CHAPTER 4

Practice of International Contract Law

§4.01 GENERAL

The vast majority of international business transactions are based on contracts. While contract issues are consequently discussed throughout all parts of this book, this chapter is meant to address general contract law issues from the point of view of cross-border transactions to provide a basis for the more detailed discussions in the subsequent chapters. It starts with a comparative introduction to basic contract law features followed by a section on pre-contractual documents and agreements and their practical implications. The main part of this chapter then addresses the usual structure and contents of contracts underlying cross-border business transactions. A final section on drafting issues completes this chapter.

It is the goal of the following sections to highlight the most important issues from the viewpoint of legal practice and to provide references which allow easy access to primary and secondary sources. Furthermore, throughout this chapter sample clauses are introduced and discussed. It is important that these sample clauses are for discussion only and should not be simply copied when drafting contracts. In contrast, contracts and other legal documents need to be drafted on the basis of the fact of each individual case and by taking into account the governing law.

§4.02 COMPARATIVE CONTRACT LAW

[A] Introduction

Legal comparativists have traditionally divided the world's legal systems into different legal traditions (also called: legal families), e.g., the Common Law tradition, the Civil Law tradition, religious legal traditions, the socialist legal tradition and so on. The concept of legal traditions has served many purposes. In particular, it has facilitated

comparative studies by allowing representative comparisons.[1] The concept of legal traditions is, however, very problematic as evidenced by the broad disagreement on how specific legal traditions are to be identified and what the distinguishing features are. Furthermore, in times of globalization of the legal world harmonization and unification efforts take place at different levels and foreign law patterns being copied (transplanted) or at least considered for legislative purposes in many countries. Therefore, almost every legal system is nowadays to a certain extent 'mixed', i.e., incorporates elements from different legal traditions.[2] As this development is gaining further momentum the concept of legal traditions loses its justification.

Comparative work is of course important also from the viewpoint of legal practice. In particular, in the context of cross-border business transactions it is inevitable to consider foreign law and foreign legal concepts when structuring cross-border deals and drafting the supporting contractual documentation. Three of the most fundamental differences between contract law systems are briefly recalled in the following. Other more specific aspects are discussed from a comparative point of view in subsequent chapters.

[B] Offer, Acceptance and Consideration

It is nowadays broadly accepted that a contract requires offer and acceptance in relation to an agreement with sufficiently specific, i.e. enforceable, contents.[3] Specifics differ from jurisdiction to jurisdiction.[4] One of the key features distinguishing Common Law from Civil Law contract law systems as far as the conclusion of contracts is concerned is the Common Law doctrine of consideration. According to this doctrine a promise is only enforceable if it is made in a deed or if something is given in return in order to ensure reciprocity among the contract parties.[5] Consequently, a gift contract would not be enforceable unless it is made in the form of a deed.[6] The doctrine of consideration requires that something of some value must be given in return for a contractual promise that is not made in a deed. But, it is not necessary that such the value of such consideration is adequate or even matches the value of the promise.[7] In principle, even a nominal consideration suffices.[8] There is a large and very sophisticated body of case law on different aspects of the doctrine of consideration and library-filling numbers of books and articles discussing the doctrine from various points of view.

The doctrine of consideration is not applied under Civil Law and in other legal traditions.[9] However, in many of these jurisdictions rules are in place to 'ensure', in a

1. Örücü 2007, 169.
2. *Ibid.*, 177.
3. Farnsworth 2006, 915.
4. Compare, e.g., for the binding nature of offers Zweigert/Koetz 1998, 357–362.
5. Compare Farnsworth 2006, 208–210.
6. Zweigert/Kötz 1998, 390.
7. Farnsworth 2006, 909; Zweigert/Kötz 1998, 391.
8. Zweigert/Kötz 1998, 391.
9. Farnsworth 2006, 910.

similar way, the two main ideas underlying the concept of consideration, i.e. reciprocity or the concept of a bargain.[10] For example, under German law only formal gift contracts are not enforceable although once the gift is made the lack of form is not a valid reason to request the return.[11]

[C] Form

In modern jurisdictions, as a matter of principle, informality prevails in contract law. Normally, contracts are, therefore, not subject to special form requirements.[12] However, in all jurisdictions form requirements do exist in relation to special contract types,[13] e.g., gift contracts, contracts on the provision of security, contracts related to real estate or consumer credit contracts. Form requirements serve two main purposes. They ensure that there is documentary prove of contractual arrangements. They may also serve a warning function as the form requirement adds an additional hurdle which will normally remind the parties to (re)consider the agreement they are about to enter into and thus avoid any imprudent action.[14]

