Foreword

The decision to write this book was taken in consideration of an unmet need of non-law students enrolled in undergraduate and postgraduate courses addressing international contracts.

In non-law faculties today there are more and more taught-in-English classes that deal with issues in connection with international contracts, and students may face serious difficulties in preparing for exams, mainly because of a lack of suitable handbooks in English taking into account their non-legal background.

We have tried to attend to this unmet need by providing those students with a useful tool summarising basic principles applicable to international contracts. In doing so, we have thought it appropriate to try to strike the right balance between general notions (a theoretical approach), on the one hand, and contract templates and sample contractual clauses (business-case approach), on the other, in order to give them a view of how international contract law may affect international business practice.

Throughout the process, we have relied on principles and notions resulting from international instruments (such as the Principles on Choice of Law in International Commercial Contracts recently promulgated by the Hague Conference on Private International Law) and on contract templates drafted in private practice or made available to the public by international chambers of commerce or trade centres, which we acknowledge as our sources.

Although this book is the result of a shared effort and the outcome of a joint project, chapters 1, 2, 5, 7, 8, 9 and 10 were authored by Vincenzo Salvatore, whilst chapters 3, 4, 6 and 11 were written by Renzo Cavalieri.

Each author remains individually responsible for any errors and inaccuracies contained in his respective chapters.

We would like to thank Stefania Carrer, Alexia Ruvoletto and Wu Mengzhen for their assistance.

Milan, March 2019

Renzo Cavalieri, Vincenzo Salvatore

Chapter 1
What is an international contract?

1.1. Contract: the legal instrument by which private parties enter and govern a business relationship between them

A contract is a voluntary, deliberate, legally binding and enforceable agreement creating **mutual obligations between two or more parties**.

The term **party** is very broad, for its notion embraces any natural or legal person, including individuals, companies, foundations, unincorporated bodies, partnerships and publicly owned entities.

Contracts are usually written but, unless the applicable law requires them to be in writing, contracts may be verbal or implied.

Each contracting party undertakes the obligation to do something for the other or others in exchange for a benefit. However, whilst all parties may expect a fair benefit from the contract (since otherwise the courts may set it aside as inequitable), it does not follow that they are entitled to benefit to an equal extent.

A contractual relationship is evidenced by an **offer**, the **acceptance** of the offer, and valid (legal and valuable) **consideration** (*i.e.*, each party must agree to give up something of value in order to obtain a benefit). Consideration frequently implies that one party pays a sum of money to the other party, typically in exchange for goods or provision of services.

In order for a contract to be valid, the parties to it must be competent, *i.e.* they must have the **legal capacity** to enter the contract. This means that they must be of legal age, of sound mind and not under the influence of drugs or alcohol.

All parties must enter into the agreement freely. A contract may prove unenforceable if certain mistakes are committed by one or more parties in its making. Likewise, a contract may be declared void if one party has committed fraud against or exerted undue influence over another.

If one party fails to fulfil his or her obligations, that party will be liable at law for **breach of the contract**. In this case the other party may seek compensation for the economic loss suffered as a consequence by suing either for damages or for performance of the obligations assumed under the contract.

1.2. International contract

A contract is international when it has certain **links with more than one State**.

Internationality concerns all cases involving a choice between the laws of at least two distinct States. Hence the notion of **conflict of laws** (otherwise referred to in terms of **private international law,** especially in civil law countries), used to identify the set of rules and criteria, amongst the two or more theoretically applicable "conflicting" national laws, the application of which is the most suitable for governing the parties' relations.

The above will obviously be the case when parties from different countries have entered into a contract, but it is also the case when a contract contains, irrespective of the parties' citizenship or nationality, one or more foreign elements, putting it in contact with one or more legal systems.

For instance, such may be the case when parties are based in different countries, or when a contract is to be executed abroad.

Conversely, a contract cannot be classified as international, and is therefore to be deemed purely **domestic**, when all of its significant elements are connected with one State only. In this regard, it must also be noted that when one or more significant elements of a contract are connected with different territorial units within the same national State (*e.g.* Quebec and Labrador in Canada, or Massachusetts and California in the United States, or Queensland and Victoria in Australia), such fact does not constitute internationality of the contract.

Additionally, the mere circumstance of the parties' having chosen a foreign State's law to govern their contractual relationship is not *per se* an element sufficient to classify a contract as international.

The ascertainment of internationality is thus an exercise that always implies careful case-by-case analysis.

1.3. International trade contract

An international trade contract is a contract for a commercial transaction, or a contract made by a trader for the purpose of his business.

International trade contracts are those in which each party intends to **act in the exercise of its trade or profession**.

The question whether a party is acting in the exercise of its trade or profession depends on the circumstances of the contract, not on the mere status of the parties.

The same person may act as a trader or professional in relation to certain transactions and as a consumer in relation to others.

The definition comprises both the commercial activities of merchants, man-

ufacturers or craftsmen (trade transactions) and the commercial activities of professionals, such as lawyers or architects (professional services).

