this Co-Promotion Agreement shall exclusively be submitted to the courts of England”*

II. Two major provisions
3. Dispute resolution
E. Drafting

- *Scope of choice of court agreement?*
  - Intention of parties is controlling – application of general principles of contract law and interpretation (but in some jurisdictions : restrictive interpretation)
  - May encompass *non contractual* disputes (*e.g.* tort claims – claim based on unfair competition)
  - Preference should go to broad scope : “all disputes arising out of or in connection with this agreement”

II. Two major provisions
3. Dispute resolution
E. Drafting

- *Scope of choice of court agreement – example :*
- *"The Court of Brussels, Belgium, are to have jurisdiction to settle any dispute which may arise out of or in connection with the Agency Agreement and the Bonds and any non-contractual obligations arising out of or in connection with the Bonds..."* (section 14.2 bond issue by GBL June 2010) – covering non-contractual obligations because liability of issuer in relation to prospectus may be characterized as non-contractual

II. Two major provisions
3. Dispute resolution
E. Drafting

- What if BestOrganics comes with an additional request : contract should include a choice for English courts
- However, there should be a 'carve out' / exclusion for urgent relief – such as in following clause
- *"Nothing in this Agreement shall prevent either party from applying to a court that would otherwise have jurisdiction for provisional or interim relief, including but not limited to any claim for preliminary injunctive relief"*

II. Two major provisions
3. Dispute resolution
E. Drafting

- *Prima facie*, it appears better to provide carve out
- If BestOrganics discovers *e.g.* breach of contract by Rhuner, no obligation to go to an English court to obtain urgent relief and enforce it in Germany

II. Two major provisions
3. Dispute resolution
E. Drafting

- In reality, problem of *construction* of choice of court clause —› can it be said that if the clause is drafted in general terms (“All disputes arising out of or in relation to...”), parties have not meant to cover requests for provisional and protective measures?
- Trend in court practice : standard language (“all disputes arising out of or in relation to...”) does not exclude possibility to seek urgent relief from other court than court chosen – but no guarantee

II. Two major provisions
3. Dispute resolution
F. Devil is in the detail

- Mr Gartner agrees with the choice for English courts, but is concerned that in case of a dispute, it might be difficult to have the documents served
- Solution : add an *ancillary* agreement on service of process

II. Two major provisions
3. Dispute resolution
F. Devil is in the detail

- Ancillary agreement on service of process : contractual arrangement on service of process, whereby one party (foreign company) appoints a third, local party to accept service. Consequence : Bypassing int'l agreements on service of process? (*e.g*. 1965 Hague Convention)

- "*Rhuner hereby irrevocably appoints [agent] as his agent for the service of process in England in connection with this Agreement. Service of process on [the agent] shall be deemed, for all purposes, to be due and effective service and service shall be deemed completed whether or not forwarded to or received by Rhuner*"

II. Two major provisions
4. Applicable rules

- Mr. Gartner next points to section 24 of the Draft, which provides that:
- *"The Agreement shall be governed by the laws of England, with the exclusion of its private international law rules"*

II. Two major provisions
4. Applicable rules
A. Impact on review

- Mr. Gartner does not like the idea of having the agreement subject to English law because he is not familiar with that law
- He wonders what impact application of English law has on his ability to review the draft – should he have an English lawyer, versed in English law, look at the draft?

II. Two major provisions
4. Applicable rules
A. Impact on review

- When reviewing a contract, applicable law will have an impact - together with dispute resolution clause
- Different standards depending on the perspective
  - Agreement subject to local jurisdiction and local law: *full* review is possible
  - Agreement subject to foreign jurisdiction and foreign law : *marginal* review, limited to enforceability of choice of court / dispute resolution clauses and potential impact of local mandatory rules – remainder to be reviewed by foreign counsel

II. Two major provisions
4. Applicable rules
A. Impact on review

- *e.g.* contract submitted to the laws of England and courts of England :

  1°) are the choice of court / choice of law provisions valid?

  2°) if yes, review by English law trained lawyer

  3°) review of substance by non English lawyer ? No, review limited to int'l mandatory rules (Art. 9 Rome I Regulation)

II. Two major provisions
4. Applicable rules
A. Impact on review

- In all cases, review not limited to purely legal issues
- Review should include:
  - Global coherence of the draft
  - Balance of the draft
  - Comprehensiveness of the draft
- Useful starting point : models/templates

II. Two major provisions
4. Applicable rules
B. Principle

- Mr. Gartner wonders whether, in view of the fact that choice for English law brings about additional costs, it should not be deleted altogether (or otherwise compensated in pricing of the Agreement)

II. Two major provisions
4. Applicable rules
B. Principle

- Mr. Gartner argues that the agreement is very detailed, spelling out the rights and duties of parties, with as much care for details as possible.
- Given the degree of details and the fact that the agreement is the law of parties (*pacta sunt servanda*), is it necessary to include a choice of law?

II. Two major provisions
4. Applicable rules
B. Principle

- Mr. Gartner has a point : impact of the choice of law is not as relevant as that of choice of dispute resolution
- Even without a choice of law, contract is there and may be used as starting point to resolve a dispute
- In fact, in many disputes, key is not so much which law applies, but interpretation of parties' intention based on the substantial provisions

II. Two major provisions
4. Applicable rules
B. Principle

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- However, applicable law remains relevant in 3 respects :
  - Agreement may not be *not complete* (*e.g*. contract concluded on the basis of general conditions)
  - Agreement may not be sufficiently *precise* —› room for interpretation
  - Agreement may give rise to doubts as to its validity (invalidity decided by applicable law)

II. Two major provisions
4. Applicable rules
B. Principle

- Even if applicable law is only marginally relevant, why not make use of the opportunity to choose the law in the contract?

- Even more relevant since method to determine applicable law if no choice by the parties may not be the same in all jurisdictions and it may not guarantee predictable result:

  - *Fixed* rule premised on one connecting factor (such as place of contracting or place of performance – Art. 8-1 *Lei de Introdução ao Código Civil Brasileiro*)
  - Closest connection (Art. 7 Mexico Inter-American Convention or s. 188 Restatement Conflicts 2nd : "the law of the state which ... has the *most significant relationship* to the transaction and the parties ... ")

II. Two major provisions
4. Applicable rules
B. Principle

- In the EU, degree of predictability achieved by the default rules is higher – mechanism of article 4 Rome I Regulation (based on concept of characteristic performance) allows in most cases for easy determination of applicable law

- However, difficult situations remains : *quaere* of *e.g.* :
  - Barter contract
  - Bond issue : law of issuer or of bond holder?

II. Two major provisions
4. Applicable rules
C. Alternatives

- Mr. Gartner is now convinced that it is useful to have a choice of law in the contract
- He is still not very fond of English law
- Given that that BestOrganics is not likely to accept a choice for German law, what are the alternatives?

II. Two major provisions
4. Applicable rules
C. Alternatives

- Solutions for deadlock:
  - No choice at all (fall-back provisions; *e.g*. Art. 4 Rome Regulation —› legal certainty reduced since escape clause)
  - Choice for a *neutral* law? (Swiss / Sweden —› dispute resolution adapted!)
  - Choice for Unidroit Principles, 'Equity and Fairness' or *lex mercatoria*?

II. Two major provisions
4. Applicable rules
C. Alternatives

- *E.g.* : Article 32 ICC Model Int'l Franchising Contract : "*This Agreement is governed by the rules and principles generally recognized in international trade together with the UNIDROIT principles on International Commercial Contracts*"
  - Probably only valid if one opts for arbitration
  - Even then : caution, general principles of law are just that, not a developed code of law with long history of court practice...

II. Two major provisions
4. Applicable rules
C. Alternatives

- Mr Gartner suggests that if choice for general principles does not offer sufficient certainty, why shouldn't contract be directly subject to an international treaty?
- Mr Gartner remembers that a sales contract he has seen, made a direct reference to the 1980 Vienna Sales Convention (CISG)

II. Two major provisions
4. Applicable rules
C. Alternatives

- May parties directly *opt in* for an int'l Convention?
- Answer is mixed
- 1st case : the Convention is not applicable on its own
- *E.g.* 1980 Vienna Sales Convention not applicable in Vietnam —› sale of flat screen televisions from Vietnam to Germany, opt in for the CISG?

II. Two major provisions
4. Applicable rules
C. Alternatives

- Validity of choice
  - in some jurisdictions (and arbitration), choice is *upheld*
  - in other, choice is downgraded to mere *incorporation* of the Convention (trumped by mandatory provisions of law objectively applicable)

II. Two major provisions
4. Applicable rules
C. Alternatives

- 2nd case : if a Convention is applicable as such?
- *E.g.* 1980 Vienna Sales Convention applicable to sales agreement between US company and company based in France —› relationship to choice of law?

