

Drafting International Contracts in the United States

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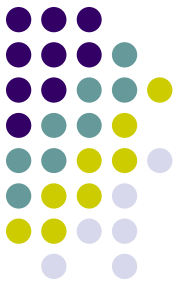
July 2, 2004 - Buenos Aires,
Argentina

Concerns when Approaching International Contracts



- *Language
- *Culture and custom
 - *Currency
- *Legislature vs.
Judiciary
- *Stare Decisis
- * Flexibility

Context of an International Contract



Private and Public Contracts

1. Private entity to Private entity
 - a. International sales
 - b. International Services
2. Public entities
 - a. Government to government
 - b. Government to private entity

When first contemplating an International Contract



- Applicable international conventions
- Applicable federal statutes
- Will the disputes arising from the contract be resolved by litigation, arbitration or mediation
- Which local law will be applied
- Enforcement of the judgment or arbitral award

Steps taken prior to the drafting of an International Contract



- Engagement letters, LOI, MOU, Mandates, Term Sheets
- Brokerage Agreements
- Confidentiality Agreements
- Escrow Agreements
- Choice of Arbitration

Dissecting the International Agreement of Sale



- **Preamble** contains Title of the agreement, Parties and Date:
- Purpose is to identify the type of transaction and the parties and the date.
- *Whereas, the Share purchase agreement dated **as of** July 2, 2004 between and among Seller, Solomon Pearl Blum Heymann & Stich, LLP, a limited liability partnership organized under the laws of Colorado and Buyer, Telecom Argentina, S.A., a company organized under the laws of Argentina...*

Dissecting the International Agreement of Sale (cont'd)



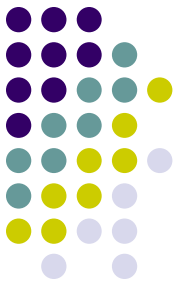
RECITALS

- Set forth important background facts.
- Present the history of how the parties arrived at entering into this agreement.
- Indicative of the intent behind the Agreement

Whereas, Solomon Pearl owns all of the outstanding shares of Disney International, a corporation organized and existing under the laws of Delaware.

Whereas, Seller desires to sell to the Buyer, Buyer's shares in Disney International.

Dissecting the International Agreement of Sale (cont'd)



- Include in the Recital section additional recitals when the parties subject to the present agreement are also subjecting itself to any other agreement
- Statement of consideration

"In consideration for the Buyer's agreement to purchase the Disney shares, the Sellers have agreed to make the representations, warranties and covenants relating to the Disney shares herein set forth"

Dissecting the International Agreement of Sale (cont'd)



Sum up the Recital section

Now therefore, in consideration of the foregoing premises, the mutual covenants, agreements, representations and warranties herein contained, and for other good and valuable consideration, (used to protect the seller if the monetary value of the shares, in our example is deemed inadequate or worthless, it is recited that there is more value than just the monetary value, ie: good will, future value) the receipt and legal sufficiency of which are hereby acknowledged”

Or a more simplified version:

**“NOW THEREFORE,
the parties hereby agree
as follows:”**



Dissecting the International Agreement of Sale (cont'd)

Action Sections

- States performance (what both parties will do upon the closing of the contract)
 - ie: Buyer shall buy, and seller shall sell.
- Consideration is set forth
- Closing terms for payment
- Currency defined

Dissecting the International Agreement of Sale (cont'd)



Definitions Sections

- Definitions are commonly included to present terms that may be unclear to any of the parties or terms that are frequently used
- Useful when terms require mathematical calculations

Dissecting the International Agreement of Sale (closing)



- **Closing Terms**
- **Closing Deliveries**
 - Buyer's
 - Seller's
- **Term of the Contract**

Dissecting the International Agreement of Sale (closing cont'd)



Seller's deliveries:

- includes instruments to be transferred at the closing (i.e.: instruments), payment of cash consideration, assumption of liabilities and might contain a **further assurances** provision.
- includes waivers of any pre-emption provisions set forth in the shareholders' agreement,

--includes assignments of each real property leases under which such Seller is lessee Cause the transfer of the Disney shares to be duly recorded and entered in the share transfer registers or in the case of a public company, that certain securities' state and federal filings be made.

"Deliver to Buyer certificates representing the Disney shares duly endorsed to the Buyer in accordance with the law of the United States."

Dissecting the International Agreement of Sale (closing cont'd)



- Further Assurances provision:
- *"The Seller shall do or cause to be done such further acts and things and deliver or cause to be delivered to the Buyer such additional assignments, agreements, powers and instruments as the Buyer may reasonably require to carry into effect the purposes of this Agreement or to better assure and confirm unto the Buyer its rights, powers and remedies without limitation."*

Dissecting the International Agreement of Sale (closing cont'd)



- **Buyer's deliveries**

Credit advices or wire transfers of immediately available funds in New York City for an aggregate amount equal to the cash consideration and/or

An assumption instrument in which the Buyer agrees to assume the Assumed Liabilities, substantially in the form of "Exhibit _"

Dissecting the International Agreement of Sale (closing cont'd)



Term:

- “Employee agrees to work for Employer pursuant to the terms of this Agreement, commencing on the Closing Date and continues to and including December 31, 2004.”

