1. Basic Tasks and Toolkit of Transnational Lawyering
   1. Know Your Client, Know Your Role (CB pg. 164-197; 2-19)
      1. Nationality of Corporations
         1. Entities driving the law are private corporations
         2. Multinational companies don’t think of themselves as having nationality
            1. Consider the global rhetoric, understand client’s global operations and how your transaction fits in the bigger picture
         3. CORPORATIONS ARE LEGAL ENTITIES—NATIONALITY VERY IMPORTANT
            1. Only national law currently creates corporations—where is corp’s center of legal gravity?
            2. NOT DIFFICULT TO IDENTIFY CLIENT NATIONALITY

Hard Case: Palestine Example—no nationality? Can’t do it, must be anchored somewhere.

* + - 1. Matters in 3 Important Ways:
         1. The domestic law of the incorporating country determines corporate organization, governance, and internal operation
         2. Other countries will look at the nationality to determine how to treat the corporation—may incur obligations under national law or restrictions may be imposed on the basis of foreign nationality

Taxes, sanctions, bans of business, etc.

* + - * 1. Sometimes application of rules of international law or treaty is affected by the nationality of the corporation

Barcelona Traction Case (ICJ)

Belgium takes Spain to the ICJ—Spain challenges standing because the corporation is Canadian

Ruling hinges on the nationality of the corporation

Sumitomo Case (US Supreme Court)

Japanese corp bring a claim that the state of NY is violating a treaty giving Japanese corps equal treatment

Ruling: Subsidiary in question is a US corp so it cannot make a claim under the treaty

* + - 1. Planning Choices in Fixing a Nationality
         1. *Centros Ltd. v. Erhvervs-og Selkabsstyrelsen* (ECJ 1999) (pg. 167)

Facts: Danish nationals set up business in the UK and want to open a branch in Denmark to do business. Denmark will not recognize branch—believe the corp is perpetrating a fraud on the Danish government because they are trying to avoid the laws

Denmark has high capitalization requirement, but UK none

Nationality shopping to set up corporation with bottom line in mind

Rule Being Applied: Principle of Freedom of Establishment (Int’l Law)

NEVER SEE WITHOUT AN INSTRUMENT OF INTERNATIONAL LAW

As a national of a member state, you have the right to establish enterprises in other member states

Opens opportunities—cross community access for purposes of nationals engaging in economic activity across the community

Purpose is economic stability and growth with the ultimate object of avoiding another world war centered in Europe

Holding: Danish government cannot refuse to recognize the British company because of the EC treaty

A little gaming of the system okay to reach the ultimate object of EC

* + 1. Treatment of Foreign Corporations
       1. Lots of questions when functioning in a foreign jurisdiction:
          1. Can I establish a subsidiary branch in a foreign country?
          2. What limits exist that might restrict my activity?
          3. Can I buy and sell real property?
          4. Am I affected in terms of how I hire and fire employees?
          5. Can this corporation sue other corporations and be sued? Do I have access to local courts?

Not every country allows foreign corporations to sue without “recognition” (i.e. France’s “restrictive theory”) in the form of a treaty or official decree

* + - * 1. Does the jurisdiction recognize and enforce the results of arbitration proceedings?
      1. Client will want to know its rights and duties for transactions in and with corporations in foreign countries
         1. Determined by: (in order of importance)

DOMESTIC LAW (of the foreign country)—MUST COMPLY! (i.e. NY statutes)

International Law (i.e. EC Treaty)

Comity (not a source of law)

Basically quid pro quo, but entails no legal obligation—can’t really be relied on before a court (would at most allow an estoppel argument)

* + - * 1. *In re Application of Fox Television Stations, Inc.* (FCC 1995) (pg. 180)

Must comply with the law until it is changed. To change, must lobby to create domestic law or make a treaty to create international law

* + - 1. Creating efficiency in the face of diversity:
         1. PRINCIPLE OF NON-DISCRIMINATION

Creates a level playing field so that foreign corps are treated the same as domestic ones

* + - * 1. Substantive Harmonization

Make the law the same in the relevant jurisdictions—typically set up by international treaties

Goal is to get as many jurisdictions as possible applying the same rules to the same kinds of transactions

* + 1. The Multinational Enterprise (MNE)
       1. “Usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways” (OECD Guidelines for Multinational Enterprises)—2 or more coordinated entities operating in 2 or more countries. (pg. 189)
       2. Why become involved as an MNE?
          1. Efficiency
          2. Lower transaction costs
          3. Access to different resources
          4. Reducing risk
          5. Access to cheaper labor, different markets
          6. Efficiency in taxation
          7. Power, politics
       3. MNEs (in the US and UK) typically have a pyramid structure with parent company at the top and subcos underneath (but structure can be very flexible)
          1. Inefficiencies increase as the base of the pyramid grows
          2. Creates the need for structures to centralize management going up to counteract the inefficiencies created by the increased number of jurisdictions

Can be difficult to reconcile this balance with the rule of law (which tends to foster complexity, decentralization, and inefficiency)

Structurally—international system of almost 200 countries—must anchor in a domestic setting

Fix: Reduce the number of countries (i.e. EU, or failed enterprises like colonies); Realistically: live with the problem

Substantively—different languages, traditions, standards, laws, histories create differences in the law (lots of influences and factors)

Can try to reduce these issues in small particular areas (i.e. tax) via treaties and arbitration

Law is a tool for achieving goals to maximize global value

* + - 1. There have been efforts to constrain the behavior of MNEs on several levels and many MNEs have also adopted their own corporate codes of conduct (especially in the wake of issues like the Bhopal Gas Leak Incident) (pg. 195)
    1. International Legal Environments and Transnational Lawyering
       1. Lawyers will be anchored in a specific jurisdiction, which is the one where they are authorized to practice
          1. Legal and ethical authority and obligations flow from the laws of that jurisdiction
          2. When the client wants to go global and takes it out of your jurisdiction—

**HIRE LOCAL COUNSEL. HIRE LOCAL COUNSEL. HIRE LOCAL COUNSEL.**

* + - * 1. *In re Roel (In the Matter of New York County Lawyers Ass’n)* (NY Ct. App. 1957) (pg. 3)
      1. Where are the clear violations?

A, advising on law of State A, without a license

A, advising on law of State B, without a license (although can depend on definition of “advising”)

A, living in A, talking to client in B about the law of B (creates more of an ethical obligation on the part of the lawyer)

* + - 1. Ways to mitigate the problem of practicing in multiple jurisdictions
         1. BE CAUTIOUS—is this really necessary for you to do to help your client?
         2. COMMUNICATE WITH THE CLIENT—be clear about your boundaries; where can you and can you not practice? (CYA and PUT IT IN WRITING!)
         3. When a transaction reaches that point, facilitate retaining competent local counsel—be sure to investigate and find qualified local counsel to recommend…the terms used are not always equivalents (pg. 11-14)
         4. There are systems currently established to help:

Clearly defined roles between national and foreign counsel on a deal

Formal contractual arrangements between firms to handle certain types of arrangements

Hire lawyers qualified in multiple jurisdictions

When working with MNEs, often have general counsel who are very sophisticated and often know better than to ask you about the law of X when they could and should ask someone else

* + - 1. Confidentiality and Ethical Considerations
         1. Jurisdictions often have common understandings of the basic issues (esp. lots of similarity in the EU)
         2. Sometimes harmonization is accomplished by a treaty that then must be adopted, but LEGAL ETHICS are not usually harmonized this way, occurs more in substantive law (although sometimes present in human rights type treaties)
         3. See *AM&S Europe v. Commission of the European Communities* (pg. 14)

HOLDING: The Commission may require, in the course of an investigation, production of the business documents the disclosure of which it considers necessary, including written communications between lawyer and client. That power is, however, subject to a restriction imposed by the need to protect confidentiality

Effect—does not change the scope of privilege, but allows for information sharing between the Commission and national competition authorities…could let in information usually subject to a higher standard of privilege.

* 1. Factors Affecting What Your Client Wants (CB pg. 61-79, 85-124)
     1. Fundamentals of International Law
        1. Public and Private International Law
           1. The Law of Nations is made up of both public and private international law
           2. Public: Treaties, customary law, general principles of law (“recognized by civilized nations”)

Limited tools that often don’t keep pace with the real world

* + - * 1. Private (Conflicts of Law): subject matter jurisdiction for courts, recognition and enforcement of foreign judgments, choice of law, substantive regulation of transactions across borders

Often occurs at the domestic level

* + - 1. Customary International Law
         1. Internalization of Rules & Norms

A rule or norm at the international level becomes domestic:

Incorporation—makes it binding as a matter of domestic law

Interpretation—sometimes hard to know what it means

Charming Betsy Presumption: if we can, we will interpret international and domestic laws so as to avoid conflict

Implementation—make the rules operational (where conflicts typically appear)

US—later in time rules as between treaties and statutes (but does NOT apply to state law—treaties always prevail over inconsistent state law b/c of Supremacy clause)

Acceptance

Effective Compliance

* + - * 1. Standards in Expropriation of Foreign Property (i.e takings)

Must be for a public purpose

Must happen in a non-discriminatory manner

Must be some compensation paid to the company that has been subject to the expropriation (standard is somewhat controversial)

Different Standards:

Just (meaning the expropriating state has wide leeway in deciding compensation—favored by capital exporting states)

PROMPT, ADEQUATE, and EFFECTIVE (measured by market value at the time of expropriation—favored by capital exporting states)

Appropriate (countries could not agree on the standard, so used this concept to support their respective positions)

Issue now typically handled via treaties

* + - * 1. Act of State Doctrine

See *Banco Nacional de Cuba v. Sabbatino* (US 1964) (pg. 68)

US Court will not sit in judgment as to what a foreign government does within its own territory—it must be determined on an intergovernmental level (executives)

Congress later passed the Sabbatino Amendment overruling the doctrine in some cases

* + - * 1. A lot of the customary international law is now being codified in treaties and similar documents. Businesses will most frequently encounter treaty law
      1. International Law of Treaties
         1. Treaty: International agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments in whatever its particular designation (Vienna Convention on the Law of Treaties)
         2. Treaties are signed by the executive, and even when not necessarily ratified by the legislature are considered binding, though not in the constitutional sense
         3. Problems with treaties in domestic legal practice:

US distinguishes between treaties:

SELF EXECUTING: creates immediate private rights (can use the treaty directly before a US court, legislation is not necessary)

Increasingly disliked by Congress

NON SELF EXECUTING: must be based on legislation which is based on a treaty—there must be a statute before a claim may be brought before a US court

* + - * 1. Treaty Interpretation

Rules of Treaty Interpretation from the Vienna Convention (Article 31):

Begin with the PLAIN MEANING of the words

Must be interpreted in light of the object and purpose and the context of the treaty

Vienna Convention on the Law of Treaties (Article 32):

Consult supplemental means of interpretation such as the equivalent of legislative history

ONLY do this if the plain meaning is unclear or leads to absurd results

The US is not a party to the Vienna Convention on the Law of Treaties, but applies it as a matter of custom

Ex. *Sumitomo v. Avagliano* (pg. 89)

Japanese sub argues based on the Friendship, Commerce, and Navigation Treaty that they are exempt from Title VII

Determined not to be a valid argument—Sumitomo America cannot rely on the FCN Treaty because they are incorporated in US

* + - 1. Extraterritorial Application of National Law
         1. Bases for Extraterritorial Jurisdiction: (Prescriptive Jurisdiction—passing laws, not enforcing)

If you are acting regarding things in your territory, you have jurisdiction

Nationality Principle: nationals outside the territory can be regulated by the state

Ex. If you are a US national, the IRS will find you

Protective Principle: government may prescribe legislation for conduct outside its territory for persons who are not its nationals when the conduct is directed toward a VERY limited class of REALLY important state interests

Ex. Countries have an interest in protecting the value and integrity of its currency—countries will prosecute counterfeiters even if they are abroad.

