UNIT 15 THE PROPER LAW OF THE CONTRACT OR THE *LEX CAUSAE*

Structure

15.0 OBJECTIVES

After studying this unit, you should be able to:

- discuss the proper law of the contract and its relevance for international trade contracts.
- describe the way proper law of the contract is defined and determined
- explain the concept of the conflict of laws
- draft a standardised export sales contract.

15.1 INTRODUCTION

You have already learnt in unit 14 that the contract is an agreement enforceable by law and the contract is central to all international trade transactions. Export sales contract (ESC) is the beginning of all international trade transactions. You have also got an insight into the various other contracts which originate after conclusion and during the execution of the export sales contract. These contracts, as mentioned earlier, are distinctly different contracts although related to the export sales contract.

The contracts being based on the 'Doctrine of Privity of Contract' create and regulate legally binding and enforceable obligations and relations among the parties to the contracts. The contracts are governed by the commercial law(s) as no contracts can survive without the governing or applicable law.

The contracts can be domestic contracts between parties belonging to one and the same country involving domestic trade transactions or international contracts between parties belonging to different countries involving international trade transactions. All domestic contracts are governed by or subject to domestic or national commercial law(s) which automatically apply to the parties. But in case of international contracts (involving foreign transactions and foreign elements) between parties belonging to different countries and legal regimes, the law applicable (to their contract) is the **proper law of the contract (PLC) or lex causae**. The PLC may be the exporter's or importer's country law or even a third country law

which are national laws. Although the transactions are international the laws applied are national laws. This is mainly because there are no private international trade laws which are universally acceptable and common to all nations or countries that can be applicable to the parties and their international contracts. In view of this, selection or identification of proper law of contract or lex causae becomes crucial by the parties to contracts involving international trade transactions including exports and imports.

In an export sales contract (ESC) the proper law of the contract which will be the applicable or governing law may or may not be the exporter's country law depending upon the non existence or existence of a 'choice of law' clause in the ESC. In this Unit, you will learn the applicability of the proper law of the contract (PLC).

15.2 THE PROPER LAW OF THE CONTRACT WHEN CHOICE OF LAW CLAUSE EXISTING OR PRESENT IN THE CONTRACT

The choice of law clause present or existing in a contract means, the contracting parties have mutually decided, agreed and provided in the contract document the lex causae or the PLC. In this case the PLC can be defined as the law which the contracting parties have expressly (or impliedly) selected or choiced to govern their contractual relationship. The selected or choiced law of the contract including ESC may be that of the exporter's or that of the importer's or even a third country law which will be applicable to their contract.

Most national legal systems recognise the principle of party autonomy and permit the parties to choose the law which will govern their contractual relationship. Although the contracting parties have, in principle, all the freedom to choose their own law, the selection of applicable law is generally subject to certain limitations. Based on the decisions of the English Courts and the provisions of English Law and American jurisprudence the following limitations have been laid down which can be said as generally applicable.

a) The chosen foreign law should not offend or should not be repugnant to English public policy.

b) Chosen law shall yield to or be subject to an English statutory law as the lex fori (Law of the forum) to the extent to which statute expressly so provides (say for example, English Unfair Contract Terms Act 1977)

c) Chosen foreign law should not go against the mandatory or overriding statutory provisions or rules of the lex fori which are of such a compelling character that the English courts will apply regardless of the proper law.

d) The parties may be free to choose the law of a place having no connection with the contract yet the choice must be bona fide and legal. It should not be made to evade or avoid the overriding provisions of what would otherwise be the proper law or the law of a country with which the contract is closely connected.

e) The chosen law will not be applicable and enforceable if the performance of the contract is unlawful by the lex loci solutionis (law of the intended place of performance of the contract).

