CHAPTER 2

Sources of the Law of International Commercial Agreements

§2.1 INTRODUCTION

Where does one find the rules of the game? The sources of the applicable law for a contract are numerous but not infinite. Some of the law is to be found in the contracts themselves in the form of principles negotiated between the parties and stated expressly as provisions in the contract. This process of party-to-party formation of legal principles, often referred to as *private ordering*, is developed mainly through the process of negotiation and drafting and is discussed below.[1] But everyone should understand that under the traditional contract doctrines of party autonomy and *pacta sunt servanda* (contracts are to be respected and enforced) such provisions are just as compelling as any other command in the law so long as these provisions do not contradict legal principles imposed by the domestic law of a country or by treaty provisions. Because contracts do not exist in a legal vacuum, they almost always must reflect certain considerations imposed by external forces. These limiting provisions have several sources: the domestic law of a country that bears some relationship to the contract, or in certain instances principles of international commercial conduct and behavior.

It is difficult to generalize accurately about the domestic law (occasionally referred to as *municipal law*) of various countries even though it is the domestic law that prescribes most of the legal principles governing commercial arrangements. To establish some predictability, most parties to international commercial agreements provide that their contracts are to be governed by the law of a particular country to

1. For a lengthy and fascinating inquiry into the impact of a single, albeit very large, American corporation on global trading practices and principles by way of the corporation's contracting and business activities, *see*, Larry Cata Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 Conn. L. Rev. 1739 (2007).

insure that the applicable legal principles will be readily understood and applied. Most of the major trading nations have extensive and detailed systems of commercial law that are remarkably similar despite having domestic legal systems that sharply differ in origin.

It is sometimes possible to frame a few general observations about the applicable law from an analysis of the placement of a country's legal system in one or another of the broad categories or *families* of law in the world. When faced with a choice as to whether to incorporate a particular country's law into a contract—or perhaps even the more basic decision whether to do business in a particular country—lawyers can sometimes gain insights from an inquiry into where that legal system fits when compared with other legal systems often referred to, by comparative legal scholars, as *families* of law.

§2.2 PROMULGATION AND ENFORCEMENT OF PRINCIPLES OF COMMERCIAL LAW

There are four basic instruments for developing and promulgating principles of commercial law external to the contract itself: (1) treaties; (2) statutes; (3) court decisions (and occasionally decisions by arbitral bodies); and (4) government regulations. Most international scholars also believe that legal principles can emerge from pronouncements of international organizations such as the UN and through the growth of international custom; but in most instances, these latter sources have less to do with actual day-to-day commercial arrangements then the four basic sources first enumerated.

Treaties. Treaties are documents that control relationships between nations. They may be negotiated and executed between two countries (*bilateral* treaties) or among a number of countries (*multilateral* treaties). Conceptually, they are devices by which each country voluntarily surrenders some sovereignty in order to enter into the agreement. There appears to be no power currently in existence (other than perhaps victory in war) that can compel a country to enter into a treaty; but once a country enters into the treaty, it generally becomes bound to the terms of that treaty. There are, of course, occasional problems of enforcement of treaty obligations. The International Court of Justice at The Hague (sometimes referred to as the *World Court*) is viewed as an appropriate body to adjudicate disagreements under a treaty, but many countries, including on occasion the United States, consider themselves free, in certain circumstances, to ignore the court's jurisdiction.

There are three steps in implementing a treaty. First, the terms of the treaty are negotiated and the participating countries prepare a final draft. Second, the final version is signed by the participating countries as a signal that they approve the final version of the negotiated document. This does not mean, however, that the treaty becomes immediately enforceable. Third, the treaty is ratified by each country's government. The process of ratification differs from country to country. Some countries permit ratification decisions to be made by the executive authority. In other countries, such as the United States, a legislative body (e.g., the U.S. Senate) must give

its approval before the ratification process is complete. Fourth, treaties enter into force when a sufficient number of countries (a number generally spelled out in the treaty itself) ratify the agreement. A country may accede to a treaty, thus considering itself bound by the treaty's terms, without formal ratification.

There are many different types of treaties that affect commercial relationships. One of the most common is the Bilateral Investment Treaty (BIT), a newer form of agreement that has eclipsed the older treaty form known as a Treaty of Friendship, Cooperation and Navigation (frequently referred to as an FCN).[2] Such treaties spell out many of the details of one country's commercial relationship with another. Multilateral treaties can have an impact on commercial relations among countries. For example, one of the most important treaties governing the enforceability of international commercial arbitral awards is the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958, discussed at length in Chapter 8. Another multilateral treaty, discussed at the end of this chapter, is the Vienna Convention on the International Sale of Goods (CISG). The World Trade Organization, a group created by this treaty to implement the General Agreement on Tariffs and Trade is having an increased impact on barriers, both tariff and nontariff, to trade in goods and services around the world. One of the most important regional treaties is the North American Free Trade Agreement, discussed in Chapter 4.

Statutes. As used in this section, the term *statute* refers to the promulgation of principles of law by the governments of individual countries that govern commercial transactions as a whole. In some countries, these principles are stated as part of the civil code. In the United States, private commercial dealings are governed mainly by statutes enacted by the legislatures of the individual states, rather than by the national government. All states except Louisiana have enacted a comprehensive set of commercial statutes called the Uniform Commercial Code (UCC), which controls, among other things, the sale of goods, commerce in negotiable instruments, and the creation of secured transactions.

Court decisions. In virtually all countries a great deal of commercial law is developed by courts' deciding individual cases brought by parties who claim to have suffered some legal injury in the context of a specific commercial undertaking. Many disputes arising out of international commercial agreements are first decided in the

2. For further reading on BITs and FCNs, *see*, Ahmad Ghouri, *The Evolution of Bilateral Investment Treaties, Investment Treaty Arbitration and International Investment Law*, 14 Int'l Arb. L. Rev. 189 (2011); Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (2010); Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (1994); United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* (1988). *See*, e.g., Mark Kantor, *Little Has Changed in the New US Model Bilateral Investment Treaty*, 27 ICSID Rev.—For. Inv. L.J. 335 (2013); Megan Wells Sheffer, *Bilateral Investment Ttreaties: A Friend or Foe to Human Rights?* 39 Denver J. Int'l L & Policy 483 (2011); Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 Brooklyn J. Int'l L. 335 (2009); Symposium, *Romancing the Foreign Investor: BIT by BIT*, 12 U.C. Davis J. Int'l L. & Pol'y 1 (2005); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L.J. 67 (2005); J. Steven Jarreau, *Anatomy of a BIT: The United States-Honduras Bilateral Investment Treaty*, 35 U. Miami Inter. Am. L. Rev. 429 (2004); Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 Mich. J. Int'l L. 621 (1993).

context of an arbitration proceeding, after which the winning party takes the arbitral award to some court for enforcement. In a common law system, the cumulation of individual court decisions leads to the development of legal principles (so-called judge-made law) that are just as valid as anything enacted by the country's legislature. Even in countries outside the common law system, the resolution of individual cases in court often helps fill in the gaps in that country's civil and commercial code.

Government regulations. In many countries with a centralized system of government, there is really no difference between government regulations and statutes since virtually all authority flows directly from the central government. By contrast, in countries such as the United States, there is often a sharp distinction drawn between statutes (which in the United States are enacted by the legislative branch of government, i.e., the state legislatures or the Congress) and regulations promulgated by government agencies within the executive branch of government such as the Department of the Treasury or the Bureau of Customs. In many countries, such as the United States, the basic principles of commercial law are usually developed through statutes and court decisions, while the peripheral aspects of commercial undertakings such as the imposition of taxes and export and import controls are implemented by government agencies.

For the most part, this book deals with private arrangements between individuals as set out in their negotiated written agreements. These agreements are generally tailored to the specific problems and issues faced by the parties; and in most countries, the parties are relatively free to work out their own deals. However, there is virtually no private deal that is totally exempt from external controls. Lawyers and business executives who seek to draft enforceable contracts must have an understanding both of what they and the other side hope to accomplish privately and what will be permitted by the various governments involved.

§2.3 THE WORLD'S MAJOR LEGAL SYSTEMS

Virtually all international commercial agreements choose some body of law to govern the contract. Knowing something about the different national legal systems makes it a little easier to understand why so many contracting parties affirmatively choose law rather than leave the decision on governing legal principles to a court or arbitrator. An understanding of the legal system of another country may also help negotiators better appreciate the context within which the other side is negotiating. At the same time, this is one of the areas of law in which too much generalization can be dangerous. This section is not intended to be an exhaustive inquiry into the fascinating area of comparative law, but rather is a relatively brief overview to demonstrate how each system accommodates commercial undertakings.[3]

3. Readers wishing additional depth in these topics may wish to review: *The Oxford Handbook of Comparative Law* (Mathias Reimann & Reinhard Zimmermann eds., 2007); Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (2014); Mary Ann Glendon, Paolo G. Carozza & Colin B. Picker, *Comparative Legal Traditions: Text, Materials and Cases on Western Law* (4th ed., 2014); International Encyclopedia of Comparative Law; P.D.V. Marsh, *Comparative Contract Law: England, France, Germany* (1994); Michael Bogdan, *Comparative Law* (1994); *Introduction to Foreign Legal Systems* (Richard A. Danner ed., 1994); Rene David & John E.C. Brierley, *Major Legal Systems in the World Today* (3d ed., 1985). Any reader searching for materials on international law, comparative law, and the law of individual countries may profitably consult the United States Library of Congress and its fabulous law library, including all of its web-based information sources. The Library of Congress' website is: www.loc.gov. The Library of Congress' law library sources may be accessed at www.loc.gov/law/find.

Most comparative law scholars agree that there are at least four broad classifications (occasionally referred to as *families*) of law: the civil law, the common law, socialist law, and Islamic law. Viewed even more deeply, one can discern subcategories such as: Latin American law, generally derived from a mixture of the various versions of European civil law; hybrids such as Japanese law—a mixture of indigenous rules and customs, the German civil code, and United States law; and aboriginal systems such as African tribal law.

The common law systems have their roots in the British law and include virtually all present and former members of the British Empire plus the largest trading nation, the United States. The United States has developed separately from Britain for the last 200 years and now has an internal system of commercial law known as the UCC. The UCC, as it is generally referred to in the United States, has become a national system of commercial law by virtue of its enactment by all the states except the state of Louisiana.

The civil code countries are primarily the countries of the European continent and those countries, such as most of Latin America whose legal systems derive either from the French or German systems. Socialist legal systems (a set of legal principles derived from the tenets of Marxism) are a dying breed as we move toward the third decade of the twenty first century. Formerly, the major socialist legal systems comprised the Soviet Union, the Peoples Republic of China and those countries of Eastern Europe and Asia that found themselves under Soviet domination. However, as China modernizes its economy and its system of external legal principles, with the demise of the Soviet Union, and as the countries of eastern Europe join the European Union (EU), the concept of a socialist legal system is nearly an anachronism. The Islamic systems, principally but not exclusively located in the Middle East, obtain their commercial doctrines from the teachings of the Koran and other Islamic religious teachings.

In recent years, there has been some movement toward development of commercial law principles on a regional basis. For example, the EU, formerly referred to as the EC or "Common Market" promulgates certain commercial and antitrust principles applicable to all the countries of the EU. The countries in Latin America's MERCOSUR trading group and the Association of Southeast Asian Nations (ASEAN) of the Far East have also started discussing regional economic and commercial practices. The last half of the twentieth century saw the formation of a number of regional trade groupings such as the North American Free Trade Agreement. These regional trade groups have developed commercial principles applicable to all participating countries.

While there may be a great deal of controversy with regard to the economic wisdom of regional trade groupings, these trends appear to have promoted a great deal of trade law uniformity thus eliminating much of the uncertainty one traditionally encountered in putting together an international business transaction. Still, when one

searches for the "law" governing the deal, he or she will of necessity look to the domestic law of individual countries. Often the law of an individual country may be better understood if a lawyer or business executive can place that country within a particular family of comparative law.

In a book such as this it is impossible to illustrate every conceivable nuance of commercial law within each of the four families of law. Some examples, however, are instructive to demonstrate how each system deals with certain fundamental issues of commercial practice. The discussion of each of the families of law set out below will address, among other things, how legal systems within that family deal with three important commercial concepts: (1) impossibility or frustration of performance; (2) the requirement of good faith in commercial dealing; and (3) the application of trade usage or course of dealing to the interpretation of contracts.

Impossibility of performance or *frustration* are encountered when events occur that impede performance of the contract or make performance totally impossible. International lawyers frequently refer to this as a force majeure event.[4] For example, fire or shipwreck may destroy the goods that are subject to the contract. An earthquake or volcanic eruption may destroy the factory where the goods are manufactured. War or insurrection may inhibit the shipment of goods or the delivery of services. Many force majeure events are what people frequently refer to as acts of God. But mere mortals may also play a role. For example, a government may take some action that limits or prohibits the transaction in question as when a country forbids the sale or consumption of alcohol. Governmental action of this sort is sometimes referred to as a *supervening illegality*, but is also normally recognized as a force majeure event.

Good faith may be difficult to define in the abstract but comprises one of the fundamental assumptions of modern commerce. If merchants cannot presume good faith on the part of the other contracting party, they probably will not agree to the transaction in the first instance. But even if the concept of good faith is elusive and theoretical, it can become important in allocating blame and risk when a dispute arises under the contract.

Trade usage is difficult to define in the abstract but is often of vital importance in resolving dispute. Even the best-drafted contracts contain ambiguities. Contracts that are to be performed over a long period of time may develop ambiguities even when the original language seems clear at the point of contract formation. When ambiguities have to be addressed, it is often helpful to see how other members of the same industry or business conduct their activities. However, not all systems of law permit reference to an industry's usage of trade or course of dealing as a tool for determining normal practices within an industry. To the extent that a legal system does not comprehend reference to terms outside the contract it may not have the necessary flexibility to be a good system for dealing with commercial matters.

4. *See* generally, Symposium, *In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster*, 31 Nova L. Rev. 551 (2007).

§2.4 THE CIVIL LAW SYSTEM

The civil law system traces its origins to Roman law and, more specifically, to probably the most distinguished contemporaneous compilation of Roman law, the sixth century Corpus Juris Civilis of Justinian (the Justinian Code). This compilation of law was revived for both study and application as the Western European countries began to develop mature, modern legal systems. The Justinian Code set the stage for many of the concepts of the present civil law system, and has many of the attributes of a modern legal system.[5] For example, it was intended to be a complete and exhaustive statement of the law, a concept that led directly to the modern idea of a civil code as an exhaustive and fully integrated body of law.

Certain concepts of canon law also affected the development of Roman law; but these principles, while generally accepted in most of Europe for a number of centuries, proved not especially suitable for commercial transactions. Because some of the early legal principles did not lend themselves easily to commercial practices, merchants began creating informal modes of dealing with each other that eventually hardened into legal principles accepted by the domestic courts of the various countries.

As the European nation-states proliferated in the eighteenth and nineteenth centuries, national legal systems emerged through the process known as codification, a movement that began in the Scandinavian countries and later found its way into the remainder of Europe. The codification movement culminated in the two most prominent codes in existence today, both of which provide the basis for today's civil law tradition. The Code civil des francais (often referred to as the Code Napoleon) was promulgated in 1804 and was followed nearly a century later by the German Civil Code of 1896.

The French Code has been adopted by or has significantly influenced a large number of domestic legal systems, including the legal systems of Belgium and Luxembourg, the Netherlands Civil Code of 1838, the Portuguese Civil Code of 1867 (now replaced with a new code promulgated in 1967), the Spanish Civil Code of 1888, some of the Eastern European countries including Poland and virtually all of France's colonial possessions. The German code, drafted almost 100 years later, was created in a different political atmosphere and under a far different tradition of legal scholarship. While the French code was viewed as a kind of everyman's law—written in general terms so that it could be read and understood by the average citizen—the German Code (*Burgerliches Gesetzbuch*) grew out of so-called scientific legal scholarship and resulted in a highly detailed set of provisions drafted with specific reference solely to Germany. The German Code is a distinguished work of legal scholarship by any standard but is one that, as one set of commentators stated, "was not built to travel."[6] Nevertheless,

5. *See*, e.g., John Henry Merryman, David S. Clark & John Owen Haley, *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia* (2010); John Henry Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition* (3d ed., 2007); Andrew Harding, *Comparative Law in the 21st Century* (2002); Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. Int'l & Comp. L. Rev. 257 (1981).
6. Glendon, *supra* n. 3.

the German code has had a substantial influence on a number of countries including Greece, Switzerland, Brazil and, perhaps most importantly, Japan.