II. Two major provisions
4. Applicable rules
C. Alternatives

- If the Convention is applicable as such
  - Choice for the law of a Contracting State : Convention not displaced – except if expressly excluded (*e.g.* : “This Agreement is governed by the laws of Spain. The provisions of the Vienna Sales Convention are expressly excluded”)
  - Choice for the law of a non Contracting State : Convention displaced (art. 1 -1 (b) CISG)

II. Two major provisions
4. Applicable rules
C. Alternatives

- In any case, choice for CISG does not offer complete solution
- CISG = limited legal framework; does not deal with all possible legal questions which could arise out of a contractual relationship (*e.g*. the Vienna Sales Convention does not deal with ownership issues, title to the goods)
- Choice for CISG does not therefore guarantee that if a dispute arises, the Convention will offer a solution for all possible questions

II. Two major provisions
4. Applicable rules
C. Alternatives

- BestOrganics has opted for its own law – choice to be commended?
- In principle yes : makes it easier to manage contracts; familiarity and ease of access with one's own law
- If choice for its own law is not possible, what choice may be commended?

II. Two major provisions
4. Applicable rules
C. Alternatives

- General guidelines:
  - Choice for “developed, stable and commercially sophisticated law” (G.B. Born) (includes ease of access and well developed bar)
  - Choice for a 'favorable' law? “Beauty is in the eye of the beholder”...
  - Interaction with dispute resolution provision
  - No choice for 'federal' law (“*The present agreement shall be governed by the laws of the United States*”)

II. Two major provisions
4. Applicable rules
C. Alternatives

- Mr. Gartner wonders whether he could suggest to BestOrganics to *split* the choice of law and have the Agreement subject to two laws, each for one part of it – so that both parties have confort of application of their own law for part of the Agreement

II. Two major provisions
4. Applicable rules
C. Alternatives

- Difference between 2 kinds of '*dépeçage*' : '*partial*' choice of law (refer part of a contract to a specified applicable law and leave the remainder of the contract to be governed by the objectively applicable law) and *split* choice of law (choice for concurrent laws)
- In both cases : caution required (is the red line between the 2 clear enough?)
- In some jurisdictions : validity of dépeçage doubtful

II. Two major provisions
4. Applicable rules
C. Alternatives

- Split choice of law : drafting
- *E.g*. “The present agreement shall be governed by the laws of Belgium. However, if any provision of this agreement were to be invalid or not fully effective under Belgian law, the validity and effectiveness of this provision shall be solely governed by German law” (*rationale* : fear that a specific provision of the contract could be invalid under Belgian law : German law as fallback law)

II. Two major provisions
4. Applicable rules
C. Alternatives

- Split choice of law : drafting
- *E.g*. "The present agreement shall be governed by the laws of Germany and German courts shall have jurisdiction. However, in so far as the mortgage provisions are concerned, French law shall be applicable and French courts shall have jurisdiction" (loan agreement German bank – German company, secured by mortgage on French immovable)

II. Two major provisions
4. Applicable rules
D. Stabilization

- Mr Gartner gives in and accepts that contract be governed by English law
- He wonders, however, whether choice could at least be 'frozen' at date of the contract, so that he does not have to worry about later change of English law

II. Two major provisions
4. Applicable rules
D. Stabilization

- May I freeze the law chosen? (*e.g.* "... the law of England, as it stands on 02.02.2009 ...")
- In general : '*stabilization*' clauses not allowed – law chosen is taken as living object
- What you may do : specify that the law chosen shall at least comply with the general principles of law or international law (as '*regulator*' of the law chosen) —› relevant for State contracts

II. Two major provisions
4. Applicable rules
E. Enforceability

- Mr Gartner gives in and accepts that contract be governed by English law
- He wonders, however, whether this at least guarantees that no other law will ever be applied to the contract

II. Two major provisions
4. Applicable rules
E. Enforceability

- Principle : yes – law chosen is the law of the parties
- Many jurisdiction recognize freedom to choose the law as a fundamental tenet of int'l contracts – *e.g.* :
  - Art. 3 EU Rome I Regulation
  - Art. 7 Mexico Inter-American Convention of March 17, 1994
  - Section 1-301(c) § 2 UCC
  - Art. 7 Japanese PIL Law 21 June 2006

II. Two major provisions
4. Applicable rules
E. Enforceability

- Nuances...
- 1st nuance : limits to enforceability of choice of law provision
- Sometimes, choice of law provision will be enforced, but only with some reservations (*e.g*. not if chosen law has no relevant connection to the contract - sect. 1-105(1) UCC : “reasonable relationship” - what with choice of law of 'neutral' jurisdiction?)
- Sometimes unclear whether the choice of law provision will be upheld (*e.g*. position under Brazilian law - *Lei de Introdução ao Código Civil Brasileiro* – is apparently not settled)

II. Two major provisions
4. Applicable rules
E. Enforceability

- 2nd nuance : even if choice of law is upheld, need to take into account the 'super priority rules' – *i.e*. the intl'y mandatory rules (*e.g.* Art. 9 Rome I Reg.)

- What are int'ly mandatory rules? “national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the ... State concerned as to require compliance therewith by all persons present on the national territory of that ... State and all legal relationships within that State” (ECJ, *Arblade*, § 30).

II. Two major provisions
4. Applicable rules
E. Enforceability

- intl'y mandatory rules similar to national mandatory rules, but have distinct features:
  - In both cases, *substantive* provisions of a given national law
  - Difference lies in strength of the mandatory rules :
    - Domestic mandatory rules displace any substantive provision of the agreement which runs against them —› you cannot *contract out* of these provisions in a domestic contract (*e.g.* prohibition of exclusion of liability for one's wilful negligence)
    - intl'y mandatory rules displace both the content of the contract *and* the law chosen by parties —› you cannot contract out of these provisions even in an int'l contract governed by foreign law

II. Two major provisions
4. Applicable rules
E. Enforceability

- Examples intl'y mandatory rules :
  - Provisions protecting national cultural heritage and prohibiting export sales (*e.g*. Art. 25 of the Law of the PRC on the Protection of Cultural Relics of 19.11.1982 – prohibition of sale of artefacts to foreigners)
  - Provisions prohibiting certain commercial agreements (*e.g*. Art. 5 of the Tunisian Act nr 91-64 of 29.07.1991 "*relative à la concurrence et aux prix*" : "*Sont prohibés, sauf cas exceptionnels autorisés par le ministre chargé du Commerce après avis du Conseil de la Concurrence, les contrats de concession et de représentation commerciale exclusive*.")

II. Two major provisions
4. Applicable rules
E. Enforceability

- Mandatory rules trump law chosen by parties and the contract's provisions
- How to determine if mandatory rules apply? —› uncertainty. Obtain advice from local counsel
- Which mandatory rules? Those of the *court* (and possibly : of third countries) Keep in mind EU rules (*e.g.* EU competition rules applicable to distribution agreements, requirements to enjoy exemption for vertical agreements)

II. Two major provisions
4. Applicable rules
E. Enforceability

- 3rd nuance : in theory, choice of law clause should also be tested from various angles - all courts (or other dispute resolution bodies) with jurisdiction
- Analysis may only be limited to reaction of court chosen in so far as choice of court is valid and enforceable...

II. Two major provisions
4. Applicable rules
E. Enforceability

- 4th nuance : account should be taken of *scope* of choice of law clause
- Law chosen will only apply to questions falling within scope of choice of law

II. Two major provisions
4. Applicable rules
E. Enforceability

- Question of the scope of the choice of law agreement mirrors the issue of the scope of the dispute resolution clause
- Scope of the choice of law provision should be expressed in *broad terms* (see above, discussion of scope of dispute clauses) - 'all issues arising out of or in relation with' / 'This Agreement is governed by...'
- Golden rule : streamline the scope of choice of court and choice of law so as to avoid any gap between the two

II. Two major provisions
4. Applicable rules
E. Enforceability

- Contractual extension of the scope of the law chosen is possible – *e.g.* :
  - "The Agency Agreement and the Bonds and any non-contractual obligations arising out of or in connection with the bonds are governed by, and shall be construed in accordance with, German law"
  - "This Agreement [and the documents to be entered into pursuant to it [save as expressly referred to therein]] shall be governed by and construed in accordance with [English] law"

II. Two major provisions
4. Applicable rules
E. Enforceability

- In principle, choice only deals with *contractual issues* (performance, remedies, interpretation, etc.)
- Non contractual issues are not covered : *e.g*. capacity of parties, consequences of representation (contract concluded through agent), issues of procedure (such as admissible evidence, etc.)
- Sometimes difficult to know where one issue falls (*e.g*. statute of limitations, burden of proof, applicable interest rate)

II. Two major provisions
4. Applicable rules
F. Exclusion of pil

- Mr. Gartner wonders why section 24 of the Draft not only includes a choice for English law but also expressly disavows the 'private international law rules'
- “The Agreement shall be governed by the laws of England, *with the exclusion of its private international law rules*”

II. Two major provisions
4. Applicable rules
F. Exclusion of pil

- Exclusion of the conflict of laws provisions of the law chosen
  - Goal is to avoid the application of the *renvoi* mechanism of the law selected (whereby account is taken of the conflict of laws rules of the applicable law)
  - However, in most countries, *renvoi* is not accepted for contracts. Even if *renvoi* were to be accepted, it is probable that the conflict rules of the law chosen would designate the law chosen by parties
- There is therefore not much point in excluding the conflict of laws rules of the law chosen. But, if it does not help, it does not hurt...