Form requirements can be established contractually or by way of law. They can refer to the whole agreement or just the declaration of intention of one party. And, they can require different form types, e.g., written form or notarial form relating to the recording of a statement, to the notarial confirmation of the identity of the person(s) who signed the contract or to the contract contents. The legal consequence for a failure to meet a form requirement may as well differ. It may render a contract void.[15] Alternatively, the lack of the required form could only mean that the agreement cannot be proven in court.[16] Or, the contract may be completely unenforceable.[17]

Finally, rules may vary in different jurisdictions in relation to the use of standard contract forms and standard contract clauses. Standard forms and standard clauses facilitate transactions as they are normally drawn up on the basis of past experience and previously developed wording, thus avoiding unnecessary work and potential sources of error.[18] It is, on the other hand, only natural that a party which uses pre-formulated standard contract forms or clauses will try to adopt wording that is to

10. *Ibid.*, 909.
11. Articles 516–518 German Civil Code.
12. Zweigert/Kötz 1998, 366.
13. Compare *ibid.*, 366.
14. Farnsworth 2006, 914.
15. Compare Art. 125 German *Civil Code*, text available online at http://www.gesetze-im-internet.de/englisch_bgb/ (last visited on 21 Jan. 2013).
16. Compare s. 1341 French *Code Civil*, text available online at http://www.napoleon-series.org/research/government/c_code.html (last visited on 21 Jan. 2013).
17. Compare § 2-201 US *Uniform Commercial Code*, text available online at http://www.law.cornell.edu/ucc/ucc.table.html (last visited on 21 Jan. 2013).
18. Farnsworth 2006, 911; Chuah 2011, 3–4 (4: 'customary practice in international commerce for parties to adopt commonly recognized standard terms').

its own advantage.[19] It is, therefore, widely acknowledged that the respective other party may need protection. The use of standard contracts and standard clauses is, therefore, normally subject to some kind of judicial control as to appropriateness and fairness. Most jurisdictions have developed statutory rules or case law for this purpose,[20] although in particular consumer protection rules may often not apply in relation to international business transactions.[21]

[D] Specific Performance

The question if and how contractual rights are enforceable is answered differently by different legal traditions. In Civil Law systems, contractual obligations must be fulfilled as a matter of principle and are, therefore, fully enforceable.[22] If a judgment debtor fails to perform as ordered by a court the judicial system provides for tools to coerce performance, e.g., through fines or – in extreme cases – imprisonment, or by way of allowing a third party to perform in place of the debtor who has to bear the costs. The situation may only differ where the obligation must be fulfilled by the debtor in person due to an agreement or the nature of the obligation.[23]

Common Law takes the same approach only in relation to money claims.[24] In contrast, it does, in principle, not acknowledge that non-monetary contractual obligations are enforceable. Instead non-performance will enable the creditor to claim for damages against the non-performing party.[25] Common Law allows claiming for 'specific performance' only in special situations, that is, where a particular obligation cannot be expressed in a money value.[26]

§4.03 E-CONTRACTS

The use of the internet in cross-border business transactions has led to the question if and to what extent electronic communications meet the established requirements of contract law. Major issues of concern in this regard are if special requirements exist for e-contracts in relation to offer and acceptance, if the electronic form can meet any existing form requirements originally established for paper-based contracts[27] and if

19. Chuah 2011, 4: '(A) distinction must be made between those that have been agreed to by parties of equal bargaining power and those imposed on persons on a "take it or leave it" basis.'
20. Compare Farnsworth 2006, 912.
21. Chuah 2011, 5.
22. Farnsworth 2006, 930; Zweigert/Kötz 1998, 472.
23. Zweigert/Kötz 1998, 472.
24. Farnsworth 2006, 931 ('substitutional relief').
25. Zweigert/Kötz 1998, 479.
26. *Ibid.*, 480.
27. Compare, e.g., Art. II 1. of the *Convention for the Recognition and Enforcement of Arbitral Awards* (the New York Convention), in force as of 7 Jun. 1959, Text available online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited on 18 Dec. 2012) according to which enforceability of arbitral awards requires a written arbitration agreement; also cf. *infra* Chapter 10, §10.07[C].

electronic signatures can serve the same purposes like signatures by hand. Furthermore, contract law systems have to decide if and how electronic documents are admissible as evidence.