Codification in these countries was only the first step, however. As the nations developed more sophisticated forms of government, and as the work of government became more complicated, the judiciary began to affect the law contained in the codes by deciding individual cases. This led inexorably to a body of judge-made law that exerts a strong influence on the legal system, even though, in theory, in civil law systems courts are not permitted to modify the code by judicial decision-making. One comparative law scholar, Professor Ferdinand Stone has identified four basic goals of a code system: (1) that the law be written essentially in the form of statutes, rather than in the form of court opinions; (2) that the provisions of the code be drafted and arranged systematically (e.g., organizing contract principles beginning with the formation of the contract and perhaps concluding with remedies for breach of contract); (3) that the code be dealt with by courts and subsequent legislatures in a unified fashion (a "seamless web" as it were); and (4) that the code be constructed by experts rather than lay persons.[7]

Have all these goals been achieved? Not exactly. Is a code system the perfect system of law? Probably not. Most codes have as many disadvantages as advantages.

Generally, the civil code systems try to separate the law into public law and private law, but with little success in preventing a great deal of overlap. In addition, although a civil code governs a large number of issues of private law it is not necessarily an exhaustive treatment of all possible questions. For example, France adopted a separate commercial code, the Code de Commerce, in 1807 shortly after adopting the Code Napoleon because the Code Napoleon simply did not address all the issues that a modern commercial system requires. German courts have historically recognized certain principles of Handelsrecht (commercial law) standing separate and apart from the main codification. Today, the most important aspects of civil and commercial law are merged in most civil code countries. Professor Rene David notes "[t]he Civil law has been commercialized to such a degree in all economically developed nations that there are hardly any rules left in which commercial obligations are treated differently from civil obligations."[8]

Because the civil codes grew up in nations with strong traditions of business and contract, the codes are generally sympathetic to the formation and performance of contracts. For example, both the French and German codes recognize both bilateral (promises made by both contracting parties) and unilateral (a promise made by one party yet enforceable by the other party) contracts. Article 1101 of the French Code defines contract as "an agreement through which one or more persons obligate themselves to one or more other persons to give, or to do or not to do, something." Article 1102 provides: "A contract is synallagmatic or bilateral when the contracting parties mutually obligate themselves each toward the other." Article 320 of the German Civil Code elaborates on the duties of persons who are parties to bilateral contracts: "A

7. Ferdinand F. Stone, *A Primer on Codification*, 29 Tul. L. Rev. 303 (1955).
8. David & Brierley, *supra* n. 3, at 90.

person who is bound by a mutual contract may refuse to perform his part until the other party has performed his part, unless the former is bound to perform his part first."

Both systems explicitly recognize impossibility of performance (the excuse of performance when it becomes impossible for one or the other party to live up to his obligations), require good faith and recognize common business practices (course of dealing or usage) in commercial arrangements. Note, for example, the following extracts from both the French and German Codes:

(1) *Impossibility and frustration of performance*: Under the French Code, Article 1134 states that contracts "cannot be revoked except by mutual consent or on grounds allowed by law."[9] Most courts and commentators have viewed the general article on contracts as a firm, virtually inflexible command of performance irrespective of unanticipated changes in circumstances. There are, of course, additional provisions in the Code such as Article 1147: "An obligor shall be ordered to pay damages [for nonperformance] ... whenever he does not establish that the nonperformance is due to a foreign cause that cannot be imputed to him. ... " But these provisions have never been used as a basis to override Article 1134's fundamental duty of performance.

The German Code was substantially revised in 2002, but most of its basic provisions, while somewhat differently phrased, remain largely intact in purpose and intent. The current German code contains a number of provisions suggesting that performance under a contract might be forgiven or adjusted due to unforeseen circumstances.[10] For example, Article 275 states: (1) "A claim for performance cannot be made in so far as it is impossible for the obligor or anyone else to perform." Article 275 goes on to provide that "the obligor may refuse to perform in so far as performance requires expenditure which, having regard to the subject-matter of the obligation and the principle of good faith, is manifestly disproportionate to the obligee's interest in performance. When determining what may reasonably be required of the obligor, regard must be had as to whether he is responsible for the impediment."

While the language of each of these articles is reasonably clear, even in civil code jurisdictions courts will adjudicate the application of code provisions to specific facts. In both the French and German systems forgiveness of performance has generally been allowed only if the event that impedes performance was not reasonably foreseeable and when the performance is humanly

9. *See* generally, John Bell & Sophie Boyron, *Principles of French Law* (2008); Barry Nicholas, *The French Law of Contract* (2d ed., 1992).
10. *See* generally, Ernest Joseph Schuster, *The Principles of German Civil Law* (2015); Sir Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2006); Reinhard Zimmerman, *The New German Law of Obligations: Historical and Comparative Perspectives (2006). Key Aspects of German Business Law: A Practice Manual* (Michael Wendler, Bernd Tremmi & Bernard John Buecker eds., 3d ed., 2006).

impossible. Moreover, the event that makes the contract nonperformable must not be attributable to any action by one of the contracting parties.[11]

(2) *Good Faith and Custom and Usage*: The French Code states: "[Contracts] must be performed in good faith" (Article 1134) and "ambiguous provisions are to be interpreted in accordance with the usage of the region in which the contract is concluded" (Article 1159). The German Code provides: "The obligor must perform in a manner consistent with good faith taking into account accepted practice" (Article 242).

These extracts make clear that a great deal of the two codes was written to promote commercial dealings by providing both stability and predictability for contracting parties. Stability and predictability largely flow from the establishment of clear and easily understood rules that allow people in business to draft and negotiate their own agreements without heavy-handed interference by either legislature or courts. As such, the French and German civil codes enhance rather than impede the formation of contracts and the honoring of business obligations.

Impossibility of performance, good faith, and custom and usage are not the only legal concepts encountered when dealing with companies in civil code countries. While the influence of the codes is great, of equal importance for modern commercial practice, is the overlay of regulatory provisions that affect such issues as licensing, antitrust, intellectual property and consumer protection measures.

§2.5 THE BRITISH COMMON LAW SYSTEM

Although the common law and civil law systems share roots in Roman law, the evolution of the common law system has taken a different path. Most scholars begin an analysis of the common law systems with the Norman conquest of England in 1066 and the subsequent work of the royal courts of justice. The general principles of the common law grow not out of codification, but rather out of the deciding of specific cases by individual judges over a long period of time.

Through the doctrine of *stare decisis* these decisions, properly read and categorized, eventually result in discernible, generally applicable principles on which future court decisions must be based. *Stare decisis* itself requires at least three assumptions: (1) that a court will render a principled and properly articulated decision—that is, that a court will give sound reasons for its decision; (2) that decisions will be published in some fashion so that other courts dealing with similar cases will know-how earlier cases came out; and (3) that the judicial system will be set up as a hierarchy, with the lower courts required to abide by the decisions of the higher courts.

11. *See*, e.g., *Durlach v. Grandgerard, Cour de cassation, Chambre des requetes*, July 3, 1918 (a lease would not be vacated simply because the city of Nancy was under enemy bombardment since the plaintiff did not show that the premises themselves were uninhabitable). German courts may on occasion revise the contract if the parties were agreeable to a revision. *W. v. K., Deutsches Reich, Reichsgericht*, Fifth Civil Senate, January 6, 1923, 106 ERG (Z). *See also*, John P. Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B.U. L. Rev. 1039 (1983).

By definition, the common law system concentrates enormous power in the courts and gives primary influence within the system to lawyers (the system's legal specialists) because lawyers are the only professionals properly schooled in the methods of the common law. At the same time, decisions were not rendered blindly or without regard for history and tradition. The early common law judges searching for a reasoned basis for substantive legal rules often consulted Roman sources. For example, the sanctity of contract doctrine (*pacta sunt servanda*) that was developed to its highest degree in England is historically a principle of Roman law. English commercial law has other roots in the conventional practices of business people, just as in the civil law systems. In 1666, an English court noted: "the law of merchants is the law of the land, and the costume is good enough generally for any man, without naming him merchant."[12] This had the effect of recognizing judicially what had probably been the case for centuries—that the basis for the development of a comprehensive, judge-made body of commercial law lies largely in those common trade practices and usages known as *lex mercatoria* or the law merchant.[13]

For those not familiar with the common law tradition, it is sometimes difficult to understand the immense influence of the courts on commercial practices in the common law countries. A short example may be helpful. In England prior to the mid-1800s it was not entirely certain whether lost profits could be awarded to a company that was injured by another company's breach of a contract. Unquestionably, the British Parliament could have passed a statute establishing some rule on point. However, because Parliament did not do so at that time—and at that point in history rarely legislated on commercial topics in any event—the development of an applicable principle of law was left to the British courts.

In the classic case in point, *Hadley v. Baxendale*,[14] a crankshaft in a mill broke and the mill owners had to send off to the manufacturer for a new shaft. The owners contracted with a transportation company to carry the new shaft from the manufacturer to the mill. The shipment was delayed and as a result the mill did not operate for several days. The mill owners sued the transportation company not only for the price of the shipment (a sum of two pounds, four shillings) but also for the lost profits over those days when the mill did not operate, a far greater sum of money.

The case eventually made its way to the Exchequer Court. The court determined the issue, and announced its decision in the form of a written judicial opinion, only after litigation between the parties. The court concluded:

> Where two parties have made a contract which one of them has broken [here the contract for the transportation of the mill shaft], the damages which the other party ought to receive...should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such

12. *Woodward v. Rowe*, 2 K.B. 132, 84 Eng.Rep.84 (1666).
13. *See* generally, Leon E. Trakman, *The Twenty-First Century Law Merchant*, 48 Am. Bus. L. J. 775 (2011); Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983); Richard A. Epstein, *The Empirical and Theoretical Underpinnings of the Law Merchant: Reflections on the Historical Origins and Economic Structure of the Law Merchant*, 5 Chi. J. Int'l L. 1 (2004); Celia Wasserstein Fassberg, *Lex Mercatoria—Hoist with Its Own Petard?* 5 Chi. J. Int'l L. 67 (2004).
14. 9 Exch. 341 (1854).

> breach of contract itself, or such as may reasonably be supposed to have been made in the contemplation of both parties, at the time they made the contract.

The court went on to determine that the lost profits had not been contemplated by the parties, because there had been no discussion of profits—or of the consequences of a delay in the shaft's shipment—when the transportation contract was entered into. Consequently, profits were not "reasonable" damages and thus could not be recovered by the mill owners.

Once this decision was announced, the principle of *stare decisis* required that other courts follow the rule of *Hadley v. Baxendale* in all similar cases. The vast majority of British commercial law principles, even those applicable today, were constructed in this fashion. Eventually, over a long period of time, an entire body of commercial law was developed that is probably as good as any other in the world. The doctrines of impossibility of performance, good faith and the use of commercial custom and usage so easily spotted in the French and German civil codes are firmly established in British law by way of case decisions rather than statutes. So, for example, impossibility in British law is a nearly absolute concept, forgiving a party's performance of a contract only when matters become either physically impossible (e.g., when the entire supply of goods is destroyed in a fire) or legally impossible (a legislature makes it a crime to sell alcoholic beverages), not when matters become merely impracticable (such as a mere rise in price).[15]

Even so, the common law method for creating commercial rules is viewed by many continental legal scholars as inefficient and somewhat haphazard since it depends on the decision of only those cases that parties chose to litigate. It is also exceptionally time-consuming. The length of the court's opinion in the *Hadley* case is as long as dozens of French or German code provisions put together. Moreover, readers of court opinion sometimes find it difficult to separate grain from chaff and even more difficult to determine whether a court might apply an earlier case in a new situation in which the facts are just slightly different. This means that most of the system is in the hands of lawyers. Laypersons cannot normally perform these feats of analysis on their own. In theory, but often not in practice, civil codes were promulgated to eliminate many of these difficulties.

At the end of the nineteenth century, the British parliament entered the arena of commercial law by enacting two detailed statutes, the Bills of Exchange Act (1882) and the Sales of Goods Act (1893). These two statutes began as reform movements but ended as attempts to merely reproduce in statutory form, the existing judge-made principles of commercial law.[16] Since then, Parliament has occasionally legislated in specific areas of commercial transactions such as import and export matters, but has left most of British commercial law in the hands of the courts. Fortunately, the case law is well parsed and most fundamental principles of contract are so well established that

15. *See*, e.g., *Ford & Sons, Ltd. v. Henry Leetham & Sons, Ltd.*, 21 Comm. Cas. 55 (1915).
16. The 1979 English Sale of Goods Act has been replaced by the 2015 Consumer Rights Act. *See*, e.g., David Campbell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation*, L.Q.Rev. 526 (2014). Mackenzie D.E.S. Chalmers, *Sale of Goods Act* (14th ed., 1963).

British merchants have virtually the same sense of stability and predictability as enjoyed by their counterparts in the code countries. Today, British contract and commercial law is highly developed and exceptionally sophisticated, as one might expect of one of the world's major trading nations.

§2.6 COMMERCIAL LAW IN THE UNITED STATES OF AMERICA

U.S. commercial law is derived from the British common law but has lately moved in the direction of codification and national uniformity. This movement toward significant national uniformity has developed in a context that is often not familiar to persons from outside the U.S. To analyze U.S. commercial principles, one must begin with the understanding that, to a large extent, the individual states that make up the United States of America have sovereignty to develop their own commercial law principles. Accordingly, when one looks for commercial "law" in the U.S., one normally does not look to the laws enacted by the national government. This means that there is no absolute uniformity within U.S. commercial law. However, the differences among the various states tend to be relatively small and insubstantial. Over the past sixty years, a great deal of uniformity has been created by state-by-state adoption of the UCC.

The UCC is now the law in 49 states and the District of Columbia. The one state that has not adopted the UCC is Louisiana, a state that entered the Union as a former French colony and that derives some of its commercial principles from the Code Napoleon. But even with Louisiana taking a somewhat different course in developing commercial principles, the differences create very few problems in commercial dealings involving businesses in Louisiana.

It is uncertain whether the UCC was intended to develop as a true code in the French and German sense. Many U.S. legal scholars disagree on this issue. Karl Llewellyn, sometimes regarded as the father of the UCC, saw the UCC as a kind of hybrid "case-law Code" that would set a firm—and uniform—basis for commercial rules, but that would permit the courts to fill in any gaps in the UCC by case law. Other scholars disagree with Llewellyn's view but are still of the opinion that the promulgation of the UCC has been a one of the most important developments in U.S. commercial law.[17]

The UCC is separated into nine articles, dealing variously with sales of goods (Article 2),[18] leases (Article 2A), commercial paper and bank deposits and collections

17. *See* generally, Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. Rev. 275 (1998); George A. Hisert, *Uniform Commercial Code: Does One Size Fit All?* 28 Loy. L.A. L. Rev. 219 (1994); Student Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 Yale L.J. 156 (1987). For an intense discussion of the Llewellyn position and opposition thereto *see*, Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 Yale L.J. 813 (1962); William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U.Ill.L.F. 291 (UCC is a true code) and Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U.Ill.L.F. 321 (UCC is merely a proper restatement of common law principles). One of the best basic treatises on the UCC is James White & Robert Summers, *Uniform Commercial Code (Hornbook)* (6th ed., 2010).
18. The full text of Art. 2 is available at numerous state law websites. For example, the District of Columbia UCC may be found at www.dc.gov (dclaws).

(Articles 3 and 4), letters of credit (Article 5), bulk transfers (Article 6), documents of title (Article 7), investment securities (Article 8), and secured transactions (Article 9). A number of provisions in Article 2 on sales of goods address the same matters examined under French, German and British law.

Under the UCC, impossibility of performance has been transmuted into a concept of *impracticability of performance* (§2-615) by providing:

> Delay in delivery...by a seller...is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation.