II. Two major provisions
5. Language

- Mr. Gartner wonders whether it would be possible to have the final agreement translated in German, so that it is easier to understand

II. Two major provisions
5. Language

- Translation of contracts is perilous
- Specific attention to English as the *lingua franca* of int'l commercial agreements

  – Legal English much more sophisticated than 'Euro-English'... (*e.g.* “execution of obligation” —› “performance of obligation”)

  – Watch out for 'imports' (*e.g.* provision entitled “Frustration” : import of the English doctrine of frustration? / Recitals : “In consideration thereof...”)

II. Two major provisions
5. Language

- Agreement in <u>two languages</u>?
- 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*"

Wrap up

- Process of contract reviewing – drafting : fundamentally similar for domestic and international contracts
- Two main differences : dispute resolution and applicable law : two fundamental issues – you cannot assume that it will be a '*home game according to your rules*'

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Drafting int'l commercial agreements : focus on confidentiality clauses

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Outline

- Purpose of the exercise
- Confidentiality agreements : Why do we need them?
- Drafting confidentiality agreements
- Analysis based on case study - *Rhuner v BestOrganics*

Purpose of the exercise

- Detailed analysis of standard clauses which are often included (and may be overlooked...) in int'l commercial agreements
- Emphasis on problem spotting / solving and on drafting issues
- Analysis could (for the most part) also be used for domestic agreements

1. Confidentiality clauses : Why do we need them?

- 1) Why is it necessary to include a provision on confidentiality?
- See question 1 case study : build up a case to support Rhuner's position that no confidentiality provision should be included in the agreement

1. Confidentiality clauses
Why do we need them?
A. From business' perspective

- 1) Why is it necessary to include a provision on confidentiality – different perspectives
- *Business-perspective* : information is a (very) valuable asset of business – technical processes, commercial methods, etc.
- Business should strive to keep control over important information – *e.g.* avoid that it falls in the hands of a competitor (today's contract partner may become tomorrow's competitor...)

1. Confidentiality clauses
Why do we need them?
A. From business' perspective

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- Importance of keeping some information confidential? Sometimes obvious:
  - For one party - *e.g.* corporate acquisition project : information disclosed to the party seeking to make the acquisition, in relation to target company (books, accounts, contracts, etc.) - need to keep information confidential obvious from seller's perspective – disclosure limited to prospective buyer
  - For the 2 parties - *e.g.* R&D contract : information exchanged between the parties on science, technology, etc. Need for both parties to keep it confidential

1. Confidentiality clauses
Why do we need them?
A. From business' perspective

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- Importance of keeping some information confidential : sometimes less obvious
- *E.g.* 'run of the mill' sales transaction relating to 'off the rack' 2nd generation consumer goods with no surprise... Only limited information could be 'sensitive' – seller's profit margin... (see also case where performance of contract will not lead to disclosure of important information)

1. Confidentiality clauses
Why do we need them?
B. From legal perspective

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- 2) Why is it necessary to include a provision on confidentiality from a *legal* point of view?
- Do the default rules (of the applicable law – either chosen or not by parties) not already offer sufficient protection for confidential information made available in contractual relationships?

1. Confidentiality clauses
Why do we need them?
B. From legal perspective

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- What protection offered by default rules of the applicable law for confidential information:
  - Some information protected by IP-rights (*e.g.* patent; copyright)
  - What protection for information which cannot be protected through IP-rights? *e.g.* data compilations, lists of customers ranked by how profitable their business is, etc.

1. Confidentiality clauses
Why do we need them?
B. From legal perspective

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- Legal protection of information through other means than IP-rights?
  - *Contract* law (liability – damages) – implicit duty of confidentiality may be based on general provision (such as good faith-principle – art. 1134 French Civil Code)
  - Tort law : misappropriation of confidential business information could give rise to liability, either under general tort law (*e.g*. art. 1382 Civ. C. / negligence / § 826 BGB) or under specific tort (unfair competition)
  - Protection through *criminal sanctions* (*e.g*. art. 513 & 623 Italian *Codice Penale*, which prohibits trade secret theft; same in France : criminal sanctions against theft of trade secrets in art. L621-1 of the *Code de la Propriété Intellectuelle*; see § 17 German *Gesetz gegen den unlauteren Wettbewerb* : criminal sanction against "*Verrat von Geschäfts- und Betriebsgeheimnissen*")

1. Confidentiality clauses
Why do we need them?
B. From legal perspective

- There remains significant '*protection gap*' for business sensitive information, unprotected or insufficiently protected by default rules of the applicable law – *e.g*.
  - business figures – turn-over, profit margin, remuneration packages of key employees, etc.
  - 'negative' know-how – *e.g*. research revealing that a new type of drug is ineffective

1. Confidentiality clauses
Why do we need them?

- Overall :
  - Confidentiality agreements = contractual confidentiality obligation as useful *complement* to existing default protection and close the protection gap
  - Importance may vary depending on nature of operation
  - In any case : this is (in most cases, but not in all cases) a *secondary* obligation and not a primary, fundamental obligation (such as price, liability, termination, etc.)

1. Confidentiality clauses
Why do we need them?

- Confidentiality agreements may serve to *reduce* the protection gap
- Confidentiality obligation will not, however, guarantee the *ownership* of information
  - Fact that A may not reveal information coming from B does not imply that B has ownership title on this information
  - Conversely, fact that agreement allows A to use/reveal reveal information coming from B does not imply that B has transferred any right or title to B, except than that of temporary use
- Issues of ownership/title : best dealt with in provision on IP

2. Drafting confidentiality clauses
A. In general

- Confidentiality agreements can be either:
  - *Independent* agreement (*e.g.* confidentiality agreement concluded during negotiations between parties) —› review this agreement when a final agreement is concluded...
  - Part of a general agreement (either *before* main contract is concluded or *within* the main agreement)

2. Drafting confidentiality clauses
A. In general

- Validity of confidentiality agreements rarely in doubt – not a strong interest of States to avoid that parties undertake confidentiality obligation
- Validity problem in rare cases *e.g.* if purpose of the confidentiality clause is to conceal an unlawful practice or to limit the disclosure of information in view of committing insider trading —› this could be considered void
- Possibly too broad if constitutes an illegitimate restraint of trade

2. Drafting confidentiality clauses
A. In general

- Validity of the confidentiality obligation? Could validity be ensured by providing that

  e.g. "Party A acknowledges that the restrictions contained in this Agreement are reasonable and necessary to protect the legitimate proprietary interest in the Confidential Information of the disclosing party"

2. Drafting confidentiality clauses
A. In general

- What *elements* should be considered in drafting?
  - Scope of the confidentiality agreement (including definition of confidential information, exceptions and extension)
  - Nature of the obligation
  - Consequences (including relation to court orders)
  - Duration

2. Drafting confidentiality clauses
B. Scope of the obligation

- Scope of the confidentiality obligation?
- See question 2 case study : reaction to draft - "confidential information" defined as "*all documents and information concerning either Party or any of its Affiliates furnished to it or its advisors, consultants, contractors or agents by the other Party*"

2. Drafting confidentiality clauses
B. Scope of the obligation

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- Scope of the confidentiality obligation?

- When drafting scope, keep in mind that confidentiality agreement could cover various types of information:

  - Information in possession of one of the parties before entering the agreement (trade secrets, marketing strategies, etc.)
  - Information generated by the performance of the agreement (R&D results, etc.)
  - Information related to the agreement as such (existence, duration, identity of parties, etc.)