15.3 THE PROPER LAW OF THE CONTRACT WHEN CHOICE OF LAW CLAUSE NOT EXISTING OR ABSENT IN THE CONTRACT

In cases where the choice of law clause is not existing or absent in the contract including ESC, it is considered essential as a first step, to find out the intention of the contracting parties from the various contract documents and even otherwise regarding the applicable law. If the intention of the parties is apparent or can be inferred the intended law will be the PLC or applicable law. In case where the contract is silent as to the applicable law and the intention of the parties is not apparent or cannot be inferred or deduced the "Conflict of Laws"

principles will be applied to determine the PLC. Each country has formulated its conflict of laws rules to provide an overall guidance to the courts on this question. Viewed against this background conflict of laws are nothing but the municipal or national laws. As mentioned earlier in this Unit, although the transaction is international (involving a foreign element) and the trade dispute (if any) is international what is normally applied is the relevant national law(s). This is mainly because there is no universally acceptable system of private international trade law which will be applicable nor are there any international business courts of justice common to all the nations which will try and solve the disputes. According to some well known scholars private international trade law is a loosely worded term which is somewhat misleading as there is no such thing as a corpus of private international trade law common to all nations. Dicey, one of the well known scholars and authorities on PLC therefore, preferred to use the word "Conflict of Laws". The national laws conflict with each other as these are not uniform in all respects. The national laws and the rules and regulations as well as their application and interpretation vary from country to country. Dicey therefore, considered it more appropriate to designate the national laws as "Conflict of Laws".

Since, every country has its own trade laws and regulations, the question arises as to which law can more appropriately be said to be the applicable law or PLC. Although, it is possible for different aspects of the contract to be governed by different laws but the strong tendency of the English and other courts today is to apply a single legal system to the contract as a whole.

The main task, then, is to identify the 'centre of gravity' of the transaction i.e. the state having the closest connection with the contract. Here the courts have tried to avoid a purely mechanical test. They have taken many facts into account or consideration like the place where contract was concluded, the places of business of the parties, the contractual place or places of performance, the nature and subject matter of the contract etc. There used to be a tendency at one time in favour of presumptions : the lex loci contractus (the law of the place where the contract is made) or the lex loci solutionis (the law of the place of intended performance of the contract). But the modern view which has prevailed is to eschew presumptions.

In the process of identifying the closely connecting factor the courts have given greater weightage to certain factors compared to others. Accordingly the lex loci solutionis or the law of the place of intended performance of the contract was considered to be most important and was given greater weightage. Prima facie lex loci solutionis was considered having closer or greater connection with the contract.

Based on lex loci solutionis the modern theory on the proper law of the contract was evolved or developed. Invariably a contract involves performance on both sides, and the two performances may be due in different places. For instance A in London agrees to export (sell) goods to B in New York, the goods to be delivered in New York and price to be paid in London. Here whose performance is relevant, that of the importer (buyer) or exporter (seller) ? The modern approach is to give importance to the performance which is characteristic of the contract. On this basis the delivery obligation of the exporter is given greater importance than the payment by the importer which is a generalized obligation. So the relevant place of performance is New York, not London.

According to this modern theory, in an FOB contract, the place of performance being in the exporting country, the laws of the exporter's country (more specifically the laws on contract and the sale of goods) will be the PLC. If the contract is DDP (Delivered Duty Paid) the importer's country laws (laws on contract and sale of goods) will be the applicable law since goods are stipulated to be delivered in the importing country. If the goods as per the contractual terms are to be delivered in a third country, that third country laws on contract and sale of goods will be the applicable law.

Identification of PLC on the basis of the modern theory posed several problems and was found to be not convenient for the exporters. Exporters exporting to several countries all over the world under a standard-term contract, it was considered highly desirable to apply the same law (exporter's country laws) to all the contracts in the absence of a choice of law clause in the ESC. It was felt and expected that an individual importer (overseas buyer) can easily deal with and refer to the laws of the exporter's (seller's) place of business while it is

unreasonable and difficult to expect the exporter to become familiar with and subject his contract to the laws of the importing countries where goods are to be delivered and contract has to be performed. In export transactions the convenience, therefore, came to play an important role. Based on the convenience of the exporter the modern theory on PLC has since been refined by decisions in Swiss Federal Court. According to the refined theory the contract has to be governed by the law of the principal place of business of the party (the exporter) whose performance is characteristic of the contract. In the absence of a choice of law clause in the contract, the PLC can, therefore, be defined as the exporter's country law (more specifically the laws on contract and sale of goods) as the exporter's principal place of business is invariably and normally located in his own country.