Many countries have enacted laws or amended existing laws to address these and other issues related to e-contracts. Often these legislative activities have been shaped after the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on Electronic Commerce*,[28] originally adopted on 12 June 1996 and the UNCITRAL *Model Law on Electronic Signatures*,[29] adopted on 5 July 2001. Building upon these instruments UNCITRAL has prepared the *United Nations Convention on the Use of Electronic Communications in International Contracts*[30] (the Electronic Communications Convention), which was adopted by the UN General Assembly on 23 November 2005.

It is the goal of the Electronic Communications Convention to ensure that e-contracts and other electronic communications are effective and enforceable in the same way as their paper-based counterparts.[31]

Its scope of applicability covers electronic communications used when contracting cross-border, i.e., the formation and performance of contracts via electronic communications between parties located in different Member States[32] unless the applicability is fully or partly excluded by the parties.[33] The Electronic Communications Convention is currently[34] in force only in three countries, namely the Dominican Republic, Honduras and Singapore.[35] It may, however, also apply based on a valid choice by the parties to a contract.[36] Furthermore, the Electronic Communications Convention must be regarded as a state-of-the-art legal framework embodying prevailing concepts regarding electronic communications in the context of international contracts.[37]

The Electronic Communications Convention makes it clear that a party is not required to use or accept electronic communications, but that a communication or a contract shall not be denied validity or enforceability only because of its electronic

28. Text available online with the Guide to Enactment at http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/1996Model.html (last visited on 18 Dec. 2012).
29. Available online with the Guide to Enactment at http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2001Model_signatures.html (last visited on 18 Dec. 2012).
30. Text available online with an Explanatory Note by UNCITRAL at http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html (last visited on 28 Jan. 2013).
31. UNCITRAL at http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html (last visited on 18 Dec. 2012).
32. Article 1 para. 1. Electronic Communications Convention; for exclusions see Art. 2.
33. Article 3 Electronic Communications Convention.
34. December 2012.
35. Compare UNCITRAL at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (last visited on 18 Dec. 2012).
36. UNCITRAL at http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html (last visited on 18 Dec. 2012).
37. UNCITRAL at http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html (last visited on 18 Dec. 2012).

CHAPTER 7

Cross-Border Services

§7.01 GENERAL

Cross-border service arrangements are based on contracts normally relating to the supply of services: (i) from the territory of one country into the territory of another country, (ii) in the territory of one country to a service consumer of another country, (iii) by a service supplier of one country through commercial presence in the territory of another country, or (iv) by a service supplier of one country through presence of natural persons in the territory of another country.[1]

Cross-border services are becoming increasingly important globally. According to WTO statistics, world exports of commercial services grew by 9% in 2010, reaching USD 3,695 billion.[2] Asia saw the most rapid increase of its outbound commercial services volume achieving a growth rate of 22% compared with 2009.[3] The leading providers of outbound services in 2010 were located in Europe taking up 24.4%[4] of the global outbound service volume, followed by the US with 18.5%, China with 6.1%, Japan with 4.9% and India with 4.4%.[5] At the same time, the US, Germany, the UK, China and Japan together accounted for one-third of the global outbound volume in commercial services.[6] It has been predicted that the future may bring a relocation of service industries from developed to developing countries reflecting trends in the manufacturing industries over the past decades.[7]

Cross-border trade in services can take very different forms and relate to different industries. Cross-border trade in services can, e.g., entail:

1. Compare GATS Articles. 1, 2.
2. WTO 2011, 15; also cf. for the development of cross-border services Miller/Oats 2012, 223–226.
3. WTO 2011, 15.
4. This figure excludes intra-EU trade in services.
5. WTO 2011, 15.
6. WTO 2011, 9.
7. Chow/Schoenbaum 2005, 17.