Effects Doctrine: conduct outside a government’s territory that has or is intended to have significant effects inside the country can be legislated

Causes the most problems, but is still recognized in customary int’l law

Often comes up in the context of antitrust law and anti-discrimination law

Ex. *Lotus Case* (1927)—Absent a rule preventing it, countries can do it (whatever it may be)

* + - * 1. Territoriality is frequently an issue in IBT, so HIRE LOCAL COUNSEL

Client has a nationality and need to know how home jurisdiction may affect conduct overseas

* + - * 1. If a basis for jurisdiction (above) has been established, the exercise must still be REASONABLE

Problems:

Governments should not be able to judge the reasonableness of their own actions (of course they will say they are reasonable).

Countries rarely agree on what is reasonable

If there is a dispute about reasonableness:

RULE: State with the weaker interest in exercising jurisdiction should defer to the state with the stronger interest (but encounter the same problems as states rarely defer)

* + - * 1. Example Cases:

*EEOC v. Arabian American Oil Co*. (pg. 98)

Facts: Boureslan (US national) is transferred to Saudi Arabian subsidiary of Aramco and is later fired because he is Jewish

Judicial presumption AGAINST extraterritoriality, so Court won’t apply laws outside the territory without CLEARLY EXPRESSED Congressional intent

No clear intent found here, but Congress responded by amending

*Mahoney v. RFE/RL, Inc.* (pg. 108)

Facts: Mahoney is fired when he turns 65 because German law supposedly requires it

Court determines age limit is German law, so the Title VII exemption applies

Title VII applies extraterritorially EXCEPT when in direct conflict with the domestic law of the relevant territory

*Hartford Fire Insurance* (pg. 113)

Antitrust is the most frequent and controversial domestic law applied extraterritorially (esp by the US and EU)

* + 1. International Policy and Legal Determinants of Transnational Business Activity (CB pg. 79-85; 125-163)
       1. International Trade
          1. Theories of International Trade

Mercantilism—national power vis-à-vis rivals (“beggar thy neighbor”)

Trade is about power

Increase exports/decrease imports (creating positive net inflow of economic resources)

Accumulate specie (gold/silver) in national treasury

End up with a TRADE WAR and closer to armed conflict if countries pursue mercantilism

Free Trade Theory

2 Strands—

Economic Theory Comparative Advantage: specialization in efficient production + free trade = economic growth and wealth for countries

Trade encourages economic interdependence, which makes countries care more about political stability and less about war (“peace through trade”)

Both strands emphasize the need to empower private actors to generate economic growth and prosperity rather than strengthening the government

Specialization + Trade = Greater Aggregate Economic Output and Greater Output for Consumption of Both Countries

Every country should do this because in the end it will pay off—powerful economic theory

* + - * 1. Politics of World Trade

Despite the economic power of the theory of comparative advantage, states have found following its policy advice without supporting structures very difficult

Economic difficulties create political pressures for restricting trade

Last significant outburst of mercantilism by major economic powers happened in the late 1930s (Smoot-Hawley Tariff Act triggering worldwide depression)

Lack of supporting structures during interwar period contributed to depression and WWII

Victorious liberal allies wanted an international political architecture to support economic interdependence and peach

Ideological opposition from communist and developing countries emerging from colonialism (has largely dissipated with the end of the Cold War)

AFTER THE COLD WAR: Bretton Woods System

GATT—General Agreement on Tariffs and Trade

World Bank (capital availability for development)

International Monetary Fund (currency exchange rate stability)

* + - * 1. The House that GATT Built

Floor: Dispute Settlement (Article XXIII)

Walls:

Tariff Regime (Articles II & XI)—make trade flow

National Treatment (Article III)—levelling the playing field

Most-Favored Nation Treatment (Article I)

Exceptions (Articles VI, XIX, XX, XXI, XXIV)—built in flexibility for political pressures and to prevent implosion

Roof: Strategic Objectives

Peace and stability

Economic interdependence

Multinationalism—get as many countries involved as possible for a systemic effect

Grew and got stronger during the Cold War, one of the central features of the global economy

* + - * 1. From GATT to WTO

World Trade Organization—formal international organization to support this set of trade agreements

WTO Dispute Settlement Mechanism (most powerful in international law)

Compulsory for all WTO member states for all multilateral agreements within the WTO

Works on the basis of “REVERSE CONSENSUS”—dispute settlement mechanism moves forward unless there is consensus not to

Includes procedures for winning WTO member states to get authorization for trade sanctions if losing WTO member states do not comply with rulings

Included new and revised agreements to lighten up the law on trade in goods

Agreement on Technical Barriers to Trade (TBT Agreement)—revised agreement originally adopted during GATT system

Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)—new agreement on trade restrictions involving food safety

New agreements on topics not previously addressed in the GATT system

General Agreement on Trade in Services (GATS)

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)\*\*\*

Agreement on Trade-Related Investment Measures (TRIMS)

* + - * 1. Trade Law and IBT—Why your clients care

Market access for sale of goods—lower and transparent tariffs; no quantitative restrictions; non-discrimination (MFN and national treatment)

Potential market access for trade in services

Protection from unfair business practices and protectionist governmental actions

Application of anti-dumping duties to fight dumping (predatory pricing) or countervailing duties against unfairly subsidized imports

Baseline protections for intellectual property rights

Basic protections concerning foreign direct investment through TRIMS (goods) and GATS (services)

Ability to encourage governments to pursue disputes in WTO dispute settlement system

Permissive environment for further market access opportunities through recognition of bilateral and regional free trade agreements

* + - * 1. Shrimp-Turtle Case, 1998 (pg. 137)

Facts: US banned importation of shrimp harvested without use of approved “turtle excluder devices” (TEDs). Shrimp-exporting WTO members brought WTO complaint against US alleging that the US law violated the general prohibition on quantitative restriction in GATT

US did not challenge the Article XI claim, but argued that Article XX(g) of GATT on conserving exhaustible natural resources provided an EXCEPTION for the ban

ARTICLE XX ANALYSIS:

Burden of proof lies with party claiming the exception

3 Step Analysis—the trade restricting measure must:

Fall within one of the listed exceptions

Satisfy all the elements within the identified exception(s)

Satisfy all the elements of the introductory paragraph of Article XX (the chapeau)

Specific Exception: Article XX(g)

“relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”

Applies to living as well as non-living natural resources

The measure in question must be primarily aimed at such conservation

Article XX Chapeau

Assessment of whether “the measure in question is APPLIED in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade

US requirement for all other WTO members to adopt the same policy applied to US trawlers was arbitrary discrimination

* + - * 1. WTO and Developing Countries

On-going round of trade liberalization negotiations (the Doha Development Round) is intended to address trade and economic needs of developing and least-developed WTO member states (been on-going for years, currently stagnant)

GATT/WTO has had difficult relationship with developing countries.

Core principle is non-discrimination, but developing countries want preferential treatment to achieve better levels of economic development faster through trade

Techniques creating incentives for preferential treatment of developing states:

General system of preferences—explicit waiver of MFN for preferential tariffs for products from developing countries

Preferential treatment built into WTO agreements (e.g. “grace periods” before full compliance for agreements is required by developing countries)

Permissive stance on bilateral and regional trade agreements that developed members sign with developing members

* + - 1. Foreign Direct Investment (see also Problem 4)
         1. FDI is a major category of IBT—NOT PASSIVE INVESTMENT—establishing subsidiaries or branches abroad; joint ventures with foreign partners; mergers and acquisitions with foreign companies
         2. International policy and law of FDI plays a big role in creating incentives for and protecting FDI
         3. One of the more controversial areas of international law affecting IBTs, especially standard of compensation for expropriations
         4. History of International Law and FDI

Imperialism—conquest and exploitation

System of capitulations based on the “standard of civilization”

Western nationals and businesses operating in “uncivilized” countries were exempt from local laws and courts and could only be sued or tried in consular courts operated by Western govts applying Western law

Principle of Diplomatic Protection (backed by “gunboat diplomacy”)

Home government would raise treatment of its nationals with host government

Development of international law protecting FDI, i.e. rules on expropriation

Growing tensions between Western and non-Western states

* + - * 1. International Law on Expropriation (see above)

*Banco Nacional de Cuba v. Chase Manhattan Bank* (1981)

Court must determine the standard of compensation under international law—evidence that states do not exhibit general and consistent state practice supported by a sense of legal obligation on any standard

If customary law doesn’t apply, the fallback should be STATE SOVEREIGNTY

* + - * 1. Emergence of BITs (Bilateral Investment Treaties)

Capital exporting states and MNEs interested in FDI realized that customary international law was inadequate to protect investments—needed something stronger

Move to BITs between capital exporting and capital importing states that largely used the standard of “prompt, adequate, and effective”

Other Benefits of BITs for Capital Exporting States and MNEs

Removed barriers to accessing foreign markets

Included obligations for fair treatment and security of investments

Obligated state parties to treat foreign investment in non-discriminatory manner

\*\*Allowed investors to take host governments directly to international arbitration in cases of dispute\*\*

Treaties are evidence of state practice, so it could now be argued that the standard in most BITs has become custom

* + - 1. International Monetary System
         1. Currencies and Transnational Business

Matter for the bottom line of companies

Matter for the effect on prices of exports and foreign exchange holdings and policies for countries

Have been various attempts to provide structure and governance

* + - * 1. Current Example: Chinese Currency Controversy

Chinese government has been accused on keeping the value of China’s currency lower than it should be based on market conditions

Lower value for the Chinese economy makes Chinese exports cheaper and US exports to China more expensive, worsening the balance of payments deficit the US runs with China

* + - * 1. Currency Regimes

Gold Standard—fixing each currency’s value to specific amount of gold, with gold being used to guarantee liquidity of currency holdings (NOT EFFECTIVE)

Decentralized Regulation—each country manages the value of its currency (NOT EFFECTIVE)

INTERNATIONAL MONETARY FUND

Main Purposes:

Achieve international exchange rate stability through system of fixed exchange rates (Article I, pg. 161)

Eliminate national restrictions on foreign exchange that hamper international trade (Article VIII, pg. 160)

* + - * 1. International Monetary Fund Achievements and Structure

Successful at eliminating foreign exchange controls that hamper international trade

Unsuccessful at gaining exchange rate stability through fixed exchange rates

Fixed exchange rate system collapsed in the 1970s and has been replaced by floating exchange rates based on market forces

IMF’s role in global economy shifted after floating system emerged:

Heightened importance of surveillance system

Heightened importance of ability to provide capital to countries in time of economic stress or crisis (prevent resort to “beggar thy neighbor”)—stabilizing macroeconomic problems

Controversies over IMF’s power through “structural adjustment programs” imposed on countries—programs were farm more interventionist than in the past

IMF uses weighted voting system—NOT one country, one vote

When in trouble, go to the IMF or go to the market—the market will often be much harsher than the IMF, so countries are left with little choice

* + 1. Planning Transnational Business Transactions
       1. International Tax Planning (Tax Reading Packet)
          1. Taxation affects corporate behavior