2. Drafting confidentiality clauses
B. Scope of the obligation

- Several options to define properly what information is covered by the obligation
- None of these options are perfect, it remains very difficult to offer precise contract language on what ought to be confidential
- Examine advantages / downsides of each option

2. Drafting confidentiality clauses
B. Scope of the obligation

- 1st option : broad blanket coverage :
  - *"All information delivered by [Party A] under this Agreement is of a strictly confidential nature and should be treated as such..."*
  - *"Confidential information means all documents and information concerning either Party or any of its Affiliates furnished to it or its advisors, consultants, contractors or agents by the other Party (including prior to the Effective Date)"*

2. Drafting confidentiality clauses
B. Scope of the obligation

- Blanket coverage :
  - Risk of 'watering down' the obligation? Object of the obligation is so large/vague that validity could be questioned or at least that its enforceability is less intense?
  - Evidence problems related to information provided orally?

2. Drafting confidentiality clauses
B. Scope of the obligation

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- At least, agreement should limit obligation to information "*in connection with this Agreement*" (if not, birthday date of CEO's son, communicated informally during negotiations, falls under obligation...)
- But even this test may not prove entirely secure; when is information wholly unrelated to the contract?

2. Drafting confidentiality clauses
B. Scope of the obligation

- 2nd option : drafting with more limited coverage, starting from the bottom and listing precise issues which fall under confidentiality duty (not a 'top down' approach, under which all information is deemed to be confidential)

2. Drafting confidentiality clauses
B. Scope of the obligation

- 2nd option : bottom up approach, listing issues which should remain confidential :
  - The existence of the Agreement
  - The terms and conditions of the Agreement
  - The *proprietary* information communicated by one party to the other. Definition of proprietary information...

2. Drafting confidentiality clauses
B. Scope of the obligation

- Definition of proprietary information

" *'Proprietary Information' of a Party means information rightfully in the possession of such Party, which information derives economic value from not being generally known to and not being readily ascertainable by proper means by another person who can obtain economic value from its disclosure and use, and which is the subject of reasonable endeavours to maintain its secrecy*"

2. Drafting confidentiality clauses
B. Scope of the obligation

- Proprietary information : definition is not perfect (test of 'economic' value' may prove difficult to apply)
- But this test is welcome attempt to narrow down scope of information protected (test is more narrow than “information in connection with this agreement” - is it less open to interpretation?)

2. Drafting confidentiality clauses
B. Scope of the obligation

- Other attempt to limit coverage and to define the subject matter of the obligation:
  - "... any information concerning the other party's plant including technique, processes, products, equipment or operations which may come within the knowledge of a party in the performance of or in connection with the Agreement..."

2. Drafting confidentiality clauses
B. Scope of the obligation

- Other attempt to limit coverage and to define the subject matter of the obligation:
  - "... any secret or confidential information whatsoever regarding the operation finances, business, products, processes, techniques, know how, suppliers, customers, dealings, transactions or other affairs of the Company or any of its subsidiaries..." [starting point of definition is awkward : information is confidential if it is 'secret' or 'confidential'...]

2. Drafting confidentiality clauses
B. Scope of the obligation

- 3rd option : other attempt to define the subject matter of the obligation : through use not of abstract definition, but one-by-one concrete approach
- *E.g.* : "... 'Confidential information' means all information, data, and material... which when disclosed are marked 'Confidential' or 'Proprietary' or, when disclosed orally, are clearly identified as 'Confidential' or 'Proprietary'"

2. Drafting confidentiality clauses
B. Scope of the obligation

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- Pros / con's concrete approach :
  - More legal certainty (no question about which information falls under obligation of non disclosure)
  - Risk : that with time passing by, staff involved in performance of the agreement lets something important pass...

2. Drafting confidentiality clauses
B. Scope of the obligation

- Other attempt : two-tiered test, mixing concrete and abstract approach:
  - "... Each of the Parties agree to keep confidential all information marked confidential and which, by its very nature, can reasonably be taken to be confidential, received from the other Party" [may lead to confusion?]

2. Drafting confidentiality clauses
B. Scope of the obligation

- If no definition of which information is confidential:
  - Courts / arbitrators
  - Criteria?
    - Is the information publicly available? Or in general difficult to obtain?
    - Will disclosure of the information result in a significant nuisance for the company? (*e.g.* list of top employees and their remuneration packages)

2. Drafting confidentiality clauses
C. Nature of the obligation

- Nature of the confidentiality obligation?
- Question 3 case study : impact of the current draft on internal organization of Rhuner : keep the information confidential or also refrain from using it?

2. Drafting confidentiality clauses
C. Nature of the obligation

- Drafting suggested by BestOrganics only includes 1st obligation (keep information confidential)
- Does it mean that no obligation to refrain from *using* information?
- Difficult issue - may Rhuner use the information without breaching non disclosure obligation?

2. Drafting confidentiality clauses
C. Nature of the obligation

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- Matter of contract interpretation
- If one adopts very literal reading of non disclosure obligation, could be taken to mean that no use may be made of information, even if only for internal purposes
- But such reading is difficult to reconcile with necessities of practice – how can Rhuner perform the agreement it cannot use the information?

2. Drafting confidentiality clauses
C. Nature of the obligation

- Drafting should therefore be adapted to include reference to *use* of information by Rhuner

- Confidentiality agreement adapted to include 2 obligations:
  - *1st obligation* : refrain from *disclosing* certain information (or : keep information confidential)
  - *2nd obligation* : refrain from *using* information which was communicated by the other party

2. Drafting confidentiality clauses
C. Nature of the obligation

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- 2 obligations may be drafted either in a *positive* or *negative* fashion (*e.g.* you may only use information for particular purpose / you may not use the information for other purpose than...)

- Impact of positive/negative drafting on post-contract survival

2. Drafting confidentiality clauses
C. Nature of the obligation

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- Question then becomes : how should prohibition of use be drafted to allow Rhuner to use information in so far as necessary for performance of the agreement?
- See question 4

2. Drafting confidentiality clauses
C. Nature of the obligation

- Obligation to refrain from using the information may be qualified by reference to purpose for which use is prohibited/allowed
- See Question 4 case study : "shall not use it improperly for its own purposes..." : what type of uses are restricted / prohibited?
- *E.g* test - a case of company acquisition : may potential buyer use information to evaluate the target company, in order to determine the price to be offered to the seller? May potential buyer also use information to build up internal knowledge system on market practices?

2. Drafting confidentiality clauses
C. Nature of the obligation

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- Other possible drafting to qualify tolerated use of confidential information:
  - no use "*for other purpose than for which it was communicated*" (question : how does one determine this purpose?)
  - information cannot be used "*other than in the context of or for the needs of the performance of the present Agreement*"

2. Drafting confidentiality clauses
C. Nature of the obligation

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- Other drafting issues in relation to nature of the obligation - what confidentiality obligation?
- Several options – *e.g.*
  - Absolute obligation : “the information shall be retained in the strictest confidence...”
  - Less strict standard : “X shall use its best efforts/diligence to keep in strict confidence all commercial and technical information...”
  - “The Proprietary Information received from Y shall be kept in strict confidence by X which must use the same degree of precaution and safeguards as it uses to protect its own Proprietary Information of similar importance ...”
  - “...X shall not be liable for inadvertent or accidental disclosure of information if such disclosure occurs despite the exercise of the same degree of care as it normally takes to preserve its own proprietary information...”

2. Drafting confidentiality clauses
C. Nature of the obligation

- Choice between different options depends on *i)* bargaining position of each party, *ii)* importance for parties involved of information protected

- Choice will have immediate impact on litigation (burden of proof, etc.)
- Confidentiality agreement is *secondary* obligation – think twice about using very strict standard for debtor

2. Drafting confidentiality clauses
C. Nature of the obligation

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- Other possible elements to be included in confidentiality obligation:
  - "X shall keep a record of the location of the Information..."
  - "...X shall keep all documents and any other material bearing or incorporating any of the Proprietary Information at its usual place of business..."

2. Drafting confidentiality clauses
D. Extension

- Extension of the confidentiality obligation?
- Question 5 case study : extension to Rhuner's employees through a NDA?

2. Drafting confidentiality clauses
D. Extension

- 1st step : who are the parties who will come into contact with information (and for which there is a potential problem of confidentiality)
  - *Employees / staff* : disclosure of information may be necessary for staff to perform its tasks properly
  - Disclosure may also be required to *other persons* involved in the performance of the agreement : suppliers, clients, sub-licensees, subcontractors, agents or distributors of the company or even public authorities (regulatory agencies)

2. Drafting confidentiality clauses
D. Extension

- 2nd step : is there a real problem of confidentiality if information disclosed to these parties?
- Not always, these parties may already be bound by confidentiality obligation
  - Employees : through statutory duty of confidentiality, or in their employment contract
  - Other third parties – *e.g.* attorneys

2. Drafting confidentiality clauses
D. Extension

- 3rd step : how to accommodate extension to other parties?
- 1) provide that Rhuner may disclose information (some or all) to employee / staff : "*the Company shall not disclose Confidential Information directly or indirectly to any third party, save to its staff or any other persons performing the obligations under this agreement*"

2. Drafting confidentiality clauses
D. Extension

- 2) provide that disclosure is *conditional* upon employee / staff / third parties signing up a confidentiality agreement
- Provide exceptions if third party is already bound by confidentiality (*e.g*. employees; attorneys, etc.)