- consultancy (e.g., tax, accounting, design, IT);
- legal services;
- training (show-how[8]);
- cultural performance;
- banking and finance;
- management;
- language services;
- security services;
- town, landscape and garden planning;
- architecture and construction;
- transport and logistics;
- medical services;
- travel services;
- communications;
- distributorship and agency;
- sports services;
- audio-visual services;
- R&D; and
- development, installation and maintenance (e.g., of IT systems).[9]

In practice, different service types are often combined. Due to the resulting diversity of cross-border service models, related legal issues can be rather complex. The following sections are aimed at giving a broad overview. Certain contract types such as those related to finance[10] and transport[11] are covered in earlier chapters. Aspects of cross-border employment relationships will be addressed in the context of the discussion of legal aspects concerning cross-border investments.[12]

Finally, intermediaries can of course also be used in the context of trade in services. Whether a contract is:

> one where the defendant agreed merely as agent to arrange for services to be provided by others, in which case there is an implied term that he will use reasonable care and skill in selecting those persons, or on where the defendant agreed to supply services, in which case there is an implied term that he will as supplier of the services carry out the services with reasonable care and skill, is a matter of construction of the particular contract in any particular case.[13]

8. Döser 2001, 119; Easson 1999, 117.
9. Also cf. the list of services provided in the WTO's *Services Sectoral Classification List* of 10 Jul. 1991, text available online at http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc (last visited on 18 Dec. 2012); Raworth 2005, 6–12; Miller/Oats 2012, 226–227.
10. *Supra* Ch. 5, §5.07 and §5.08.
11. *Supra* Ch. 5, §5.06.
12. *Infra* Ch. 8, §8.09.
13. Bugden/Lamont-Black 1999, 1.

§7.02 DOMESTIC LAW AND TRADE IN SERVICES

From the perspective of private law, purely domestic as well as cross-border service arrangements are, first of all, subject to domestic contract law rules and it is for the applicable private international law rules[14] to determine the governing regime. Domestic law often establishes barriers to or imposes restrictions or prohibitions on cross-border service arrangements. These restrictions and prohibitions may take the form of nationality requirements, residency requirements or operational requirements, e.g., in the form of procedures that must be followed, restrictions on capital transfers or prohibitions for special types of services.[15] Domestic tax law may impose taxes on the provision of services[16] or profits made through the provision of services.[17] The reasons behind this kind of barriers, restrictions and prohibitions can range from public security or health concerns, purely statistical interests, the need to generate revenue to support government operations to blunt protectionism.[18]

The 'intangible' nature of cross-border services, as opposed, e.g., to the exchange of 'tangible' goods against money in the case of trade projects, leads to greater complexities when it comes to design legal regimes.[19] In addition, the specifics of particular service types may vary significantly. Consequently, domestic contract law often has to provide for rather different rules to cater for the variety of types of service contracts. More common service contract types may be subject to elaborate tailor-made regimes. In contrast, special rules may not be available for less common or more innovative contract types with the result that general contract law governs or that rules developed for other contract types have to be applied by analogy.

It is not surprising that the disparities of domestic rules governing different service contract types are mirrored by the differences of rules applied in different jurisdictions. This is in particular true as far as breach of contract rules and available remedies are concerned. To minimize the potential for disputes arising out of these differences, contractual arrangements governing the cross-border provision of services are normally rather comprehensive.[20]

14. *Supra* Ch. 3, §3.04[F].
15. Raworth 2005, 16–17.
16. In the form of indirect taxes, cf. *infra* Ch. 9, §9.01[A].
17. In the form of direct taxes, cf. *infra* Ch. 9, §9.01[A].
18. Also cf. *supra* Ch. 5, §5.14.
19. Raworth 2005, 1: 'The essence of a service transaction, on the other hand, is the conferral of an intangible benefit …'; cf. Chow/Schoenbaum 2005, 19 ('no package crossing a national boundary and a customs frontier').
20. Döser 2001, 120, 98; cf. *infra* §7.04.

§7.03 INTERNATIONAL LAW AND TRADE IN SERVICES

[A] Introduction

As already mentioned, domestic law often imposes barriers to and restrictions on cross-border services.[21] Unlike other areas where initiatives at the supra-national level aim first of all at the harmonization of domestic rules in a particular area, the main goal of international initiatives related to cross-border services is the liberalization of trade in services. The focus is on ensuring market access, national treatment [22] and most-favoured-nation treatment[23] as well on guaranteeing the transparency of domestic law, its fair application and the availability of a review process.[24] The following sections summarize major international initiatives in this regard.