The official comments to the UCC make clear that the use of the term *impracticable* is intended to include circumstances that are less onerous than absolute impossibility of performance, although there is a serious question whether section 2-615 excuses performance of a contract merely because of increases in prices.[19]

Similarly, section 1-203 establishes a fundamental obligation of good faith for all transactions governed by the Code by providing: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Section 2-208 permits a contract to be construed in terms of the merchants' course of performance and the general usages of trade unless the contract provides otherwise.

The UCC is not the sum total of U.S. commercial law, however. Even though the UCC is one of the primary sources of commercial law in the United States, and even though it has had an impact far beyond the boundaries of the United States because it is so often incorporated as the law applicable to international commercial agreements, there is a great deal of American commercial practice that is not covered by the Code. For example, the UCC does not cover contracts for the purchase and sale of services. It has virtually nothing to do with the purchase and sale of real estate. Until an Article 2A was added about twenty years ago, the UCC did not apply to leases of goods. For the law governing these matters, American lawyers look to the common law of each state and statutes in the various states apart from the UCC that may affect the subject matter of the transaction. Looking to the common law, as in the British system, requires the analysis of numerous court decisions.

§2.7 SOCIALIST LEGAL SYSTEMS

As we move through the first decade of the twenty-first century, this section is something of an anachronism. Nonetheless, because a few socialist states remain, a

19. *See* generally, Paula Walter, *Commercial Impracticability in Contracts*, 61 St. John's L. Rev. 225 (2012); Stephen G. York, *The Impracticability Doctrine of the U.C.C.*, 29 Duq. L. Rev. 221 (1991); Jonathan A. Eddy & Peter Winship, *Commercial Transactions: Text, Cases & Problems* (1985), 543–552 and Richard E. Speidel, *Excusable Non-Performance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.Car. L. Rev. 241 (1980). *See also*, Carla Spivak, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse under U.C.C. §2-615 and CISG Article 79*, 27 U.Pa.J. Econ. L. 757 (2006).

reader may encounter a socialist legal system in practice. Cuba, North Korea and perhaps one or two other countries are avowedly socialist.

This system of law had its origins in the 1917 political revolution in Russia which set the stage for a parallel revolution in its legal system that, in turn, has affected a number of other countries when those countries adopted socialism as their form of government. Under Marxist theory, the government—and by implication, the law—was eventually to wither away. However, in the interim all socialist countries have developed highly sophisticated systems of legal controls that affect not only the conduct of individuals within those societies, but also the nature and course of commercial practices in those countries.

In theory, the concept of a private contract is antithetical to a socialist system. Under socialism, the state has three tasks: (1) to provide for national security; (2) to enhance economic development so that each person receives goods and services according to his need; and (3) to eliminate the acquisitive tendencies of human beings that are characteristic of capitalist societies and that are so detrimental to the building of a truly fair and just society. None of these goals comprehends commercial contractual relationships between private persons. To the extent that the state must engage in international trade either with other collective systems or with private companies outside the socialist country, those contracts are executed and performed by the government, not by individuals.

Of course, theory gives way to reality in most systems of government. In all socialist systems, the law springs primarily from the central government in the form of legislation and proclamations. The following is an illustration, based on practices in the former Soviet Union that typifies a socialist legal systems development of commercial legal principles.

As a byproduct of the central government's economic activities, many countries, including the former Soviet Union, established a concept of internal contracting that was based on various economic plans written by the government. Within the strictures of the economic plan, each affected economic enterprise is required to enter into a plan contract with another related enterprise for the supply of the raw materials needed for it to meet its production plan. Thus, for example, an enterprise that produces automobiles will be required to contract with an enterprise that produces tires.[20]

Disputes that arise under these plan contracts are typically handled through a system of economic courts that function in much the same way as a Western arbitration system. They review disputes in terms of state economic goals rather than in terms of narrow principles of contract law and are frequently dissociated from the regular courts of the country.[21]

These arbitral bodies are generally limited to internal disputes between governmental entities. Contracts between the national government and foreign private companies are negotiated and performed between the private companies and a governmental body referred to as a foreign trading organization or foreign trading

20. Glendon, *supra* n. 3, at 766–767. For an excellent general work on Soviet law *see*, John Hazard, William Butler & Peter B. Maggs, *The Soviet Legal System* (3d ed., 1977).
21. *Id.*

CHAPTER 4

Drafting International Commercial Agreements

§4.1 INTRODUCTION

Most lawyers talk in terms of "negotiating and drafting" of contracts, suggesting that negotiation always precedes the actual drafting of contract language. That is not necessarily a realistic way to view the process, although in most cases negotiation and drafting go hand in hand. Many agreements are based on standard form contracts that one or the other party has drafted long in advance of the actual transaction. In other cases, negotiation of the agreement's provisions takes place after one party submits a draft agreement to the other party for consideration. There are still other cases in which a letter of intent—a document that has many of the attributes of a contract without necessarily being a binding instrument—is the first meaningful communication between the parties. There are many instances in which an exchange of documents precedes face-to-face negotiation. Submitting a preliminary document such as a draft contract or letter of intent may itself be a powerful negotiating tactic in the same sense that a great deal of power (sometimes referred to as "leverage") accrues to the person who sets the agenda for a meeting. As a consequence, it is frequently more logical to think about what you would like your version of the contract to say, and then to see what occurs during the negotiating sessions.

Often the party who proffers the first draft will carry the day on many of the points of the transaction simply by having been first to suggest written language. Even if the contract is substantially redrafted during the negotiation process, the party who has thought about the wording of various provisions and who has at least tried to put some words on paper before the meeting frequently develops a great deal of negotiation leverage when alternative provisions are discussed and drafted.

For all these reasons, this chapter discusses contract drafting and Chapter 5 takes up negotiating techniques and strategy. There is nothing wrong, however, with a

reader beginning with Chapter 5 if he or she does not agree with this analysis. Contract drafting and contract negotiation go together—to use a favorite American expression—like ham and eggs.

§4.2 SOME THRESHOLD CONSIDERATIONS

There are probably as many theories on how to draft contracts as there are drafters of contracts. Anyone who has tried to write anything from a personal letter to a short story to a legal document has a store of pet language, a list of "do's" and "don'ts" and various rules of thumb for everything from the length of sentences to the alignment of paragraphs. If there is any principle that cuts through all these individualized techniques and idiosyncrasies, it is simply this: language is communication, or put a bit more realistically, the use of language is an attempt by two or more persons to communicate with each other.[1] At bottom, any drafting exercise is largely a matter of taking what is in one person's mind and putting that information on paper in a sufficiently precise form to convey that same information into the mind of the other party. But as everyone recognizes, this is easier said than done.

Is writing something that most people do naturally? Is it something that can only be left to the specialists? Are lawyers necessarily the best judge of contract language? The answer to all three of these questions is either "no" or, since lawyers always hedge their bets, "probably not." Is it possible even to discuss contract drafting generally?

1. No American law professor writing about legal drafting can ignore the contributions of probably the foremost scholar in the area, the late Professor F. Reed Dickerson; *see*, e.g., F. Reed Dickerson, *Materials on Legal Drafting* (1981) and his classic treatise on the subject, F. Reed Dickerson, *The Fundamentals of Legal Drafting* (1965). One of the best statements of a growing development in U.S. legal circles known as the Plain English movement is Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* (1981). More recent works that may be profitably consulted are: Kenneth A. Adams, *A Manual of Style for Contract Drafting* (3d ed., 2013); Bryan A. Garner, *Garner's Modern English Usage (2016) and* Bryan A. Garner, *The Elements of Legal Style* (2d ed., 2002); Marcel Fontaine & Filip De Ly, *Drafting International Contracts: An Analysis of Contract Clauses* (2d ed., 2009); Fabio Bortolotti, *Drafting and Negotiating International Commercial Contracts* (2008);Peter Butt & Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (2006); Edward W. Daigneault, *Drafting International Agreements in Legal English* (2005); A very healthy article on lawyer's passion for absolute precision is Vincent A. Wellman, *The Unfortunate Quest for Magic in Contract Drafting*, 52 Wayne L. Rev. 1101 (2006). For a creative but cautionary approach to international business contracts *see*, Larry DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability*, 23 Syracuse J. Int'l L. & Com. 67 (1997). There are many law journal articles devoted to specific categories of international contracts. *See*, e.g., Karla C. Shippey, *International Contracts: Drafting the International Sales Contract* (2009); James M. Klotz, *International Sales Agreements: An Annotated Drafting and Negotiating Guide* (2d ed., 2008); Mark S. Walter & Harry M. Flechtner, *Drafting Contracts Under the CISG*, (2007); Dena H. Elkhatib, *The ABA Practical Guide to Drafting Basic Islamic Finance Contracts* (2013); Some representative articles include: Klaus Peter Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 36 Vand. J. Transnat'l L. 1347 (2003); John C. Grabow, *Negotiating and Drafting Contracts in International Barter and Countertrade Transactions*, 9 N.C.J. Int'l L. & Com. Reg. 255 (1984); Craig A. Jaslow, *Practical Considerations in Drafting a Joint Venture Agreement with China*, 31 Am. J. Comp. L. 209 (1983); S. John Byington, *Planning & Drafting of International Licensing Agreements*, 6 N.C.J.Int'l L. & Com. Reg. 193 (1982).

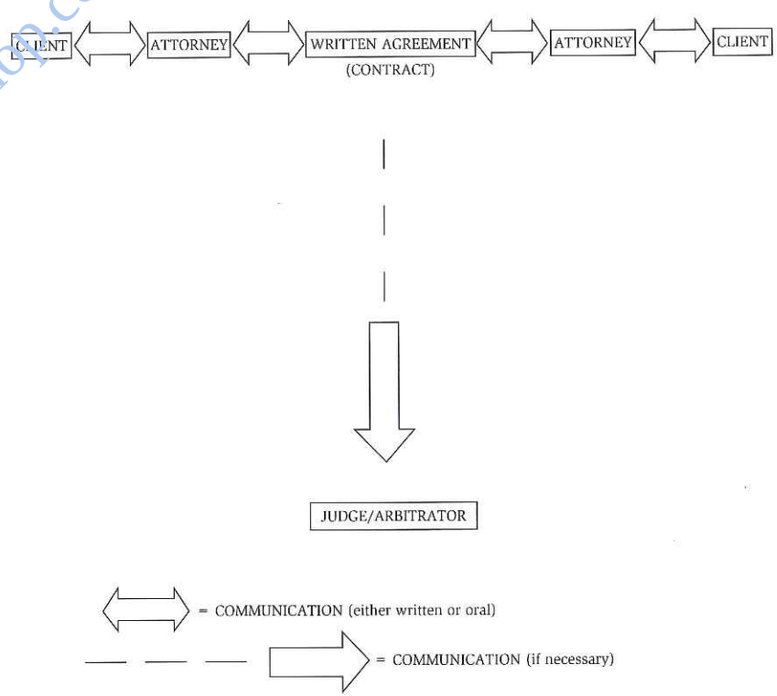
This author's firm belief is that it can be discussed and that the best contracts are drafted by people who take some time to review basic concepts of drafting before committing themselves to paper.

If the normal goal of writing is to communicate, the specific goal of a contract is to express the agreement between the parties as clearly and as fully as possible so that there is little need to go beyond the document if later misunderstandings arise between the parties. Recall the twin principles of basic contract law: the parties are generally free to frame whatever agreement they choose (*party autonomy*) and once having agreed, they will be held to the terms of that agreement (*pacta sunt servanda*).[2]

One of the basic dilemmas of contract drafting is that all forms of human communication are subject to misunderstandings and misinterpretation. It is virtually impossible to put anything on paper that is totally free of ambiguity. Even so, a writer can strive for clarity and precision even if no document drafted by mere mortals is going to be perfect.

In diagram form, *see* Figure 4.1, the task of a contract drafter can be viewed as a series of communication steps.

Figure 4.1 Communication in Contract Drafting



2. *See*, e.g., Maya Mandery, *Party Autonomy in Contractual and Non-Contractual Obligations* (2014).

To begin with, the client must have some sense of what he wants to do. It may be an idea as simple as wanting to market her telescopes in another country without any good sense of how to go about the transaction. By contrast, a contract drafter may encounter a sophisticated client who has a complete understanding of the transaction and simply needs someone to put the words on paper. Whether the client is an experienced business executive or a neophyte, it is vital that the drafter have a solid idea of what the client hopes to accomplish. For this reason, the client/drafter communication must flow *both* ways to be truly effective. For all the same reasons, the party on the other side of the transaction must be dealt with in a similar fashion.

The diagram assumes that it is a lawyer who will serve as contract drafter although the author recognizes that in many countries lawyers are not commonly brought into the transaction at the drafting stage.

Once the two parties and their lawyers have a sense of what each of them hopes to accomplish, the communication then takes place between the two parties, usually in the form of negotiation. That communication can take place in many forms (e-mail, telephone, facsimile, face-to-face) but it is once again vital that virtually everything in the heads of people on one side of the transaction get into the heads of the people on the other side. The communication that takes place during the negotiation must then be transferred to paper so that the written document may be reviewed and eventually signed by the parties.

But a drafter cannot rest on his or her laurels at that point. Too many contract drafters forget that they are not writing merely for the parties. They are, in truth, writing for a possible third-party—that is, an arbitrator or judge who may have to examine the document, decide what the document means, and render a decision on a dispute that arises at some point in the transaction. A good contract drafter always acknowledges the ghostly presence of that judge or arbitrator who was not present at the creation, who may be reading the document years after the agreement was signed, but who must try to understand what the parties were getting at when they first put words to paper.

§4.2.1 Identifying Goals and Objectives

The first step toward clarity and precision is identifying the goals and objectives of the client. There must be a common denominator of understanding between people on the same side of the transaction to create a good document. In many cases, this is very hard work, particularly if the client and the drafter are working together for the first time. A lawyer working with new clients is well advised to spend a substantial amount of time in discussions with that client to make absolutely certain that there is a meeting of the minds between lawyer and client. To make sure that important things are not forgotten, even experienced lawyers often resort to contract drafting outlines and checklists. Checklists of important elements may seem a tool only for beginners, but they can help insure that the final writing covers all of the important components in the transaction.

Most people in business have a good idea of what they want to accomplish from a business standpoint. Understanding the fundamental nature of the transaction in

question is the first place to start. A contract's aim may be to sell 20,000 brass fittings on a one-time basis to an Argentine retailer, or to commence a multi-million dollar turnkey construction project in Pakistan. If the drafter is a business executive drafting her own contract, it is likely that she will have a fairly good grasp of the contract's basic goals. Outside the United States, some business executives draft their own contracts. But many business executives will stop at the conception stage and then turn the remainder of the transaction over to the lawyers for the drafting work. Obviously, a lawyer's job is to try and accommodate the wishes of the client. A favorite client of the author's nicely expressed this concept when he said: "I don't want you to tell me no; I want you to tell me how."

Most clients remain involved far longer than the initial consultation with the lawyer and, in any event, American lawyers have an ethical obligation to zealously represent their clients within the bounds of the law.[3] This means that a lawyer engaged in drafting a contract for a client cannot be satisfied with merely learning the client's basic short-term goals. The client may have objectives beyond the specific business deal at hand that will affect the manner in which the contract is drafted and the tone and content of the negotiations. For example, the sale of the 20,000 brass fittings may be viewed by the seller as a pilot project with the additional goal of establishing a long-term business relationship with the buyer. This single fact might prompt the drafter of the contract to include more evenly balanced and conciliatory terms in the document—and to negotiate more gently—than might be the case if the transaction is merely incidental to the seller's domestic business and one in which the seller does not have any long term interests. In the latter case, a contract drafter representing the seller might emphasize speed and security of payment and might write language that makes it very difficult for the buyer to terminate the contract once it is executed.

If the seller regards the sale as merely a sideline and one in which the seller does not want to incur any great expense, the seller's lawyer may decide to rely more heavily on preprinted forms or clauses copied out of form books rather than create a completely new document. Whether lawyers admit it or not, this type of informal cost-benefit analysis (i.e., how much professional time and attention does this deal deserve?) always takes place in the mind of the lawyer, if not in conversations with the client.