2. Drafting confidentiality clauses
D. Extension

- Possible add-on : draft NDA approved in advance by beneficiary of confidentiality (annexed to main agreement)
- Other possible add-on : take into account that Rhuner may find it difficult to obtain signature of an NDA from 3rd parties...
- *Reasonable efforts* to obtain a signed confidentiality agreement from a third party? (*e.g.* regulatory agency refuses to sign a confidentiality agreement...)

2. Drafting confidentiality clauses
D. Extension

- Comprehensive drafting to accommodate extension to other parties:
- *e.g. "Information may only be made available to those of Company A's representatives who strictly need or will need said information in the context of the transaction, and subject to the condition that they are subject to a confidentiality obligation, which is at least equivalent to the obligation Company A has accepted under this Agreement, and provided Company A remains fully liable for any breach of confidentiality by its representatives"*

2. Drafting confidentiality clauses
E. Exceptions

- Exceptions to the confidentiality obligation?
- Question 6 case study : possibility for Rhuner to mention existence of the agreement to third parties?

2. Drafting confidentiality clauses
E. Exceptions

- Practical need to allow some exceptions to obligation of confidentiality (related to nature of obligation imposed) :
  - Possibility to mention the existence of agreement and / or name of other party as one of its customer in its presentations/ marketing material etc.
  - Possibility to share some information with third parties which are conducting surveys

2. Drafting confidentiality clauses
E. Exceptions

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- If not provided explicitly, such practices could run against confidentiality obligation (especially if obligation is framed in absolute terms)
- Drafting to allow Rhuner to mention existence of the agreement?

2. Drafting confidentiality clauses
E. Exceptions

- One possible draft to allow for such exception : “X may disclose existence of the agreement between parties, provided it has duly informed the other party prior to such disclosure and the other party has consented.”

2. Drafting confidentiality clauses
E. Exceptions

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- Possible addition: “Such consent shall not be unreasonably be withheld” - very often used
- Consequences of this add-on?
  - Exact meaning not perfectly clear
  - Net effect is that it puts burden on BestOrganics to explain why it has withheld its consent... So at least should help avoid that BestOrganics arbitrarily refuses its consent, simply to 'annoy' Rhuner

2. Drafting confidentiality clauses
E. Exceptions

- Another possible drafting : "*Upon notice of the other party, the party who has disclosed the information, shall immediately cease such disclosure*"
- This does not require consent to be obtained *prior* to disclosure, but give possibility to other party to oppose disclosure *post factum*

2. Drafting confidentiality clauses
E. Exceptions

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- Other exceptions to the confidentiality obligation?
- (1) Any information which one party can prove to have been in its possession at the date of the contract
  - Define the scope of exception (*e.g.* “Any information communicated in confidence under this Agreement by either party shall be treated by the other party as confidential unless... such information was in the Licensee's possession at the date of its receipt from the Licensor...”)

2. Drafting confidentiality clauses
E. Exceptions

- (1) Any information which one party can prove to have been in its possession at the date of the contract

  - How to demonstrate that information was already in its possession? (*e.g.* “said term shall not include information which was either in the possession of the Licensee at the date of receipt from Licensor as evidenced by Licensee's written records, or can be shown by the Licensee to have been, independently developed…”)

2. Drafting confidentiality clauses
E. Exceptions

- (2) Any information which has been disclosed to the *general public* or has become part of the *public domain* (otherwise than through a breach of confidentiality...)
- *E.g*. annual accounts or by-laws of companies, provided they must be made available through public register

2. Drafting confidentiality clauses
E. Exceptions

- (2) Public domain information:
  - If part of the public domain when contract concluded *or* becomes part of public domain later on;
  - How does one demonstrate that information is part of the public domain? ("... any information which is or becomes generally available to the public in printed publications of general circulation...");
  - *Caveat* to the exception : "...except to the extent such data and information are in or hereafter come within the public domain without fault on the part of the Seller..."

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- Consequences of the confidentiality obligation?
- Question 7 case study – what to make of the suggestion by BestOrganics that compensation is in order in case of violation?

2. Drafting confidentiality clauses
F. Consequences of confidentiality

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- Good way to approach this : examine what would happen if contract remained silent on consequences of breach
- If contract is silent : general contractual liability for breach of contract
  - Obligation to demonstrate breach *and* damage suffered
  - Evaluation of damage could prove particularly difficult - not uncommon for court to grant a *lump sum*

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- *e.g.* publishing house about to publish memoirs of famous politician, approaches various newsmagazines and offers to disclose one chapter for prepublication. Magazines put in bid and sign confidentiality agreement. One magazine whose bid is not selected, publishes a piece directly inspired by the information which was disclosed. What is the damage?

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- Difficulty is most serious for evaluation of damage:
  - *Loss of earning* – how to quantify? Can compensation be linked to benefit received by the other party (debtor in breach)?
  - *Damage to reputation?*

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- How can contract help?
- At least drafting should make it clear what consequences attach to violation of confidentiality :
  - *Compensation*
  - *Other remedy (such as : termination)*

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- If a choice is made for compensation, adequate drafting can pre-empt difficulties – *e.g.* :
  - Stricter liability regime : no evidence required of *intent* to breach or to damage
  - Liquidated damages : including a *penalty clause* - advantages?
    - Acting as deterrent
    - Avoiding any discussion on amount of damage

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- How to draft penalty clause?
  - Impose an amount – but which one? Risk of being arbitrary (in some jurisdictions : court could have possibility to reduce the amount or disregard penalty clause)

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- How to draft penalty clause?
  - Include a minimum amount? "*The Company shall compensate [...] for any damage resulting from the violation of any of the obligations of confidentiality under this contract. In view of the nature of the information disclosed, said compensation may, under no circumstances, be less than 10.000 EUR* »

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- Other possible remedies?
  - Link breach of confidentiality to possibility to *terminate* the agreement without compensation? Exit at no cost for aggrieved party... Question 8 case study
  - If information is extremely confidential, require other party to provide a *bank guarantee* linked to compliance with confidentiality duty? [exceptional]

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- Other possible remedies? What to make of this:

  e.g. Party A acknowledges that "*remedies at law will be inadequate and any violation of these restrictions will cause irreparable damage to the disclosing Party not compensable in monetary damages*" [provision is purely descriptive, not prescriptive – no place in a contract]

  e.g. Party A acknowledges that "*the disclosing party will be entitled to injunctive relief against each violation*"

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- Other possible remedies? What to make of this:

  e.g. Party A acknowledges that "*the receiving party will use all efforts required to prevent any disclosure or misuse of any Confidential Information provided to the receiving party and shall fully cooperate and assist the disclosing party in protecting the Confidential Information, including but no limited to commencing legal proceedings if necessary »*

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- In practice : few confidentiality agreements will provide specific sanctions. Is the confidentiality merely a 'paper tiger'?
- Is this a sign that practitioners realize that confidentiality agreements are difficult to sanction? Prof. Fontaine : *"this gap possibly also reveals that practitioners are sceptical about the possibility of ensuring the respect of a confidentiality undertaking"*

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- What if conflict with court proceedings? <u>Question 9 case study</u>
  - One situation : court injunction to reveal / disclose information (*e.g.* proceedings before regulatory authority) – contractual liability?
  - Other situation : a party wants to disclose information in court proceedings to defend its case - liability?

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- Consequences of the confidentiality obligation : what if conflict with court proceedings?
  - Court injunction : most likely that no liability – disclosure may be justified under contract law (*e.g*. doctrine of '*fait du prince*' or 'supervening event') – no need for contract to anticipate on this situation
  - Voluntary disclosure : liability may be in order – but other party must prove damage

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- Contract may help to deal with situation where conflict between confidentiality obligation and *e.g*. court order
- Contract may include:
  - Duty for party subject to court order to *inform* other party
  - Duty to *work together* with other party
  - Duty to *minimize* impact of court order

2. Drafting confidentiality clauses
F. Consequences of confidentiality

- *E.g*. contractual arrangement : the party under court injunction "*shall immediately notify the other Party of the requirement and the terms thereof prior to the submission and shall cooperate to the maximum extent practicable to minimize the disclosure of the information. The Party disclosing such information shall use its reasonable efforts, at the cost of the other Party, to obtain confidential treatment of such information by the third party to whom the information is disclosed, and will, to the extent such remedies are available, seek protective orders limiting dissemination and use of the information*"

2. Drafting confidentiality clauses
G. Duration of obligation

- Duration of the confidentiality obligation?
- Question 10 case study

2. Drafting confidentiality clauses
G. Duration of obligation

- Distinction according to the type of information?
  - Purely business information may rapidly become obsolete
  - Technical / technology information may have a longer lifespan
- Distinction may *not be workable* in practice
- If a time limit is provided, specify when it starts to run (at disclosure of information? Or when agreement entered into force?)

