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## **UPDATE ON RECENT DEVELOPMENTS IN INTERNATIONAL PURCHASING/CONTRACTING**

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### **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- Convention on Contracts for the International Sale of Goods (CISG)
- Benchmarking of International Terms of the Deal!
- Resolution of International Disputes

### **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- Convention on Contracts for the International Sale of Goods (CISG)
  - Over 68 countries (including the United States) have executed this treaty.
  - CISG applies to, and controls, the international sale/purchase of “goods,” (as defined) between firms/entities operating (places of business) in those countries that have signed the treaty.
  - Countries that account for over two-thirds of the world trade have signed the CISG!

## **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- International sales that are excluded from the CISG...
  - consumer goods,
  - goods bought at auction,
  - vessels,
  - aircraft,
  - ships,
  - electricity,
  - where the preponderant part is for labor or services,
  - assembly contracts whereby a “substantial part of the materials” were provided by the buyer, and
  - where the parties specifically “opt out” from having the treaty apply to their international transaction.

## **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- Distinction of CISG as compared to UCC include...
  - Need not be a writing to find a contract! Trading protocols are strongly recommended to reflect when and if a contract is being formed!
  - A parol evidence rule is very limited in application, e.g. a court “may” consider “all relevant circumstances” including negotiations, trade usages, etc. in interpreting a contract. Having a fully integrated agreement, etc. may be desirable.
  - CISG offers may not be revoked if the offeree reasonably relies on the offer as being irrevocable.
  - Acceptance of offers is a little different under the CISG with no “Battle-of-the-Forms” language found in UCC 2-207.
  - A buyer may avoid the contract only if there has been a “fundamental breach,” i.e. “substantially deprive the buyer of what s/he is entitled to expect under the contract.” The UCC “perfect tender” (2-601) rule is not provided in the CISG!
  - Penalties versus Liquidated Damages under the UCC/local law.

## **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- Benchmarking of International Terms of the Deal!
  - ISM and International Association of Contract and Commercial Managers (IACCM) Benchmarking Report--2004.
  - 36 Significant Contract Provisions International Companies are using, or not using, in international contracts!

## **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- Benchmarking of International Terms of the Deal!
  - Highlights from clauses...
    - Acceptance
    - Payment Provisions
    - Warranties/(Performance Issues)

## **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- Benchmarking of International Terms of the Deal!

- Highlights from clauses...

- Delivery
- Indemnification
- Insurance/Limitation of Liability

## **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- Benchmarking of International Terms of the Deal!

- Highlights from clauses...

- Termination
- Delays/Force Majeure
- Dispute Resolution
- Applicable Law/Jurisdiction

## **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- Resolution of International Disputes Through Arbitration

- PriceWaterhouseCooper Survey in 2006.

- Finding that multinational companies are using arbitration rather than litigation in resolving international disputes and citing “greater flexibility, finality and confidentiality.”

## **UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING**

- Key items from PriceWaterhouseCooper Survey...

- Majority of corporations prefer arbitration for international contract disputes.
- Advantages of international arbitration “clearly” outweigh the disadvantages.
- Having a corporate dispute resolution policy provides several strategic advantages.
- Well-drafted contractual arbitration clauses provide tactical advantages.
- Institutional arbitration verses *ad hoc* verses regional arbitration institutions analyzed.
- Why arbitration venue is a crucial factor and which venues are the most popular.

## UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING

- Key items from PriceWaterhouseCooper Survey (Cont'd)...
  - Corporations overwhelmingly favor the finality of arbitration awards.
  - Corporations are looking for arbitrators with the requisite international expertise.
  - Corporations are retaining specialist arbitration counsel.
  - Cost of international arbitrations may be “more” expensive.
  - There is a demand for (more) education on the processes, opportunities and risks in using international arbitration.
  - Why the outlook for international arbitration is positive.

## UPDATE ON INTERNATIONAL PURCHASING/CONTRACTING

References Include...

- For additional information on the CISG including text, guidance, questions/answers, cases, etc. go to <http://www.cisg.law.pace.edu/>
- ISM and IACCM “Benchmarking Standard Contract Terms and Conditions (2004)” study included 5 reports
  - Administrative Terms <http://www.ism.ws/Files/tools/AdministrativeTerms.pdf>
  - Business Terms <http://www.ism.ws/Files/tools/BusinessTerms.pdf>
  - Financial Terms <http://www.ism.ws/files/Tools/FinancialTerms.pdf>
  - Intellectual Property / Data Production Terms  
<http://www.ism.ws/Files/tools/IPTerms.pdf>
  - Legal Terms <http://www.ism.ws/Files/tools/LegalTerms.pdf>
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is located at <http://www.adr.org/sp.asp?id=22096>
- The 2006 PricewaterhouseCoopers sponsored research at the School of International Arbitration, Queen Mary, University of London is located at <http://www.pwc.com/extweb/pwcpublishations.nsf/docid/0B3FD76A8551573E85257168005122C8>

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