[B] GATS

The General Agreement on Trade in Services (GATS)[25] is probably the most prominent international treaty system addressing cross-border service issues. GATS forms part of the *Final Act Embodying the Uruguay Round of Multilateral Trade Negotiations* signed in Marakesh on 15 April 1994 by ministers of the WTO founding states.[26] The *Final Act* and GATS have entered into force on 1 January 1995.[27]

GATS is divided into four parts: Part I determines the scope of applicability of GATS. Part II on 'General Obligations and Disciplines' establishes basic obligations of the GATS Member States, such as the obligation

- to provide most-favoured-nation treatment;[28]
- to meet transparency requirements, e.g., in relation to the publication of relevant laws and regulations as well as relevant data;[29]
- to administer restrictions imposed on trade in services in a 'reasonable, objective and impartial manner';[30]

21. Raworth 2005, 1.
22. The national treatment requirement obliges States 'not to discriminate between domestic and foreign services and service suppliers by treating foreign services and suppliers less favorably than like domestic services and suppliers', Wolfrum/Stoll/Feinäugle, 397.
23. Most-favoured-nation treatment means that advantages granted by a state to a third state or person must be no less favourable than treatment granted by the granting state to a third state or to persons or things in the same relationship with that third state, Wolfrum/Stoll/Feinäugle 2008, 73.
24. Compare Raworth 2005, 12–27.
25. Text available online at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (last visited on 18 Dec. 2012).
26. See WTO Texts (under 'General Agreement on Tariffs and Trade').
27. *Supra* Ch. 3, §5.03[B].
28. Article II GATS.
29. Articles III and III *bis* GATS.
30. Article VI (1) GATS.

- to establish a review system in relation to administrative decisions regarding trade in services;[31] and
- to meet requirements related to the recognition of qualifications for the purpose, e.g., of obtaining authorizations and licenses.[32]

However, GATS 'adopts a positive-list modality whereby the liberalization obligations only apply to the sectors listed, which themselves are subject to limitations and conditions inscribed'.[33] This means that it is for the GATS Member States to negotiate commitments amongst themselves.[34] In other words, Member States are free to decide which sectors they want to liberalize.[35]

Part III of GATS, titled 'Specific Commitments', addresses issues of market access and national treatment to which Member States subscribe in so-called national schedules.[36] Part IV on 'Progressive Liberalization' calls for further rounds of negotiations and the development of national schedules to continue the process of service sector liberalization in the future.[37] Part V contains 'Institutional Provisions' on consultations between the Member States, dispute settlement and enforcement, the establishment, constitution and operation of a Council for Trade in Services, technical cooperation and the relationship with other international organizations. 'Final Provisions' are set out in Part VI. Annexes to GATS deal with exemptions from GATS obligations, the movement of natural persons supplying services under GATS, air transport services, financial services, negotiations on maritime transport services, telecommunications and negotiations of basic telecommunications. GATS is further supplemented by a number of instruments in the form of decisions and one understanding.[38]

[C] OECD 'Sub-global' Instruments[39]

Certain instruments employed by the Organisation for Economic Co-operation and Development (OECD)[40] address issues related to trade in services.[41] These instruments only apply to the currently[42] thirty-four OECD Member States.[43] The instruments are in

31. Article VI (2) GATS.
32. Article VI (4) GATS.
33. Roy/Marchetti/Lim 2007, 158; Roy/Marchetti/Lim 2008, 80.
34. Article XIX GATS; cf. Raworth 2005, 32.
35. Raworth 2005, 32.
36. WTO Part III.
37. WTO Part IV.
38. Texts available online at http://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm (last visited on 18 Dec. 2012).
39. Raworth 2005, 13, 71–85.
40. *Supra* Ch. 5, §5.03[A][3].
41. Compare Raworth 2005, 71–85.
42. December 2012.
43. Note, however, the recent invitation to non-OECD members to join the Codes, see OECD Investment Policy at http://www.oecd.org/document/63/0,3343,en_2649_34887_1826559_1_1_1_1,00.html (last visited on 16 Jan. 2013).

CHAPTER 10

Dispute Settlement and Cross-Border Enforcement of Awards

§10.01 GENERAL

In the context of cross-border business transactions, disputes can arise between the different parties of a project or with third parties. Disputes can also arise 'vertically' between parties and governments, government authorities or international organizations and their organs. Disputes can arise at any time during the different stages of a project, i.e., pre-completion and during as well as after the term of the project. Different dispute settlement regimes may govern respectively.

