Chapter 1 Escaping the Trap of the Familiar in International Contract Negotiations

Learning Objectives:
- Enhance the reader's ability to anticipate legal and business risks and minimize potential pitfalls
- Assist the reader to make commercially sensible decisions to avoid being caught up by the 'all-too-familiar' approach

1.1 Every International Commercial Negotiator's Starting Point: Getting Comfortable with Unfamiliar Concepts

Most lawyers receive their legal education and subsequent training and experience with only one legal system, and they grow increasingly accustomed to advising clients on optimal solutions that they have learned. At some point, the day arrives when they must advise their client on an international commercial contract. How hidebound will they remain to their training in their own national system when other legal principles could be introduced, potentially equal to or in some cases worse, and in others superior to, those with which they are most familiar?

Consider a lawyer in New York who represents a New York seller of goods to a Singaporean buyer with all of its revenues and assets in Singapore and who is in turn represented by a Singaporean lawyer. The New York seller has told their lawyer that their greatest concern is the ability to enforce their right to payment since the Singaporean seller is unwilling to agree to advance payments. Further, the Singaporean company has no assets in New York or anywhere else in the United States and is unable or unwilling to provide any security for the contract's payment obligations, for example, through a bank letter of credit. Thus, if the buyer defaults, the only way for the seller to be paid will be through a legal action.

This New York lawyer has experience only with contract negotiations and litigation in the United States. She is considering different options for choice of law and

dispute resolution in this negotiation. Which of the options below do you think she is most likely to insist upon? And which do you think will most likely protect her client's entitlement to payment?

a. Silence on the questions of governing law or dispute resolution.
b. The contract would be governed by New York law, with any disputes to be resolved by litigation in the courts of New York.
c. The contract would be governed by English law and disputes to be settled by international arbitration, with London as the seat.
d. The contract would be governed by Singaporean law, with any litigation in the courts of Singapore, the buyer's country.

You probably guessed she will insist on (b), because that is what she is most familiar with. In fact, the available data suggests you would be correct; 'familiar' is the most common choice among lawyers.[2]

But the second question is whether this is the best option.

Most lawyers will likely reject option (a), and for good reason. For an international commercial contract, silence on choice of law and dispute resolution injects a good deal of uncertainty. It will rarely be the preferred option of a competent or experienced lawyer.

Option (b), however, does not appear to be optimal for the seller. The New York lawyer may feel she can confidently endorse her home state's law and courts as a means to provide a fair dispute resolution process. But a fair process will be meaningless to her client if the result does not lead to a payment. With no payment security and a buyer that has no assets in the United States, our New York lawyer risks recommending to her client to accept contract terms that will lead to victory in name only, since a US court judgment may have limited or little authority in the countries where the buyer has assets.

While a multi-lateral treaty to recognize and enforce the foreign court judgments of certain countries is in the early stages of adoption and its success remains to be seen,[3] for now parties seeking cross-border enforcement have only one of two avenues to pursue:

– Identify whether a *bilateral* treaty exists between both countries for enforcing each other's court judgments and seek to enforce the judgment of the foreign country under the terms of the treaty. Even when such a bilateral treaty exists,

2 G. Moser, *supra* note 1, pp. 33-92.

3 The Hague Conference of Private International Law concluded the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters on 2 July 2019 (*the Judgments Convention)*. The Judgments Convention provides for the mutual enforcement of court judgments not limited to exclusive jurisdiction clauses, the full text of which is available here: www.hcch.net/en/projects/legislative-projects/judgments. On the date of publication, there were no published instances of the courts of any country having relied upon the Judgments Convention to order the enforcement of a foreign court's judgment.

however, the enforcing courts may be reluctant to enforce a 'judgment' rendered by a foreign court of first instance if an appeal has been lodged and remains pending.[4]

– In the absence of a treaty, the judgment creditor must initiate enforcement proceedings in the country of the judgment debtor's assets under court principles of comity, i.e. the mechanisms by which a court will ensure itself that adequate due process has been applied to the rendering of the judgment. Of course, the court will not apply due process as it is known at the place of judgment, but that with which the court itself is most familiar, i.e. Singapore procedure. This gives the judgment debtor another bite at the apple. In addition, we face the same problem with enforcement treaties: the judgment creditor may not be able to initiate enforcement until all appeals have been exhausted.

Accordingly, the option that is most familiar to the seller's lawyer may well be the least optimal to achieve her client's main objective.

Option (c), international arbitration in London, may be a logical choice, and it is not a bad one. It is usually much easier to enforce an international arbitration award because of the existence of a multilateral treaty, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also called "the New York Convention"[5]), discussed in more detail in Chapter 3.[6] Under the New York Convention, signatory states agree to treat arbitration award rendered in another signatory state as enforceable as if they were a judgment of the court of first instance.[7] Both the United Kingdom and Singapore are signatories to the New York Convention. Thus, if a creditor can immediately enforce a domestic court judgment in Singapore, then they can also enforce an arbitration award rendered in London.

