

Drafting and Negotiating an International Contract Distribution Agreements



Legal Framework Governing the Contract

- Choice of Law / Options for Italian wine exporter and U.S. importer/distributor
- Arbitration vs. Submission to Court Jurisdiction



Choices for Governing Law

Law of a U.S. State – New York, California, others

Italian Law

Law of a Third Country – English Law

No clause – U.N. Convention on the International Sales of Goods (CISG) will apply by default

Note – Choice of Law has potentially important consequences

Legal Issues to be Considered in Choice of Law Analysis

Interpretation of Contract

Good Faith in Contract Performance

Force Majeure

Hardship

Attorneys' Fees

Interpretation of Contract

New York Law	English Law	CISG	Italian Law
Parol Evidence Rule	Exclusionary Rule	Allows oral statements made before the signing of the contract or at the time or signing to become part of the parties' agreement. Art. 8(3)	"Subjective Interpretation Criteria"
Contract language interpreted as written if unambiguous. No evidence of parties' intent is permitted to contradict the terms of a written agreement. UCC 2-202	Similar to NY law if contract unambiguous. Previous negotiations and declarations of subjective intentions inadmissible for purposes of contractual interpretation.	A tribunal may consider "all relevant circumstances" to determine the intent of the parties.	Establish intention of the parties based first of all on literal meaning of the contract. If literal meaning is clear, the tribunal should verify its consistency with the intention of the parties.
If language is found to be ambiguous, evidence external to the contract is permitted (communications from time of contract, other documents etc.)	For ambiguous contracts, courts should give the contract a meaning that a reasonable person would give it having all of the background information that was available to the parties at the time the contract was made. Investors Compensation Scheme v West Bromwich Considered an "objective" test.		Includes parties' behaviour, pre-contract, exchange of e-mails etc.
In general, course of performance accepted or acquiesced in is relevant to determine the meaning of the agreement. UCC 2-208	In general, if the parties have consistently and clearly dealt with each other on a particular basis, the court may imply terms to reflect this, provided the actual wording does not contradict it.	Parties are bound by any usage to which they have agreed and by any practices they have established between themselves. Art. 9(1)	If the contract is not clear and it is not possible to reconstruct the intention of the parties, contract interpreted in accordance with good faith principle. Art. 1362-1371 Civil Code

Good Faith in Contract Performance

New York Law	English Law	CISG	Italian Law
<p>Every contract has an implied covenant of good faith and fair dealing.</p>	<p>No principle of an obligation of good faith in the performance of contracts.</p>	<p>Calls for the observance of good faith in international trade.</p>	<p>General duty of good faith – <i>Principio della correttezza</i> - Art. 1175 Civil Code)</p>
	<p>Contract terms interpreted strictly</p>	<p>Good faith principle applies to the interpretation of a contract and to the parties' contractual relationship.</p>	<p>Parties to perform in good faith the obligations set out in the contract. Art. 1375 Civil Code</p>
	<p>As one judge put it, there is a real danger that if a general principle of good faith were established it would be invoked just as often to undermine as to support the terms on which the parties had reached agreement. <i>MSC Mediterranean Shipping Company, SA. v Cottonex Anstalt</i>, [2016] EWCA Civ 789, Moore-Bick, L.J.</p>		

Force Majeure

New York Law	English Law	CISG	Italian Law
<p>Concept does not exist as such</p>	<p>Similar to NY Law.</p>	<p>Force majeure provided in the Convention. Art. 79</p>	<p>By default, if performance of an obligation becomes “impossible”, a party is entitled to a termination right.</p>
<p>In the absence of a clause, events outside of a party’s control will not excuse performance</p>		<p>In the absence of a clause, CISG concepts will apply.</p>	<p>In the absence of a clause, the court may still apply the principle of good faith in the performance of the contract.</p>
<p>Clauses generally will be enforced as written</p>		<p>An “impediment beyond the parties’ control” will excuse performance</p>	<p>Parties are entitled to insert a definition of force majeure in the contract.</p>
<p>Care should be taken in drafting force majeure clauses to not allow them to be invoked too easily (if you are the party expecting performance)</p>		<p>but which could not reasonably have been expected to be taken into account when the contract was made</p>	
		<p>or to avoid or overcome the impediment.</p>	