Taxes increase the price of goods and services

Taxes decrease profits available for shareholders or reinvesting

* + - * 1. Tax implications in the transnational context

Multiple jurisdictions (and levels of jurisdiction) applying tax laws

Different substantive and procedural tax laws

Different tax rates

The ‘formal’ tax system and the ‘operation code’ of how things really work—need to know about any gaps and corruption

* + - * 1. Company A is in State A and is engaging in a transaction with State B

Potential taxes in State B: customs duties, sales/VAT, property taxes, excise taxes, income taxes

State A may also apply a tax to the income depending on how a state views foreign income—could be DOUBLE TAXED

* + - * 1. Corporate Needs Concerning Taxes

Corporate Strategy—minimize taxes or income generated by operations to maximize the return on shareholder investments

In government application of tax systems:

TRANSPARENCY: for business planning and avoidance of corruption (most important)

Corporations can build the cost of various taxes into how they plan and execute a transaction

Clear tax rates and rules for application of taxes (e.g. deductions) reduces opportunities for corruption (e.g. bribing tax officials)

NON-DISCRIMINATION: level competitive playing field, especially with respect to national treatment of products, services, and investments

HARMONIZATION: reduce inefficiencies and costs associated with different tax concepts, laws, and systems

Difficult to achieve because authority to tax is very significant to fiscal needs and sovereignty of a country

Low income tax rates for corporations

Same or similar substantive content for tax rules (e.g., what constitutes a deductible business expenses for computing net income)

The operation of global markets causes some harmonization through the competition for FDI, trade, and business

Not much harmonization through international agreements in terms of tax rates, rules, and systems (apart from the system of non-discrimination)

* + - * 1. Tax Minimization Strategies

Reduce net incomes subject to income tax at the national level

Utilize deductions to reduce taxable net income

Utilize net operating loss (NOL) carry back/carry forward rules (where applicable—not in every jurisdiction)

Reduce applicable tax rate(s) (Government moves to eliminate or regulate these strategies)

Transfer pricing

Offshore holding company

Deferring tax liability on net income

Corporate inversion

Avoid or reduce double taxation

National law: unilateral government help (e.g., foreign tax credit)

International law: bilateral tax treaties

Government has to make this possible

* + - * 1. Taking Advantage of Deductions and NOLs

Rules on deducting expenses and NOLs from gross income to produce lower taxable net income operate domestically at the source of the income

Domestic tax law might prevent such acquisition of NOLs through M&A activity if principal purpose of purchase was to secure NOLs rather than to purchase for a legitimate reason.

* + - * 1. Transfer Pricing: Company sells its products to other subsidiaries of the parent company (arm’s length price) so there is no income from the intercompany sales
        2. OECD—Organization for Economic Cooperation and Development

Developed some guidelines for governments to think about—not a treaty, just recommendations

Soft form of international harmonization for purposes of putting in regulations that deal with transfer pricing

* + - * 1. Offshore Holding Companies

Corporation that holds, as an investment vehicle, shares or other ownership interests of other corporate subsidiaries or income producing assets

Purposes:

Creates layer of limited liability between companies held by the holding company and the company that owns the holding company

Used to organize complex group of affiliated entities rationally (e.g., holding companies for manufacturing subsidiaries, distribution subsidiaries, and R&D subsidiaries)

Tax advantages because holding companies do not operate in taxing jurisdictions (in the meaning of tax laws that apply to income from operations)

Allows a parent company to concentrate investment income in a low-tax jurisdiction (a tax haven) in order to defer payment of taxes for the parent company.

* + - * 1. Anti Tax Avoidance Rules

States have adopted rules that limit the ability of companies to use holding companies to avoid and/or defer paying income taxes

US Tax Code: Subpart F

Controlled foreign corporations (CFC): foreign corporation that is majority owned by US shareholders

CFC income apportioned to US shareholders as taxable income, even though foreign corporation has not distributed the income to the shareholders

CFC income taxable under Subpart F includes passive income and income “that can be easily transferred between states,” but a CFC can legally accumulate other types of income and defer payment of US taxes

* + - * 1. Corporate Invasion

Create tax saving by re-incorporating in low-tax jurisdiction

In MNE, re-incorporate the parent such that it becomes a foreign corporation in a low-tax country, and move ownership of foreign operation to the new foreign parent corporation

IRS will not allow this if done purely for tax purposes

If all of the same shareholders and assets are involved—government will likely deem the new foreign corporation under US jurisdiction using nationality (even if it isn’t)—see below.

Anti-inversion legislation: Prohibits the practice of corporation inversion for tax purposes (e.g., the legislation treats the new inverted corporation as a domestic corporation still subject to the higher tax laws) if the same shareholders are involved.

To avoid this, must do more than just change it on paper, have to move operations out of the US entirely. Will still pursue CEO’s personal income, but corporate income is safe

* + - * 1. Double Taxation

POLICY OBJECTIVE: If we are interested in enhancing our countries’ engagement with global markets through trade and investment, we need to think of double taxation as a barrier. ‘Reciprocal Interests’

This is why so many bilateral tax treaties are being used to facilitate trade and investment

SOLUTIONS: Tax Neutrality—reduces or eliminates double taxation as much as feasible

Steps:

Determine whether income comes from a foreign source

Adjust taxation to achieve neutrality effect through: deduction, credit, waiver

Can be done unilaterally or via coordination with other countries and get a tax treaty

* + - * 1. Foreign Tax Credit

US taxpayers usually can get a foreign tax credit applied against its US income tax—even in the absence of a bilateral tax treaty

Credits available for foreign incomes taxes (not VAT, sales taxes) that are MANDATORY and COMPARABLE to US income taxes

Credit applies to foreign taxes paid to the extent the foreign tax rate is EQUAL TO OR LOWER than the US income tax rate

IF the foreign rate is higher than the US rate, the foreign tax credit only equals an amount equal to the tax produced by applying the US tax rate

Foreign tax credit can be carried forwards or backwards if the US taxpayer is unable to use it in the current year

* + - * 1. Bilateral Tax Treaties

States frequently enter into bilateral tax treaties to address the problem of double taxation as part of encouraging private investment

Approximately 2,000 such treaties exist; US has tax treaties with 65 countries

Four Main Provisions in Bilateral Tax Treaties:

Source Rules: to allocate tax jurisdiction to the respective contracting parties

Residency Rules: to determine which individuals and businesses are residents of the respective contracting parties

Non-Discrimination Rule: to treat taxpayers resident in the one contracting party the same as residents in the other contracting party (a “national treatment” principle for tax purposes)

Specific Double-Taxation Avoidance Rules: to eliminate or reduce double taxation

* + - * 1. Sub-State Taxation and International Transactions

In planning international business transactions, also have to analyze what impact, if any, sub-state taxation systems might have

Most frequently a problem in federal states that allocate tax authority between central and sub-national political entities (e.g., states)

US states impose income taxes on the income of corporations related to transactions reasonably connected with that state

Conflict between a state’s tax rules (e.g. on apportioning income) and the US government’s rules relating to foreign nations is resolved in favor of the federal government under the Supremacy Clause

* + - 1. International Dispute Settlement (CB pg. 19-60)
         1. Planning for Dispute Resolution

Lawyer’s function is to help reduce liability, risk, and costs for client

Corporate planning (subsidiary or branch?)

Tax planning (reducing tax liabilities)

Dispute resolution planning (minimizing risk associated with settling disputes)

Clients often pay insufficient attention to planning for dispute settlement (lawyer must create the focus)

* + - * 1. Planning Considerations

The nature of the transaction (e.g., sale of goods v. joint venture)

The business strategy behind the transaction (e.g. , one-off deal v. attempt to penetrate foreign market)

Client’s familiarity with the foreign jurisdiction (e.g., no familiarity v. client already subject to jurisdiction of the courts of the target country)

Client’s risk tolerance for the transaction (e.g., zero tolerance v. willingness to take risk)

* + - * 1. Planning Principles and Parameters

Generally private parties to contracts have freedom to determine how they will settle their disputes

*Bremen v. Zapata* (pg. 27): “There are compelling reasons why a freely negotiated private international agreement. . . should be given full effect”

Limitations on freedom of contract

Problems with the transaction—fraud, undue influence of one party over the other, unequal bargaining power

Government regulations on certain transactions (e.g. disputes in joint ventures in State A must be settled under the law and by the courts of State A)

Public policy considerations

* + - * 1. Choosing and Negotiating Dispute Settlement Provisions

CHOICE OF FORUM: Where to settle the dispute?

Primary Choice: LITIGATE before a national court or ARBITRATE before an international arbitration body

Role of Mediation: Parties can agree to use mediation processes to resolve disputes, but still need to plan for dispute settlement if mediation fails to bring the parties to a mutually agreeable solution

Can be built in before you get to actual litigation/arbitration

CHOICE OF LAW: Under what rules shall disputes be settled? What laws will govern this case?

Also very important in the overall contract and will govern on the merits of the dispute—think about the whole contract, not just the dispute

Often will match the choice of law with the forum

Take advantage of the experience of local counsel

* + - * 1. Risk Management and Neutrality in Dispute Settlement

Key principle driving the CHOICE OF FORUM and CHOICE OF LAW in contracts is managing risk by seeking favorable or neutral dispute settlement contexts

Choice of Forum:

Selection of a 3d country’s courts for litigation (e.g., Bremen v. Zapata)

Selection of international arbitration (e.g., Mitsubishi v. Soler Chrysler-Plymouth, Inc.)

But, the choice of forum is not always “neutral” because it reflects the home jurisdiction of one of the parties to the contract (e.g., Carnival Cruise Lines v. Shute)

Choice of Law: What law governs the contract and, thus, the resolution for disputes?

Bremen v. Zapata: English law applied in litigation before English courts

Alghanim v. Toys R Us: New York law applied in arbitration

* + - * 1. Choice of Forum Issues

Jurisdictional Rules: will the national court system selected exercise subject matter and personal jurisdiction concerning a dispute under the contract?

Local counsel is very helpful—should know jurisdictional rules

Difference in National Court Procedures: differences between common law and civil law jurisdictions; jury trials in civil cases; discovery and other evidentiary procedures; duration and costs of litigation; appeals

Enforcement of Foreign Judgments: winning party will want to enforce the judgment against the defendant, sometimes through enforcement of a foreign judgment in another country

If I win, can I get a judgment recognized and enforced in another jurisdiction (especially an issue when going to a neutral location for dispute resolution)?

* + - * 1. Procedural Challenges in Foreign Litigation

Litigation before national courts requires navigating the procedural requirements of those courts—i.e. service of process, gathering of evidence

Potential for higher costs and inefficiencies with different rules

International law used to create standardized procedures for service of process and obtaining evidence

Hague Service Convention (55 state parties): provides a centralized means for serving process in each state party

Volkswagen Case—US Supreme Court allows involuntary service in Illinois of the subsidiary to be valid against B Co. because the state law on service governs

Hague Evidence Convention (43 state parties): requests for assistance routed through a central authority that undertakes to obtain the evidence requested

US is a party, but US courts still permit litigants to use F.R.Civ.P. to gather evidence located in another state party

For US, this is mostly used to get evidence from foreign non-parties

Not anywhere close to supported by the majority of the international system—standardized process is not always available—have to look at the jurisdiction

* + - * 1. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: National and International Law

National Law: Countries can adopt national rules that govern whether national courts can recognize and enforce foreign judgments

German Code of Civil Procedure pg. 32-33

Uniform Foreign Money Judgments Recognition Act, pg. 33-34

International Law: US is not a party to any existing treaty on recognition and enforcement of foreign judgments

Brussels Convention (now an EU-wide regulation for EU members, pg. 32)

Convention on Choice of Courts Agreements, pg. 32

Because the US (or another jurisdiction is not a party to these treaties), you must use national law to enforce—MAKES PLANNING PARAMOUNT

* + - * 1. Arbitration

Arbitration can provide the neutrality the parties to a contract need to finalize the deal

Even if in one party’s home jurisdiction, arbitration is neutral—the minute an arbitration company is perceived as biased, they’re done

Arbitration can be (but isn’t always) relatively quick, cheap, more informal, and confidential than national court proceedings

Foreign arbitral awards falling within the Convention on Recognition and Enforcement of Foreign Arbitral Awards (NEW YORK CONVENTION; 142 state parties) provides protection for collecting on arbitral awards

US is a party

Can’t really appeal an arbitral award, but can challenge the legitimacy of the arbitration process. Such a challenge will be in the national courts of the jurisdiction where the arbitration took place

If there is a challenge to the award, the court of the country where an award is trying to be enforced may refuse enforcement (unless both states party to NY Convention)

Drafting an Arbitration Clause

International Chamber of Commerce model arbitration provision: “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said Rules.”