But as the diagram shows, communication cannot run only from client to lawyer. The client will articulate both short-term and long-term goals; but it is normally up to the lawyer to identify both problems and opportunities. For example, novice business executives may not appreciate the importance of the parole evidence rule—a legal requirement that severely limits the amount of external evidence a court will consider in construing a contract. In Anglo-American legal systems, the document is supposed to stand or fall on its own terms and normally cannot be altered by oral understandings or extraneous documents.

Other legal systems are more accepting of materials and information outside the written document to evidence the transaction, but even in those systems, most contract

3. *See*, e.g., Canon 7, American Bar Association, Model Code of Professional Responsibility. The language is almost a verbatim quote from Canon 7. The more recent Model Rules of Professional Conduct express similar sentiments using a slightly different vocabulary.

drafters try to craft a writing that sets out all the important understandings of the parties even if certain matters such as equipment specifications or price lists are left to annexes or subsequent agreement.

There can be additional external consequences triggered by the document beyond the transaction itself. For example, certain language in the contract may initiate serious tax or antitrust problems for either buyer or seller. Business executives are not normally experts in these matters. It is a lawyer's job to alert the client to the dangers that arise in a legal context outside the scope of a particular agreement. Developing a sensitivity to *all* the consequences of a contract is frequently left to the lawyer.

A business deal can sometimes become far more complicated than the business executive may suspect when first setting up the transaction. For example, a novice business executive may not know that, in certain countries, it is nearly impossible to deal with retail establishments without going through wholesale entities. A national government may insist on the foreign company's forming a joint venture with some of its own citizens in order to conclude an agreement for a large-scale construction project in that country. These things need to be sorted out as early as possible. It is embarrassing and often professionally dangerous to learn something new about the deal, the client's wishes, or the state of the law only when sitting across from the other side in the final negotiating session. Proper planning and client counseling at the predrafting stage will substantially reduce the number of subsequent problems and surprises.

Remember, finally, that while the primary audience for any contract is the parties and lawyers who are involved in the transactions, there may be yet another set of important readers of the document whose identity is not even known when the contract is drafted. If some dispute arises in the course of the agreement, judges or arbitrators may be brought into the process, asked to read the document and ultimately to resolve the dispute based on what the document says and what the parties testify to. As lawyers and business executives work on their drafts, they should always give an over-the-shoulder glance at those persons who may eventually read and decide.

§4.2.2 Research as a Planning and Drafting Tool

Chapter 5 will constantly remind the reader that in business negotiations knowledge is power. It is axiomatic that the more knowledge negotiators have, the more leverage they will accrue in negotiating the deal. Without question, the more research that can be performed before negotiation, the better will be the negotiation. In many cases, the problem is not so much where to start but rather where to stop.

Business executives often perform a great deal of relevant research long before they focus on a specific transaction. Trade fairs and business publications convey a great deal of information on the climate for doing business in particular countries. Credit reporting services can quickly obtain information on the financial status and the creditworthiness of individual companies in many countries. In the United States, as in other countries, various government entities such as the Department of State, the Department of Commerce, the Export-Import Bank and the OPIC regularly collect and

publish an enormous amount of information on international transactions and on targeted countries. Prior to entering into a contract, businesses frequently exchange information on themselves, especially if they do not have an existing relationship. This generic information can often enhance both the drafting and negotiating of individual transactions. These days the Internet is an enormous compendium of information (a lot accurate, some erroneous) that no competent drafter can ignore.

Proper interviewing and counseling of the client is vitally important. An understanding of the legal issues is indispensable. But how far should a lawyer go? Is the question just a matter of economics? In other words, does the lawyer research only as much as the client is willing to pay for? For American attorneys, the problem is not simple. Lawyers have special responsibilities and special difficulties in this area because ethically they are not permitted to handle cases in which they are not competent and they are generally not permitted to educate themselves at the expense of their clients.[4]

There is no easy way to resolve the problem of where to halt one's research or investigation. Obviously, lawyers should not attempt transactions on which they are not at least minimally informed and competent; but even experienced lawyers must grapple with many of these questions. Consider, for example, an issue that is discussed extensively in §4.4 below—choosing the law applicable to that contract for the sale of 20,000 brass fittings by an American manufacturer to an Argentine company. Most international contracts take a very cavalier approach to this problem. Almost as an afterthought the contract drafter will state that the governing law is "the law of the State of New York" if the seller is located in New York. If the buyer does not have enough negotiation leverage to insist on a choice of Argentine law (assuming i.e., his preference), this clause may well find itself in the final contract.

In practice, choice of law can be more complicated than one might assume. Given that New York has adopted the Uniform Commercial Code (UCC), given that Article Two of the UCC expressly covers the sale of goods, and given that almost all U.S. lawyers specializing in commercial transactions have extensive education and training in the UCC, there should be no major problems arising from the choice of law issue from the seller's standpoint. The Argentine buyer might be agreeable, particularly if the buyer is represented in the transaction by New York lawyers. If both sides feel comfortable with the body of law chosen, the transaction should proceed smoothly.

But assume the contrary. The U.S. seller is so desperate to get rid of those brass fittings that he will agree to nearly anything in terms of a choice of law clause. He may, in fact, have instructed his lawyer not to argue over peripheral matters in the contract. The Argentine buyer may insist on Argentine law governing the contract. How deeply does the seller's lawyer have to research Argentine law to protect the seller's interests (and the lawyer's own professional interest in not committing malpractice). If money and time is no object, the New York attorney might perform substantial research on Argentine sales law and possibly even hire a consultant on Argentine commercial law

4. Rule 1.1 ("Competence") of the American Bar Association's Model Rules of Professional Conduct requires U.S. lawyers to do an adequate amount of preparation and research to properly counsel the client. Lawyers in other countries are subject to similar requirements.

to help advise the client. If the fittings contract is to be the first of many such agreements, both seller and the seller's lawyer have a long-term stake in knowing more about Argentina's legal system so a greater initial investment in legal research may be justified.

But if the fittings contract is for a modest amount of money and if it is viewed as a one-time transaction, the research problem becomes stickier. There are a number of options over a wide spectrum. A lawyer might take some minimal comfort from the notion that a contract's choice of law becomes relevant only if the contract is subject to some kind of dispute and only if the person (judge or arbitrator) who has to resolve the dispute believes that it is necessary to refer to principles in an underlying legal system to reach a decision. The seller's lawyer could simply do nothing and hope for the best. It is possible that: (1) even if a dispute arises, the judge or arbitrator may not have to refer to underlying law; and (2) even if the judge or arbitrator makes such a reference it is possible that the decision will be the same irrespective of which law is applied.

But is it proper to leave something this important up for grabs—simply to play the probabilities that choice of law will never be important? There are plenty of disputes in which choice of law is vitally important and someone working on the draft of a contract cannot possibly anticipate all possible disputes or all possible outcomes. A more careful lawyer might want to seek out an attorney knowledgeable in Argentine law for advice on choice of law. But seeking comprehensive legal advice from an outside attorney may cost a lot of money. Many lawyers, and many clients, do not want to pay the underlying costs for a comprehensive analysis of choice of law.

There are some less-costly options. The seller's lawyer could try to personally research Argentine law using resources available in her own law library or by way of online legal research. The lawyer could commission a qualified lawyer to perform research in Argentine law only on a limited number of legal issues that the lawyer anticipates might arise and use that research as a comfort factor. The lawyer could hire an Argentine practitioner solely to review the final contract, rather than to spend all the hours that go into preparing early drafts of the document.

There are no hard, fast answers here. Predrafting and prenegotiation research is not just a matter of business wisdom. For lawyers involved in international contracts, it can become a difficult question of professional responsibility. In any event, the question of "research, how much?" should be given close attention by both lawyers and clients.

§4.2.3 Beginning the Drafting Process

The blank page syndrome that all authors face is equally common in contract drafting. How does a writer begin to fill up the paper? One method used by a large number of contract drafters is to begin from some kind of checklist or standard outline for commercial contracts. Using a typical contract for the sale of goods as an example, most contracts address the substantive matters of the contracts in something like the following order:

(1) Date and place of the agreement.
(2) Description including full names and addresses of the parties.
(3) Definitions, if any.
(4) Description of the subject matter of the contract.
(5) Recitation of offer and acceptance.
(6) Price term.
(7) Payment term.
(8) Security interest, if any.
(9) Delivery term.
(10) Title, risk of loss and insurance.
(11) Specifications and warranties, if any.
(12) Taxes.
(13) Authorizations, permits, and licenses.
(14) Breach, termination, and liquidated damages, if any.
(15) Notices.
(16) Cancellation and rescission.
(17) Applicable law.
(18) Official language.
(19) Dispute resolution.
(20) Force majeure.
(21) Assignment of contract.
(22) Alterations (including a prohibition on oral modifications, if desired).
(23) Annexes, if any.
(24) Signatures and counterpart provision (if necessary).

Most of these clauses are self-explanatory or are discussed more elaborately later in this chapter.

A counterpart provision is a clause in or near the signature lines that provides that each party may sign a copy of the contract in his or her location. Each of these signed copies will be merged into a final single contract, but the date of execution is the date on which all of the parties put their signatures to the document, rather than the date of final merger. A counterpart provision is particularly helpful if the parties are a long distance from each other and if they do not want to spend the time and expense to travel to a central location for a signing ceremony. Counterpart provisions are also helpful if a contract must be executed as of a particular date when the parties cannot all come together for signing on that date. As more and more drafting and negotiation takes place electronically via e-mail, text messages, and the like, counterpart provisions may become more common. The reader should check the law of the applicable jurisdiction to make sure that counterpart clauses are valid.

Contracts for the sale of goods are the most common form of international commercial agreement, but there are many other types of contracts. For example, in the context of international licensing agreements, a contract normally includes clauses on the following as well as most if not all of the clauses in the foregoing list:

(1) Transfer of the license from licensor to license.
(2) Royalty rate.
(3) Place and manner of payment of royalties.
(4) Determination of rates of exchange [a currency fluctuation clause].
(5) Allocation of tax burdens between the parties.
(6) Government approvals.
(7) Registration and recordation of the license.
(8) Compliance with export laws in country of origin.

Contracts for multi-million dollar turnkey construction projects can be even longer and more extensive. The following Tables 4.1–4.12 are an example of an outline for an international construction contract for the construction of offshore oil drilling platforms.

Table 4.1 Chapter One: Introduction

Article 1:	Definitions
Article 2:	Scope of Work
Article 3:	Representatives of the Parties

Table 4.2 Chapter Two: General Obligations of Contractor

Article 4:	Performance of the work
Article 5:	Personnel
Article 6:	Drawings and Specifications
Article 7:	Compliance with Laws and Regulations
Article 8:	Authorizations, Permits and Licenses
Article 9:	Care of Company Provided Items
Article 10:	Independent Contractor Relationship
Article 11:	Publicity
Article 12:	Use of Host Country's Goods and Services
Article 13:	Access to Sites
Article 14:	Taxes

Table 4.3 Chapter Three: General Obligations of Company

Article 15:	Company Provided Items, Drawings, Specifications and sites
Article 16:	Authorizations, Permits and Licenses

Table 4.4 Chapter Four: Progress of the Work

Article 17:	Progress of the Work
Article 18:	Quality Assurance and Quality Control

Table 4.5 Chapter Five: Variations

Article 19:	Company's right to Order Variations
Article 20:	Contractor's Right to Propose Variations
Article 21:	Contractor's Estimate
Article 22:	The Effects of the Variation on the Contract Price, Contract Schedule and Other Terms of the Contract
Article 23:	Variation Order Procedure
Article 24:	Disputed Variations

Table 4.6 Chapter Six: Cancellation and Suspension

Article 25:	Cancellation
Article 26:	Suspension

Table 4.7 Chapter Seven: Delivery and Payment

Article 27:	Delivery and Completion of the Work
Article 28:	Payment, Invoices and Audit
Article 29:	Invoice Retention/Bank Guarantee
Article 30:	Title and Liens
Article 31:	Guarantee and Final Acceptance Certificate

Table 4.8 Chapter Eight: Breach of Contract

Article 32:	Contractor's Delay
Article 33:	Contractor's Liability for Breach of Guarantee
Article 34:	Termination Because of Contractor's Default
Article 35:	Company's Breach of Contract

Table 4.9 Chapter Nine: Risk, Liability, Indemnification, and Insurance

Article 36:	Passing of Risk for Contract Object and Company Provided Items
Article 37:	Liability and Indemnification
Article 38:	Insurance

Table 4.10 Chapter Ten: Proprietary Rights

Article 39:	Ownership of Drawings, Plans and Specifications
Article 40:	Patents and Inventions
Article 41:	Confidential Information
Article 42:	General Competence

Table 4.11 Chapter Eleven: Miscellaneous Clauses

Article 43:	Subcontracting and Assignment
Article 44:	Non-Waiver of Default
Article 45:	Force Majeure
Article 46:	Governing Law and Dispute Resolution
Article 47:	Notices
Article 48:	Alteration of Contract
Article 49:	Signatures

Table 4.12 Annexes and Attachments

Equally interesting is the following outline for a relatively simple joint venture agreement:

Preamble

1. Description of parties
2. Name of joint venture and principal place of business
3. Description of project
4. Relationship between the parties
   - a. corporation, partnership or other relationship to be formed
   - b. jurisdiction of venture formation
   - c. principal structural features
5. Term
   - a. commencement
   - b. threshold termination if purpose is unattainable
   - c. completion of project or early termination
   - d. government approvals (if and when required)
6. Obligations of each party to the joint venture
   - a. equity (capital) contribution
   - b. financial liability for future cash needs (including guarantees)
   - c. service and management personnel
   - d. research obligations and offer of new developments acquired
   - e. property or contracts transferred

   - f. positive covenants
     - (1) right to enter agreement
     - (2) right to property
   - g. negative covenants
     - (1) not to pledge joint venture credit
     - (2) not to compete in joint venture market
7. Management and control
   - a. board of directors or similar body
     - (1) membership, representation of shares, chairperson
     - (2) meetings (in person, by phone or e-mail, in writing)
     - (3) voting
     - (4) deadlocks
     - (5) major issues
     - (6) language
   - b. Chief Executive Officer
     - (1) responsibilities
     - (2) remuneration
     - (3) appointment of initial CEO/manager
     - (4) dismissal
     - (5) Indemnities
8. Capital interests
   - a. relative shares and voting power
   - b. treatment in books of account; initial balances
   - c. treatment of surpluses and deficits
   - d. allocation of tax benefits
   - e. additional contributions
     - (1) by both parties
     - (2) by one party
   - f. extraordinary majorities required for major decisions
   - g. special procedures for shareholder meetings/votes
9. Use of funds
   - a. use to which initial capital contributions may be put
   - b. budget for first year
   - c. three-year projected budget
   - d. financial delegations
   - e. profits and declarations of dividends
10. Schedule of work (business plan)
    - a. agreed plan at commencement of work
    - b. schedule for first year

A contract drafter can find sample outlines and checklists in various form books. A drafter can create an original contract outline by simply considering all the elements that he or she would like to see in the contract. Even though that list is likely to be modified during conversations with the client and with the other side, an outline is a good place to begin and a good way to work around the blank page trauma. Once a drafter has set out most if not all of the ingredients in the contract, she can begin to order these items into an outline and to think about how to fill in the blanks with precise, substantive contract language.

Drafting actual contract language is something that many lawyers find highly intimidating. Traditional contract language is so abstruse and complex that it bears little relation to the way in which people normally communicate with each other. One recourse for the neophyte contract drafter is to borrow from form books. Contract drafting is one form of human activity where the concept of plagiarism simply does not apply. Lawyers in particular borrow constantly from documents that have gone before. One reason for this is simply the innate conservatism of the legal profession. Lawyers hesitate trying anything new if they can adopt something that someone has already used successfully. Another reason is that the doctrine of *stare decisis*—an Anglo-American doctrine concept growing out of litigation that requires courts to abide by previous court decisions—is carried over, often inappropriately, to transactional work. If a lawyer finds a document that seems to have passed muster sometime previously, he is happy to use it for his own transaction. Sometimes that makes sense; other times it is the height of stupidity.

Because lawyers tend to be such large-scale borrowers most law libraries stock numerous form books containing sample contract clauses, checklists for the content of contracts, and often complete contracts. For the easily intimidated somewhat lazy lawyer, these may simply be copied with appropriate changes in the parties' names and other specific details and presented to the client as a newly created legal document.