15.4 QUALIFICATIONS OF THE PROPER LAW

The discussion of the subject on the proper law of the contract will not be complete without a mention of the qualifications of the proper law. In the first place, most aspects of a contract are considered to be governed by the proper law of the contract that is the law expressly or impliedly selected by the parties or where their choice is not manifest and the intention cannot be inferred, the law with which the transaction has its closest connection. The proper law or the putative (supposed) proper law, governs the formation and essential validity, capacity, interpretation, effect and discharge of the contract. The general principles have been adopted by the EC Convention on the Law Applicable to Contractual Obligations in 1980.

Secondly, according to some English authors, the proper law is not of universal application. The definition and location of connecting factor, procedural law etc. are matters of lex fori (law of the forum). A contract can also be considered formally valid if it satisfies the formalities prescribed by the lex loci contractus (law of the place where contract is made) even if it does not meet those of proper law. A contract valid by its proper law will not be enforced by English courts where it involves breach of overriding statutory provisions or rules of public policy or the performance of the contract is unlawful or illegal by the lex loci solutionis, (law of the intended or due place of performance).

15.5 APPLICATION OF LEX CAUSAE TO SALE OF GOODS

Apart from contract, the lex causae or the proper law of the contract has been made applicable to sale of goods including export sales. According to Professor Goode the general principles explained earlier on lex causae in contracts, most of the contractual aspects of a contract for the sale of goods are governed by the proper law of the contract. In the absence of an express or implied choice of law by the parties the law of the seller's principal place of business will be the applicable law or lex causae.

But, the proprietary aspects of a contract for the sale of goods including the capacity to transfer, formalities of a valid transfer, its essential validity, the time of the passing of the property, location of title etc. will be determined by the lex situs, that is the law of the place where goods are situated at the time of the contract. Professor Cheshire had earlier advocated the proper law to govern the proprietary rights of the parties interse but now it seems to be agreed that the lex situs governs the proprietary issues even where they arise solely between the parties to the contract and do not involve a third party.

According to the general principle the forum should recognise a title validly acquired under the lex situs and should refuse to accept a claim to ownership not recognised by the lex situs, even if a different result would have been reached under the lex fori. For example, when goods move from State A to State B and subjected to a new or fresh dealing or sale the court will apply the law of State A upto the moment of the fresh dealing in State B to locate the title and will then apply the law of the State B to ascertain the effect of that fresh dealing on the title established by the law of State A. This is in accordance with the general principle that the lex situs governs the effect of transactions carried out and the events occurring where

the goods are in that situs but does not apply to transactions effected and events occurring after the goods have moved to a new situs and subjected to a fresh dealing.

The above principle was applied and adopted in the case of Winkworth Vs (1) Christie & (2) Manson & Woods Ltd. (1980). In this case certain works of art belonging to plaintiff were stolen from him in England and taken to Italy where they were sold to the second defendant, a bonafide purchaser for value without notice of the plaintiff's title. By the Italian law (not by English law), sale by a thief to a bonafide purchaser passes a good title. The second defendant subsequently returned the goods to England to be sold by the first defendant who is a well known firm of auctioneers. The plaintiff brought a suit against the defendants. The defendants contended that the title had become vested in the second defendant as the result of sale to him in Italy. On the issue as to whether English or Italian law governed the title dispute, the court applying an earlier case Cammel Vs Soewell (1860) held that the effect of the sale to the second defendant was governed by the lex situs at the time of that sale, that is Italian law even if goods have been removed to Italy without plaintiff's consent and had subsequently returned to England.

Check Your Progress A

1. What is proper law of contract?

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2. What do you mean by *Lex Loci* solutionis?

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3. What is conflict of laws?

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4. What is *lex Fori*?

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5. State whether following statements are true or false.

i) Doctrine of privity of contract create and regulate legally binding and enforceable obligations and relations among the parties to the contract.

ii) In the absence of a choice of law clause in the contract, the proper law of contract may be defined as the importer's country law.

iii) The proper law has universal application.

iv) A contract can also be considered formally valid if it satisfies the formalities prescribed by the *lex loci contractus*.

v) In the absence of an express or implied choice of law by the parties, the law of the seller's principal place of business will be the applicable law.