Additional Drafting Issues: place of arbitration; language of arbitration; number of arbitrators; choice of law

Participating in Arbitration

Selection of an established arbitration process or institution will, usually, mean agreement to arbitrate according to its rules of procedure

Many choices—Japan Commercial Arbitration Association; International Chamber of Commerce; American Arbitration Association

* + - * 1. Mitsubishi v. Soler-Chrysler

Application of a treaty, not national law

HOLDING: Antitrust claims ARE capable of settlement by arbitration

DISSENT: Antitrust claims deal with public policy that should not be put into arbitration clauses. It opens the door to avoiding court adjudication in important areas of public policy

* + - * 1. Alghanim v. Toys R Us

Applying NY Convention: Party seeks recognition and enforcement in US, but US does not consider it to be a domestic award because a national of another country is also involved.

Court applies US arbitration law:

If the treaty applies, a US court is applying US arbitration law to answer question presented because that is what the treaty says to do

If you are in a jurisdiction where states are party to the NY Convention, you know the treaty will be in play when you seek enforcement and recognition of an award.

* + - 1. Human Rights (197-217; ASIL Articles)
         1. Human Rights as Business Planning

Human rights obligations apply to governments; some obligations apply to individuals (e.g., crimes against humanity, war crimes, crime of genocide)

Post Cold War—convergence of trends that raised human rights for MNEs

Globalization of trade, investment, and commerce (perceived to increase corporate power vis-à-vis governments, communities, and individuals)

Globalization of the human rights movement (released from the rigid bipolar geopolitical context and facilitated by use of new information technologies)

Intergovernmental and non-governmental human rights entities began to apply human rights forms directly to corporations, especially MNEs operating in multiple jurisdictions, creating for such corporations question of:

Bad publicity for corporate image

Risks to business operations (boycotts, working dirrently with supplies, involving NGOs)

Costs to the bottom line (economic costs, potential legal liabilities)

Planning Considerations

Human rights review or assessment of corporate transactions and operations (should primarily be an in-house process so something outside counsel does)

State Corporate Commitments: If client has issued a corporate code of conduct or signed non-binding principles, does the transaction create any concerns with such commitments?

No Pre-Existing Commitments: What human rights concerns are most likely to arise, and how does the transaction in question relate to such concerns?

Identify strategies to address the human rights concerns in the specific transaction or how the client vets its transactions and operations for human rights issues.

* + - * 1. Business Contexts in Which Human Rights Appear

MNEs operating directly in foreign countries: direct control over operations that might raise human rights concerns

MNEs contracting with suppliers in other countries that operate in ways that generate human rights issues (e.g., Nike could be held responsible for the conditions in a supplying factory in another country)

MNEs doing business with governments that allegedly violate human rights

MNEs engaging in business practices or behavior that creates human rights questions:

Patents, pharmaceutical prices, and equitable access to medicines and vaccines

Enforcing rights under BITs

Selling products that harm people or the environment (e.g., tobacco, obesogenic foods and beverages, alcohol)

* + - * 1. Regulating MNE Behavior Concerning Human Rights

INDIRECT: (Traditional)

Governments accept human rights obligations in treaties or customary international law and implement/enforce them in their territories

Governments impose restrictions on its nationals concerning exports of goods and services to other countries

Governments are responsible for protecting human rights

Problems:

Governments often fail to implement and/or enforce the human rights obligations they accept through human rights treaties (e.g. by intent or failure of capacity)

Governments generally tend not to extend their human rights obligations in an extraterritorial manner to their corporations operating in foreign countries

International mechanisms for enforcing human rights obligations are, generally, weak (e.g., UN human rights treaties)

Corporations have threatened governments with divestment when faced with serious regulatory action that would increase operating costs—threats that chill regulatory activity

Indirect strategy not currently working very well in case of human rights enforcement

DIRECT: (More Novel; More Controversial)

“Soft Law” strategies of non-binding principles and standards aimed at human rights performance of corporations (See, e.g., Guidelines for Multinational Enterprises, pg. 199)

NOT TREATIES—can’t have treaties with non-state parties—NOT INTERNATIONAL LAW (just non-binding political statements)

Pressuring corporations to adopt “codes of conduct” to guide their human rights behavior

Lawsuits against corporations under national legal measures potentially making corporations liable for human rights violations relation to their operations overseas

Problems:

“Soft Law”

Lots of general and specific attempts to develop non-binding guidelines or principles for corporations that touch on human rights issues: ILO Tripartite Declarations; OECO Guidelines for MNEs; UN Global Compact; etc.

Very general, not binding, fragmented monitoring, and no enforcement beyond “public opinion”

“Codes of Conduct”—seek to guide corp. operations in accordance w/ human rights principles

Starting with Levi Strauss & Co in 1991, many corporations have ‘voluntarily’ adopted ‘corporate codes of conduct’

Have stronger (audited) and weaker (marketing materials) codes of conduct; no standardized (or required) form or content

Monitoring is ad hoc and fragmented, and sanction is PR embarrassment for corporation rather than legal sanctions or costs

The more companies that have them, the more diluted the effect

Litigation

Strategy pioneered through the ATS in the US and later adopted by other jurisdictions

ATS gives federal courts jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US” (28 USC 1350)

Traditional ATS strategy: seek tort damages from individuals (e.g. government officials) for committing human rights violations (e.g., torture)

Later, human rights groups began assisting foreign plaintiffs in bringing ATS suits directly against corporations for “aiding and abetting” human rights violations for foreign governments

* + - * 1. Complicated History of ATS Actions

From Filartiga in 1980 (Paraguayan national held liable for damages in relation to torture that occurred in Paraguay) to Sosa v. Alvarez-Machain in 2004, human rights activists used the ATS to try to bring attention to human rights abuses, and increasingly sought to do against corporations

In Sosa, the Supreme Court narrowed the causes of action under the ATS to those violations of international legal norms that reflected the same level of definite content and acceptance as the norms Congress had in mid in 1798. Sosa did not address corporate liability under the ATS

* + - * 1. *Khulumani v. Barclay National Bank* (2007)

HOLDING: In the 2d Circuit, a plaintiff may plead a theory of aiding and abetting under the ATS against a corporation

* + - * 1. *Kiobel v. Royal Dutch Petroleum* (2010)

More recent decision by the 2d Circuit on corporate liability for aiding and abetting under the ATS

1. Doing Deals: Facilitating Your Client’s Transactions
   1. Buying and Selling Products—Problem 1: Transnational Sales (pg. 264-316)
      1. Book Hypothetical: The Sale Goes Sideways
         1. Sale of goods between CCC and ACC—CCC rejects the goods, arguing that they do not conform to what they ordered
         2. CCC files suit in a Chinese court seeking damages calculated at the difference between the price of the products shipped (which CCC resold to a computer company in another country) and the price the company paid to buy similar goods from another supplier
      2. Choice of Law (Contract Issue)—see also decision tree
         1. What law governs the contract between ACC and CCC?
            1. Even where there has been a choice of law made, there can be conflicts and problems

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| LAW | Warranties | Non-Conformity | Limits on Remedies | Force Majeure | Battle of Forms |
| NY Law | Recognizes express and implied warranties | Perfect tender rule | Seller may limit buyer’s remedies to repayment of price | Impractical performance excused | Allow non-material changes is not limited to terms of offer |
| Chinese Law | Recognizes express and implied warranties | Buyer cannot terminate unless defect is a fundamental breach | Voids limits that exclude seller’s liability and increase buyer’s liability | Impossible performance excused | Closer to ‘mirror image’ rule |
| CISG | Recognizes express and implied warranties | Buyer cannot terminate unless defect is a fundamental breach | Sum equal to the loss, including loss of profit | Unforeseeable impediment to performance excused | Closer to the Chinese rule rather than the UCC |

* + - * 1. CISG = UN Convention on Contracts for the International Sale of Goods

Applies to contracts of sale of goods between parties whose places of business are in different States where the States are contracting states OR the rules of international law lead to its application.

* + 1. Choice of Forum (Contract Issue)—see also decision tree
       1. What forum should resolve disputes between CCC and ACC?
          1. Will the courts of the selected forum exercise jurisdiction over the dispute?
          2. If no choice of forum, is there a choice of law provision?

Generally a choice of law would indicate a presumption for choice of forum

* + 1. Transportation and Financing in International Trade
       1. Use of Trade Term in Sales of Goods Contracts
          1. Lex Mercatoria—The Law of Merchants

Development of the customary practices of merchants into rules used for international transactions

For of harmonization of commercial practices

Codification of these harmonized rules of commercial behavior via e.g., the International Chamber of Commerce’s INCOTERMS

Incorporation of these harmonized rules into contracts between private enterprises

* + - * 1. FOB (INCOTERMS) (see pg. 275 in casebook for FOB obligations)

Identifies context in which “Free on Board” (FOB) should be used (and other trade terms that facilitate international trade in goods)—used ONLY FOR CARRIAGE BY SEA

Defines IN DETAIL the obligations of the buyer and the seller in and FOB transaction

Incorporation of these rules into the contract makes these obligations part of the substantive content of the contract

In disputes, parties and courts will use INCOTERMS where relevant in resolving disputes (choice of law/choice of forum shouldn’t matter here)

Designates WHO BEARS THE RISK at every step of the process

Latest edition of INCOTERMS—INCOTERMS 2010—became official on January 1, 2011—FOB (INCOTERMS 2010): [named port of shipment]

* + - * 1. Tax Consequences of International Sale of Goods

Sale of goods gives rise to income for seller

Goods sold in US constitutes US source income

Goods sold outside US produces foreign source income, still taxable by US govt

If goods are manufactured by seller, then income is apportioned between the country of manufacture and the country of sale

* + - * 1. Contracts and Payments

FOB term doesn’t settle how a party will be paid, only says that the price must be paid

Seller must address mode of payment in the contract to lower risk and protect itself against a potential breach or default by buyer

Buyer needs to lower its risk and protect itself from seller’s failure to ship the contracted goods

Common mechanism to facilitate risk management for both buyer and seller used in the “letter of credit”

* + - * 1. LETTERS OF CREDIT (UCP 600 on pg. 287)

LETTER OF CREDIT (doesn’t happen in every transaction, mostly with unfamiliar business partners—contract between buyer and buyer’s bank—buyer pays for the process)

Irrevocable, Confirmed, Sight Letter of Credit

IRREVOCABLE: no changes to the letter of credit unless both applicant (buyer) and beneficiary (seller) agree

CONFIRMED: bank in beneficiary’s country adds its promise to pay beneficiary in addition to the promise to pay from the issuing bank in applicant’s country

SIGHT: confirming/bank promises to pay on receipt and inspection of the documents required under the K

Sometimes parties get a continuing letter of credit that acts as a revolving line of credit open with a bank—enhances the liquidity of the company

Legal Issues

Letters of credit are contracts SEPARATE from the underlying sales contract (\*\*bank deals with documents, not with goods\*\*)

Fraud Exception (from Sztejn v. Schroder (1941)): notice of fraud on the underlying transaction by the seller can produce refusal to honor presentation of documents

Harmonization of letter of credit rules through the International Chamber of Commerce’s Uniform Customs and Practices for Documentary Credits (UCP). Latest version is UCP 600. Banks participating in letter of credit transactions incorporate UCP 600 into the terms of the letter of credit contract with applicant

UCP 600 contains rules on the standard for examination of documents and the process for addressing discrepancies in documents presented.