There are better ways to think about contract drafting. Form books ought to be a drafter's starting point, not her finishing point. When using preexisting language or when creating language of one's own, there are some generic considerations that ought to be applied. If there is a cardinal rule in contract drafting it is that you rely on other people's work at your peril. §4.5 discusses the use of standardized clauses and form agreements in more depth. Most contracts for any substantial amount of money are tailored to the parties' specific situation.

How then does one go about this process of refinement? A contract drafter, whether lawyer or nonlawyer, should not forget everything he has already been taught about the use of language and what constitutes good writing.[6] While there is no single approach to writing of any sort, there is no question that well-written contracts go a long way toward avoiding problems. To be even a little more patronizing, contracts ought to be properly punctuated, verb tenses ought to agree and language ought to be used accurately and with precision.

6. Felsenfeld & Siegel, *supra* n. 1, is a particularly good source of material on these issues. A newer variant on the same theme is Howard Darmstadter, *Hereof, Thereof and Everywhereof: A Contrarian Guide to Legal Drafting* (2002).

In working with form books and other preexisting language, or in drafting original contracts, a drafter should consider three generic problems that occur in contract drafting: the use of superfluous language, the use of ambiguity and the use of legal or industrial terms of art. The modern trend in legal drafting is to eliminate excessive legalisms in contracts while avoiding colloquialisms. Modern contracts do not need terms such as *witnesseth*, *heretofore*, the excessively used *whereas*, or the particularly disgusting *said* as in "This contract is for the sale of fittings. *Said* fittings. ..." When these words are strung together in a single clause in a contract they become hilarious.

One clause of similar import from an actual contract reads: "NOW, THEREFORE, in consideration of the premises 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." What the parties are trying to say is that they have come together to make a contract and the terms of the agreement follow that clause. Is all this language necessary to a valid agreement? Absolutely not.

Terms such as these are archaic; their origins are obscure. If they ever had a special meaning or purpose, such things have been lost in history. They contribute nothing but word count to the contract. Tragically, too many lawyers and not a few clients do not realize this and insist—wholly without justification—that contracts must contain such language to be valid agreements. When the author drafted a contract for a client several years ago, the client rejected the document saying: "It just doesn't look like a contract." When asked why, the client said: "Because it doesn't have any 'witnesseths' in it, like my other lawyer's contracts." After a long-distance hassle as to what a real contract looked like, the client concluded the discussion by saying: "If you don't put those words back in, I'm not going to pay you." The words were put back in. This is the second lesson on superfluous language. Even if it does not contribute anything to a contract, it probably does not destroy the legal integrity of the document either.

Superfluous language has a first cousin—verbosity. Lawyers often try to accomplish too much and wind up saying nothing of consequence. Verbosity and complexity in contract language often causes rather than cures problems. For example, a sales contract might say something such as: "Seller agrees to sell and Buyer agrees to buy 1000 fittings at $1.00 per fitting." There are plenty of other simple variations on this language that are perfectly permissible and that accurately convey the intent of the parties. What is not needed is something such as: "Seller agrees to sell, convey, transfer, assign and otherwise relinquish claim to and otherwise commit into the permanent possession and ownership of buyer 1000 fittings."

Language such as this occurs in contracts for two different reasons, one somewhat commendable and understandable; the other far less so. The less commendable reason simply reflects the drafting process in so many law firms. Each lawyer cannot feel that he or she has made a contribution to the document unless something is added to the contract. Even a few extra words will suffice, but the contract cannot escape the average lawyers' desk without having something else grafted on to it.

The second reason at least has a legitimate purpose behind it even if the purpose is rarely accomplished. In writing clauses such as this, lawyers are trying to cover all

bases, to prepare for all possible contingencies. There may have been actual litigated cases long in the past where the absence of one or another synonym caused a court to declare the agreement invalid. Even without close examination of the facts of those early cases, we can now say with certainty that this sort of verbosity is not necessary today. Worse, unlike purely superfluous language, many of the verbs in the quoted price term do not mean the same thing: for example, assignments in the U.S. legal system are somewhat different from pure sales transactions, so *to assign* is not necessarily the same as *to sell*. To the extent that the verbs are completely synonymous, they are superfluous—akin to saying, "Seller seller seller agrees agrees agrees to buy to buy to buy."

Contract drafters should appreciate that all human communication is imprecise and that additional detail does not necessarily constitute additional precision. Business executives are almost always far more realistic. When one executive says "buy" the other executive knows pretty much what is meant. Lawyers ought to be secure enough to accept and utilize this sort of simplicity.

Many contract drafters agonize over the meaning of words. For the most part that is a good trait. In most instances contract drafters should avoid ambiguity and imprecision. For example, a contract that states: "The price of each fitting may be $5.00 per fitting" is simply bad usage. A price term is usually expected to be clear and definite. The use of the verb "may" creates ambiguity where none should exist. In the English language, the mandatory verb is "shall." By contrast, there are times when contract drafters may want to use what is called deliberate or purposeful ambiguity. For example, a contract could specify the actual shipping vessel (SS Hermes, say) on which the fittings are to be shipped. This is the height of precision, but it is probably uncalled for. In all likelihood, other problems may occur if the Hermes is not available. In the alternative, using the device of deliberate ambiguity, the contract might simply state: "Seller agrees to transport the fittings using a mutually acceptable form of surface transportation." Or, "seller agrees to transport the fittings by rail."

Underlying legal systems occasionally invoke deliberate ambiguity. The Uniform Commercial Code in the United States provides that when a contract does not specify price, the price shall be a price that is reasonable at the time of shipment of the goods. Deliberate ambiguity can accomplish two things: it can leave open a contract term on which the parties cannot agree while permitting them to achieve agreement on everything else; and it can leave peripheral matters to the discretion of one or another of the parties without triggering a breach of contract simply because the other party might have done something differently.

The use of terms of art can also shorten the length of contracts or lead to substantial conflict. On this point, there are a few good rules of thumb. Most courts and most people who work with contracts define words by applying the ordinary, dictionary meaning of those terms. So a contract that calls for the sale of 120 "eggs" would generally not be construed as calling for the sale of 120 Scotch eggs (the British pub food). There are, however, some departures from the plain meaning rule. Within specific industries, and among merchants in those industries, it may be permissible to use terms in other than their ordinary meanings on the plausible assumption that "everybody" (i.e., all the parties) knows what the contract talking about. But a contract

for the sale of 120 Scotch eggs between two British pub owners might conceivably use only the term "egg" to describe the commodity. Petroleum refineries use a device called a reformer to manufactured lead-free gasoline. A contract for the construction of an oil refinery that calls for the installation of a reformer, without further definition, would probably not cause problems. None of the parties to the oil refinery contract would define the term as "a person who seeks to change things by making them better."

There is another way to deal with terms in a contract. Certain terms may be defined specifically in a separate definition section of the contract. A definitional section has the advantage of explaining the term in the contract itself and thus not leaving a definition to the vagaries of judges or arbitrators. Lawyers know that even so-called everyday definitions can vary from time to time and place to place. A definitional section has the additional advantage of making the body of a contract shorter. For example, two merchants can agree to buy and sell 100 wooden boxes. The definitional section (or conceivably a separate addendum on specifications) can prescribe that each box shall be of top grade walnut and of certain dimensions. Once having set out this definition, the contract may then simply refer to "box" or "boxes" whenever it is necessary to mention the commodity in question without reiterating the boxes' specifications.

These are just a few of the things that contract drafters should consider before setting words down on paper. There are no categorical rules in this regard except perhaps the homily that well-written contracts cause fewer problems than poorly written contracts. The remainder of this chapter considers more specific contract drafting issues.

§4.3 THE USE AND EFFECT OF A LETTER OF INTENT

In complicated undertakings, the parties often need a document that signals that they have "agreed to agree." The drafting of a letter of intent or a memorandum of understanding is often necessary when matters central to the final agreement such as financing and government approval are not yet a certainty. A letter of intent may occasionally be taken to a government official or bank officer in order to get the permissions or funding necessary for the agreement. On other occasions, a letter of intent has the effect of resolving certain preliminary matters while a long-term negotiation hammers out the remaining components of the deal.[7]

The difficulty, of course, is that a letter of intent itself has to be drafted and negotiated. While this is usually not terribly difficult, persons engaged in contract drafting who also draft letters of intent should be aware that these documents can

7. For more commentary on letters of intent generally *see*, Ekaterina Pannebakker, *Letter of Intent in International Contracting* (2016); Ralph B. Lake & Ugo Draetta, *Letters of Intent and Other Precontractual Documents* (2d ed.,1994) and Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 Harv. L. Rev. 661 (2007). *See also*, J. Andrew Holten, *Letters of Intent in Corporate Negotiations: Using Hostage Exchanges and Legal Uncertainty to Promote Compliance*, 162 U. Penn. L.Rev. 1237 (2014); Giuditta Cordero Moss, *The Function of Letters of Intent and Their Recognition in Modern Legal Systems*, in *New Features in Contract Law* (Reiner Schultze ed., 2007).

sometimes take on a life of their own, particularly in jurisdictions where the requirement of a writing allows a contract to be formed by something less than a comprehensive, fully executed agreement.

In most legal systems, letters of intent and memoranda of agreement are viewed as merely preliminary and have virtually no force and effect. In international contracts for the sale of goods that incorporate U.S. law as the contract's choice of law there are particular dangers. Under the U.S. legal doctrine known as the statute of frauds, a preliminary letter or memorandum signed "by the party to be charged" (i.e., the person accused of breaching the agreement) may be sufficient proof of the existence of a contract, and any violation of that document and whatever else is deemed to constitute the agreement, may lead to court-imposed sanctions for breach of contract. A writing that satisfies the statute of frauds can be terribly vague and incomplete.

By contrast, the U.S. UCC merely points out that 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 afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. "The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted."[8]

Coping with this problem is often easier said than done. A number of authorities suggest that the letter of intent or memorandum include express language that the document is merely evidence of the parties' "willingness to negotiate and nothing more." One option for the drafter of a letter of intent is to insert into the letter language such as: "This memorandum is not intended to constitute a binding contract" or this letter refers to "the possible formation of a joint venture."[9] Such disclaimers may very well work if the only goal is to eliminate problems with an U.S.-style statute of frauds. But what happens when a government official who is being asked to give permission to export or import the commodities in question or a bank officer who is being asked to approve a multi-million dollar loan reads the letter of intent. The very disclaimers that may keep the document from being construed by a court or arbitrator as a binding agreement may persuade the government or bank that the parties are still so far apart that they should not take the action requested. This often puts contracting parties between the "rock and a hard place" often described by President Abraham Lincoln when the choices he was offered gave him no meaningful way out.

There is another way to view letters of intent and preliminary memoranda—that is, as potentially enforceable documents. In other words, the parties may proceed on the basis that the terms and conditions spelled out in the letter of intent could at some

8. UCC §2-201, comment 1.
9. *See*, e.g., Lawrence M. Solan, *Contract as Agreement*, 81 Notre Dame L. Rev. 353 (2007) (questioning whether letter of intent ever constitutes a contract); Keith E. Witek, *Drafting a More Predictable Letter of Intent—Reducing Risk and Uncertainty in a Risky and Uncertain Transaction*, 9 Tex. Intell. Prop. L.J. 185 (2001).

subsequent time be considered enforceable. However, the letter of intent may still include express language making formation of the actual contract expressly conditional on the happening of later events (in American contract parlance the occurrence of a condition subsequent). This might cause the parties to write into the letter of intent language such as: "This letter may not be viewed as a final contract unless Government X gives final export approval [or unless Bank Y gives final approval to the financing agreement.]"

There are, of course, dangers associated with this action. If those subsequent conditions fall into place, the parties may have an agreement even if one or another is not quite ready to put a signature to the final document. This possibility shows up the dilemma of a letter of intent. If it is too loose, persons external to the agreement may not want to act on the basis of the letter. If it is too detailed and does not contain a sufficient number of disclaiming phrases, the letter of intent itself could be construed as a binding contract. There is probably a moral here, if not a complete answer in the law. Parties should be wary of putting their signatures to any document, however preliminary and no matter what the document's language, if they are not sure they want to enter into the agreement.

§4.4 CHOOSING THE LANGUAGE AND THE LAW OF THE AGREEMENT

§4.4.1 Choosing the Contract's Language

International lawyers to warn of the pitfalls and dangers of negotiating and drafting contracts that cut across cultural and linguistic lines. In even the most innocuous settings language differences can cause severe problems of interpretation. Consider a partial list of terms from Professor George DeLaume's book on transnational contracts to show the enormous contrasts between French and English legal expression (*see* Table 4.13):

Table 4.13 English-French Differences

English	*French*
compromise	transaction
agreement to arbitrate	compromise
execution	signature
performance	execution[10]

These are striking differences and point up the problems that occur even in cultural systems and languages that are somewhat similar and that have common roots. Contemplate what could happen when there are vast differences in culture, legal system, and language.

10. This chart is taken from Georges Delaume, *Transnational Contracts* 231 (1982).

If a contract is between two parties who speak different languages, it is generally conceded that an international commercial contract should have an "official" language as well as be translated into the languages of the various contracting parties. For example, a contract drafted for an English seller and a French buyer might state that while the contract has been translated into both English and French "the English language text is to be regarded as the definitive and official text of the agreement." There are occasions when the parties simply cannot agree on language. In that instance, the contract can simply remain silent on official language, letting a judge or arbitrator fill in the blank.

For the most part, contracting parties should view a choice of language clause as simply another matter to be expressly addressed in the document. Generally, the choice is negotiable; and even when, for various reasons, one party insists on using his native language as the official language, the other party has a simple means of insuring that the choice does not hamper further negotiations or actual performance under the contract. If you are not comfortable with a contract's language, hire a translator—preferably one who is also something of a legal specialist. Courts and arbitrators will not disturb a choice of official language so long as no fraud or undue influence was exercised by one party against the other in making the choice.

The actual wording of a choice of language clause need not be complicated. The traditional samples are excessively cumbersome: "Notwithstanding subsequent translations of this agreement, whether or not said translations are made contemporaneously with the negotiation and execution of said agreement, the English language version of said agreement shall exclusively control." The following wording should suffice: "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."

§4.4.2 Choosing the Contract's Applicable Law

The discussion in this chapter and in Chapter 2 should give the reader a good understanding why a choice of law clause in a contract is often crucial. As will be seen in §4.6, choosing a system of law applicable to the contract could have the effect of inserting clauses or terms in the contract without the express consent of the parties. In other words, the underlying legal system can provide a gap-filling function for the agreement. This is not necessarily a bad thing. Gap-filling can free the parties from drafting clauses on many peripheral matters. It does, however, require that the parties be alert to how gap-filling may occur.

But even though risks are involved in choosing a body of law applicable to the contract, there are far more dangers associated with executing a document that is silent on choice of law.[11] Silence on applicable law can come back to haunt the parties if any

11. *See* generally, Maria Hook, *The Choice of Law Contract* (2016); Dolly Wu, *Timing the Choice of Law by Contract*, 9 Nw. J. Tech. & Intell. Prop. 401 (2011); Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 Akron L. Rev. 123 (2008); Andreas Junius, *Issues Surrounding Islamic Law as a Choice of Law under German Conflict of Laws Principles*, 7

dispute arises under the contract. Moreover, it is difficult to negotiate and draft a contract when the parties have no idea which legal system or body of law will govern the undertaking because the constraints of the chosen system will govern many of the provisions in the contract. For these reasons, this subsection will first discuss why most parties go about affirmatively choosing the law of the contract.

[1] Affirmatively Choosing the Law

There are essentially two ways to choose law affirmatively. First, the parties may try to avoid all choice of law problems by spelling out, in intricate detail in the contract itself, all the interpretative and substantive rules necessary to resolve any dispute under the contract. For small transactions in the hands of lawyers and business executives who are both brilliant and psychic, it is conceivable that such a contract could be drafted. However, excessive detail in the written document could lead to the breakdown of negotiations. Companies rarely have an infinite amount of time to spend on any individual agreement; and even assuming all this detail could be plausibly reduced to contract language, the contract itself would be gargantuan. Excessive detail sometimes also hampers efficient dispute resolution. If arbitrators have to plow through hundreds of pages, they may miss the central issues in the dispute.