Cross-border business disputes can arise for very different reasons. Examples are perceived contract breaches,[1] inter-cultural difficulties,[2] the realization of the political risk[3] and the fact that the governing law is incomplete, inconsistent or otherwise unclear. Last but not least, conflicts can be a result of imperfect contract documents.

This chapter first considers briefly the importance of dispute avoidance and steps that can be taken in this respect. It goes on to discuss different methods to settle disputes between the parties of cross-border business projects. Amongst others, the cross-border service of documents, the cross-border taking of evidence and the cross-border enforcement of judgments and arbitral awards are addressed. A special part is dedicated to investors-state disputes. The final section on contract practice concludes this chapter.

1. Compare *supra* §4.05[G].
2. *Supra* Ch. 2, §2.02.
3. *Supra* Ch. 8, §8.03.

§10.02 AVOIDING DISPUTES

Measures to avoid problems in the context of cross-border business projects are mostly not specifically linked to particular transaction types, but are rather of general importance.[4] First of all, the careful analysis of all factors relevant for the viability of a project during the due diligence process as well as any consequential action are key to avoid any unpleasant surprises.[5] A transaction structure which guarantees minimum exposure on the one hand and the creation of a comprehensive and precise contractual basis on the other hand will further reduce the potential for disputes.[6] This was addressed in many sections of earlier chapters, e.g., in the context of explanations regarding political risk factors.[7]

Parties to cross-border business transactions have to determine if and at which stage advisors shall be involved. The fee rates of advisors are often discouraging at first glance. The decision to invest in competent advice may, however, generate invaluable returns.

In addition, the close cooperation with local and foreign partners, authorities and other stakeholders during the entire pre-closing, operational and post-term period of the project will preserve the possibility to overcome the risk of obstruction and interference, and to ensure support when needed. Often, even a strong bargaining position or – as far as intra-organizational dispute settlement is concerned – majority voting powers cannot guarantee the successful settlement of disputes if communication channels between the concerned parties are blocked or not available.[8] Contractual arrangements can provide important support in this regard. In particular, the contractual imposition of additional dispute settlement steps before legal proceedings can be initiated has been an effective tool in practice. Examples are contractual clauses according to which the other party must be informed about any alleged breach of contract and be requested to remedy the situation within a reasonable period before legal proceedings can be started. Contractual obligations to negotiate or to go through mediation in the case of disputes also fall into this category.[9] For long-term transactions, it can be helpful to establish 'joint committees' formed by representatives of all concerned parties for the sake of early detection of sources of difficulties and to provide a forum for negotiations.[10]

Finally, some of the main international dispute resolution bodies provide 'dispute avoidance services'. For example, the American Arbitration Association offers institutionalized support of this kind in terms of:

4. Wolff 2010, 303.
5. Compare *supra* Ch. 8, §8.06[D].
6. Wolff 2010, 303.
7. *Supra* Ch. 8, §8.03.
8. Seelye/Seelye-James 1995, Culture Clash, 1995, 142; cf. Cremades 2001, 94.
9. Compare also *infra* §10.09[A]; critical in the context of countertrade transactions UNCITRAL 1992, 171.
10. UNICITRAL 1992, 171.

- objective and independent fact finding;
- the appointment of neutrals who join project teams to assist in solving problems before they escalate;
- an evaluation by neutrals of problems and the development of best and worst case scenarios to guide the parties to negotiated agreements;
- partnering projects where all stakeholders identify potential risks and problems as well as procedures under the guidance of a facilitator;
- the appointment of a 'project neutral' who may act as advisor, mediator or make binding decisions depending on the parties' agreement; or
- the appointment of an 'initial decision maker' to whom claims must be referred before they go to mediation or arbitration.[11]

§10.03 NEGOTIATIONS

Problems arising in the context of cross-border business transactions should and will in most cases first be addressed by way of negotiations between the concerned parties.[12] As already mentioned,[13] contractual dispute settlement clauses may force parties to attempt to settle any dispute via negotiations before initiating court or arbitration proceedings.