15.6 STANDARDISED EXPORT SALES CONTRACT

You have learnt that all export transactions are legalised through contracts called Export Sales Contracts (ESC) and formalised through written agreements containing standard terms and conditions. Apart from written agreements, the ESC sometimes, manifests in different other forms like letters, telex or fax messages, purchase orders or letters of credit which evidence only the existence of an agreement between the parties from which a contract can be subsequently constructed for the parties. Sometimes oral contracts (though valid) are also made or orders are placed or booked over telephone and subsequently confirmed in writing. These forms of ESC are, although, valid they may not contain the standard terms and conditions of exports to the desired extent and there may be other omissions and commissions affording greater scope for disputes and differences between the parties. In view of this many exporters have developed certain standard terms and conditions which are incorporated in the export contract to facilitate day-to-day export operations and to avoid or reduce the possibility of disputes. In other words, they have evolved some sort of a standardised ESC depending upon the products they export. If the product is a standardised one, such as garments, handicrafts, light engineering products etc. the standardised terms and conditions can be evolved and adopted with or without some changes each time a contract is drafted. These terms and conditions are comparatively simple compared to the terms and conditions in a contract for export of more complicated products like petrochemical plants or heavy engineering products.

Before we deliberate and make an attempt to evolve a standardised export sales contract (ESC), it is necessary to recapitulate the concept and the nature of the ESC, its essential elements and indicate the difference between the export sales contract (ESC) and the domestic sales contract (DSC) and the principal provisions/clauses which should be incorporated to make the ESC as comprehensive as possible for safeguarding the interests of the contracting parties more particularly the exporter.

15.6.1 Concept and Elements of Export Sales Contract

Export Sales Contract (ESC) or Export Contract is defined as a contract whereby the exporter (seller) transfers or agrees to transfer the property in the goods to the importer (buyer) for a price. This definition emphasises the following essential elements of ESC.

1) It is a contract between two distinct parties, i.e. an exporter and an importer who must be competent to contract.

2) Goods which form the subject matter of the contract must be movables and may be either existing goods owned and possessed by the exporter or future goods (to be procured or manufactured).

3) The exporter transfers or agrees to transfer the property (ownership) in the goods to the importer. Transfer of general property in the goods or ownership is the essence of the contract of export sales.

4) The transfer of property in the goods from the exporter to the importer is for consideration which must be money, called the price. When goods are exchanged for goods it is not an export (or a sale) but a barter. When the consideration is partly in cash and partly in goods the transaction is an export or sale.

5) The other essential elements of a contract like the competency of the parties, lawful object and consideration, certainty of meaning etc. are also applicable to ESC.

You have learnt that the ESC involves two parties called exporter and importer. We would like to mention that an exporter is a person who exports or agrees to export and an importer is a person who imports or agrees to import goods.

Export Sales contract (ESC) like a Domestic Sales Contract (DSC) includes both export (sale or outright sale) and an agreement to export (agreement to sell). Export or sale involves transfer of property in the goods at the time of making of the contract whereas an agreement to export or sell involves transfer of property in the goods subsequent to the making of the contract or at a future date or on the fulfilment of certain specified conditions. Export (sale) is an absolute and executed contract whereas an agreement to export or sell is an executory and conditional contract.

Since export transactions involve a foreign element and a lot of legal and other formalities exports are hardly effected on the basis of sale or outright sale. In view of this, most exports are conducted on the basis of an agreement to sell which operate as a present agreement to sell future goods i.e. the goods which are yet to be either procured or produced for export after entering into a contract of sale. An agreement to export or sell becomes an export or actual sale at a future date when goods are ultimately exported or on fulfilment of certain specified conditions.

Export sales contract is formed by offer (to buy or sell goods) by one party and its acceptance (to sell or buy goods respectively) by the other party. The contract is made in writing or by word of mouth or partly in writing and partly by word of mouth. The contract may also be implied from the conduct of the parties or from the course of dealing between the parties. Although oral contracts are valid, it is always safe and secure to have a formal written contract.

Difference Between ESC and DSC

Although the essential elements of a valid ESC and that of the DSC are same there appears to be some differences, between these two contracts. This is mainly because all export sales have a foreign element which is absent in all domestic sales. The ESC (which legalises the export sales) involves parties who are called exporter and importer belonging to different countries. The price (consideration) under the ESC is quoted and realised in foreign currency. The goods (forming the subject matter of ESC) are exported across the boundary of the exporter's country. The applicable law and jurisdiction under the ESC may or may not be the exporter's country law and jurisdiction. The ESC is concluded subject to the provisions of certain laws on Foreign Exchange Regulations, Foreign Trade Development and Regulations etc., which are not relevant for domestic sales regularised through DSC. Lastly, the export sales regularised through ESC is subjected to various legal and procedural formalities which are not required in domestic sales formalised through DSC.