There is a far more workable alternative. The parties can draft all the clauses that they believe are necessary to a proper agreement and then can choose law that fills in the remaining details. In the past, parties have normally chosen the law of a single country, usually that of either the seller or the buyer or, in some cases, the law of a respected, neutral third country. Swiss law, for example, is frequently chosen by parties who cannot agree on the law of either the seller's or the buyer's country. Since the entering into force of the Convention on the CISG, parties involved in sale of goods transactions may choose the CISG as the applicable law.

One attorney of the author's acquaintance sometimes dispenses with choosing the law of a specific country. When his clients cannot agree on choice of law, he incorporates a clause in the contract requiring arbitrators to apply "generally accepted principles of international trade and commercial practice" (or similar language) to resolve the dispute. Another version of this alternative permits the parties to declare an arbitrator as an *amiable compositeur*, a device that permits the arbitrator to apply fundamental principles of equity, fairness, and common sense to settle the dispute without the necessity of referring to and applying a body of specific municipal law. The selection of an international code of commercial law or the *amiable compositeur*

Chi. J. Int'l L. 537 (2007); Giuditta Cordero Moss, *Tacit Choice of Law, Partial Choice and Closest Connection: The Case of Common Law Contract Models Governed by a Civilian Law*, in *Rett Og Toleranse—Festkrift Helod Johan* (2007); Giesela Ruhl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 Berkeley J. Int'l L. 801 (2006); Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 Emory Int'l L. Rev. 511 (2006). Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 Am. J. Comp. L. 195 (1997); Ian F.G. Baxter, *International Conflict of Laws and International Business*, 34 Int'l & Comp. L.Q. 538 (1985); George A. Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 Int'l Trade L.J. 311 (1978).

alternative could be particularly attractive to negotiating parties who are unwilling to adopt each other's domestic commercial legal system as the choice of law. Under the twin doctrines of party autonomy and *pacta sunt servanda*, there appears to be no reason why such choices would not be honored.[12]

There is some debate as to whether the contracting parties' choice is completely unfettered, however. Classic choice of law doctrine in most of the major trading nations has generally required some connection between the legal system chosen and the contract itself. Under the U.S. UCC's rules for contracts involving the sale of goods, the choice of law must bear some reasonable relation to the contract and the contracting parties.[13] In other contracts in the U.S. and under British law, the parties' choice of law is honored so long as there is some reasonable basis for the choice.[14] For example, in an important choice of law case in the United Kingdom, *Vita Food Products v. Unus Shipping Co.*,[15] the contract for a shipment of goods from Newfoundland, Canada to New York was to be governed by English commercial law. The British court enforced the choice and determined that if contracting parties voluntarily choose a body of law, that choice will be honored irrespective of whether the law chosen has any special connection with the contract.

The United States Supreme Court in the important case, *Scherk v. Alberto-Culver Co.*,[16] concluded that choice of law clauses in contracts promote "the orderliness and predictability essential to any international business transaction" and thus suggested that U.S. courts would honor virtually any reasonable choice. Similarly, the recently promulgated European Communities Convention on the Law Applicable to Contractual Obligations[17] appears to follow the United States Supreme Court in promoting party autonomy and honoring the parties' choice.[18] In a number of other countries whose legal systems are based on civil law doctrine, the courts usually require some fairly close connection between the transaction, the parties, and the system of law chosen. In a few countries, contract drafters must cope with legal principles that provide that contracts that are to be performed within the country are to be governed by that

12. *See*, §4.9 of this chapter and the discussion in Chapter 9.
13. UCC §1-105 states: "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." This appears to limit a contract's choice of law solely to the country of the seller or the country of the buyer. However, judicial construction of this term has generally permitted the parties to choose the law of a neutral third country.
14. Restatement (Second) of Conflict of Laws §187(2)(a). Readers not familiar with the American system of Restatements of the Law should simply consider that these documents are attempts by groups of law professors, practitioners and judges to gather into a single source, as a kind of private codification, legal principles derived and announced by courts throughout the United States. Principles of law set out in the Restatements are frequently cited by U.S. courts on an advisory basis but they have no controlling effect on the outcome of cases.
15. [1939] A.C. 277.
16. 417 U.S. 506 (1974).
17. 23 O.J. Eur. Comm. (No. L-266) (1980).
18. *See*, e.g., Russel J. Weintraub, *How to Choose the Law and How Not To: The EEC Convention*, 17 Tex. Int'l L.J. 155 (1982).

country's law, irrespective of whether the parties might have made another choice.[19] For example, petroleum agreements with the Kingdom of Saudi Arabia, for example, are to be governed solely by Saudi law.[20]

Making a choice can eliminate a great deal of uncertainty, although parties must be careful in their choice.[21] If a third country is chosen, it should be a country with an easily researched, well-defined body of commercial law. Far out choices—for example choosing the law of Tanzania in a contract between a seller in Iceland and a buyer in Taiwan—would raise eyebrows among arbitrators and reviewing courts. Such a choice is so bizarre and so totally unrelated to the transaction, that a court or arbitrator might feel free to disregard it. Choosing, as a neutral country, the law of one of the major trading nations is the better alternative.

There is a secondary problem in choice of law that bears discussion. When courts or arbitrators apply choice of law, they generally apply those legal principles that are in effect in the chosen country at the time of the arbitration or litigation, rather than those principles that might have existed when the contract was drafted. Usually this is not a major problem. The commercial principles of most countries evolve so slowly that drastic changes are not likely to occur in the life of the average contract. The parties could try to stipulate that the choice of law is the set of legal principles in effect at the time the contract was executed, but it is uncertain whether a court or arbitrator would be bound by such a stipulation.

Once the choice itself is made, there is no trouble drafting the clause itself. The parties may simply state: "This contract shall be governed by and construed in accordance with the laws of _____." The Japanese External Trade Organization (JETRO) suggests that contracts contain a provision stating: "Governing law: This contract shall be governed in all respects by the laws of Japan." More cumbersome clauses sometimes attempt to show the relation between the choice of law and the contract in the clause itself. The following is an example: "This contract shall be subject to and shall be construed and enforced pursuant to the laws of _____ (country), which is the location of the headquarters of the Seller [or Buyer]." Lawyers and business executives outside the United States must understand that if U.S. commercial law is chosen, the choice of law clause must specify a particular state in the United States. There is no body of national commercial law that can be chosen for a contract between private parties. The U.S. UCC comes into being only through the sovereignty of the various states. It is national only in the sense that each state's version of the UCC is essentially the same as any other state. It is also possible, although terribly cumbersome, to choose different systems of law for different portions of the contract. This can lead to a lot of confusion when disputes arise, but even here the parties' choices will generally be honored.

19. Chile is an example. *See*, the Chilean Codigo de Comercio, Art. 113.
20. *See*, e.g., Ernest Smith & John S. Dzienkowski, *A Fifty Year Perspective on World Petroleum Arrangements*, 24 Tex. Int'l L.J. 13 (1989).
21. On this issue and several other relevant topics *see*, David Hricik, *Infinite Combinations: Whether the Duty of Competency Requires Lawyers to Include Choice of Law Clauses in Contracts They Draft for Their Clients*, 12 Willamette J. Int'l L. & Disp. Res. 241 (2004).

[2] Choosing the Law When the Contract Is Silent

The question here is why any contracting party would let such an important matter as choice of law be decided at some later date by a decision-maker who may not be fully under the control of the parties. The short answer is that many negotiating parties cannot come to an agreement on choice of law. Rather than forego the deal itself, the parties simply leave that matter for later resolution by a third party such as a court or arbitrator. To a certain extent, silence reflects a hope that no dispute will ever arise under the contract; or, in the alternative, that if a dispute arises, the arbitrators or judge will make an intelligent choice, hoping, obviously, that no dispute will ever arise. As noted earlier, some contracts try to avoid problems by providing that the governing law will be "principles of law common to 'civilized nations'," or that the parties undertake the contract in "mutual good will and good faith" without applying a specific country's legal system. But there is no readily accepted or generally available reference source for these common principles. The practical effect of such clauses is to simply turn over the dispute to the good sense of the judge or arbitrator.

Some of these issues have been the subject of litigation. In an oil concession agreement entered into between a British oil company and the country of Abu Dhabi, the parties recognized that they could not agree as to a specific body of law and inserted a clause providing merely: "[The parties] declare that they base their work in this Agreement on good will and sincerity of belief and on the interpretation of this Agreement in a fashion consistent with reason." In 1951 a dispute arose under the concession and was submitted to arbitration. Lord Asquith, sitting as one of the arbitrators, asked:

What is the "Proper Law" applicable in construing this contract? This is a contract made between Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the municipal law of England could apply.[22]

Thus, the question faced by Asquith was: Is it possible to construe or interpret a commercial contract without reference to an identifiable system of municipal law? Lord Asquith hit on a Solomonic solution: he invoked certain principles of British commercial law that he deemed "of ecumenical validity" but chose to disregard other rules of British commercial practice that he characterized as excessively "rigid." This was probably not a bad solution for Lord Asquith as arbitrator; he had to come to some decision under the contract. But there is considerable danger in this approach. There is no assurance that every judge or arbitrator will have the stature and brilliance of Lord Asquith. A different arbitrator might well have applied Abu Dhabi law or the whole of British commercial law, however inappropriate, or some melange of commercial

22. *Id.*

principles that did violence to the underlying agreement. When a contract is silent on choice of law many unpredictable things can happen.

There are, of course, certain legal concepts derived from that body of law known as conflict of laws that assist courts and arbitrators in determining which body of municipal law to apply in the absence of an express choice by the parties. A compilation of legal principles in the United States entitled the Restatement (Second) Conflict of Laws suggests that the law to be applied is the law of the country having the "most significant relationship to the transaction and the parties" taking into consideration the place of contracting, the place where the contract was negotiated, the place where the contract is to be performed, the location of the subject matter of the contract and the domicile, residence, nationality, place of incorporation and place of business of the parties.[23] The UCC (now effective in all states except Louisiana) provides that the when the parties have not chosen law, the applicable law is the law of the state bearing the most "appropriate relation" to the commercial agreement.

In other countries the rules vary. In some instances the domestic commercial law provides that the applicable law will be the law of the place where the contract was made. In other instances it is the law of the place where the contract is to be performed; and in yet other countries it is the national law of the contracting parties if they are of common nationality or the law of the country where the contract was made or where it is to be performed if the parties are not of common nationality.[24] But, again, the ultimate choice is not certain and will be made by someone other than a party to the contract.

In 2015, The Hague Conference on Private International Law issued a set of guidelines on choice of law in international commercial agreements: The Principles on Choice of Law in International Commercial Contracts. As with the other Hague Conference materials, these provisions in the words of the Conference, are to be considered a "code of best practice."[25] Set out in a Preamble with twelve articles (and extensive accompanying commentary), they can be briefly summarized as follows:

(1) The parties may choose the law applicable to the whole contract or only parts of the contract and different law may be applied to different parts of the same contract (Article 2). But the choice must be made expressly in the contract (Article 4).

23. Readers who are not lawyers or who are from outside the United States should keep in mind that while the Restatement is prestigious, it is essentially a compilation of legal principles by law professors and, accordingly, is not regarded as controlling law in any jurisdiction in the United States. Restatement principles become binding only when they are formally adopted by the various state courts.
24. *See*, James R. Lowe, *Choice of Law Clauses in International Contracts: A Practical Approach*, 12 Harv. Int'l L.J. 1 (1971); For a discussion of some of the civil law doctrines on choice of law *see*, e.g., Christoph Reithmann, *Internationales Vertragsrecht* 2–17 (2d ed., 1972). For a distinguished but perhaps now somewhat dated statement that civil law requires a reasonable relationship between parties, performance and choice of law (and that discusses the "excesses" of party autonomy) *see*, Niboyet, *Traite De Droit International Prive Francais* 51–60 (1948).
25. The full text of the principles may be found at The Hague Conference website: www.hcch.net.

CHAPTER 8

The Less-Drastic Forms of Commercial Dispute Resolution

§8.1 INTRODUCTION

Lawyers and business executives occasionally lose sight of the fact that inserting terms in a contract that promote flexibility, or drafting a clause that calls for renegotiation when the deal becomes unstuck can solve a lot of problems that otherwise would have to be dealt with through the vastly more expensive processes of arbitration or litigation. Flexibility, particularly in long-term contracts, should be a matter of concern both when a contract is initially drafted and when disputes arise during the life of a contract.

The language of the contract can alleviate many problems. Express provisions that work to resolve disputes can be inserted in many contracts. Even when the contract is silent on some of these matters, many legal systems have created rules of law that permit contracts to be adjusted without breach (1) over the life of the contract either automatically (e.g., a contract whose price term increases a fixed percentage each year) or at the insistence of one or another of the parties (e.g., when one party is allowed to adjust quantity or quality requirements unilaterally), or (2) on the occurrence of certain specific events, such as war, strikes or currency devaluations.

Most international contracts contain some of these provisions as a matter of course;[1] but even if a contract is totally inflexible when it is initially drafted, renegotiation of the entire contract or portions of the contract is always a possibility.[2] Occasionally, renegotiation takes place in the presence of a third-party mediator/conciliator who attempts to assist the parties in reaching a satisfactory solution.

1. *See*, the discussion of typical contract provisions in Ch. 4, *supra*.
2. The first portion of this chapter owes a great debt to two of the principle works on contract adaptation and renegotiation: *Adaptation and Renegotiation of Contracts in International Trade and Finance* (Norbert Horn ed., 1985) [hereinafter *Contract Adaptation*] and Martin Bartels, *Contractual Adaptation and Conflict Resolution* (1985). *See also* Giorgio Zanarone, *Contract Adaptation under Legal Constraints*, 29 J. L. Econ. & Org. 799 (2012).

Finally, there is a new device on the horizon, the minitrial, not yet fully accepted by international business executives but which shows great promise as an alternative to formal arbitration or litigation. Each of these options is discussed in depth below, but one thing should be kept firmly in mind: all of these options are far less disruptive to the underlying business relationship and far less costly than either litigation or arbitration. In some cultures, notably many of the Pacific Rim countries, these devices are preferred over the more traditional methods of arbitration or litigation. While none of these techniques is the perfect dispute resolution device, they may be profitably explored before a party commences a lawsuit or triggers the contract's arbitration clause.

§8.2 CONTRACT ADAPTATION

The term contract adaptation generally refers to the incorporation of certain terms and conditions in a contract that promote flexibility and that permit the contract to conform to certain changes in conditions without automatic termination or without the need for renegotiation. Adaptation is most important in those contracts that are expected to be of long duration. Contracts calling for a one-time sale of goods transaction or a single service activity to be performed over a short period of time immediately after signing normally do not require adaptation provisions. Similarly, contracts executed by parties who have no expectation of ever seeing each other again or ever doing business again usually have little or no interest in adaptation provisions.

Short-term contracts can be safely drafted with a view toward only the conditions existing at the time of the transaction or at the anticipated time of performance. By contrast, contracts of longer duration require more thought and planning and generally include a number of clauses that are specifically designed to promote flexibility over the life of the contract. Even contracts involving single sales transactions in which the parties want to continue to do business in the future will often contain clauses promoting flexibility because both parties wish not to antagonize each other. An easy way to antagonize someone is to accuse him of breach of contract.

The longer the duration of the contract the more interest the parties are going to have in proper adaptation clauses because the parties are rarely able to predict internal or external conditions over the long run. On the international scene, at least in the twentieth and twenty-first centuries, change in circumstances rather than stability has been the rule. In exceptionally long contracts such as petroleum sharing contracts and other natural resource production agreements—which often have a duration of thirty years—the drafters of the original contract will of necessity include a sizable number of adaptation provisions.

There are a number of ways to categorize adaptation provisions. Professor Norbert Horn, for example, has developed a classification that makes a great deal of sense: "[Adaptation] clauses are designed either to specify details of contractual obligations (gap-filling) or to slightly modify the contents of these obligations

(adjustment, adaptation)."[3] Clauses such as force majeure clauses are normally referred to as automatic adaptation clauses. In other words, the happening of certain events external to the contract—such as strikes, political insurrection, or war—automatically suspends or, in certain cases, alters one or both parties' performance obligations.