The amicable settlement of disputes via negotiations is the preferable and normally the most satisfactory dispute settlement method. Negotiations cannot only save costs and time. More importantly, as a non-adversarial dispute settlement mode, negotiations will normally have only minimum impact on the (continuing) business relationship between the parties.[14] At the same time, potential risks and problems of negotiations, e.g., arising out of cultural differences, always have to be kept in mind.[15]

§10.04 COURT PROCEEDINGS

[A] Introduction

Parties of cross-border business projects will often agree on arbitration as the main dispute settlement method rather than relying on court proceedings. The presumed advantages of arbitration are discussed in a later section.[16] If the parties have failed to reach an arbitration agreement or if the arbitration agreement is void or if arbitration is

11. AAA at http://www.adr.org/aaa/faces/services?_afrLoop=264625440753247&_afrWindowMode=0&_afrWindowId=rnvg6xu47_1#%40%3F_afrWindowId%3Drnvg6xu47_1%26_afrLoop%3D264625440753247%26_afrWindowMode%3D0%26_adf.ctrl-state%3Drnvg6xu47_47 (under Services – Dispute Avoidance Services) (last visited on 18 Dec. 2012).
12. Compare UNCITRAL 1992, 170–171.
13. *Supra* §10.02.
14. UNCITRAL 1992, 170–171.
15. *Supra* Ch. 2, §2.02.
16. *Infra* §10.05[A]; also cf. Rubins/Kinsella 2005, 43–44: 'The advantages of arbitration over litigation for private and public parties are well documented and widely accepted.'

not available due to legal or other constraints, state courts will be competent to settle the case. Domestic court systems as well as the related procedural rules may differ substantially thus creating potential advantages or disadvantages for the concerned parties. Related aspects therefore need to be considered during the planning stage of any cross-border business project. Issues of general importance are highlighted in the following sections.

[B] Jurisdiction

To initiate court proceedings as well as to challenge the initiation of court proceedings as a defendant it is important to assess which court has jurisdiction.[17] The term 'jurisdiction' denotes the general authority of a dispute settlement body to determine a particular issue.[18] The term is, however, sometimes also used in a broader sense comprising also choice of law issues.[19] For the sake of clarity the question of the competence of a dispute settlement body to handle a case and the question of the applicable law, are separately addressed in this book. For the same reason, i.e., to avoid any misunderstanding, the same approach is recommended for the drafting of contract documents. Separate contract clauses therefore should address the issues of jurisdiction on the one hand and of the governing law on the other hand.[20]

Rules governing jurisdiction can be part of multilateral regimes, bilateral treaties or domestic rules. The multilateral *Convention on Choice of Court Agreements*[21] was concluded on 30 June 2005, but is not in force yet.[22] Within the EU a unified set of rules regarding the determination of the jurisdiction of courts is available under Chapter II of the so-called Brussels I Regulation[23] and if the defendant is located in Switzerland, Norway and Iceland, under the Lugano Convention (2007).[24] Another example of a multilateral regime covering amongst others jurisdictional issues, is the *Riyadh Arab*

17. Compare for Brazil de Souza 2009, 73; for England Warne 2009, 236: 'A defendant disputing the jurisdiction of the English court must file an acknowledgment of service of the claim and then apply for relief. The primary relief is a declaration that the English court has no jurisdiction over the claim.' (footnotes in the original text are omitted here).
18. North/Fawcett 2004, 179; Rodger 2007, 317.
19. Compare Fitzpatric/Russel 2009, 11; for choice of law issues cf. *supra* Ch. 3, §3.04[B][6], Ch. 4, §4.05[M].
20. Compare Friedland 2007, 183–184.
21. Text available online at http://www.hcch.net/upload/conventions/txt37en.pdf (last visited on 18 Dec. 2012).
22. Compare Hague Conference on Private International Law at http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited on 18 Dec. 2012); Folsom et.al. 2009, 1351–1352.
23. *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, text available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:html (last visited on 18 Dec. 2012); cf. Rodger 2007, 319–321; Chuah 2011, 603–650.
24. *Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters*, text available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007D0712:EN:NOT (last visited on 18 Dec. 2012) signed on behalf of the EU according to *Council Decision 2007/712/EC of 15 October 2007 on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.*

Agreement for Judicial Cooperation of 6 April 1983.[25] In addition, many countries have entered into bilateral enforcement treaties addressing also issues of jurisdiction.

CASE STUDY

Jurisdiction under the Brussels I Regulation[26]

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Section 1
General provisions

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.
2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

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Section 2
Special jurisdiction

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

25. Text available online at http://www.unhcr.org/refworld/docid/3ae6b38d8.html (last visited on 18 Dec. 2012); for jurisdictional issues see Arts 25–29.
26. *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, text available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:html (last visited on 18 Dec. 2012).