Hardship

New York Law	English Law	CISG	Italian Law
Concept does not exist as such	Concept does not exist as such.	No specific provision	In a contract where both parties have obligations (for continuous or periodic performance), if extraordinary and unforeseeable events make the performance of one of the parties "excessively onerous," the party who owes such performance can demand dissolution of the contract, Art. 1467 Civil Code
In the absence of a clause, changed economic circumstances that make a contract more difficult to perform will not in principle be an excuse.	Same as NY law.	In the absence of a provision, it is unclear whether hardship would be available as a defense. Courts in some countries (Belgium) have accepted it based on Art. 79 force majeure concepts (impediment beyond a parties' control)	Dissolution cannot be demanded if the supervening onerousness is part of the normal risk of the contract.
But UCC 2-615 excuses a seller from timely delivery of goods where performance has become "commercially impracticable" because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.	The common law recognizes the doctrine of "frustration of contract" Frustration occurs when, without default of either party, "a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract." Davis Contractors Ltd v Fareham U. D. C. [1956]	Courts in other countries have referred to the UNIDROIT principles. Hardship occurs when events fundamentally alter the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance has diminished; provided the events could not reasonably have been taken into account at the time of contracting, are beyond the control of the affected party and the risk of events was not assumed by the party.	A party against whom the dissolution is demanded can avoid it by offering to modify equitably the conditions of the contract.

Hardship (continued)

New York Law	English Law	CISG	Italian Law
<p>Very difficult for a party to succeed on a commercial impracticability claim, although something like a 100% increase in cost of performance has been accepted. Applies only to sellers. If claim is successful, contract is terminated but not revised.</p>	<p>Very difficult to prove frustration of contract. If found, the contract is terminated without liability to the affected party.</p>	<p>If hardship is found under UNIDROIT principles, the affected party can request renegotiation. If there is not agreement within a reasonable time, either party can go to court. If the court finds hardship, it can terminate the contract or “adapt the contract with a view towards restoring its equilibrium.”</p>	<p>If the contract is one in which only one of the parties has assumed obligations, it can demand a reduction in his performance or a modification of the manner of performance, sufficient to restore it to an equitable basis.</p>
<p>Not the practice to have hardship clauses in contracts.</p>	<p>Similar to NY law.</p>		<p>Parties may insert a clause defining the events that will be excessively onerous and the consequences.</p>
<p>Virtually impossible for a party have the terms of the contract revised by a tribunal.</p>	<p>Courts do not revise the terms of contracts.</p>		<p>Parties may insert a clause defining the events that would be excessively onerous</p>

Attorneys' Fees

New York Law	English Law	CISG	Italian Law
<p>Default rule is that each party bears its own legal fees in any dispute</p>	<p>Loser pays – known as “costs follow the event.”</p>	<p>Not entirely clear, but the CISG Advisory Council has issued an interpretation of Art. 74 on damages that discourages recovery of legal expenses in enforcing claims.</p>	<p>Loser pays principle – <i>Principio della soccombenza</i> – Art. 91 Civil Procedure Code</p>
<p>Possible to vary by contract.</p>		<p>Art. 74 does not preclude a court or arbitral tribunal from awarding attorneys' fees when the contract provides for it or when authorized by applicable arbitration rules.</p>	<p>But if there is good cause, the court may vary the principle if no party is totally successful or there are other serious and exceptional reasons. Law No. 69 of June 18, 2019</p>
			<p>Another exception – if the winning party fails to obtain a judgement more advantageous than a conciliation proposal and refused the proposal without good cause, the winning party bears all fees incurred after the proposal was made.</p>

Choices for Dispute Resolution

Submission to U.S. Court Jurisdiction

Arbitration

Arbitration Strongly Recommended.

Arbitration will avoid lengthy U.S. court proceedings and also possibility of a jury trial

Institutional Arbitration preferred – Choice of ICC Rules, others.

Panelists



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