International sales contracts/invoices, should provide for the method of payment—perhaps: “Payment for all goods under this Invoice shall be made by the buyer under an irrevocable, confirmed, sight letter of credit”

* + 1. US Regulation
       1. Export Trade
          1. US (and other countries) regulate exports for different reasons, often having to do with the nature of the goods being exported or the nature of the transaction through which goods are sold
          2. The US controls the export of products for various reasons, including national security, non-proliferation, crime control, and anti-terrorism
          3. Products subject to these export controls cannot be exported without a license
          4. Determining whether a license is needed:

Identify whether the product in question falls within regulated categories, found through the Export Control Classification Number (ECCN) system

Determine whether the product subject to the ECCN requires a license for export to its destination country by using the Country Control List (CCL)

Check whether any exemptions apply if a license if required.

* + - * 1. Re-Export and Extraterritorial Application of US Law

US export control regulations attempt to reach non-US persons located outside the US that receive products exported under licenses

In 1980s, US banned exportation and re-exportation of certain products related to pipeline construction to frustrate Soviet construction of a pipeline for energy supplies to Western Europe

Many European countries reacted angrily to the US attempt to apply its laws to European countries located outside the US (attempt at extraterritorial application of domestic law violated international law of prescriptive jurisdiction)

*Compagnie Europeene des Petroles v. Sensor*

Strongest Bases for Exercising Prescriptive Jurisdiction: Territoriality > Nationality > Protective Principle > Effects Doctrine > Force Majeure

* + - 1. Anti-Boycott Legislation
         1. Anti-boycott legislation prohibits US persons—defined to include foreign companies controlled in fact by US companies—from participating in boycotts of countries friendly to the US (e.g., Israel)
         2. How would the anti-boycott legislation arise in the context of the international sale of goods?

“We’ll buy goods as long as you are also not selling to the following companies”—that is generally a boycott, client should call you

* + - 1. Foreign Corrupt Practices
         1. Pervasiveness of the practice tends to make it part of the competitive environment of winning contracts and completing deals (“you have to pay to play”)
         2. US was the first major developed country to act against such corrupt practices (OECD and Inter-American conventions against corruption)
         3. Corruption still remains a serious problem despite development of international law and the obligation to implement these treaties into domestic law
         4. “Grease payments” are typically allowed for “routine government actions,” but must consider if the amount is appropriate
         5. Strengthen advice to your client by getting a “no action” letter from the government.
  1. Expanding Markets: Gaining Footholds in Foreign Markets
     1. Problem 2: Agency and Distributorship Agreements (pg. 217-353)
        1. Agent or Distributor?

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Agreement Type | Title to Goods | Payment | Risk | Binding Authority | Regulatory Regimes | Tax Treatment |
| Agent | Doesn’t take title | Customer pays—deal directly | Client bears greater risk | Can have agent bind you, or choose not to | Apply | Different treatment |
| Distributor | Takes title | Distributor pays you—they deal with customer | Distributor bears greater risk | Distributor cannot bind you to clients (arm’s length) | Apply | Different treatment |

* + - * 1. Lawyering the Agreements

Prepare the contract(s) that will establish the agency or distribution agreement

Make sure the agency or distribution arrangement in the contract(s) complies with applicable law:

Jurisdiction of the principal/supplier (your jurisdiction)

Jurisdiction of the agent/distributor (foreign counsel’s jurisdiction)

Many times clients want to avoid hiring foreign counsel by relying on the agent/distributor’s foreign counsel—can be a risk, but often they don’t want the cost

* + - 1. Distributorship Agreement—Book Example TECHNO-IMPO Distributor Agreement
         1. Choice of law provision:

What about CSIG? Title passes to the distributor so this is an international sale of goods. CISG applies unless excluded…if parties don’t want it to apply, it must be explicitly excluded (as long as both countries are party to it)

Choice of law will not displace the law where the agreement activity occurs where that country’s law regulates such entities

* + - * 1. Choice of forum provision:

Want lots of detail and transparency—a foreign corp may not be comfortable with arbitration i.e., in the US

May want to meet in the middle so that costs are more equitable

Must make sure that the arbitration award will be recognized and enforced in either country

* + - * 1. Check to make sure the correct INCOTERMS are used (i.e. can’t use FOB for land shipments)
        2. Want to make sure to check how payment will be made—need to explicitly address it (probably not a letter of credit) because it will be an ongoing transaction
        3. Elements of Distributor Agreement:

Appointment and Scope of Appointment

Distributor Obligations

Termination Provisions

Reciprocal Obligations

* + - * 1. Representations and warranties from both parties usually forms part of due diligence in concluding such deals
        2. Regulatory Regimes

The domestic law of the country in which the agent or distributor is located

If the country is within the European Union, then national law will be affected by EU law

Directives: binding as to result, but not implementation

Regulations: binding and directly applicable on EU members

Types of Regulatory Regimes:

Specific: laws that apply to agency and distributorship agreements

General: laws that address larger policy problems but potentially affect agency and distributorship agreements (e.g., antitrust; export regs; FCPA; etc.)

Regulatory Regimes and Contract Drafting

Choice of Law/Choice of Forum Clauses: Cannot avoid the application of foreign regulatory regimes that affect agents and distributors operating in that foreign jurisdiction by putting choice of law/forum clauses in the contract.

See Ingmar v. Eaton Leonard Technologies, Inc. (pg. 331-333)

Techniques to mitigate risk of running afoul of regulatory regimes

Foreign party to the contract will raise problems with the provisions that generate regulatory concerns

Foreign counsel for your client should review the contract for compliance with regulatory regimes

Contract as regulatory compliance mechanism: can use the contract to help ensure compliance with applicable regulatory regimes

\*BEST TO HAVE FOREIGN LAWYERS CHECK FOR REG COMPLIANCE\*

Regulatory Compliance

Registration requirement that applies to agents across the board makes application of regulations easier across the board

May have to discuss human rights issues with your client

Agency contracts are subject to EU law (Directive 86/654/EEC)

Determine whether the agency relationship created is covered by the directive

Review requirements of the agreement—esp. Compensation of the Agent, Termination of the Agency Relationship, and Indemnification or Damages for Terminated Agent

Amend the draft agency agreement to conform, where necessary, to the regulatory regime

* + - 1. Exclusivity
         1. Antitrust Law/Competition Law

Both US and EU law prohibit commercial transaction and practices that restrain trade and competition or that abuse a dominant market position

Exclusive distributor agreements can, depending on market circumstances, raise antitrust law concerns

Typically not addressed in drafting, but is rather a larger policy concern

Mostly occurs in the context of exclusive distributorships

Keep in mind potential effects on the competition, otherwise it could create problems—true in ANY jurisdiction

|  |  |  |  |
| --- | --- | --- | --- |
| Type of Agreement | Per Se Violation (prohibited without reference to any impact on market competition) | Rule of Reason Analysis (prohibiting unreasonable restraint on trade in light of all information) | Block Exemption/Safe Harbor (defining what types of arrangements will not trigger competition concerns) |
| Horizontal Agreement (between companies at same level of activity) | * Price fixing * Market sharing * Tying arrangements | * Agreement’s impact on the conditions of competition in the relevant markets | * N/A for distributor agreements |
| Vertical Agreement (between companies at different levels of activity) | * Price fixing | * Agreement’s effect on inter-brand competition | * EC Regulation No. 2790/1999 on vertical agreements and concerted practices |

* Often cooperation and collaboration if two jurisdiction involved to get the same result, courts just often talk about it differently. Sometimes, though, there will be different outcomes because of a divergence of interests regarding competition
* Exclusive Distributor Agreements and Effects on Competition

|  |  |  |
| --- | --- | --- |
| Contract Feature | Intra-Brand Competition | Inter-Brand Competition  (more important issue) |
| Territorial Exclusivity | Reduces intra-brand in-country competition | Positive: increases inter-brand competition  Negative: with market power, could decrease inter-brand competition |
| Territorial Restrictions | Reduces intra-brand cross-border competition | Positive: increases inter-brand competition  Negative: with market power, could decrease inter-brand competition |
| Noncompete Obligations | N/A | Could reduce inter-brand competition |

* Territorial exclusivity could increase competition
  + - * 1. Under EU law, steps in legal analysis for a distributor agreement

Does the Agreement benefit from the Block Exemption on vertical agreements and concerted practices? If yes, no EU competition law problems

If no, does the Agreement withstand per se and “rule of reason” scrutiny under Articles 81 and 82 of the EC Treaty?

Any time you have a player to a transaction with major market power, you have to focus in closer on competition issues

* + - * 1. EU Block Exemption for Vertical Agreements

Will the agreement at issue be benefited by the EU Block Exemption?

Agreement between two or more undertakings each of which operates at a different level of the production or distribution chain? (Article 2(1), pg. 346)

Agreement relating to the conditions under which the parties purchase, sell, or resell certain goods? (Article 2(1), pg. 346)

Agreement contains restrictions on competition falling within Article 81(1) of the EC Treaty? (Article 2(1), pg. 346—i.e. territorial exclusivity, territorial restriction)

Agreement involves competing undertakings where buyer has total turnover not exceeding EUR 100 million and buyer does not manufacture goods competing with supplier? (Article 4, pg. 347)

Supplier’s market share in EUR Country X does not exceed 30% of the relevant market? (Article 3(1), pg. 347)

Agreement trigger any “black listed” provisions? (Article 4, pg. 347-348)

Agreement has a “noncompete” provision that triggers non-application of Block Exemption for that provision? (Article 5, pg. 348-349)

If benefited by the Block Exemption, provided safe harbor for the agreement

* + - * 1. Applicable EC Treaty Law

Article 81

If the Block Exemption for vertical agreements is not available for the agreement, then it should be reviewed under Article 81

Article 81(1) may not apply because it contributes to the distribution of goods that allows consumers a fair share of the resulting benefit (Article 81(3), pg. 342)

Can get a “negative clearance” from European competition law authorities (like a no action letter in the US)

Substantive analysis will focus on whether the Agreement has the object or effect of preventing, restricting, or distorting competition within the common market (Article 81(1), pg. 341-342)

Rule of Reason Analysis—looking for anti-competitive effect of Agreement in light of all relevant information

Focus on impact of Agreement on inter-brand competition in the relevant market

Article 82

Prohibits abuse of a dominant position within the common market or a substantial portion of it.