Dissecting the International Agreement of Sale (cont'd)



ALLOCATION OF RISK/PROVISION OF COMFORT

- Representations "Reps" and Warranties
 - made by one party to the other regarding existing facts or circumstances of the company, goods (item of transfer)
- Covenants
 - promises for things or situations to occur in the future
- Conditions Precedent
 - future things or situations that must occur before an obligation is triggered.

Dissecting the International Agreement of Sale (Reps)



- Authority

“Seller [Buyer] has full corporate power to act and bind the seller and to perform its obligations under the Agreement.”

- Enforceability-
 - “ Seller represents and warrants that the agreement is legal, valid and a binding obligation of the seller enforceable except in the case of bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting creditors' rights or general equitable principles, regardless of whether the issue of enforceability is considered in a proceeding in equity or at law.”

Dissecting the International Agreement of Sale (reps cont'd)



- **Financial Statements**

“The company’s financial statements were prepared in compliance with generally accepted accounting principles, in the US GAAP”
or-

“No materially adverse change in the financial condition or in the operations, business, prospects, properties or assets of the Seller from that shown on the last audited financial statements.”

- **Patents, trademarks**

“The seller owns or possesses the right to use all the material trademarks, service marks, trade names, brands, copyrights, letters patent, patent applications and licenses, and rights with respect to the foregoing necessary for the conduct of its business as now conducted, without any known material conflict with the rights of others.”

Dissecting the International Agreement of Sale (Reps cont'd)



Governmental consents-

“No consent, approval order or authorization of, or registration, declaration or filing with, any governmental authority is required in connection with the execution or delivery of this agreement, other than notification to (said governmental body) in connection with the change of possession of the shares pursuant to this agreement.”

Non-contravention--

“The execution and delivery of this agreement and the (transaction documents) and the consummation of the transactions contemplated hereby and thereby will not violate any provision of the by-laws or any other constitutive document of seller's or any law, statute, regulation, ordinance, decree, judgment or rule to which the seller is subject.”

Dissecting the International Agreement of Sale (Reps cont'd)



- **Litigation**

“Except to the extent set forth in Schedule __ hereto, there is no suit, action, litigation, administrative, arbitration or other proceeding or governmental investigation or inquiry affecting the property to be sold hereto.”

- **Ownership Rep**

Knowledge qualifiers –

ie: *“There is no suit, action or proceeding pending or threatened against the Seller.”* or

“Except as set forth in Schedule _____, Seller does not know, and has no reasonable grounds to know, of any basis for assertion against it of any claim or liability.”

Dissecting the International Agreement of Sale (Covenants)



- Covenant to cooperate better known as the “best efforts” provision
- ie: *“The seller shall use its **best efforts** to cause the sale contemplated by the Agreement to be consummated, and,*
- *without limiting the generality of the foregoing, to obtain all consents and authorizations of third parties and to make all filings with*
- *and give all **notices** to third parties which may be necessary or reasonably required in order to effect the transactions contemplated hereby.*

Dissecting the International Agreement of Sale (cont'd)



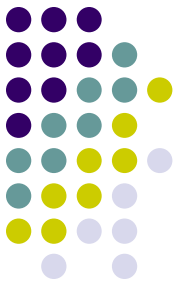
Conditions precedent

- Counsel's Opinion can be a condition precedent to closing
- Comfort letter

Indemnification

“The Seller shall indemnify and hold harmless the Buyer from and against any loss, liability, obligation, damage or expense (including without limitation, attorneys' fees and expenses) resulting from or relating to any misrepresentation, warranty, or failure to perform any covenant in this Agreement to be performed by the Seller.”

Dissecting the International Agreement of Sale (Misc.)



- **Non-exclusive jurisdiction clause**

- “All disputes, controversies or claims arising out of or in connection with or relation to the contract, including any question regarding the existence of the contract, its validity or termination, may be submitted to and be subject to the jurisdiction of the courts of the [home jurisdiction] which shall have non-exclusive jurisdiction in the event of any dispute hereunder. The parties hereby irrevocably submit and attorn to the non-exclusive jurisdiction of such courts to finally adjudicate or determine any suit, action or proceeding arising out of or in connection with this Agreement.”

Choosing the Applicable Law to Govern the International Contract



- No mention of choice of law in the contract
- Knowing the law of the country or state in which you want to litigate
- Whether to include an arbitration clause

Applying the Appropriate Forum, Venue and Law



Choice of Law

Mediation

Enforceability;
Location; Language;
Number of Mediators;
Rules to apply

Arbitration

Location; Language;
Number of arbitrators;
Arbitration association;
Rules to apply;
Provisional remedies

Litigation

Location; State vs. Federal
Service of Process;
Time;
Expense