2. Drafting confidentiality clauses
G. Duration of obligation

- Do not forget to indicate that this obligation will *survive* the agreement
  - *"The present provision shall apply not only during the Term of the Agreement but also after its termination, whatever the reason for termination, as well after any transfer of this Agreement"*
  - *"The obligations of Parties set forth in paragraph (a) above shall survive the termination of this Agreement"*

2. Drafting confidentiality clauses
G. Duration of obligation

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- Post-contract obligation : what is the *regime*?
  - Dispute resolution? Also survives the termination (even if not expressly provided)
  - Applicable law? Likewise survives the agreement, even if not provided
  - *Caveat* : could be useful to limit the survival post-termination to a certain period (5 – 10 years) – undertakings in perpetuity may be prohibited

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Joint Venture Agreements – selected questions

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Outline

- A Primer on Joint Venture Agreements
- Selected drafting issues
  - Contractual arrangements and the negociation process
  -

1. A Primer on Joint Venture Agreements

- *One* form of doing business abroad - next to :
  - Direct sale of products or supply of services abroad
  - Take over of a foreign company
  - Establishment of a foreign subsidiary
  - Distribution agreements
  - …

1. A Primer on JV Agreements

- JV as a *horizontal* form of business integration:
  - Favoured method whenever business needs to team up resources (*e.g*. technical skills *v*. local market knowledge) – very common in major infrastructure projects (*e.g.* transport – bridges, tunnels -, energy – power plant -, telecom – mobile network -, and real estate – office parks, entertainment complex, etc.)
  - In other circumstances, entering into a JV is a *compulsory business* decision (*e.g*. if local legislation resists direct foreign investment through establishment of direct foreign subsidiary – less and less common with accession to WTO)

1. A Primer on JV Agreements

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- Case study *Zhuhai – Sky Telecom* : JV in order to submit bid for a mobile telecom licence in a country opening new network licence

- JV formed by:

  - Active venturers contributing expertise, know how and management
    - Project development company (identifies opportunity and manages bid)
    - Major telecom operators (provide experience required to obtain licence)
    - Local business partner (provides access to local retail for distribution of service)
  - Passive investors contributing financing

1. A Primer on JV Agreements

- 1st step : JV agreement (JVA) is negotiated
- 2nd step : Parties prepare the bid and submit it – this is already covered by JVA (allocation of efforts and costs for bid)
- 3rd step : If the bid is obtained, parties will activate other provisions of the JVA and incorporate a separate company in order to launch business

1. A Primer on JV Agreements

- Drafting exercise based on model JVA prepared by the Int'l Trade Center (joint agency of the WTO and UNCTAD) used as basis (see *www.jurisint.org/doc/orig/con/en/2005/2005jiconen1/2005jiconen1.pdf)*

2. Drafting JV Agreements
A. Not an overnight negotiation...

- As in many large contracts, process of discussions and negotiations of a JVA could extend over several weeks or months

- When businesses engage in protracted negotiations, two issues:

  _ 1st : need to have some kind of document at the outset of discussions, to provide legal framework?

  _ 2nd : any risk with the fact that negotiations lead to drafting various versions of JVA, which are exchanged and discussed, and are more and more final?

2. Drafting JV Agreements
A. Not an overnight negotiation...
I. Negotiation contracts

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- 1st issue : need to give discussions a legal framework ?
- What is position of parties if they engage in negotiations?
  - Exclusivity?
  - Confidentiality?
  - Duty to act in good faith?
  - Allocation of costs?

2. Drafting JV Agreements
A. Not an overnight negotiation...
I. Negotiation contracts

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- In order to avoid uncertainty on legal position during negotiations, parties may sign/exchange a 1st written document at the outset of negotiations – names may vary ('letter of intent', 'term sheet', 'heads of agreement' or 'memorandum of understanding', etc.)

- 1st goal : provide clear answers as to legal position of parties

- Other goals :

  _ Have a 'place to start' (agenda for negotiations - focus for discussion)

  _ Commit parties to negotiations – but risk of 'moral' commitment to provisions (it may be difficult to change key terms once agreed in the memorandum which could adversely affect a party's bargaining power at a later stage).

  _ May be useful to obtain financing, gov't approval, etc.

2. Drafting JV Agreements
A. Not an overnight negotiation...
I. Negotiation contracts

- 1st document may be no more than an email recapping 1st discussions between parties – but may go much further and include various points aimed at giving legal guidance on how negotiations should proceed
- In the 1st case, (probably) no need to be too concerned about legal impact

2. Drafting JV Agreements
A. Not an overnight negotiation...
I. Negotiation contracts

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- If 1st document is intended as real legal foundation of negotiations, issues to be included:
  - 1) Recall main points of agreement businesswise (or spell out issues to be discussed)
  - 2) Exclusivity (or not)
  - 3) Allocation of costs (auditors, etc.)
  - 4) Confidentiality (scope?)
  - 5) Dispute resolution and applicable law
  - 6) No commitment to contract – to preserve freedom to exit negotiations

2. Drafting JV Agreements
A. Not an overnight negotiation...
I. Negotiation contracts

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- If real 'negotiation contract' : binding nature cannot be challenged

2. Drafting JV Agreements
A. Not an overnight negotiation...
II. Binding nature of drafts

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- 2nd issue : what if discussions lead to various drafts

  _ The 1st one summarizing goals and objectives of parties together with first list of issues on which agreement exists, with no intention to already bind parties

  _ But the next ones more complete than preceding and gradually leading to what looks like a 'final' contract

- How to ensure that such 'documents' remain just that and are not seen as contract?

2. Drafting JV Agreements
A. Not an overnight negotiation...
II. Binding nature of drafts

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- *E.g.* US statute of frauds : a writing may be considered to be a contract even if not fully comprehensive, if signed "by the party to be charged" and violation of that document may be considered breach of contract...

- UCC §2-201 (comment): "The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing affords a basis for believing that the offered oral evidence rests on a real transaction..."

2. Drafting JV Agreements
A. Not an overnight negotiation...
II. Binding nature of drafts

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- What drafting may be added to avoid this peril?
- *"This document is designed to serve purely as a basis for future negotiations and cannot be deemed in any way to be a contract or constitute an offer for a contract. Nothing contained herein shall be binding on either party until an agreement has been finally executed or result in liability on any other basis"*

2. Drafting JV Agreements
A. Not an overnight negotiation...
II. Binding nature of drafts

- Other drafting : adding a condition subsequent:
- "*The purpose of this letter of intent is to confirm the parties' discussions to date regarding the transaction noted above. The transaction above will require approval of the boards of directors of [X] and [Y] and all necessary government approval.*"

2. Drafting JV Agreements
A. Not an overnight negotiation...
II. Binding nature of drafts

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- Difficulty : at late stage of negotiation, if written draft almost complete and only remaining obstacle is approval by boards of directors of one of the parties
- If no approval by that party : could it not be said that contract was entirely negotiated and that requirement of approval by board is purely discretionary and hence void? (*e.g*. under French law : '*condition purement potestative*')

2. Drafting JV Agreements
A. Not an overnight negotiation...
II. Binding nature of drafts

- What value will successive drafts have in dispute? Could court / arbitral tribunal compare the various versions of the JVA to determine precise meaning of a provision?

2. Drafting JV Agreements
A. Not an overnight negotiation...
II. Binding nature of drafts

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- Answer : depends on interpretation method of court / tribunal
- Is court / tribunal bound by the wording of the JVA or may it look at the intention of parties?

2. Drafting JV Agreements
A. Not an overnight negotiation...
II. Binding nature of drafts

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- If parties wish to exclude the possibility to rely on history of negotiations
- [Language] XXX

2. Drafting JV Agreements
A. Not an overnight negotiation...
II. Binding nature of drafts

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- Not to be confused with [no oral modification] / [four corners clause]
- See *e.g.* article 28 Model JVA : "This Agreement may be varied or modified only by a written amendment signed by each of the Parties"
- Goal : avoid that the 'life' of the contract trumps written agreement

2. Drafting JV Agreements
B. JVAgreement and JVCompany

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- Zhuhai – Sky JVAgreement contemplates the setting up of a separate company ('JVCo')
- Art. 3 – 12 Model JVA : provisions on incorporation, funding and governance of JVCo

2. Drafting JV Agreements
B. JVAgreement and JVCompany

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- Joint Venture does not always lead to JVCo – choice between :
  - Unincorporated JV
  - JVA with JVCo

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B. JVAgreement and JVCompany

- Choice between the incorporated and unincorporated JV:
  - mainly driven by *tax reasons* (how will profits made by the JV be taxed?)
  - If JV business is of any scale, need for a separate corporate body (*e.g.* telecom licence – separate company required by regulator)

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B. JVAgreement and JVCompany

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- Whether JVA remains unincorporated *or* leads to setting up of a JVCo, joint venture always remains based on a *contract* [JVA] - name may vary (*e.g.* 'cooperation agreement', 'consortium', 'strategic alliance', etc.)