For this Article to apply, one of the companies must have a “dominant position” in the EU or an EU country AND abuse that position through anti-competitive behavior, transactions, or agreements

Requires research to determine if there is a strong enough market share

If a dispute arose under the applicable EC treaty, it may not be addressed under the arbitration body decided upon in an arbitration clause

Would need to look at conflict of laws

Most likely dispute scenario is that a competitor would approach the state’s competition law authority to argue that the Agreement does not benefit from the Block Exemption and violates Article 81 or 82 of the EC Treaty

* + 1. Problem 3: Licensing Agreement (pg. 354-392)
       1. License Agreement
          1. Will often be licenses accompanying other types of transactions, especially joint ventures—licensing is a different way of breaking into a new market
          2. Most cost effective, less risk, but export controls will still apply
          3. Accessing cheaper labor, shipping software is a lot cheaper than shipping physical goods
          4. Negatives:

Less control over the property once it has been turned over; the other country’s law may not be very helpful at protecting the property

* + - * 1. If the company doesn’t want to license, it will typically go build a factory in the other country so they can maintain complete control. Joint venture would also allow for more control
        2. Lawyering IP License Agreements:

Drafting and negotiating the contract

General provisions & IP license specific provisions

Addressing regulatory issues

Licensor’s jurisdiction (e.g., export control laws)

Licensee’s jurisdiction (e.g., laws regulating the terms of license agreements)

* + - * 1. Important License Agreement Provisions

Grant of the right work and restrictions (grant; no sub-license, no assignment of license)

Often lots of restrictions on the grant because IP owner wants control

Payment provisions (royalties and record keeping on sales)

Usually a percentage of sales—very complicated provisions

Licensee’s IP-based Obligations

Disclosure of improvements and grant back

Grant-back requires that any improvements, etc. made by the licensee on the IP are granted back to the original IP owner

Confidentiality

Trademark

Non-contestation of licensor’s rights

Infringement notification

Licensor-specific provisions

Technical assistance

Warranties on IP validity and indemnification of Licensee for breach of IP warranties

Term and Termination

General Provisions (entire agreement, language, applicable law, arbitration)

Choice of Law, Choice of Forum

No CISG—only for sale of GOODS

If you want to exclude conflict of laws provisions, the provision should explicitly say so

Depending on how the other country regulates IP, some issues may not be able to be governed by the chosen law (like EC regulatory regimes cannot be overruled by this type of provision in distributor agreements—difference between contract and regulatory disputes)

Check to make sure arbitration will be recognized and enforced in both countries.

Should state where arbitration will take place and what rules will apply

Arbitrators may award damages—for IP will likely need some sort of mechanism in place to be able to obtain injunctive relief as well—arbitration can’t do them

May want to bifurcate remedies depending on the type of relief sought—definitely should be discussed with client

* + - * 1. IP Grant Provision

Exclusive License: Licensor is only granting Licensee the right to use Licensor’s IP in the other state (e.g., Guatador)

Could make the exclusive license a “site license” where Licensee can only work and use the IP at an identified location

Could make the license “non-exclusive,” giving the Licensor the right to license again in Guatador

Exclusive license can only be worked and used in Guatador (territorial restriction)—potential antitrust issues

License cannot be sub-licensed or assigned without Licensor’s prior written consent.

* + - * 1. IP License Agreement and INCOTERMS? Odd place to use them, but good for allocating risk
        2. US Export Controls and the License Agreement

The casebook sample License Agreement does not contain any provisions related to US export control laws

May want to protect the client in the event that something prevents completion of the contract (force majeure)

If the contract doesn’t have a provision on Licensee responsibilities under US export control law, you still need to talk to the Licensee about it because the US will reach out to control the transaction if there are violations.

* + - 1. Intellectual Property Law
         1. Introduction

IP Protection Systems

National Law—IP rights are rights granted by governments to encourage innovation

IP protection systems are still based in national law

Have to understand in IP license agreements how the relevant national system of law regulates the IP being licensed

Relevant national system of law can provide protections against licensee (e.g. for violations of patents in another country) but can also create issues that might limit the licensor’s power to control its IP under the license (e.g. the grant-back provision in the contract)

International Law

Principle of Non-Discrimination (national treatment) in protecting IP rights (Paris Convention; Berne Convention)

Harmonization to achieve baseline substantive and procedural IP protections (WTO Agreement)

Laws at the national level must meet the harmonizing baseline (game-changer)

* + - * 1. IP and Developing Countries

Technology transfer from developed to developing countries was contentious after WWII, with developed countries seeking higher IP protections and developing countries resisting the protection of IP for development purposes.

Refusal of many developing countries to recognize patents on pharmaceutical products in order to facilitate access to generic medicines

Widespread “pirating” of trademarked and copyrighted products in developing countries to develop production capacity and technical skills

Adoption of technology transfer laws to seek more transfer of IP and technology to developing countries from developed countries

* + - * 1. Antitrust Aspects

TRIPS Agreement—allows WTO members to address actions involving IP rights that restrain competition through competition or anti-trust laws (pg. 364)

Patents:

Requirement to grant patents to nationals of WTO members on a non-discriminatory basis (MFN and national treatment)

Governments of WTO members can grant compulsory licensees under TRIP Article 31 subject to certain conditions (e.g., adequate remuneration for patent holder; CL cannot be used to export patented products)

Trademarks: shall be protected on a non-discriminatory basis and are not subject to compulsory licenses

Trade Secrets: natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices (TRIPS Article 39.2)

Copyright: Computer programs can be protected by copyright (TRIPS Article 10)

Parallel Imports: TRIPS allows each WTO member to decide how it wants to address parallel importation of “gray market” goods (TRIPS Article 6)

TRIPS has become the leading IP Treaty and most countries you deal with will be parties to the WTO. If a country is a member of WTO, they cannot opt out of TRIPS

Have also been some controversies with TRIPS—with access to pharmaceutical products, etc.

Requirement in TRIPS that countries grant patents on a non-discriminatory basis, most favored nation, etc.

TRIPS is an agreement between states so the states are the ones held responsible.

INFRINGING AND “GRAY MARKET” GOODS

IP laws contain sanctions that can be applied against goods that infringe IP rights—goods made and sold with the IP right holder’s permission

Gray Market Goods are those that were originally sold legally with licensing, but then sold to another unlicensed party at a lower cost than the licensor is selling

Parallel importation of “gray market” goods—lawfully produced products sold in a market not authorized by the IP holder

TRIPS Agreement leaves how to handle parallel importation to each WTO member

Have to look to national law to find out whether IP owner has any remedies against parallel importation

US tends to be hostile toward parallel importation, particularly goods produced with IP owned by US companies

Trademark: Customs Service Regulation 133.23 (pg. 387-388) that permit detention of “restricted gray market goods,” defined to include goods bearing a genuine trademark applied by a licensee independent of the US owner of the trademark

Patents: “First sale doctrine” of IP rights exhaustion does not apply to sales outside the US, even if the sales were authorized by the US patent holder

Should the License Agreement include anything about “gray market goods”?

May not have breach of contract if licensee did nothing wrong, but could write something in to infringement provision

|  |  |  |  |
| --- | --- | --- | --- |
| Provision in License Agreement | US | EU (if licensee were Spanish company) | Guatador (as informed by Andean Community) |
| Territorial Restrictions | Permissible | Permissible as to active selling, but not as to passive selling | Andean Community prohibition on restrictions on exports to other Andean Community markets |
| Grant-Back | Permissible | Not permissible as an excluded restriction | Andean Community concern with such provisions |
| Non-Competition | Permissible | Permissible if market-share thresholds met | ??? |
| Non-Contestation of Rights | Permissible | Not permissible as an excluded restriction | ??? |

* Restraints are permissible (from the US point of view) under the RULE OF REASON analysis. US Government will normally not challenge restraints IF they are not facially competitive (no per se) and the licensee and licensor do not account for a certain threshold percentage of the market.
* EU: If two undertakings in a similar market are competing will be permitted where the combined market share does not exceed 20% (another threshold). If they are non-competing undertakings, the license agreement can benefit from the exemption where the individual market shares do not exceed 30%
  + Cannot be applied to some certain obligations in licensing agreements—particularly grant-back and non-contestation. Not permissible under the EU Block Exemption
    - * 1. Royalty Arrangements

Exchange Rate Risk

Does your client face exchange rate risk in the way the royalty payment provisions are drafted?

Can reduce exchange rate risk can be reduced through the contract, by careful drafting

Can also be reduced by engaging in hedging strategies with currency (lawyers probably wouldn’t be involved)

Taxation of Royalty Payments

Any tax treaty benefits for royalty payments under a tax treaty (e.g. royalty payments are only taxed when received by Licensor in the US)?

Is there a double taxation treaty between countries—TAX LAWYERS WILL BE INVOLVED IN THIS ISSUE NO MATTER WHAT

If no tax treaty, then need to understand how both states involved will tax the royalty payments (e.g., withholding tax in Guatador, income tax in US with foreign tax credit)

* + 1. Problem 4: Establishing an Operation Abroad—Foreign Direct Investment (pg. 393-439)
       1. General FDI Lawyering
          1. Law of the Foreign Jurisdiction:

Establishing operations in the foreign jurisdiction

Complying with laws on foreign investment

Operating under foreign legal system

* + - * 1. Protections for FDI

Treaty law (e.g., BITs, NAFTA

Insurance (e.g., OPIC, MIGA)—protecting investment from expropriation and other political risks

* + - * 1. Is the Foreign Country Open for Business? (Mexico/NAFTA example)

GENERAL PRINCIPLE: Mexico is open for business to US companies, but must check the exceptions…

Exceptions to the General Principle:

Activities reserved exclusively to the State of Mexico

Activities reserved exclusively for Mexican nationals or corporations

Activities subject to limits on the percentage of foreign ownership

Investments that require the approval of the National Commission of Foreign Investments

Are there other approvals or authorizations needed to invest in the country?

Will generally be basic bureaucratic hoops like recording and registration, but will often need the help of foreign counsel to go into operation

* + - 1. Choice of Corporate Form
         1. Branch or Subsidiary--Considerations

Business Reasons: How does the company want to operate?

Legal: Limited liability available through corporate form. Potentially important in light of the product

Definitely want to know how courts go about piercing the corporate veil

Tax: Could defer tax payments on income earned by foreign subsidiary and offset such income with foreign tax credits. Income from branch is immediately taxable as foreign source income

Treaty Law Issues:

Tax treaty between US and Mexico that addresses double taxation?

Treaties that protect FDI? Does Pestco’s plan fall within the scope of the applicable treaty protecting FDI?

NAFTA Chapter 11 (defines investment broadly—can usually fall within the definition fairly easily)

* + - * 1. Which form to use in the foreign country?

NEED FOREIGN COUNSEL TO WALK THROUGH THIS

Sucursal de Sociedad Extranjera (branch)—not used much for FDI

Sociedad Anonima (SA) (public corporation)

Offers limited liability, but has an inflexible capital structure (tied to certain types of securities to be offered to investors)

Requires government approval to raise money by issuing shares of stock. How much of a disincentive is it?

Socidad Anonima de Capital Variable (SA de CV) (corporation with variable capital)

Limited liability, but gives more opportunity to design the company as you see fit

Tax deferral doesn’t matter because rates are the same

Sociedad de Responsibilidad Limitada (SA de RL) (LLC)

Limited liability

Under US tax law, this can be treated as either a branch or a partnership, which allows the investors to avoid paying US tax on the payment of dividends—direct revenue stream

Limitations on ownership that might get in the way of raising capital down the road

* + - 1. Restrictions and Protection of Foreign Investment
         1. Permission/Authorization to Invest

NAFTA helps assure the client that Mexico is open for business

Countries that oscillate between open and closed generally open using BITs

NAFTA and other BITs are VERY investor friendly

* + - * 1. Operation of the Investment

Will the corporation be able to operate as it wishes?