15.6.2 Principal Provisions of ESC

The ESC needs to be comprehensive in terms of both structure and contents to avoid and or reduce the possibility of any differences and disputes between the parties which may arise due to various omissions and commissions. The comprehensiveness largely depends on the negotiating ability of the parties and the various aspects agreed to be incorporated on the contract ultimately. The exporter, should try, to the extent possible, to include and incorporate all the relevant provisions and required details to make the ESC as comprehensive as possible to safeguard his interests. ESC is broadly, structured and divided into two parts namely: substantive part and regulatory part. The substantive part defines the contractual rights and obligations of the parties while the regulatory part contains provisions designed to regulate their commercial relations.

Keeping all this in mind, the ESC should, by and large, contain the following clauses or provisions to make the contract reasonably comprehensive and standardised.

Substantive part

1. Parties (name and address)
2. Product (specification/description)

3. Product Quality/Standards
4. Quantity
5. Price Per Unit
6. Total Value
7. Price Escalation
8. Currency
9. Packing requirements
10. Marking and labelling requirements
11. Mode of transport including Port of Shipment/discharge, part and transshipment etc.
12. Delivery: place and schedule
13. Insurance
14. Inspection
15. Documentation
16. Mode of Payment
17. Passing of Property/risk
18. Availability/Non-availability of export-import licences
19. Conditions
20. Warranties

Regulatory part

21. Force Majeure
22. Settlement of disputes
23. Proper Law of the Contract
24. Jurisdiction
25. Termination clause
26. Liquidated damages/Penalty.

15.6.3 Model or Standardised Export Sales Contract

We may like to mention that Export Sales Contracts vary from product to product and it is difficult to perscribe a standardised or model ESC which will be applicable to all products and under all circumstances. In view of this we can select a standard product and draft a contract taking into account the principal provisions (terms and conditions) which should normally be included in the contract.

We may select a standard product say, 'Mixed Fruit Jam' and before the contract is drafted we may like to design a cover page indicating the title of the contract, name of the parties and the product as follows:

EXPORT SALES CONTRACT

BETWEEN

ALPHA COMPANY LTD ..... EXPORTER/SELLER

AND

BETA COMPANY LTD ..... IMPORTER/BUYER

FOR EXPORT OF

MIXED FRUIT JAM

EXPORT SALES CONTRACT

THIS AGREEMENT (OR CONTRACT) is made on the third day of April 1998 between ALPHA COMPANY LTD. (ACL) having its registered office at G-20 Connaught Place, New Delhi - 110 001 here-in-after referred to as "The Exporter"/"The Seller" of the one part and

the BETA COMPANY LTD. (BCL) having its registered office at 25 Suleman Street, Kuwait here in after referred to as "The Importer"/"The Buyer" of the other part.

WHEREAS : ACL the exporter (or the seller) who deals in the product MIXED FRUIT JAM (MFJ) has agreed to export/sell MFJ by both sample and description and BCL, the importer (or the buyer) has agreed to import/purchase the said Mixed Fruit Jam (MFJ) on the basis of the sample and description subject to the following terms and conditions.

Clause - 1. Name and Address

EXPORTER/SELLER	*IMPORTER/BUYER*
ALPHA COMPANY LTD. (ACL)	BETA COMPANY LTD (BCL)
G-20 CONNAUGHT CIRCUS	25 SULEMAN STREET
NEW DELHI - 110 001 INDIA	KUWAIT.
TEL NOS.....	TEL NOS.....
TELEX NO.....	TELEX NO.....
FAX NO.....	FAX NO.....

Clause - 2 Product (Specification and Description)

ACL has agreed to sell and BCL has agreed to buy MFJ as per the approved sample and description (Product code MFJ 015) containing ingredients of sugar, mixed fruit pulp, pectin, citric acid, flavours, preservatives and colours.