2. Drafting JV Agreements
B. JVAgreement and JVCompany

- If joint venturers contemplate formation a *separate corporation* to conduct the business of the JV - dual source to guide parties :
  - JV agreement (JVA): joint venture agreement – governs relationship between JV parties
  - JVCo : separate company - applicable statutory rules relating to corporation (+ by laws)

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B. JVAgreement and JVCompany

- If JV remains merely contractual, which rules govern relationship between parties?
  - contractual arrangements (creating a 'partnership' between parties, but not in the meaning of corporate law, for the purpose of performing some kind of business operation)
  - no body of law that governs the operation of a contractual joint venture other than contract law itself - default rules of States :
    - Usually no specific provisions on JV's
    - At most regulatory framework – but more concerned with tax/investment control than purely contractual questions (*e.g*. in some countries, specific legislation on JV's providing regulatory framework for foreign direct investment – control over foreign investment, with *e.g*. requirement that local partner have majority stake (*e.g*. China in 1979)

2. Drafting JV Agreements
B. JVAgreement and JVCompany

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- Unlike a company, every aspect of the operation of an unincorporated joint venture must be defined in JVA
- Therefore usually inappropriate for an ongoing business and/or where goal is to establish a full function joint venture - *i.e.* one which performs all the functions of an autonomous economic entity

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B. JVAgreement and JVCompany

- How to ensure that JVA is sufficiently precise if no JVCo?
- Provide contractual provisions on key points (which would be taken care of in by laws if JVCo)

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B. JVAgreement and JVCompany

- Key elements?
- 1°) governance of the JV
- *e.g*. governance procedure of the JV - role, management responsibilities, division of authority, which decisions require unanimity, and degree of participation of each joint venturer

2. Drafting JV Agreements
B. JVAgreement and JVCompany

- Key elements?
- 2°) funding and contributions of partners of the JV
- *e.g*. contribution of capital and other resources by each party, additional funding, guarantee of debts by joint venturers, method and percentage of profit and loss sharing, etc.

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B. JVAgreement and JVCompany

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- Key elements?
- 3°) dispute resolution : jv's are inherently unstable – need for internal mechanism to avoid management impasses and other deadlock (see later)

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2. Drafting JV Agreements
B. JVAgreement and JVCompany

- Key elements?
- 4°) termination : how long will JV last, when may it be terminated, whether upon termination of the JV, parties may carry on business in the same products, services and market as the business previously carried on by the Joint Venture, what will happen with IPrights developed by JV (any right of use, if yes exclusive or not, free of charge or not by the parties, etc.)

2. Drafting JV Agreements
B. JVAgreement and JVCompany

- If JVA supplemented by JVCo : need to keep in mind the two layers of rules applicable to the operation of the JV
- *E.g.* termination – if JV terminated :
  - JVA must be terminated
  - What about JVCo?

2. Drafting JV Agreements
B. JVAgreement and JVCompany

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- Dual termination provision – see art. 21 Model JVA ("End of the Joint Venture")
  - Art. 21.1 : general provision about termination of the JV (events leading to termination)
  - Art. 21.2 : "Upon termination of the Joint Venture under Article 21.1, the Parties shall take all steps necessary to dissolve the Joint Venture Company and to distribute or sell its assets."

2. Drafting JV Agreements
B. JVAgreement and JVCompany

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- Art. 21.2 : lists steps to be taken for the winding up of the JVCo :

  _ (a) Terminating all legal relationships of the Joint Venture Company with third parties;

  _ (b) Selling the assets of the Joint Venture Company at the best possible price; a Party having a justified interest in the return of a Contribution it has made in a form other than cash shall have a right of first refusal to re-acquire this Contribution at market value;

  _ (c) Settling the debts of the Joint Venture Company;

  _ (d) Where applicable, refunding any loans made by the Parties;

  _ (e) At the end of the liquidation, distributing any remaining cash surplus to the Parties according to their Shares.

2. Drafting JV Agreements
C. JV as a long term relationship

- JV relationship may be compared to a marriage : for good and bad times...
- In bad times (economic downturn, difference of view among partners on strategy of jv, etc.) : need for contractual mechanism to avoid deadlock
- Especially relevant if only 2 JV partners (or 2 main partners)

2. Drafting JV Agreements
C. JV as a long term relationship

- If JV leads to incorporation of separate entity (most frequent case) : corporate rules applicable to separate entity will already provide some solution to deadlocks
- *E.g.* statutory share transfer mechanisms (compulsory buy out of minority partner) etc. - no need for specific drafting

2. Drafting JV Agreements
C. JV as a long term relationship

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- These mechanisms could, however, prove insufficient – *e.g*. because there is no 'minority' partner or because statutory scheme is seen as too cumbersome
- Further, part of the relationship between parties is also contractual (and hence may not be covered by statutory mechanisms)
- Hence JVA can also provide *contractual* mechanisms in case of deadlock

2. Drafting JV Agreements
C. JV as a long term relationship

- What are the *contractual* mechanisms in case of deadlock?
- Distinction between various instruments of 'self-regulation':
  - Attempting to prevent divorce
  - Leading to 'divorce'

2. Drafting JV Agreements
C. JV as a long term relationship

- 1st : Contractual mechanisms attempting to *prevent divorce*:
  - Best efforts to resolve all disputes by mutual agreement
  - Dispute resolution board (composed of senior executives of the partners)
  - Mediation

2. Drafting JV Agreements
C. JV as a long term relationship

- 'Scale' of mechanisms is typical of long term projects (see model contracts FIDIC)
- Idea : isolate a limited difficulty and try to find a solution before it escalates to something bigger; in the meantime, contract can be performed 'as usual'

2. Drafting JV Agreements
C. JV as a long term relationship

- 'Scale' of mechanisms – see art. 31 Model JVA – 4 different steps considered to prevent break-up:
  - Amicable discussions
  - Dispute resolution board
  - Mediation
  - Expert determination (isolate a dispute and ask a 3rd party to resolve it while contract continues to be performed)

2. Drafting JV Agreements
C. JV as a long term relationship

- Amicable discussions : Art. 31.1 If a dispute (including a Deadlock) arises between the Parties or some of them in relation to this Agreement or any Ancillary Agreement or in the course of the activities of the Joint Venture, all Parties shall seek to resolve it amicably

2. Drafting JV Agreements
C. JV as a long term relationship

- Dispute resolution board : Art. 31.2 - In the course of their attempts at amicable settlement of any dispute seriously affecting the Joint Venture, any Party may request (in writing to the other Parties) that the dispute be brought before the most senior decision-making persons in their respective organizations. If such a request is made, the decision-makers in the organizations concerned shall meet at least once to consider the dispute and possible ways to resolve it.

2. Drafting JV Agreements
C. JV as a long term relationship

- Mediation : Art. 31.3 - If the dispute has not been resolved within one month after the request under Article 31.2, any Party may request that it be brought to mediation or any other form of alternative dispute resolution (ADR). The other Parties shall give constructive consideration to such request but, with the exception of the meeting of senior decision-makers pursuant to Article 31.2 above, no Party shall be obliged to engage in ADR procedures unless (and then only for so long as) it agrees to it.

2. Drafting JV Agreements
C. JV as a long term relationship

- Expert determination : Art. 31.7 – If any such dispute relates to a question of valuation not otherwise determined under this Agreement, any Party may request the appointment of an Independent Expert according to proceedings to be agreed by the Parties. If the Parties fail to agree on the appointment of the Independent Expert and on the applicable rules, the Rules for Expertise of the International Chamber of Commerce's International Centre for Expertise shall apply. The Independent Expert's valuation shall be final and binding on the Parties

2. Drafting JV Agreements
C. JV as a long term relationship

- 2nd : Contractual mechanisms leading to divorces:
- 1st : classic mechanisms such as arbitration and other dispute resolution methods (see *e.g*. art. 31.5 Model JVA : choice for arbitration)
- In JVA, also typical to find other mechanisms to deal with break up – such as:
  - Transfer of shares (1st refusal or pre-emption clause; put and call options) – see art. 15 Model JVA; need for a price determination mechanism – see art. 15-6 Model JVA
  - Divestiture or dissolution of the JV

2. Drafting JV Agreements
C. JV as a long term relationship

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- Transfer of shares : main elements?