* + - * 1. Dispute Setlement

What are the rights and obligations in the case of a dispute with the foreign government?

If there really is a dispute, need to bring in people who know what they are talking about—need specialists

* + - * 1. Divestment

Want to make sure the corporation can bring the investment to an end—get the money out and leave

* + - * 1. NAFTA, Chapter 11

Permission/Authorization:

Chapter 11 protects investors of one NAFTA party who make investments in another

Operating the Investment:

Principles of non-discrimination: national treatment (Article 1102) and most-favored-nation treatment (Article 1103)

Exceptions to national treatment allow Mexico to restrict equity investments

Potential for a foreign corporation to be treated even better than a domestic company (tax holidays and other incentives)

Fair and equitable treatment (Article 1105)

Protection from performance requirements (Article 1106)

Freedom to appoint senior management without respect to nationality (Article 1107)

Freedom to transfer profits and proceeds of an investment (Article 1109)

Expropriation protections (Article 1110)

Host country can expropriate your property, but there is protection—there are conditions on the exercise of that power which include “prompt, adequate, effective compensation”

* + - * 1. Environmental and Labor Issues

NAFTA includes provisions and “side provisions” on environmental protection and labor

Controversial, but also weak (governments couldn’t reach a deeper level of consensus)

Aimed directly at governments, not investors

NAFTA, Article 1114 (pg. 412): Acknowledges NAFTA state parties’ rights to enact environmental regulations that affect investment as long as they are consistent with NAFTA. Also, no NAFTA party should lower its environmental standards to attract investment

Side agreements establish objectives and processes among the three governments to address concerns that liberalized trade will lead to more environmental degradation and mistreatment of labor

Provisions not really designed to improve anything, but rather were meant to enforce the standards already in place among the governments against each other.

See Metalclad v. Mexico, below

* + - * 1. Political Risk Insurance

In addition to taking advantage of the access and protections afforded by BITs like NAFTA, can also protect investment via political risk insurance

Overseas Private Investment Corporation (OPIC) offers insurance against expropriation, political violence, and currency inconvertibility for up to 90% of book value (actual cost) of the investment

World Bank’s Multilateral Investment Guarantee Agency (MIGA) offers insurance against expropriation, political violence, inconvertibility, and breach of contract by a foreign government

* + - 1. Human Rights Issues in FDI
         1. Would your client ever have to worry about litigation against it in the US under the ATS?
         2. Would an ATS claim arise if your client simply operated the plant under less stringent Mexican regulations, which resulted in health harms to people working and located near the facility?
         3. Are there other human rights issues to take into consideration in this investment? (THINK BHOPAL)
      2. Money Transfers and Divestment: Closing Down an Investment
         1. How does NAFTA protect transfers of monies (e.g., dividends back to the US corporation) and divestment, should the client sell or discontinue operations in Mexico
         2. Article 1109: Transfers

Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:

Profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment

Proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment…etc. etc.

* + - 1. Metalclad v. Mexico (Environmental Issue Case)
         1. Facts: Metalclad bought a company in Mexico which is supposed to be building a landfill. A number of problems arise. There is an agreement between Metalclad and the Mexican federal (but not state) government to permit the landfill operation. Municipality denies construction permit after construction was completed and state government and Metalclad fail to resolve dispute. Metalclad files for NAFTA arbitration and the state government adopts ecological decree preventing landfill operations.
         2. Arbitral Decision:

ISSUE: Was the federal government of Mexico responsible under international law for the acts of the state and municipal governments concerning Metalclad?

Under IL, federal government is always responsible for the actions of lower levels of government

Cannot excuse a violation by saying that a local/municipal government violated but the national did not.

ISSUE: Did MX violate its obligation not to expropriate an investment except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and Article 1105(1), and on payment of compensation?

Need to look at the definition of “expropriation” under NAFTA

“Indirect expropriation” language from this case not necessary, so some worried it would create bad precedent.

Worried about the acts of the municipality—preventing return on investment

“Prompt, adequate, and effective” don’t appear in NAFTA, but that is the general idea behind the compensation awarded

Can’t factor in elements of a going concern because it never became one—awarded the original investment

* + - * 1. British Columbian Decision

Arbitration occurred in BC, and under their law you can challenge arbitration awards in their domestic courts

* 1. Growing the Enterprise: Adding New Transnational Capacity
     1. Problem 5: Mergers and Acquisitions (CB pg. 440-496)
        1. M&A Basics
           1. Book example: American Kitchens & Deutsche Kuechen Werke GmbH
           2. Regulatory issues on both sides become CONTRACT ISSUES
           3. Reasons for engaging in M&A in transnational contexts:

Breaking into a new market faster than establishing new foreign subsidiary

Foreign companies have customer access, business assets, or technologies worth purchasing for business expansion purposes

* + - * 1. Foreign acquisitions of domestic companies often raise generic and particular legal issues.

GENERIC: application of contract, corporate, securities, and antitrust laws

PARTICULAR: laws on national security review of foreign acquisitions of companies in certain sectors (e.g., defense contractors) or laws restricting foreign ownership of companies in certain sectors (e.g., communications)

* + - * 1. See Takeover Defenses pg. 459
      1. Share Purchase Agreement: Basic Parts
         1. Sale and Transfer of the DKW Shares: exchange of legal control over DKW for money. No assignment of these rights
         2. Representation and Warranties of AKI and DKW Shareholders: important statements on which the parties rely in the transaction
         3. Closing and Conditions for Closing: establish when the sale of shares will be finalized and what has to happen on both sides before that date
         4. Termination: provides contexts in which the sale of shares can be terminated by either one party or both prior to or on the closing date
         5. Restrictive Covenants: limiting what sellers of the shares in DKW can do that might compete with AKI
         6. Confidentiality: keeps Share Purchase Agreement and information related thereto confidential
         7. Choice of Forum and Choice of Law: selects venue for settling disputes and the law to govern the Share Purchase Agreement
      2. Securities Law
         1. German law on the purchase and sale of securities will apply to the sale of German shares in a German company

Potentially address in the Share Purchase Agreement (e.g., requirement for a legal opinion on behalf of Sellers)

RETAIN LOCAL COUNSEL ON THIS ISSUE

* + - * 1. Does US securities law apply to this transaction?

Probably yes…extraterritorial application

* + - 1. Corporations Law
         1. Law regulating mergers and acquisitions, such as takeovers
         2. US federal law, the Williams Act, would not apply because AKI (a publicly listed company) is not the target of a takeover effort; nor would Delaware law, as the law of the place of AKI’s incorporation, apply to AKI’s board of directors concerning this transaction (pg. 458-459)
         3. Applicable law here is the German Takeover Law (pg. 460-462), which means the law of the jurisdiction of the acquired company. Does it apply to AKI’s purchase of all the shares of DKW…NEED LOCAL COUNSEL
         4. Accounting Issues:

As a company publicly listed on a US exchange, US law on accounting practices, including Sarbanes-Oxley, applies to it, but DKW is not subject to these rules

After AKI acquires DKW, AKI will have to report its activities in Germany as part of its reporting requirements under US securities law, so it will have to translate its DKW accounts (produced in accordance with German generally accepted accounting principles and practices) into US GAAP to conform with US legal requirements

* + - 1. Antitrust Law
         1. US Antitrust (pg. 469)

Clayton Act, Section 7: prohibits any person engaged in commerce from acquiring the stock or assets of any other person engaged in commerce where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”

Hart-Scott-Rodino Act requires pre-merger notification to the DOJ or the FTC based if threshold dollar amounts are met.

Also applies to acquisitions involving foreign parties that affect US commerce.

* + - * 1. EC Merger Regulation (pg. 473)

Prohibits mergers that “significantly impede effective competition in particular as a result of the creation or strengthening of a dominant position. Mergers with anticompetitive effects in oligopolistic markets are prohibited even if the merged company is not “dominant”

Allows the parties to file a notification before entering a binding agreement as long as there is a good faith intention to conclude the agreement

Allows parties to a transaction not covered by the regulation but subject to notification in 3+ member states to request review by the Commission absent objections

* + - * 1. German Competition Law
      1. Exon-Florio Amendment
         1. Gives the President authority to suspend or prohibit any transaction that could result in foreign control of any person engaged in commerce in the US if he finds that “there is credible evidence…that the foreign interest exercising control might take action that threatens to impair the national security”

See list of factors to be considered, pg. 490

Review authority has been delegated to CFIUS

Giving notice under the amendment is voluntary, but there is incentive to do so because the President can order divestiture of unapproved transactions

* + - 1. Privatization
         1. Process that permits foreign companies to bid for and acquire controlling stakes in formerly state-owned or state-operated enterprises
         2. Privatization processes typically have their own regulatory frameworks that differ from the generally applicable laws on buying and selling shares in corporate entities
         3. Political considerations in privatization that do not arise with ordinary M&A transactions, and on-going political risks (e.g., Venezuela’s re-nationalization of the privatized CANTV; note that the Venezuelan government paid compensation for the nationalize shares at fair market value)
      2. M&A in BITs
         1. Buying a company, under most BITs is an investment—the only treaty between developed countries that covers investment is NAFTA
         2. BITs tend to be between developed and developing countries
         3. Metalclad—direct investment—acquiring a company will usually be caught by the definition of investment, so if something goes wrong, the government may have a role to play (never happens between developed countries)
         4. BROAD DEFINITION OF INVESTMENT in BITs and treaties like NAFTA
    1. Problem 6: International Joint Venture (pg. 497-527)
       1. US-Chinese Joint Venture Contract
          1. Like agency/distribution/license agreements, FDI, and mergers, companies use JVs in foreign countries to get access to new markets for their products and services
          2. Business Reasons:

Less costly than FDI because combining resources of two entities

Get access to technology or other assets of the foreign company (e.g. distribution network, knowledge of local markets, experience working with government regulations)

Intermediate step towards more direct participation in the foreign market

* + - * 1. Legal Reasons:

Law in foreign country might require FDI to take the form of a joint venture either generally or in particular areas of the economy (recall Mexico’s law on foreign investment)

Can only enter markets for energy, etc. in the form of a joint venture

JVs are very flexible instruments that can be used to accomplish lots of different goals

* + - * 1. CONTRACTUAL ISSUES:

JV Contract

Ancillary contracts and documents required under the JV agreement or the nature of the transactions (e.g., share purchase agreement, license agreement for IP rights, articles of association, loan agreements between the JV entity and the JV partners)

|  |  |  |
| --- | --- | --- |
| CATEGORY | ISSUE | JV CONTRACT |
| Control | Which partner has greater management rights? | Registered Capital  Board of Directors  Management  Assignment |
| Technology Transfer | How are IP rights protected? | Technology Transfer  Tech Transfer Agreement |
| Valuation | What level of contributions do the partners make to the JV entity? | Total Investment  Registered Capital  Technology Transfer  Accounting |
| Dispute Resolution | How are disputes between the JV partners resolved? | Breach of Contract  Force Majeure  Applicable Law  Settlement of Disputes |
| Exit | How do the JV partners end the JV? | Board of Directors  Term  Assignment  Dissolution/Liquidation |

* Other Potential Contract Issues:
  + Representations and warranties from American and People’s?
  + Loans from the Parties to the JV?
  + Exchange rate issues related to valuation of the contributions, especially from American?
  + Market limitations on sales/exports of products from Double Happiness?
  + Responsibility of American to procure machinery and raw materials, install and test machinery, and train personnel—compensation from Double Happiness part of the investment? Mechanics of these aspects of the contract (e.g., is Double Happiness the actual buyer from a supplier located by American?)
  + American as a supplier of goods and services to Double Happiness during its operation?
  + Handling distribution/re-investment of net profits of Double Happiness—dividends or re-investment in Double Happiness?
  + Closing date for the joint venture to be established formally (e.g., all documents and contracts completed and executed with all approvals from Chinese authorities in hand)?
    - * 1. REGULATORY ISSUES:

Laws on joint ventures or FDI (e.g., Chinese Law on Sino-Foreign Equity Joint Ventures)

Securities law (e.g., American and People’s Manufacturing are purchasing shares of equity in Double Happiness)

Corporate law (e.g., setting up new Chinese company; limited liability; piercing corporate veil)

Anti-trust law (e.g., US and Chinese antitrust laws)

Tax laws (e.g., US and Chinese treatment of the JV’s income—tax credits, etc.)