Sometimes, adaptation can be triggered unilaterally by one of the parties. For example, a contract may contain a "most-favored" clause that requires a contract to receive the same treatment as a contract subsequently negotiated with another party, even though the first party may have absolutely nothing to do with the later agreement.[4] The concept is akin to the idea of most-favored nation: when one country is extended certain trade benefits, all other countries with most-favored nation status must be given the same treatment. In other circumstances a contract may provide that a party may unilaterally assign all rights under the contract or may terminate the contract on the occurrence or nonoccurrence of certain conditions. So, for example, if a contract calls for the buyer to purchase all his requirements from a seller and the contract contains a provision that provides for a minimum amount of requirements that never materialize, the contract might permit the buyer to terminate, irrespective of the wishes of the seller, because the buyer's actual requirements never reach the amounts specified in the contract.

In many cases, conditions may change to the point where both parties see the need for adaptation. Occasionally, bilateral adaptation may occur simply by minor adjustments in the manner of performance by one or both parties that do not trigger an objection by the other side. For example, a contract may call for payment in the currency of a specific currency, say, Swiss francs. If that currency for some reason cannot be utilized, the buyer may simply proffer payment in a substitute currency, say U.S. dollars, that the seller then accepts without protest. Usually, however, bilateral adaptation follows some intense renegotiation between the parties. Many long-term contracts provide an express mechanism for bringing the parties together to work out appropriate adaptation clauses.

There are a number of other ways to categorize adaptation provisions. Professor Horn has developed four different groups. In his view, contracts may be divided into: (a) "open" contracts such as turnkey construction projects or complex technology transfer projects in which the parties concede that all the details cannot be anticipated and written into the basic document; (b) "flexible" contracts in which certain of the details underlying the basic agreement such as the price of a vital natural resource is expected to change over time and thus cannot be specified in the original document; (c) contracts involving "special risks" which the parties did not specifically anticipate but for which they incorporated a special risk clause; and (d) contracts with force majeure provisions.

3. Norbert Horn, *Standard Clauses on Contract Adaptation in International Commerce,* in Contract Adaptation, *supra* n. 2, at 112. *See also,* Klaus Peter Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators,* 36 Vand. J. Transnat'l L. 1347 (2003); John Y. Gotanda, *Renegotiation and Adaptation Clauses in Investment Contracts Revisited,* 36 Vand. J. Transnat'l L. 1461 (2003).
4. Mr. Bartels notes that "most-favored" clauses are not very common. Bartels, *supra* n. 2, at 35.

The first two categories are self-explanatory. With regard to the latter two categories, there is not a great deal of difference between a special risk clause and a force majeure clause in actual operation. The effect of both is to forgive or suspend performance, or, in certain instances, to alter performance requirements. A special risk clause is usually inserted in a contract when the parties believe a certain event might happen—such as a change of government that might lead to nationalization of a certain industry. The special risk clause will make specific adjustments in the contract to accommodate that occurrence. A force majeure clause, by contrast, is inserted in virtually every commercial contract, whether or not of international scope, and provides for relief from the occurrence of unanticipated events of a more general nature such as earthquakes, floods, and war.

Another way to look at adaptation issues is with regard to the ultimate effect of the change in circumstances. Some changes can be so drastic that they totally prevent further performance under the contract. Other changes can have a somewhat milder effect in that they merely make the contract more difficult or more burdensome to perform. For example, British commercial law recognizes the doctrine of "frustration" and may occasionally apply the doctrine to forgive performance, but the British courts have almost always applied the doctrine narrowly to mean that performance has become technically impossible, not merely difficult.[5] For example, a change in a government regulation may make performance of the contract unlawful. A contract between a Scottish distillery and a United States liquor dealer to sell single malt whisky in the United States would have been deemed "frustrated" and performance thereby forgiven when the United States government made the sale of liquor illegal in 1919.

The United States' Uniform Commercial Code (UCC) is considerably more flexible on this point. The UCC recognizes through its doctrine of "commercial impracticability," that excessively burdened performance may require forgiveness. While the burden of increased costs is usually never a proper excuse (as the Code points out: "that is exactly the type of business risk which business contracts made at fixed prices are intended to cover"), such matters as severe shortages of raw materials or unforeseen shutdowns of major sources of supply may excuse performance or at least permit delayed performance.[6] Other countries deal with these issues of difficult or impossible performance on a case-by-case basis by construing the force majeure clause in individual contracts.

In drafting contracts, there are essentially two ways in which parties can cope with changed conditions: they can let the contract remain silent on these matters with the expectation that the law underlying the contract will fill in the necessary gaps; or they can address them specifically in the contract by drafting clauses which provide the necessary flexibility to accommodate the changes.

5. *See*, e.g., *Ford & Sons, Ltd. v. Henry Leetham & Sons, Ltd.*, 21 Com. Cas. 55 (1915, K.B.D.).
6. For some excellent discussion and analysis of commercial impracticability, *see* Jennifer Camero, *Mission Impracticable: The Impossibility of Commercial Impracticability*, 13 U.N.H.L. Rev. 28 (2014); Paula Walter, *Commercial Impracticability in Contracts*, 61 St. John's L. Rev. 225 (2012).

§8.2.1 Gap-Filling Mechanisms in the Underlying Law

To understand this topic, it is important to have some understanding as to the manner in which the law underlying the contract is ascertained. As discussed in Chapter 2, the applicable law may be expressly stated in the contract by way of a choice of law clause. If the contract contains no express choice of law clause, virtually all mature legal systems provide rules and mechanisms by which a court may determine which law to apply.[7] These court- or arbitrator-imposed rules can be complex; but for the purposes of the following discussion it is enough to realize that if the parties become engaged in a dispute under the contract the entity charged with resolving the dispute will choose a body of law to apply to that contract if the parties have not made their own choice of law.

Frequently, a choice made by a judge or arbitrator satisfies neither party. That is, a court or an arbitrator choosing a body of law may not make the same choice the parties might have made had they chosen the law when the contract was drafted. Nonetheless, when a body of law is chosen, that law will frequently impose certain gap-filling mechanisms on the parties. These mechanisms will apply in addition to whatever is expressed in the contract.

Leaving the choice of law to others is dangerous. It greatly lessens both predictability and stability under the contract. It can have consequences never intended by the parties; and, if the contract becomes the subject of an intense dispute culminating in arbitration or litigation, the lack of an express choice of law provision in the contract often prolongs the dispute because parties then have to fight over which law to apply as well as fighting over the substantive parts of the contract. Most international contracts contain a carefully considered choice of law provision even if the remainder of the contract is less detailed. When the negotiators cannot agree on a choice of law, some contract drafters invoke "commonly accepted principles of commercial behavior" as a kind of choice of law that avoids tying the contract to any particular country's system of contract law.

By and large, the parties' choice of law will be honored by courts and arbitrators. In a few instances, the choice will not be honored for reasons of public policy. The court or arbitrator is then empowered to impose a choice of its own. This is a rare

7. An intense discussion of choice of law rules in various jurisdictions is beyond the scope of this chapter. For additional information on this topic *see*, Ian F.G. Baxter, *International Conflict of Laws and International Business*, 34 Int'l and Comp. L.Q. 538 (1985); Russell Weintraub, *How to Choose Law for Contracts, and How Not To: The EEC Convention*, 17 Tex. Int'l L. J. 155 (1982); Georges R. Delaume, *The European Convention on the Law Applicable to Contractual Obligations: Why a Convention?* 22 Va. J. Int'l L. 107 (1981); and George A. Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 Int'l Trade L. J. 311 (1978). The reader should also review the lengthy section on choice of law in Chapter 4. There is some new literature on choice of law under The Hague Principles. *See*, e.g., Andreas Schwartze, *New Trends in Parties' Options to Select the Applicable Law? The Hague Principles on Choice of Law in International Contracts in a Comparative Perspective*, 12 U. St. Thomas L.J. 87 (2015); Marta Pertegas & Brooke Adele Marshall, *Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts*, 39 Brook. J. Int'l L. 975 (2014); Symeon C. Symeneonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 Am. J. Comp. L. 395 (2013).

occurrence, of course, and to avoid it, contract drafters should simply insure that there is a reasonable relation between the law chosen for the contract, the identity of the parties and the place of performance. A contract between a Swiss seller and a Mexican buyer that chooses either Swiss or Mexican law will virtually never have its choice of law disturbed. By contrast, a contract between a United States seller and a Ghanian buyer that chooses Icelandic law will be automatically suspect and possibly not honored. When parties, for whatever reason, make a rather exotic choice of law, they should probably explain their reasons for doing so in the contract itself or in some contemporaneous sidebar document. Even an exotic choice of law properly explained by the contracting parties will normally be accepted by the court or arbitrator when a dispute occurs.

Some legal systems are better equipped to fill gaps than others. Under the United States' UCC, many details of a contract may permissibly be left open with the expectation that the general legal principles applicable under the UCC will fill in many of the gaps. For example, in the United States, a contract for the sale of goods governed by Article 2 of the UCC can be silent on a number of important matters and still remain enforceable. Under the UCC, an offer that does not specify a time during which it may be accepted is deemed to remain open "a reasonable time, but in no event [in excess of] three months."[8] A contract that leaves the price term open will require the payment of "a reasonable price at the time of delivery."[9] In other circumstances, as discussed above, the UCC forgives performance in cases in which performance becomes "commercially impracticable" due to unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.[10]

Accordingly, an international commercial contract that incorporates the UCC as its substantive legal framework could in theory dispense with a substantial amount of detail, could leave out a large number of specific terms, and might still be an enforceable document. But even a contract that chooses the UCC that leaves too many things out exposes the parties to some risks. Most of the gap-filling of the UCC turns on the concept of "reasonableness"—a term that may be readily understood by two parties in the United States who are used to functioning in the same commercial atmosphere, but that may be very difficult to ascertain by business executives from other cultures whose concepts of acceptable commercial behavior (what is frequently called the "course of dealing" or "course of performance") may be radically different from practices in the United States. Moreover, even U.S. contract drafters find themselves extremely uncomfortable leaving open all the terms permissibly left open under the UCC. In international contracts, especially between two parties who have not had prior dealings and who come from different cultural and legal backgrounds, leaving open such crucial items such as price and delivery is almost never done.

Virtually no other legal system provides for the breadth of gap-filling permitted under the UCC. Under the French law, the basic concept of force majeure excuses performance only when an event occurs that is totally beyond the control of one of the

8. UCC §2-205.
9. *Id.*, §2-305.
10. *Id.*, §2-615.

parties. In limited circumstances involving contractual dealings between private parties and the state, the doctrine of imprevision permits a court to forgive performance when conditions change such that performance becomes extremely burdensome for one of the parties. However, Professor Horn notes that those French courts that have recognized the principle of imprevision have also required, apparently as a condition precedent, that the parties attempt to renegotiate the terms before seeking forgiveness of performance in court.[11]

Under German law the doctrine of impossibility of performance may be used to excuse performance when the nonperforming party is not negligent and when the event which inhibits performance is found to be beyond that party's control. Under British common law, performance under a contract is virtually never excused unless the nonperforming party can show "frustration" of performance—that is, that performance was absolutely impossible due to an event beyond that party's control.

A number of recent commentators have suggested that to the extent there exists an international law of contract—and most observers seem to have concluded that in practice there is really no such thing because virtually all contracts which cross national boundaries remain tied in some fashion to some nation's domestic substantive law—it may be possible to ascertain gap-filling provisions in these principles of international law. For example, Professor Horn points to Article 62 of the Vienna Convention on the Law of Treaties[12] and its language on fundamental change of circumstances as an instance of international recognition of the doctrine of impossibility or frustration. Similarly, Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) contains a forgiveness provision that operates essentially as a force majeure clause: "A party is not liable for a failure to perform any of his obligations if he proved that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." As more and more countries accept the CISG, and as more and more parties choose the CISG as the law applicable to their contract, Article 79 may be used more frequently as a gap-filling device.

§8.2.2 Coping with Uncertainty Through Express Contractual Provisions: Some Typical Adaptation Clauses

Most contracting parties will probably not wish to leave important details in the contract to the mercy of gap-filling mechanisms derived from the underlying substantive legal system. Instead, they will likely wish to deal with as many uncertainties and create as much flexibility as possible through express provisions in the contract itself. Although express contractual language will not totally eliminate risk—there is virtually nothing that can accomplish this—it does give a great deal of control over most of the important matters to the parties themselves; because in virtually all instances, whether

11. Norbert Horn, *Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law*, in Contract Adaptation, *supra* n. 2, at 18.
12. This is the so-called treaty on treaties and is reprinted in 8 *Int'l Leg. Materials* 679 (1969).

the contract is simply performed, whether it is litigated or whether it goes to arbitration, the contract language will be honored and enforced in the dispute resolution process.[13]

There are essentially two ways that contracting parties can incorporate adaptation clauses in the contract. On the one hand, the parties may simply search the literature for standard form clauses and write those clauses into the document with perhaps slight changes. A number of organizations provide such clauses. For example, for international construction contracts, two organizations, the Federation Internationale des Ingenieurs-Consiels (FIDIC) and the United Nations International Development Organization (UNIDO), have developed standard form clauses covering a variety of matters including alterations, delays, cost overruns, special risks and other issues.

The FIDIC clauses have been frequently used even though many of the clauses have internal defects and are not universally appropriate. As Professor Horn puts it: the clauses "do not display much consistency with regard to [their] terminology or scope ... and, as an offspring of British contractual practice, are hardly compatible with [the legal systems] of civil law countries."[14] The UNIDO clauses are often useful for only very narrow specific purposes, because they have been drafted in the context of specific model construction contracts, such as turnkey fertilizer plant construction projects. Many domestic commercial organizations such as trade associations and chambers of commerce also provide model contracts or standard form clauses.

Models and standard forms are cheap and quick; but they contain a number of pitfalls and hazards. First, they may not fit precisely the commercial dealing in question, just as clothing off the rack rarely fits as well as custom-made clothing. Second, it is virtually impossible to draft a single model contract or standard clause that meets the legal requirements of all the world's legal systems. It is always possible, of course, to alter a standard form to meet the requirements of a specific transaction; but it is sometimes more difficult and time consuming to change a standard clause than it is simply to draft an original clause that satisfies the desires of the parties.

At the same time, striving for complete originality is rarely called for or even possible in most circumstances. Given that so many contracts are drafted by or with the assistance of lawyers, and that lawyers in all countries tend to be inordinately conservative when it comes to breaking new linguistic ground, most contracts are based on preexisting, traditional language. Also, standard form clauses and model contracts may contain a great deal of language that is suitable for the transaction in question; and, at the very least, may provide a checklist of issues and phrases that the parties should consider for incorporation in their document.

13. The reader should be aware that there are instances in which courts have refused to honor contractual provisions that somehow violate a nation's "public policy" or which are so unfair or biased as to be deemed "unconscionable"; but such rulings are relatively rare. Most courts and arbitrators insist that the parties live with language that they have previously agreed to.
14. Norbert Horn, *Standard Clauses on Contract Adaptation in International Commerce* in Contract Adaptation, *supra* n. 2, at 113–114.

If the parties choose to draft their own language, they are well advised to consider—as gap-filling or adaptation provisions—the following checklist of possible clauses:[15]

(1) *Variation and change clauses*. These clauses, often incorporated in construction contracts, permit the parties to alter materials specifications, techniques of construction and the like so that excessive rigidity in the original contract does not prevent the completion of the project.
(2) *Price escalation clauses*. These clauses cope with price uncertainty and permit the seller to maintain his profit margins even if costs begin to escalate. As one might expect, there are virtually no fixed price contracts in, for example, the international petroleum industry. Almost all natural resource contracts provide for some type of automatic price escalation (or in certain cases, price reduction) based on the prices set at the source.
(3) *Stabilization and tax clauses*. These clauses help protect against changes in government and government policy. They typically excuse performance when government policy changes to the extent that contract performance is impaired. Tax clauses address expressly the prospect of changes in a nation's tax policy that may impair the economic worth of the contract.
(4) *Review clauses*. Review clauses are essentially renegotiation clauses and obligate the parties to discuss unanticipated changes in circumstances with a view toward amending the contract language to cope with those changes. However, as noted in the next section, renegotiation may take place without a specific contractual provision obligating the parties to do so.