Insurance contracts and contracts transferring or licensing intellectual property rights between professionals also fall within the compass of trade contracts, as do agency or franchise contracts.

For example, a contract between a German entrepreneur and a Pakistani commercial agent constitutes an international trade contract. Such may also be the case when a joint venture agreement is made between a French fashion garment manufacturer and a Thai supplier of textiles.

1.4. Private international law and international civil procedural law

When parties enter into an international contract, it is crucial for them to **know which law will be applicable to their relationship**, as provisions governing contractual obligations can vary substantially between different countries, and differences in local laws may have a substantial impact on the outcome of a dispute.

The answer to this question will also be important for a court or arbitral tribunal vested with the power to settle disputes that may arise between parties in relation to contract.

Private international law (or the rules governing the conflict of different national laws) may be defined as that branch of law which, in each State, deals with cases of private law involving a foreign element. Thus, the term "international" in cases of private international law can actually be considered a bit misleading, since it refers to the character of a case rather than to the international origin of the rules governing it.

Private international law rules are procedural and not substantive, meaning that they are used to identify the national law applicable to a given international case rather than to dictate the rules governing the relationship in question. Private international law may thus be properly defined as the procedural technique used to determine what national law is applicable to a private matter having cross-border implications.

On the other hand, international civil procedural law will address the following questions:

1) what court has jurisdiction in such a matter? and
2) under what conditions may a court's decision be recognised and enforced in another country?

Both private international law and international civil procedural law rely on **connecting factors** to identify the applicable law or the court or arbitral tribunal with jurisdiction.

Connecting factors are elements that link a transaction or occurrence with a particular national law or jurisdiction.

Amongst the most significant connecting factors in international contracts are:

a) the citizenship or nationality of the parties,
b) the parties' domicile or habitual residence (in cases involving individuals),
c) the parties' place of incorporation or establishment (in cases involving legal persons),
d) the place where the contract was made,
e) the place where the contract is to be executed,
f) the place where the object of the contract is located,
g) the currency of payment,
h) the place of payment.

Different countries may hold different views on which connecting factors are to be deemed most appropriate for establishing legal links.

As an alternative to private international law, international contracts may be subject to **national or international substantive rules**: *i.e.* they may be established either at national level, with the consequence that a given national legal system will apply its own rules to a contract, irrespective of the contract's international nature, or at international level, by virtue of an international agreement (*e.g.* The Vienna Convention on International Sale of Goods, *infra*, Chapter 7).

1.5. The closest connection

The most recent theories in private international law share the view that an international contract should preferably be governed by the legal system with which it has the closest connection.

This approach, also known as the **proximity rule**, considers it appropriate, in the absence of a choice of applicable law made by the contracting parties, to subject a contract to the law of the country with which it has the most immediate ties. The identification of the country with which a contract is most closely connected is left to the appreciation of the judge, who will have to consider all of its factual elements on the basis of an ad hoc analysis.

With regard to international matters, as we shall see in further detail in the following chapter, a contract is generally considered to be most closely connected with the country where the party bound to effect the performance involved has it habitual residence. However, this consideration will be disregarded if it appears that the contract is more closely connected with another country.

1.6. Characterisation, qualification or classification

One of the major difficulties that parties and judges have to face when considering the question of the national law governing an international contract lies in the fact that a given situation may be deemed to be of one nature under the law of the *forum* (so called *lex fori*, *i.e.* the law of the country where the judge sits) and of another nature under the law of the country with which the contract is connected (so called *lex causae*, *i.e.* the law of the country which will substantially govern the contractual relationship). For instance, the same situation may be regarded by one national law as presenting an issue of contract and by another national law as one of succession. A similar problem may arise when the *lex fori* and the *lex causae* differ on questions of capacity and form. The question then is: are these issues to be classified according to the *lex fori* or the *lex causae*?

Similar matters may surface with respect to the classification of connecting factors: *e.g.* is the notion of domicile to be understood according to the *lex fori* or the *lex causae*? One question liable to arise is the following: once a legal notion has been understood according to the *lex fori* (*i.e.* primary qualification), can it be reclassified according to the *lex causae* as identified consequent to application of the rules on conflict of laws (*i.e.* secondary qualification)?

All of the aforementioned possibilities pose a problem of classification (also referred to as qualification or characterisation).

The prevailing doctrine considers that, as a general rule, the primary qualification (both of facts and of connecting factors) should be effected according to the *lex fori* (with the sole exception of the criterion of citizenship, since a given State cannot decide when an individual is a citizen of another country), whilst the secondary classification should be effected according to the *lex causae*.

An important exception to qualification according to the *lex fori* applies when a judge must ascertain facts or connecting factors governed by conventions addressing international conflict of rules or by other supranational sources of private international law (*e.g.* rules rendered applicable in a member State by a European Union regulation). In such cases the judge will have to take into account the international origin of the legal or regulatory source in order to ascertain the relevant notion, and follow the rules of interpretation applicable to the international conventions (or European Union law) involved.