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

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

The actual wording of a choice of language clause need not be complicated. The traditional samples are excessively cumbersome: "Notwithstanding subsequent translations of this agreement, whether or not said translations are made contemporaneously with the negotiation and execution of said agreement, the English language version of said agreement shall exclusively control." The following wording should suffice: "This contract may be translated into languages other than English. The English language version of this contract is the official version and shall be controlling in any dispute arising under this contract."

§4.4.2 Choosing the contract's applicable law

The discussion in this chapter and in Chapter 2 should give the reader a good understanding why a choice of law clause in a contract is often crucial. As will be seen in section 4.6, choosing a system of law applicable to the contract could have the effect of inserting clauses or terms in the contract without the express consent of the parties. In other words, the underlying legal system can provide a gap-filling function for the agreement. This is

not necessarily a bad thing. Gap-filling can free the parties from drafting clauses on many peripheral matters. It does, however, require that the parties be alert to how gap-filling may occur.

But even though risks are involved in choosing a body of law applicable to the contract, there are far more dangers associated with executing a document that is silent on choice of law.[9] Silence on applicable law can come back to haunt the parties if any dispute arises under the contract. Moreover, it is difficult to negotiate and draft a contract when the parties have no idea which legal system or body of law will govern the undertaking because the constraints of the chosen system will govern many of the provisions in the contract. For these reasons, this subsection will first discuss why most parties go about affirmatively choosing the law of the contract.

a. *Affirmatively choosing the law.*

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

There is a far more workable alternative. The parties can draft all the clauses that they believe are necessary to a proper agreement and then can choose law that fills in the remaining details. In the past, parties have normally chosen the law of a single country, usually that of either the seller or the buyer or, in some cases, the law of a respected, neutral third country.

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[9]See generally, Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 Am.J. Comp. L. 195 (1997); Ian F.G. Baxter, *International Conflict of Laws and International Business*, 34 Int'l & Comp. L.Q. 538 (1985); George A. Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 Int'l Trade L.J. 311 (1978).

Swiss law, for example, is frequently chosen by parties who cannot agree on the law of either the seller's or the buyer's country. Since the entering into force of the Convention on the International Sale of Goods (CISG), parties involved in sale of goods transactions may choose the CISG as the applicable law. One attorney of the author's acquaintance sometimes dispenses with choosing the law of a specific country. When his clients cannot agree on choice of law, he incorporates a clause in the contract requiring arbitrators to apply "generally accepted principles of international trade and commercial practice" (or similar language) to resolve the dispute. Another version of this alternative permits the parties to declare an arbitrator as an *amiable compositeur*, a device that permits the arbitrator to apply fundamental principles of equity, fairness and common sense to settle the dispute without the necessity of referring to and applying a body of specific municipal law. The selection of an international code of commercial law or the amiable compositeur alternative could be particularly attractive to negotiating parties who are unwilling to adopt each other's domestic commercial legal system as the choice of law. Under the twin doctrines of party autonomy and pacta sunt servanda, there appears to be no reason why such choices would not be honored.[10]

There is some debate as to whether the contracting parties' choice is completely unfettered, however. Classic choice of law doctrine in most of the major trading nations has generally required some connection between the legal system chosen and the contract itself. Under the U.S. Uniform Commercial Code's (UCC) rules for contracts involving the sale of goods, the choice of law must bear some reasonable relation to the contract and the contracting parties.[11] In other contracts in the U.S. and under British law, the parties' choice of law is honored so long as there is some reasonable basis for the choice.[12] For example, in an important choice of law case in the

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[10]See §4.9 of this Chapter and the discussion in Chapter Nine.

[11]UCC §1-105 states: "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." This appears to limit a contract's choice of law solely to the country of the seller or the country of the buyer. However, judicial construction of this term has generally permitted the parties to choose the law of a neutral third country.

[12]Restatement (Second) of Conflict of Laws §187(2)(a). Readers not familiar with the American system of Restatements of the Law should simply consider that these documents are attempts by groups of law professors, practitioners and judges to gather into a single source, as a kind of private codification, legal principles derived and announced

United Kingdom, *Vita Food Products v. Unus Shipping Co.*,[13] the contract for a shipment of goods from Newfoundland, Canada to New York was to be governed by English commercial law. The British court enforced the choice and determined that if contracting parties voluntarily choose a body of law, that choice will be honored irrespective of whether the law chosen has any special connection with the contract.

The United States Supreme Court in the important case, *Scherk v. Alberto-Culver Co.*,[14] concluded that choice of law clauses in contracts promote "the orderliness and predictability essential to any international business transaction" and thus suggested that U.S. courts would honor virtually any reasonable choice. Similarly, the recently promulgated European Communities Convention on the Law Applicable to Contractual Obligations[15] appears to follow the United States Supreme Court in promoting party autonomy and honoring the parties' choice.[16] In a number of other countries whose legal systems are based on civil law doctrine, the courts usually require some fairly close connection between the transaction, the parties and the system of law chosen. In a few countries, contract drafters must cope with legal principles that provide that contracts that are to be performed within the country are to be governed by that country's law, irrespective of whether the parties might have made another choice.[17] For example, petroleum agreements with the Kingdom of Saudi Arabia, for example, are to be governed solely by Saudi law.[18]

Making a choice can eliminate a great deal of uncertainty, although parties must be careful in their choice. If a third country is chosen, it should be a country with an easily researched, well-defined body of commercial law. Far out choices — for example choosing the law of Tanzania in a contract between a seller in Iceland and a buyer in Taiwan — would raise eyebrows among arbitrators and reviewing courts. Such a choice is so bizarre

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by courts throughout the United States. Principles of law set out in the Restatements are frequently cited by U.S. courts on an advisory basis but they have no controlling effect on the outcome of cases.