While there are some specified exceptions to enforcement, such as violation of public policy or fraud, foreign arbitral awards are typically given effect under the New York Convention. Also, Singapore is widely regarded as an 'arbitration-friendly' country.

But let us consider the last option, (d), especially if the seller's only or main concern is the ability to sue promptly for payment. Thus, the option that will be

4 For example, even within the framework of European regulations, European courts may suspend enforcement when an appeal has been lodged in the judgment's country of origin. A. Pertoldi & G. Horlock, 'Conditions for Recognition and Enforcement of Foreign Judgments in the United Kingdom', available at www.lexology.com/library/detail.aspx?g=e7614f91-c3b8-4d7b-9b5e-82634f47fcac.

5 The text of the 1958 New York Convention is available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

6 *See* Chapter 3, para. 3.5 and 3.11.

7 A worldwide database of decisions under the 1958 New York Convention is available at http://newyorkconvention1958.org.

the least familiar to the New York lawyer, litigation in the courts of the buyer, may be the best method for her to achieve her client's key objective.[8]

It is also important for her to know (or be able to find out), however, that Singapore courts have a reputation for being relatively reliable and efficient, and may even be faster (and certainly not slower) than an international arbitration followed by the need to initiate recognition and enforcement proceedings in Singapore (if the debtor does not voluntarily and promptly pay).

At this point, the reader may be worried that each dispute resolution or choice of law decision requires encyclopaedic knowledge of the court practices of various countries. Not at all.

In this particular example, a lawyer who simply questions whether their domestic dispute resolution is the best way to achieve the client's objective will already be more likely to achieve the client's objectives than one who simply insists on what they are most familiar with instead. It is a good starting point in international commercial negotiations to question what is most familiar and understand that it may not be optimal. This is especially so if negotiating to obtain the 'home advantage' also requires the negotiator to compromise on other important terms of the contract, such as price and delivery.

1.2 And Now the Choice of Law

Lawyers regularly negotiate whether to agree that a judge or arbitrator should decide any disputes under the contract, where they should be decided and under what rules, as well as what substantive law should apply. International commercial lawyers learn to use these as interconnected tools where, for example, changing the governing law may affect whether a judge or arbitrator would be best suited to decide any disputes, rather than as separate and independent from each other.

Going back to our New York-Singapore example above, suppose our lawyer recognizes that submitting a claim in the courts of Singapore would be the quickest and most reliable route to obtaining payment if the buyer defaults on their obligations. And let us suppose further that the New York lawyer does what most lawyers are inclined to do, which is to insist that the contract be governed by the laws of her home jurisdiction, New York, because she knows it and is qualified to advise the client on it.

Can a Singaporean judge apply New York law? Of course. But *how* would a Singaporean judge likely apply it? Judges, too, tend to prefer what is most familiar. Rarely are judges trained in applying foreign law, and even when they are, they typically will have little experience doing so. It should seem obvious that a New York lawyer should not reasonably expect a judge in Singapore to apply domestic New York law the same way it would be applied by a judge sitting in New York. And yet this compromise solution is occasionally the result of international

8 M. McIlwrath & J. Savage, *International Arbitration & Mediation: A Practical Guide*, Kluwer Law International, Alphen aan den Rijn, 2010, p. 17.

contract negotiations, potentially to the disappointment of both sides to the contract when they later try to enforce the contract according to their expectations.
Yet our New York lawyer may yet have more in her bag of tricks that will make her feel more comfortable in advising her client on a contract that will be governed by a foreign law on which she is not qualified. That is, what is 'New York law' or 'Singapore law' in this context? By familiarizing herself with the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG[9]), she will know that both Singapore and the United States have ratified the CISG.[10] Since her client is selling goods from New York to a buyer in Singapore, the CISG will apply to her contract.
Therefore, by agreeing that the arbitration will be governed by 'Singapore law', she is really accepting 'Singapore's law of international sales'. Since that is Singapore's implementation of the CISG, it will be similar to New York's law of international sales, which is also an implementation of the CISG.
Once a country formally accedes to the CISG,[11] and 94 have at the date of this publication,[12] the CISG becomes incorporated into its legal system and is "national law"[13] with respect to contracts for the international sales of goods with parties in other states that have accepted the CISG. Thus, the lawyer may be able to advise her client that, while counter-intuitive, agreeing to resolve disputes in Singapore courts applying the law of Singapore is even more reliable than a compromise that combines Singapore court with New York governing law.
In some cases, however, lawyers overlook this opportunity because they do not appreciate the relationship that choice of law will have on the enforcement of the contract. Indeed, empirical studies on choice of law in international contracts indicate that lawyers often add boilerplate (standard) language from other

9 The text of the CISG is available at www.cisg.law.pace.edu/cisg/text/treaty.html.

10 The list of CISG contracting states is available at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status

11 In this sense, *see* Art. 100 of the CISG:
Art. 100
(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.
(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

12 *See supra* note 9.