Clause - 3 Product (Quality Standards)

The MFJ must conform to the following quality standards and conditions.

a) MFJ must correspond to the sample as well as description.

b) MFJ should be wholesome and fit for human consumption and shall be free from any contamination.

c) MFJ shall contain permissible class II preservatives, colours and added flavours.

d) MFJ shall be of merchantable quality i.e. the goods must have use and exchange values.

e) BCL (the buyer) shall have a reasonable opportunity of comparing the bulk with the sample.

f) Goods shall be free from any defect rendering the same unmerchantable.

g) MFJ must conform to USFDA regulations.

Clause - 4 Quantity

ACL agrees to sell and BCL agrees to buy 2000(Two Thousand) cartoons of MFJ each containing 10 (Ten) tins of 500 grammes each.

Clause - 5 Price and Total Value

The price per tin of 500 gms of MFJ is agreed to be US$ 5 (Five US Dollars) FOB Bombay.

The total value of the contracted MFJ is US $ 100,000 (US Dollar One Lakh)

Clause - 6 Price Escalation

Price escalation upto 10% of the value would be allowed subject to the consent and agreement by the parties for reasons considered to be reasonable and unavoidable.

Clause - 7 Currency

The contracted price and value of MFJ shall be payable in US Dollars in India.

Clause - 8 Packing

The contracted MFJ shall be packed in consumer tins (Material Standard .....) and (Design Standard .....) as approved and agreed to by both the contracting parties. Ten (10) tins of MFJ containing 500 grammes each should be packed in 5 ply cartoons. Twenty (20) such cartoons shall be packed in a master cartoon as per sample approved to ensure export worthy packing.

Clause - 9 Marking and Labelling

MFJ must be properly labelled indicating in both English and Arabic product name, brand, manufacturer's name and address, net and gross weight, percentage wise ingredients, date of manufacture and date of expiry. Dates of manufacture and expiry of the products must either be embossed or printed on the tin pack. Dates shall be prominently printed along with other details both on the tin packs and unit cartoons which should withstand rubbing and treatment by chemicals.

Clause - 10 Mode of Transport

Goods as agreed to shall be shipped from Bombay port by a liner ship named by the importer who is obligated to reserve the shipping space and give due notice of the same to the exporter. Partial shipment and Transshipment are not allowed.

Clause - 11 Delivery

The shipment shall be made on or before June 30, 1998 and the goods as mentioned above shall be delivered and loaded on board the vessel named by the importer at Bomaby Port.

Clause - 12 Insurance

The goods as requested and agreed to shall be insured by the exporter/seller for 110% of the value of the goods. Insurance should cover all risks including war/SRCC and natural calamities. The exporter shall take a CPA policy to ensure settlement of claims if any by the importer at Kuwait in the buyer's country currency. The insurance premium shall be borne by the buyer.

Clause - 13 Inspection

The exporter as indicated by the importer shall get the goods inspected by ABC services Ltd. Bombay, before shipment and obtain a certificate to that effect. The inspection shall cover the product, the product specifications, quality, standards, quantity, the packaging and labelling requirements. The exporter/seller shall bear all costs pertaining to such inspection.

Clause - 14 Mode of Payments

The importer / buyer shall make payment of the total value of goods by a confirmed, irrevocable and transferable Letter of Credits in favour of the exporter / seller (ACL) through the advising bank State Bank of India Main Branch, Parliament Street, New Delhi - 110 001. The L/C will be opened by the importer/buyer (BCL) within a week of the acceptance of the offer and it will be governed by the provisions of Uniform Customs and Practices for Documentary Credits (UPCPDC), 500 of 1993 in force from January 1994. The L/C shall be confirmed by a bank in Delhi other than the advising bank. The total invoice value of the goods shall be payable at sight on presentation of the seller's draft along with the documents mentioned under clause 15 within a period of 15 days of the date of shipment and within the validity of the L/C.

Clause - 15 Documentation

The following documents are required to be submitted to the bank along with the seller's draft for negotiation and payment.

1. Commercial invoice (6 copies) along with the original invoice duly signed by the seller.

2. Complete set of Clean on Board Bill of Lading issued to Order of the shipper blank endorsed marked freight to be paid.
3. Packing list in duplicate.
4. Inspection Certificate original and one more copy.
5. Insurance Certificate or Policy.
6. Certificate of Origin in standard form issued by the Chamber of Commerce stating that goods are of Indian Origin indicating the name and address of the manufacturer in duplicate.
7. Health certificate.