[13][1939] A.C. 277.

[14]417 U.S. 506 (1974).

[15]23 O.J. Eur. Comm. (No. L-266) (1980).

[16]See, e.g., Russel J. Weintraub, *How to Choose the Law and How Not To: The EEC Convention*, 17 Tex. Int'l L.J. 155 (1982),

[17]Chile is an example. See the Chilean Codigo de Comercio, art. 113.

[18]See, e.g., Ernest Smith & John S. Dzienkowski, *A Fifty Year Perspective on World Petroleum Arrangements*, 24 Tex. Int'l L. J. 13 (1989).

and so totally unrelated to the transaction, that a court or arbitrator might feel free to disregard it. Choosing, as a neutral country, the law of one of the major trading nations is the better alternative.

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

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

b. Choosing the law when the contract is silent

The question here is why any contracting party would let such an important matter as choice of law be decided at some later date by a decision-

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

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

> What is the "Proper Law" applicable in construing this contract? This is a contract made between Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the municipal law of England could apply.[19]

Thus, the question faced by Asquith was: Is it possible to construe or interpret a commercial contract without reference to an identifiable system of municipal law? Lord Asquith hit on a Solomonic solution: he invoked

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[19] *Id.*

certain principles of British commercial law that he deemed "of ecumenical validity" but chose to disregard other rules of British commercial practice that he characterized as excessively "rigid." This was probably not a bad solution for Lord Asquith as arbitrator; he had to come to some decision under the contract. But there is considerable danger in this approach. There is no assurance that every judge or arbitrator will have the stature and brilliance of Lord Asquith. A different arbitrator might well have applied Abu Dhabi law or the whole of British commercial law, however inappropriate, or some melange of commercial principles that did violence to the underlying agreement. When a contract is silent on choice of law many unpredictable things can happen.

There are, of course, certain legal concepts derived from that body of law known as conflict of laws that assist courts and arbitrators in determining which body of municipal law to apply in the absence of an express choice by the parties. A compilation of legal principles in the United States entitled the Restatement (Second) Conflict of Laws suggests that the law to be applied is the law of the country having the "most significant relationship to the transaction and the parties" taking into consideration the place of contracting, the place where the contract was negotiated, the place where the contract is to be performed, the location of the subject matter of the contract and the domicil, residence, nationality, place of incorporation and place of business of the parties.[20] The Uniform Commercial Code (now effective in all states except Louisiana) provides that the when the parties have not chosen law, the applicable law is the law of the state bearing the most "appropriate relation" to the commercial agreement.

In other countries the rules vary. In some instances the domestic commercial law provides that the applicable law will be the law of the place where the contract was made. In other instances it is the law of the place where the contract is to be performed; and in yet other countries it is the national law of the contracting parties if they are of common nationality or the law of the country where the contract was made or where it is to be performed if the parties are not of common nationality.[21] But, again, the ulti-

[20]Readers who are not lawyers or who are from outside the United States should keep in mind that while the Restatement is prestigious, it is essentially a compilation of legal principles by law professors and, accordingly, is not regarded as controlling law in any jurisdiction in the United States.

[21]For a lengthy and complex discussion of all these issues see GEORGES R. Delaume, TRANSNATIONAL CONTRACTS, supra note 1, Booklet 2 (1982). See also, Bax-

mate choice is not certain and will be made by someone other than a party to the contract.

§4.5 USING STANDARDIZED CLAUSES AND FORMS

There are both benefits and dangers in using standard forms in contracts. Chapter Three, section 3.4, has warned about certain problems that parties involved in contracts for the sale of goods will encounter if the buyer and seller merely exchange forms. But standard forms save money and for low-cost contracts they may be virtually the only way that the companies can do business.

On the international level, contracts tend to be for larger amounts of money and are often performed over longer periods of time. Accordingly, those contracts' provisions tend to be more detailed and intricate. As a result, many international contracts are separately negotiated between the parties and the resulting contract is tailored to the deal at hand. But even these contracts are likely to contain a large amount of standardized language. There is absolutely nothing wrong with this. Using certain standardized clauses promotes efficiency and economy in contract drafting. There is no need, normally, to draft each and every word in a contract from scratch. On occasion, use of standard language will promote agreement and may enhance any dispute resolution since arbitrators and judges are likely to have encountered this standard language previously.

There are any number of sources for standard clauses. Most law libraries contain form books that recite language from earlier contracts. There are a number of useful compendiums of sample contracts covering different types of agreements. One such work, International Business Transactions (edited by Dennis Campbell and Reinhard Proksch and published by Kluwer) contains computer software that permits a contract drafter to insert phrases and clauses from those sample contracts directly

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ter, *supra* note 9; James R. Lowe, *Choice of Law Clauses in International Contracts: A Practical Approach*, 12 Harv. Int'l L.J. 1 (1971); For a discussion of some of the civil law doctrines on choice of law see, e.g., CHRISTOPH REITHMANN, INTERNATIONALES VERTRAGSRECHT 2-17 (2d ed. 1972). For a distinguished but perhaps now some what dated statement that civil law requires a reasonable relationship between parties, performance and choice of law (and that discusses the "excesses" of party autonomy) see JEAN PAULIN NIBOYET, 5 TRAITE DE DROIT INTERNATIONAL PRIVE FRANCAIS 51-60 (1948).