13 This is addressed in Chapter 2, *infra,* para. 2.1, *see also* G. Moser, *supra* note 1, p. 58; and L.G. Meira Moser, 'CISG in Brazilian Courts: A Promising Start – Case Commentary on Inversiones Metalmecánicas I.C.A. v. Voges Metalurgia Ltd.', *Internationales Handelsrecht*, Vol. 16, Issue 4, 2016, pp. 133-136.

documents to exclude the application of the CISG, such as "this contract shall be governed by the laws of Singapore to the exclusion of the CISG".[14] Is it a good idea to exclude the legal effect of a widely adopted international treaty because a lawyer is unfamiliar with them? As we will see in Chapter 2,[15] probably not.

Exercises: Basic

This section sets out several exercises based on commonly discussed points in international commercial contract negotiations. They are aimed at developing confidence in accepting 'unfamiliar' choices of law and dispute resolution.

> ***Exercise 1.1: Is home court better?***
> Amelie and Vishal are in-house lawyers for companies headquartered in France and India, respectively. They are negotiating a stock purchase agreement (SPA) by which Amelie's company will acquire a subsidiary of Vishal's company in India. All of the terms have been agreed except for choice of law and a forum for dispute resolution. Please assess the situations below:
> **A. Dispute forum**: Amelie has initiated this negotiation by proposing that any disputes under the acquisition agreement should be resolved in the courts of Paris, which is the acquiring company's principal place of business. Leaving aside considerations of whether French courts are regarded as independent and efficient, what sort of questions do you think Amelie and Vishal should consider before agreeing with Amelie's proposal?
> **B. Governing law**: Vishal's boss, the General Counsel (GC), prefers all of the company's contracts to be governed by Indian law. He is an experienced Indian lawyer and feels comfortable about his domestic laws. But this is an international contract, and the GC recognizes that the buyer is unlikely to accept Indian law, and he does not want this to become a distracting issue in the negotiations. He has asked Vishal to recommend the best governing law for this international M&A deal. Which of these is the *first* issue Vishal should consider before making a proposal to his GC, and why?
> a. Whether English or Singapore law would be good alternatives because they are both common law systems that share much with Indian law;
> b. Whether the law is from a country with a stable and highly regarded legal system;
> c. What disputes are likely to arise under this M&A contract and which laws will be most advantageous should one of those disputes arise.

14 G. Moser, *supra* note 1, pp. 1-92. For a complete analysis of the main drivers that often lead contracting parties to exclude the CISG, *see* pp. 33-92. For a discussion on the level of rationality of these choices, and the factors and underlying motives that influence these decisions, *see* G. Moser, *supra* note 1, pp. 93-116.

15 *See* Chapter 2 *infra,* para. 2.1.

Exercise 1.2: Small city problems

After a day of negotiations, Amelie and Vishal have agreed that the contract's dispute resolution procedure will be arbitration, but they have not agreed on the seat of the arbitration. Amelie has proposed Grenoble, a small French town in the Alps where her client's company has its headquarters. The town has a population of 160,000 and has its own courthouse with a small pool of judges who handle commercial litigation as well as labour, family, tax, administrative and environmental disputes. Which of the following might present a problem in procedure for setting up the arbitration or enforcing any award, even for Amelie's own client, if Grenoble is accepted as the seat?

a. A small town in the Alps will not be convenient for hearings, for the arbitrators, or even Amelie and her colleagues as lawyers who will be coming from other parts of France.
b. The judges are not likely to have much experience with international arbitration, and this could be a problem if either of the parties challenges the award (which is the jurisdiction of the courts at the legal seat of the arbitration).
c. If there is any arbitration hearing in the winter, the arbitrators could get hurt while skiing and this could cause the proceedings to be delayed.

Exercise 1.3: Seat connection needed?

Continuing to negotiate, Amelie and Vishal have narrowed the choice of seat of arbitration to either Paris or London. Amelie insists on Paris because, she says, neither party has any connection with London or the United Kingdom, and therefore an arbitration in London risks being invalid. Vishal insists that the parties can choose any city in the world as the seat of arbitration. Who is right and why?

a. Amelie
b. Vishal
c. Both

Exercise 1.4: Does it matter where international arbitration institutions are located?

After further back-and-forth discussions, Amelie and Vishal have agreed to London as the seat of the arbitration and for the contract to be governed by English law. Their last point of disagreement is the rules of arbitration to adopt. Amelie is insisting on the Rules of Arbitration of the International Chamber of Commerce (ICC), while Vishal demands the LCIA (London Court of International Arbitration). Vishal is adamant that the ICC cannot be designated because it is headquartered in Paris and insists the LCIA should be used because it is headquartered in London, the same as the place of arbitration, and English is the governing law. Amelie disagrees and says the ICC rules can apply to an arbitration in London, just as the LCIA rules could apply to an arbitration seated in Paris. Who is right and why?

a. Amelie
b. Vishal
c. Both

Notes