- 1st : right conferred to all parties to approve transfer by another party (see Art. 15.1 Model JVA)
  - Scope : transfer and / or pledge?
  - Scope : also for transfer to affiliates (intra-group transfer)?
  - Approval : discretionary power granted to other parties or need to justify
  - Prohibition of transfer in first period of life of JV?

2. Drafting JV Agreements
C. JV as a long term relationship

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- Transfer of shares : main elements?

- 2nd : right of first refusal conferred to all parties (see Art. 15.4 Model JVA)
  - Time frame : how long to exercise right of first refusal ?
  - How should option be lifted ?
  - How should purchase price be determined?

2. Drafting JV Agreements
C. JV as a long term relationship

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- Transfer of shares : main elements?

- 3rd : price determination mechanism (see Art. 15.6 Model JVA) – usually a scale of methods:
  - Determination by consent
  - If no consensus, determination by expert (final and binding determination)
  - Elements the expert should rely on when determining the price (market value, market value as a whole or in part, premium or discount depending on size of the holding to be sold, etc.)

2. Drafting JV Agreements
D. JVA and satellite agreements

- JVA is not alone : in most instances, JVA agreement will be one of many agreements concluded between parties
- *E.g*. JV formed in order to submit bid for mobile telecom licence – what are the 'satellite' agreements?

2. Drafting JV Agreements
D. JVA and satellite agreements

- What agreements will parties enter into ?
  - JVA
  - Shareholders agreement for JVCo
  - Management agreement (telecom operator providing start up management services and ongoing to the JVCo, possibly extending to ongoing management services for first years – management fee)
  - Secondment agreements : telecom operators and other JV parties may second employees to JVCo at least for first years

2. Drafting JV Agreements
D. JVA and satellite agreements

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- Other agreements parties may conclude:
  - Transfer or licensing agreement for IP owned by telecom operator (*e.g*. cobranding between JVCo and telecom operator or transfer of know how on network design) – see art. 14.1 JVA : "The contribution by each Party of intangible assets and/or intellectual property rights relating to technical developments, patents, software or know-how to the Joint Venture Company shall be made in accordance with: (a) The relevant Ancillary Agreement (attached as Appendix …… [specify]) between that Party and the Joint Venture Company;"
  - Agreement with local business for (exclusive or not) distribution of telecom services (and possibly handsets)

2. Drafting JV Agreements
D. JVA and satellite agreements

- Other related agreements:
  - Assignments
  - Employment agreements
  - Real estate purchase or lease agreements
  - Finance documents (additional funding from JV parties – subordinated debts – or from banks – guarantee mechanisms from JV parties)
  - Supply agreements

2. Drafting JV Agreements
D. JVA and satellite agreements

- Question : how to ensure coherence between JVA and 'satellite' agreements – need to avoid gaps and discrepancies in legal regime
- 1st solution : JVA may include comprehensive drafting on issues to be addressed in satellite agreements

2. Drafting JV Agreements
D. JVA and satellite agreements

- This may be done in text of JVA
- *e.g.* shareholders agreement : JVA will already include provisions on joint appointment of directors, 1st option to buy out, etc.; idem for articles of incorporation of corporate entity

2. Drafting JV Agreements
D. JVA and satellite agreements

- In practice, JVA will frequently include draft satellite agreements as annexes or appendixes (*e.g.* Model JVA : Ancillary Agreement on intangible assets/intellectual property rights, etc.) - JVA as 'Russian dolls'

2. Drafting JV Agreements
D. JVA and satellite agreements

- If not possible (*e.g.* because lack of time) to already anticipate on satellite agreements when drafting JVA : extra care when drafting satellite agreements
- This applies in particular to some contract provisions which should be focus points when drafting a 'hub' of contracts:
  - Dispute resolution
  - Termination provisions

2. Drafting JV Agreements
D. JVA and satellite agreements

- One method : '*reference provision*' in satellite agreement, which incorporates in that agreement some key provisions of JVA

2. Drafting JV Agreements
D. JVA and satellite agreements

- *e.g.* : "This Agreement shall be treated as supplemental to the Joint Venture Agreement including, **in particular**, Article 4 (Contributions to the Joint Venture Company upon its establishment), Article 14 (Intangible assets and intellectual property rights) and Article 21 (End of the Joint Venture). The provisions of Article 24 (Hardship and review), Article 25 (Relief from performance and liability in case of Force Majeure), Article 30 (Applicable law) and 31 (Resolution of disputes) in the Joint Venture Agreement shall apply ***mutatis mutandis*** to this Agreement"

2. Drafting JV Agreements
D. JVA and satellite agreements

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- Another method : adapted drafting for key provisions of satellite agreement
- *1st example* : termination provisions – 2 issues:
  - Should there be a link between termination of JVA and satellite agreements (in two directions)?
  - How to deal with consequences of termination?

2. Drafting JV Agreements
D. JVA and satellite agreements

- Termination provisions – link
  - May a party terminate a satellite agreement in the absence of termination of JVA (may be useful in some circumstances)?
  - When should there be an automatic link between termination of JVA and termination of 'satellite' agreements - depends on reason for termination of JVA (*e.g*. if JVA is terminated because business is sold to 3rd party, there may be a need for some of the satellite agreements to continue)

2. Drafting JV Agreements
D. JVA and satellite agreements

- Termination provisions – consequences
- Provision for coordinated consequences of termination – *e.g.* length of notice period, restitution, post-contract survival of various obligations, etc.

2. Drafting JV Agreements
D. JVA and satellite agreements

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- *2nd example* : dispute resolution
- Goal : have consistent decisions and avoid parallel proceedings
- Best solution : streamline all dispute resolution clauses and provide for same 'forum'
- One method : establish a 'stand-alone dispute resolution protocol', incorporated by reference in all related contracts
- Not always possible because satellite agreement may be concluded with other parties (not all parties to JVA or even party foreign to JVA)

2. Drafting JV Agreements
D. JVA and satellite agreements

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- Other method : include identical dispute resolution clause in all agreements
- Alternative : if several agreements between the same parties : insert one single provision in 'main' agreement which also covers disputes arising out of other agreements, and remain silent on disputes in other agreements

2. Drafting JV Agreements
D. JVA and satellite agreements

- *Eg* : *"The Court of Roma, Italy, are to have jurisdiction to settle any dispute which may arise out of or in connection with the present Agreement and also with the Agency Agreement and the Management Agreement"*

2. Drafting JV Agreements
D. JVA and satellite agreements

- If not possible to streamline all dispute resolution clauses, how can we ensure *consolidation* of disputes?
- If state courts : see applicable rules of procedure (may not always be possible)
- If arbitration : can consolidation be guaranteed by contracts?

2. Drafting JV Agreements
D. JVA and satellite agreements

- In order for consolidation of arbitration proceedings to be possible, at least:
  - Arbitration clauses in various agreements should be identical or complementary
  - Contract should also make clear that a tribunal appointed under one contract has jurisdiction to consider and decide issues related to the other related contracts – *e.g*. "The parties agree that an arbitral tribunal appointed hereunder or under [the related agreement(s)] may exercise jurisdiction with respect to both this agreement and [the related agreement(s)]"
  - In addition, provide consent to consolidation (as this is often a requirement for consolidation)

2. Drafting JV Agreements
D. JVA and satellite agreements

- *e.g.* : "The parties consent to the consolidation of arbitrations commenced hereunder and/or under [the related agreements] as follows. If two or more arbitrations are commenced hereunder and/or [the related agreements], any party named as claimant or respondent in any of these arbitrations may petition any arbitral tribunal appointed in these arbitrations for an order that the several arbitrations be consolidated in a single arbitration before that arbitral tribunal (a "Consolidation Order"). In deciding whether to make such a Consolidation Order, that arbitral tribunal shall consider whether the several arbitrations raise common issues of law or facts and whether to consolidate the several arbitrations would serve the interests of justice and efficiency" (Draft IBA Guidelines on for Drafting Intl Arbitration Clauses)

2. Drafting JV Agreements
D. JVA and satellite agreements

- If contract provides for consolidation, also address issue of appointment of arbitrators:

- *e.g.* : "If before a Consolidation Order is made by an arbitral tribunal with respect to another arbitration, arbitrators have already been appointed in that other arbitration, their appointment terminates upon the making of such Consolidation Order and they are deemed to be functus officio. Such termination is without prejudice to: (I) the validity of any acts done or orders made by them prior to the termination, (ii) their entitlement to be paid their proper fees and disbursements, and (iii) the date when any claim or defense was raised for the purpose of applying any limitation bar or any like rule or provision".