Clause - 16 Passing of Property and Risk

The property in the goods shall be transferred to the buyer only when goods are loaded on board the ship at Bombay. The risk of loss or damage to goods shall pass from the seller to the buyer only when the goods pass the ship's rails at Bombay, the named port of shipment.

Clause - 17 Export-Import Licence

The seller shall be responsible for arranging the export licence (if any) required for clearing the goods for export. If for any reason beyond the control of the exporter the export licence/ permit cannot be obtained he shall be excused from the performance of his contractual obligations under this contract. The importer/buyer on the other hand shall be responsible for obtaining the import licence (if any) for the goods required for clearing the import cargo on payment of duties, levies etc. by him. In case the importer fails to obtain the required import licence and permit for reasons beyond his control he shall be excused to perform his contractual obligations under this contract.

Clause - 18 Conditions and Warranties

This contract is subject to the implied conditions and warranties as contained in secs. 12-17 of the Sale of Goods Act 1930 of India.

Clause - 19 Force Majeure

If at any time during the currency of this contract either party to this contract is prevented from performing its contractual obligations because of Force Majeure circumstances like war, hostility, civil commotions, revolutions, sabotage, acts of god, flood, fires at the factory, explosion, epidemics, embargoes, strikes at ports, government legislations or any other cause or causes beyond the control of the parties, fulfilment of the contractual obligations shall be postponed provided a notice is given by the party postponding the performance of the contract to the other party within 10 days of the happening of such event and proof of the existence of Force Majeure circumstance and its duration is furnished by a certificate from the Chamber of Commerce and Industry of the country concerned. In case the Force Majeure conditions continue to exist beyond 60 days either party shall have the right to avoid or frustrate the contract and be excused from further performance of the contract and neither party will have the right to claim any damages.

Clause - 20 Settlement of Trade Disputes

All disputes arising in connection with and out of this contract between the parties shall, at the first instance, be amicably settled by the parties. If the amicable method of settling the dispute fails, the dispute shall be settled by reconciliation. If the parties do not agree with the decision of the reconciliator the dispute shall then be referred to arbitration by the Indian Council of Arbitration, Delhi. The parties shall have the right to appoint one arbitrator each and the third arbitrator shall be appointed by the Indian Council of Arbitration. The arbitration proceedings which shall be conducted at Delhi in English language should be commenced and completed within a period of three months. The award given by the arbitrators shall be final and binding on the parties. The dispute shall be settled in accordance with the provisions of the Indian Arbitration and conciliation Act of 1996 which shall be the applicable Law.

Clause - 21 Applicable Law and Jurisdiction

courts will assume jurisdiction for filing execution proceedings for any claims arising out of the Court Judgements or Awards.

Clause - 22 Termination

This contract may be terminated at any time before performance of this contract subject to the consent and agreement by the parties in writing.

Clause - 23 Liquidated damages and Penalty

If and when either party to the contract commits a breach of the contract, the aggrieved party shall be entitled to liquidated damages. If the seller delays delivery of goods and if the buyer refuses to take delivery of the goods and fails to pay the defaulting party shall pay liquidated damages at the rate of US $ 10 per day from the date of default to the other party which should be considered as a reasonable compensation for the probable loss that might ensue as a result of the breach.

Clause - 24 Miscellaneous

This contract consisting of ----- pages has been drawn up in ----- copies and signed by the parties on all pages. The parties signing this contract declare that they have been duly authorised by their respective companies to enter into and execute this contract and their rights and duties shall be governed by the relevant provisions of INCOTERMS of International Chamber of Commerce Paris.

IN WITNESS WHEREOF the parties here to have set their hands and seals the day and year first above written.

Authorised signatory of

ALPHA COMPANY LTD. OF INDIA

Sd/-

(Name .....)

Managing Director
Alpha Company Ltd. of India
(Affix the seal of the company)

Authorised signatory of

BETA COMPANY LTD. OF KUWAIT

Sd/-

(Name .....)