§8.3 RENEGOTIATION

To a certain extent, this section restates the obvious. In most instances when a contract begins to cause trouble, the parties voluntarily get together to see what can be done to preserve the business relationship. People in business, pragmatists that they are, rarely jump immediately into court merely because something troublesome occurs.

The obligation to renegotiate can also be built into the contract and conceivably enforced as any other provision in the document. Renegotiation clauses are not a panacea, of course. On occasion, uncooperative parties who are forced to renegotiate simply because a contract clause demands that they renegotiate will probably make sure that the negotiation fails and that the contract is put through some more formal—and adversarial—type of dispute resolution mechanism. Readers about to enter a renegotiation session should refresh their recollection of the basic negotiation principles set out in Chapter 5. Renegotiation is distinct from initial contract

15. Space limitations do not permit a comprehensive discussion of all these clauses. Readers who wish specific illustrative language for these clauses should consult two of the preeminent multivolume treatises in the area. *The International Law of International Commercial Transactions* (Norbert Horn & Clive M. Schmitthoff eds., 1983) and Georges R. Delaume, *Transnational Contracts* (1982).

negotiation in only one sense: it is negotiation as Professor Horn puts it, "in the shadow of the court." When an initial negotiation fails, the parties simply do not execute the contract; when a renegotiation fails, the parties generally resort to some more structured type of dispute resolution mechanism such as arbitration or litigation. But even at this point parties should seriously consider the two other mechanisms discussed in this chapter—mediation/conciliation and the minitrial before resorting to either arbitration or litigation.

§8.4 FACT FINDING AND EARLY NEUTRAL EVALUATION

There are additional processes that are recognized as forms of alternative dispute resolution (ADR) that might prove efficient and effective for international commercial disputes. One such procedure is known as *fact finding*.[16] In this instance, a neutral person (i.e., one with no relationship to the parties) conducts an investigation of the dispute and, mainly, determines what the facts of the matter are and gives a report of that fact finding to the parties. This process has a great deal to commend it because it is fast and relatively inexpensive. It deals with a component of a dispute (i.e., what the facts really are) in the same way that a judge or jury might find the facts. Often, when the parties are confronted by a report of a neutral third party setting out the facts as that third party sees the dispute, there are strong pressures to settle the dispute realistically.

In yet another type of ADR that stands, in the taxonomy of ADR, somewhere between fact finding and mediation known as *early neutral evaluation*.[17] In this instance, as in fact finding, the parties select a neutral third person to engage in both fact finding and a broader evaluation of the dispute that may, conceivably, include an analysis and evaluation of legal and economic issues apart from the facts themselves. As in fact finding, the neutral issues a report to the parties for their consideration. The process is typically speedy and relatively cheap and often provides just enough objectivity that the parties are able to resolve the dispute armed with the neutral's report. Persons experienced with early neutral evaluation often note that the report of the evaluator differs little from the view of the dispute that arbitrators or mediators might take. For this reason, it is yet another form of less-drastic dispute resolution that parties may wish to consider. In both fact finding and early neutral evaluation, the parties have a great deal of control over the process and confidentiality is rarely compromised.

16. *See*, e.g., Tim K. Klintworth, *The Enforceability of an Agreement to Submit to a Non-Arbitral Form of Dispute Resolution: The Rise of Mediation and Neutral Fact Finding*, 1995 J. Disp. Resol. 181 (1995).
17. *See*, e.g., Norman Zakiyy & Kamal Halili Hassan, *Prospects of Using Early Neutral Evaluation in Case Management of Complex Civil Cases in Malaysia*, 3 Eur. J. Econ. & Bus. Stud. 9 (2015); Karen Engro & Lisa Pupo Lenihan, *Understanding Early Neutral Evaluation in the Western District of Pennsylvania*, 10 Laws. J. 3 (2008).

§8.5 MEDIATION AND CONCILIATION

§8.5.1 Mediation and Conciliation Generally

Mediation as a commercial dispute resolution process has been with us probably as long as there have been people doing business. Conceptually, it is not much more than negotiation in the presence of, and facilitated by, a third person or persons. It can be informal, as for example, when two disputing shop owners ask a third shop owner to help resolve their conflict, or it can be relatively structured with the application of rules of procedures, the exchange of written memoranda prior to the mediation, the formal appointment of a mediator, a final written agreement and the like. There is even a lack of consensus on the basic terminology. A number of writers on the topic, particularly some of the European commentators, appear to distinguish sharply between mediation and conciliation, viewing mediation as the use of a third party facilitator who, both literally and figuratively, sits between the contesting parties and helps them come to terms and conciliation as a process by which each party designates a conciliator for his or her side who then, on their own, meet to hammer out some kind of resolution that is then presented to the actual parties for their confirmation.

This distinction is probably not necessary in most circumstances since there are any number of successful models for mediation/conciliation that have been worked out over the years. Accordingly, for the purposes of this section, the term mediation will be used as the generic term for this type of dispute resolution.

§8.5.2 A General Theory of Mediation

Mediation is a device for resolving disputes that attempts to defuse a great deal of hostility and anguish between the parties by using a third party as a go-between.[18] And

18. The basic mediation literature is growing, but the mediation writings specifically addressed to international business disputes remains relatively sparse. For some basic works *see*, e.g., Alexia Georgakopoulos, *The Mediation Handbook: Research, Theory & Practice* (2017); Eileen Carroll & Karl Mackie, *International Mediation: Breaking Business Deadlock* (2016); Klaus Peter Berger, *Private International Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (2015); Nadja Alexander, *International Comparative Mediation: Legal Perspectives* (2009); Christian Buhring-Uhle, *Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management* (1996); Jay Folberg & Alison Taylor, *Mediation* (1984) [hereinafter *Folberg*]; Roger Fisher & William Ury, *International Mediation: A Working Guide* (1978) (emphasizing diplomatic mediation rather than private commercial mediation). For more general, but helpful, reading on mediation *see*: Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (2004); Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (2003); Jay Folberg, Dwight Golann, Thomas J. Stipanowich & Lisa Kloppenberg, *Resolving Disputes: Theory, Practice and Law* (2d ed., 2010). For some articles *see*, the classic jurisprudential work by Professor Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. Calif. L. Rev. 305 (1971). Also helpful are: Penny Booker & Anthony Lavers, *Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom*, 5 Pepp. Disp. Resol. L. J. 161 (2005); Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation*, 75 Tul. L. Rev. 913 (2001); Symposium, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation*, 15 B.U. L. Rev. 175 (1997); Julie Barker, *International*

while it places enormous (sometimes excessive) importance on the role of the mediator has a number of characteristics that commend it for commercial disputes. For example, mediation is relatively inexpensive and compared with some of the more adversarial forms of dispute resolution, not very time consuming. It is normally confidential—thus sparing the parties the prospect of a fight in open court—and it is normally not burdened by such things as rigid rules of procedure and evidence. Best of all, it is a superior device for preserving the underlying business relationship while permitting the parties to resolve the dispute at hand because it is not nearly as confrontational as litigation. A skillful mediator can sometimes preserve a spirit of good feeling between the parties even as they work through the specific problem at hand.

In theory, mediation is not that different from negotiation, so many of the concepts and issues discussed in Chapter 5 are relevant here. The insertion of the third party mediator, however, lends a slightly different atmosphere to mediation. For this reason, much of the theory of mediation revolves around the behavior of the mediator. Professors Jay Folberg and Allison Taylor postulate seven stages for mediation that now serve as a model for much mediation research. The Folberg-Taylor stages are almost self-explanatory and bear a distinct and understandable relation to the Fisher and Urey stages of negotiation. They are:

(1) Introduction—creating trust and structure.
(2) Fact finding and isolation of issues.
(3) Creation of options and alternatives.
(4) Negotiation and decision-making.
(5) Clarification and writing of a plan.
(6) Legal review and processing.
(7) Implementation, review, and revision.

Set in an international commercial context, the stages might work in the following manner. In the beginning, the mediator works with the parties to defuse whatever hostility and distrust has arisen from the dispute so far. This may be merely a matter of getting the parties to talk quietly with each other in some neutral setting such as a hotel suite. If tempers are too hot for this, a mediator might begin the mediation by some kind of shuttle diplomacy, by which the mediator keeps the parties in their respective rooms and moves back and forth between the two sides, conveying information, clarifying positions and discussing issues. There are additional complications of linguistic and cultural differences in international contracts. A mediator who is sensitive to these nuances can make all the difference in the world between success and breakdown.

Mediation: A Better Alternative for the Resolution of Commercial Disputes, 19 Loy. L.A. Int'l & Comp. L. J. 1 (1996); Walter A. Wright, *Mediation of Private United States-Mexico Commercial Disputes: Will It Work?* 26 N.M. L. Rev. 57 (1996); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 Vt. L. Rev. 85 (1981); and Lawrence Perlman & Steven Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 Int'l L. 215 (1983).

Stages 2 and 3 in an international commercial setting are frequently crucial to a successful outcome. Often the parties come together knowing only their side of the story because so much of the business transaction has been conducted over long distances. A mere appreciation of the difficulties faced by the other party is sometimes enough to provoke an amicable resolution. Mediators can play a crucial role in developing creative options. The two parties frequently become what the psychologists call field dependent and can see only their own point of view filtered through all their own prejudices. They lose sight of other possibilities that are not within their limited field of vision. A mediator who knows something about international transactions can suggest possibilities that would never occur to the two disputants.

Stages 4 and 5 are inevitable in any mediation or negotiation. A decision that is acceptable to both parties must be reached to have a successful conclusion. In a commercial setting that decision is almost always committed to paper. The paper may be a wholly new contract or a mere addendum to the existing contract. Occasionally, it is signed on the spot by the parties' representatives, if they have been given that power, or it is drafted, initialed, and returned to corporate headquarters for ratification.

Folberg and Taylor's Stage 6 (legal review and processing) is a stage more important to disputes in the area of domestic relations or community grievances and is rarely a factor in international commercial disputes unless those disputes are already in some form of litigation and the mediation is used in an attempt to settle the litigation. By contrast, Stage 7 (implementation and review) is highly important and sometimes ignored. It is vital that two parties dealing at long distance develop some process by which the mediated agreement can be properly monitored.

The monitoring can be by third parties or by a requirement of periodic reporting between the parties; but it must occur in some fashion if only to avoid the reoccurrence of the problems that lead to the initial dispute. One common deficiency in renegotiated or mediated agreements is a lack of some kind of policing mechanism to insure that the new agreement is being fully performed. Another common defect is falling into the trap of thinking that renegotiation or mediation need occur only once, thus failing to establish some mechanism by which the parties can reconvene if any problems arise. The mechanism need not be elaborate. It can be something as simple as a letter notification process by which one party notifies the other that a problem has occurred and that invites the other party to participate in a mediation.

There are inherent problems with mediation, of course. No one should consider it a panacea for all commercial disputes. One of the problems with the rush toward mediation in the United States is that its proponents emphasize its positive attributes but are generally blind to its defects. Mediation is often unsuccessful when there is disproportionate power or leverage on one side or another. In contrast, the formal procedures of litigation can go a long way toward equalizing leverage. Like negotiation, mediation is normally useless when one party insists on acting in a confrontational, take-it-or-leave it manner. While the mediation itself is usually fairly quick—speed is one of its distinct advantages—a mediation failure means that the parties must resort to some more formal mechanism such as arbitration or litigation when they could have begun with that process. So it can waste a lot of time and expense for the parties and leave them no better off than they were at the beginning.

the crucial issue of confidentiality by providing that "all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement."[30] Among other things, the law provides that any settlement agreement that emerges from such a proceeding is itself fully enforceable.[31]

§8.5.4 Mediation in the Future

The fact that mediation has not yet caught on in the international commercial community is something of a disappointment. Mediation, even when it is used, is rarely reported in the legal or business literature. For persons as conservative as lawyers and business executives, this lack of a track record for mediation severely inhibits its use. Few lawyers want to be attacked by their clients or to get a reputation among other lawyers for engaging in costly, futile actions. This fear of failure probably stifles a lot of innovative dispute resolution techniques. But while the process has both advantages and disadvantages, it is a process that bears more attention and consideration than it is now getting. Some disputes—especially those involving certain Pacific Rim cultures who abhor the adversarial nature of arbitration and litigation—simply cry out for mediation. It would be a shame if the innate conservatism of international commercial lawyers was the only thing standing in the way of increased use of these techniques.

§8.6 THE MINITRIAL

§8.6.1 The Minitrial Generally

Although mediation has been with us practically since time immemorial, the minitrial device is newly developed and just beginning to be appreciated. No one knows precisely when or where the idea was first developed. One of the first articles describing a minitrial was written in 1978 by Professor Eric Green who may remain the device's strongest and most articulate proponent.[32] Recently, the Canton of Zurich promulgated minitrial rules that may catch on in Europe and elsewhere. The AAA has now gotten into the act with minitrial rules, and it appears as if a number of other arbitral bodies may follow suit.

The process is relatively simple. The disputing parties convene for a short period of time, usually for not more than two days. The lawyers for each side make summary

30. Article 9.
31. Article 14. For some explanation of the history and negotiating context of the model law *see*, Robert N. Dobbins, *UNCITRAL Model Law on International Commercial Conciliation: From a Topic of Possible Discussion to Approval by the General Assembly*, 3 Pepp. Disp. Resol. L.J. 529 (2003).
32. Eric D. Green, *Settling Large Case Litigation: An Alternative Approach*, 11 Loyola L.A. L. Rev. 493 (1978). *See also*, Thomas J. Klitgaard & William E. Mussman III, *High Technology Disputes: The Minitrial as the Emerging Solution*, 8 Santa Clara High Tech. L. J. 1 (1992); Lewis D. Barr, *Whose Dispute Is This Anyway: The Propriety of the Mini-Trial in Promoting Corporate Dispute Resolution*, 1987 J. Disp. Resol. 133.

presentations of the cases to a senior executive from each of the companies involved. Under normal ground rules, that executive attends on condition that he/she have full settlement authority in the dispute. In other words, the executives present must be capable of coming to an agreement on the spot when the minitrial concludes. Frequently, the executives will enlist the help of some third party such as a retired judge who is commonly referred to as a "neutral advisor," to help them understand and evaluate the factual presentations and the legal issues involved. The proceeding is conducted in a private setting (i.e., confidentiality is enforced), without a record, under informal rules of procedure and without rules of evidence, and is nonbinding. Once the presentations are concluded, the executives sit down together either by themselves or in the presence of the neutral advisor and negotiate a settlement of the dispute.

Note the advantages to this procedure. The delay factor caused by court congestion is eliminated. The parties work out their own schedule. The expense and agony of a lengthy trial is eliminated by three components of the minitrial procedure: the summary presentations, the lack of an excessive number of formal rules of procedure, and the absence of rules of evidence. To the extent that the executives have to be educated on the legal issues of the case, they are educated by the neutral adviser, presumably a person with some degree of expertise and prestige. Confidentiality is usually assured, and if things blow up in the parties' faces, they may move into binding arbitration or litigation without having made any damaging formal and public concessions on any of the issues. Most importantly, the presentations are made to, and the ultimate decision made by, two persons with the requisite authority to commit their companies to the settlement. In other words, a draft agreement does not have to be cleared through successive echelons of a corporate structure long after the minitrial has been completed.

§8.6.2 Specific Minitrial Rules

For persons interested in utilizing the minitrial, a short description of two typical rules systems may be helpful. One of the first sets of minitrial rules was promulgated by the Zurich Chamber of Commerce (Switzerland) in October 1984. Described by the Chamber as an "attractive fourth route," the rules were: (a) compared with arbitration which was explained as being perhaps too "cumbersome and expensive;" (b) were seen as preferable to mere negotiations by senior executives who may be insufficiently briefed when they enter a conventional negotiation; and (c) as an improvement over mediation which the Chamber of Commerce drafters believed is too "unstructured and unpredictable."

A Zurich minitrial is commenced in much the same way as an UNCITRAL mediation. One of the parties to a dispute files a petition with the Zurich Chamber of Commerce and sends a copy of the petition to the opposing party.[33] Once the opposing party is notified and has consented to the procedure, the two parties designate "a member of their senior management" as associate members of the minitrial panel. The

33. Zurich Mini-Trial Rules, Rule 3.