May even drive the way the JV gets set up—holding companies, etc.

* + - * 1. Legally dense and logistically intensive to get the lawyering done on all these types of deals
      1. Chinese Regulation of Foreign Investment
         1. Important JV Regulatory Issues

|  |  |  |  |
| --- | --- | --- | --- |
| CATEGORY | ISSUE | JV CONTRACT | CHINESE LAW on SINO-FOREIGN EQUITY JV |
| Control | Which partner has greater management rights? | Registered Capital  Board of Directors  Management  Assignment | Article 4: minimum foreign participation requirement  Article 6: on board of directors and management |
| Technology Transfer | How are IP rights protected? | Tech Transfer  Tech Transfer Agreement | Article 5: requirements for technology transfer  Equity Joint Venture Regulations (requirements for tech transfers) |
| Valuation | What level of contributions do the partners make to the JV entity? | Total Investment  Registered Capital  Tech Transfer  Accounting | Article 5: on valuation of contributors  Article 8: on distribution of net profit |
| Dispute Resolution | How are disputes between the JV partners resolved? | Breach of Contract  Force Majeure  Applicable Law  Settlement of Disputes | Article 2: Chinese law applies  Article 15: on dispute settlement |
| Exit | How do the JV partners end the JV? | Board of Directors  Term  Assignment  Dissolution/Liquidation | Article 13: on term of JV  Equity Joint Venture Regulation: on assignment and protections for minority partner |

* + - * 1. Securities and Corporate Law

SECURITIES LAW: Double Happiness will issue equity shares to American and People’s Manufacturing, Any additional issues under US or Chinese law not addressed by the law on equity joint ventures?

CORPORATE LAW: Double Happiness will be a Chinese LLC and, thus, subject to Chinese corporate law.

* + - 1. Resolving Differences
         1. Settlement of disputes between the JV partners

JV contract mandates consultation or mediation first. Through what process?

Need to clarify what this means—need to make sure the partners have the same understanding

When does the “mediation” end to start further steps of dispute resolution?

Either need to discuss with the other side or have more transparency in the contract

If consultation or mediation fails, then arbitration under Chinese International Economic and Trade Arbitration (CIETAC) good for American?

American ok with CIETAC rules? See rule on appointment of 3d arbitrator if parties fail to agree(pg. 514), which could lead to CIETAC appointing the 3d arbitrator, which might mean 2 of the 3 arbitrators are Chinese nationals

Language of arbitration will be Chinese under CIETAC unless otherwise provided in the JV contract

American cannot use New York Convention to get recognition and enforcement of an arbitral award issued in American’s favor by CIETAC in China because the Chinese government does not recognize such awards as “foreign” arbitral awards subject to the New York Convention. People’s Manufacturing is unlikely to have nay assets in the US to go after through recognition and enforcement of the Chinese arbitral award in the US under the NY Convention.

Will have to go through the normal Chinese legal process to get an arbitral award enforced…NEED LOCAL COUNSEL.

If you want to make sure it falls under the NY Convention it will have to be done outside China and not with CIETAC to be a foreign arbitral award.

IMPORTANT POINT TO ALWAYS BE CONSIDERED:

Even being able to enforce in the US doesn’t do a lot of good. It would work legally, but doesn’t help practically because there are no assets in the US

If you lose the arbitration in China, People’s could potentially use the NY Convention to enforce an award against American because its assets are in the US.

* + - * 1. Disputes between the Chinese government and American

Chinese law provides that expropriation is only allowed in “special circumstances”

“Certain compensation must be paid”—need to talk to local counsel, doesn’t necessarily mean prompt, adequate, and effective

Is there a public purpose? Is it non-discriminatory? Is compensation prompt, adequate, and effective?

American could use international law to protect it in a dispute with the Chinese government concerning an alleged expropriation of its investment

Two options: custom or treaty

Getting corporate liability in custom is not that easy

No treaty, so customary international law requires: public purpose; non-discriminatory & non-retaliatory; prompt, adequate, and effective standard

No BIT, so corporation can’t take Chinese government directly to arbitration—will have to go through the US State Department

* + - 1. Antitrust
         1. US Antitrust Law:

Foreign joint ventures ARE NOT subject to US anti-trust laws unless the conduct of such joint ventures has DIRECT, SUBSTANTIAL, and REASONABLY FORESEEABLE ANTICOMPETITIVE EFFECTS on domestic commerce, import commerce, or export commerce (pg. 524; effects doctrine)

* + - * 1. Chinese Antimonopoly Law:

Prohibits agreements (potentially including joint ventures) that restrain competition (e.g. a joint venture between two competitors that restricts output, fixes prices, or allocates markets)

* + - 1. Tax concerns should also be addressed
  1. Transacting with Sovereign Governments—Problem 7: Development Agreements (CB pg. 528-570)
     1. Development Agreements—Generally
        1. Transactions where the other side of the deal is a government. VERY SPECIALIZED TRANSACTION SETTING
        2. Can sometimes even see exclusive rights for certain kinds of services (particularly utilities)—probably more common to be in the utilities realm than natural resources
        3. Human rights issues come up here A LOT
        4. Development Agreement Dynamics
           1. Trying to manage change. The term typically lasts a long time

Have to expect laws, markets, and politics to change over the term of the agreement

Politics play a much larger role here than in transactions between purely private parties

* + - 1. Core Components
         1. Grant of Development Rights
         2. Obligations to Work the Development Rights
         3. Operational Provisions
         4. Regulatory Provisions
         5. Payment Provisions
         6. Dispute Resolution Provisions
    1. Drafting Problems and Legal Aspects
       1. General goal is to even the positions of the parties—most favored nation and most favored country clauses that allow the contract to respond to changes in new arrangements elsewhere are common
       2. Using the Contract to Stabilize Change
          1. Grant of Rights: e.g., Relinquishment provision under which the Company’s rights in the Concession Area shrink according to a time table
          2. Payments to Government: e.g., Royalty Payments provision under which the royalty payment percentage increases according to scale of production
          3. Tax Rates: e.g., Taxation provision under which the income tax rate increases according to scale of production and Limit of Taxation provision which limits taxation of the company to the tax rates in the taxation provision and any other taxes “ordinarily imposed and generally applicable to other companies engaged in similar operations in the country.

With high rates of production, the tax rates go quite high

* + - * 1. Market Changes: e.g., Better Terms provision allows re-negotiation of the Agreement if deals for similar development agreements in the Middle East give governments better benefits
        2. Government Participation Option: e.g., Government’s Option provision, which allows client to buy a 60% stake in the rights and obligations under the Agreement and in the Concession Area after discovery of Crude Oil in Commercial Quantities
      1. STABILIZATION CLAUSES
         1. Purpose is to prevent, limit, or provide compensation for changes in regulatory regimes that harm the foreign investor
         2. Limit on the exercise of sovereignty vis-à-vis the foreign investor party to the development agreement. As such has created controversies concerning neo-colonial restrictions on sovereignty, perceived imbalances in economic benefits from the agreement to the detriment of developing countries, and advocacy for more regulatory action on labor standards, human rights, and environmental protection.

Controversial for a while

* + - * 1. Use and perceived legitimacy of stabilization clauses appears to rise and fall with economic and political attitudes towards foreign investment
      1. Choice of Law
         1. Works a little differently because it is dealing with a sovereign government on the other side
         2. Book Sample, Article 35(G): “This Agreement shall have the force of law. It shall be given effect and shall be interpreted and applied in conformity with the principles of law normally recognized by civilized states in general including those which have been applied by international Tribunals.”

Company must be asking for this clause. Default choice of law would be the government’s own law, but that can be changed at the government’s whim. This clause provides for more security by basing everything more on international custom.

Possible Problems:

Who will determine what the general principles of contract law would be?

* + - * 1. If a government insists that their law be applied, the company would insist on a stabilization clause so that the law could not be changed.
        2. If no choice of law provision:

Law applied would be decided by the arbitrator or judge. It usually has to do with the “center of gravity” and conflicts principles.

* + - 1. Choice of Dispute Settlement Mechanism
         1. Book Example--Article 35: Establishes ad hoc arbitration procedure to settle disputes under the Oil Concession Agreement

Both parties appoint one arbitrator

Arbitrators select “referee”; if cannot agree, referee selected by President of the ICJ

Referee determines procedure for the arbitration, and casts deciding vote if the arbitrators are divided on the questions litigated

A lot rides on who gets chosen as the referee—this decision making process could lead to a lack of transparency

BITs can be helpful because then the government would have already agreed to be taken to arbitration by the private corporation

This sort of ad hoc procedure is VERY RARE and most likely because the government cannot be taken to normal and established arbitration.

* + - * 1. Other choices for dispute settlement mechanisms

Ad hoc arbitration using rules of established arbitration procedures (e.g., UNCITRAL Arbitration Rules)

Treaty-based arbitration system (International Center for the Settlement of Investment Disputes (ICSID), if the home country and host country are parties to ICSID Convention)

Established formal arbitration bodies not requiring treaty application (e.g., ICSID Additional Facility, International Chamber of Commerce, London Court of International Arbitration, etc.)

* + - * 1. Think about the intersection of dispute settlement choice in the development agreement and dispute settlement options under any applicable bilateral investment treaty (come back to this issue later)
        2. Other Arbitration Issues to Consider

Language of arbitration

Place of arbitration

ENFORCEMENT of arbitral award in the country

If arbitration held in the country—unlikely to be considered foreign, would not fall under NY Convention (though depends on govt view)

If arbitration held in another country—NY Convention would probably apply

* + 1. International Law and Development Agreements
       1. Involvement of a sovereign state as a contractual party raises questions about the application of international law to development agreements and disputes that might arise under them
       2. Want to know what limits international law places on the exercise of a host country’s sovereignty in connection with a development agreement.
       3. Issues of sovereignty have been politically controversial in international politics, especially during the period of decolonization after WWII
    2. International Law on Breach or Repudiation
       1. If rights are withdrawn (often because host country wants greater sovereign control over its natural resources), usually the state will claim breach of contract while the corporation wants it to be a violation of international law
          1. Company will argue violation of international law on FDI as expropriation without prompt, adequate, and effective compensation
          2. Host country will counter that it is only a claim for possible breach of contract that must go to arbitration and international law doesn’t enter at all.
    3. Renegotiation
       1. Many of these agreements include renegotiation clauses—whether or not one is included, renegotiation often occurs after threats from each side
          1. Usually based upon triggering events like changed circumstances, most-favored-nation, and most-favored-company