Managing Director
Beta Company Ltd. of Kuwait
(Affix the seal of the company)

Check Your Progress B

1. What is Export Sales Contract?

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2. Distinguish between Export Sales Contract and Domestic Sales Contract.

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3. What do you mean by *Force Majeure*?

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4. What is liquidated damages?

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5. State whether following statements are true or false.

   i) Transfer of general property in the goods or ownership is the essence of the contract of export.

   ii) Most exports are conducted on the basis of an agreement to sale.

   iii) Mode of Payment is a regulatory part of the contract.

   iv) An agreement to export becomes an export sale without the fulfilment of any conditions.

   v) The applicable law and jurisdiction under the export sales contract may or may not be the exporter's country law and jurisdiction.

15.7 LET US SUM UP

The foreign or international contracts involving a foreign element are governed by the proper law of the contract which may not or may be the relevant national laws (of the exporter) depending upon the presence or absence of a choice of law clause in the contract. If the choice of law clause exists or present in the contract the proper law of contract will be the law expressly or impliedly selected and agreed by the parties. In that case the chosen law may be that of the exporter's or the importer's or even a third country law which will be applicable.

In the absence of a choice of law clause in the contract the intention of the parties has to be normally ascertained. If their intention can not be ascertained or inferred from the circumstances "conflict of laws" principles will be applied to determine the proper law of the contract or applicable law. "Conflict of laws" are national laws applied to international trade contracts as there is no universally acceptable system of private international trade laws which will be applicable. In the process of determining whose national law will be the applicable law, the courts have decided that the contract shall be governed by the law with which the transaction is most closely connected. After considering various factors, the closely connecting factor was identified (on the basis of lex fori) to be the lex loci solutionis (the law of the place of intended performance of the contract). Based on this the modern theory on PLC was developed. Subsequently, it was found to be not very convenient to the exporter as it was considered most unreasonable for the exporter to get acquainted with the legal systems of various importing countries. Based on the convenience of the exporter, the modern theory was refined by the decisions in the Swiss Federal Court. According to the refined theory, the law of the principal place of business of the party (the exporter) whose performance is the characteristic of the contract should be the applicable law. Ultimately the exporter's country law was decided to be the proper law of the contract.

The Export Sales Contract should be comprehensive in terms of both structure and contents to avoid and or reduce the possibility of any differences and disputes between the parties.

The contract contains both the substantive part and the regulatory part. The major clauses of the substantive part include: parties, product, quality, quantity, price, total value, price escalation, currency, packing requirements, marking and labelling requirements, modes of transport, delivery, insurance, inspection, documentation, mode of payment, passing of property, availability or non-availability of export-import licences, conditions and warranties. The major provisions of regulatory part include: force majeure, settlement of disputes, proper law of the contract, jurisdiction, termination clause, liquidated damages.

15.8 KEY WORDS

The Proper Law of the Contract (PLC) : The lex causae or the proper law of the contract is defined as the law which has been expressly or impliedly selected by the contracting parties to govern their contractual relationship. In the absence of an express or implied choice of law, the PLC is defined as the law of the principal place of business of the exporter whose performance is the characteristic of the contract.

Lex Fori : Legal system or law of the forum or country where courts of law dispense with justice.

Lex Loci Solutionis : Law of the intended place of performance of the contract. Performance like delivery obligations is considered to be the characteristic of the contract.

Conflict of Laws : Conflict of Laws are national laws applicable to contracts in the absence of a system of private international business law common to all nations or countries.

Closely Connecting Factor : Closely connecting factor means the act or event which connects the question in issue to the putative (Supposed) lex causae which was ultimately decided to be the lex loci solutionis — (the place of intended performance of the contract).

Lex Loci Contractus : Lex loci contractus is the law of the place where contract is made.

Lex Situs : Lex situs is the law of the place where goods are situated at the time of the contract.

15.9 TERMINAL QUESTIONS

1. What do you mean by proper law? Describe the proper law of the contract when the choice of law clause exists in the contract and identify its limitations.
2. Describe the provisions of the proper law of contract when choice of law clause does not exist in the contract.
3. Define Export Sales Contract. Distinguish between export sales contract and domestic sales contract.
4. XYZ company of Delhi agreed to export 10,000 pieces of Suits to C&A New York at the rate of dollar 100 per piece. Draft an Export Sales Contract.