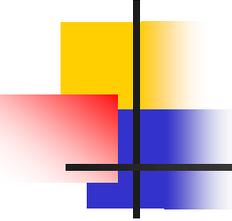


***Chapter 10: Disputes, Claim,
Arbitration and Force Majeure***

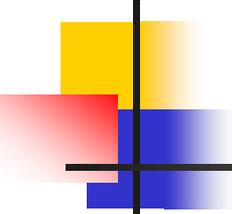


Disputes, Claim, Arbitration and Force Majeure

A: Disputes and claim

B: Force Majeures clause

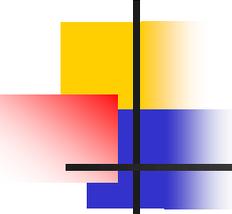
C: Arbitration



Disputes, Claim, Arbitration and Force Majeure

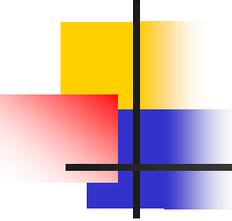
A: Disputes and claim

1. Disputes
2. Claim and Satisfaction
3. Points in Handling Claim and Satisfaction
4. Claim Clauses in the Contract
5. Settlement of Claim



A: Disputes and claim

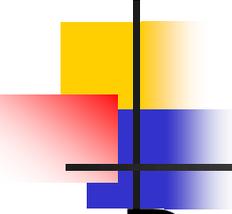
- **Main reasons for disputes**
 - **breach of contract by the seller**
 - fails to deliver the goods
 - fails to present required documents
 - **breach of contract by the buyer**
 - fails to open L/C
 - fails to accept the goods
 - fails to dispatch the vessel (FOB)
 - **breach of contract by both parties**
 - misunderstands contract stipulations



A: Disputes and claim

2. **Claim and Satisfaction**

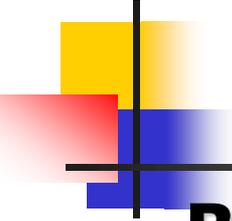
- **Claim:** means that in international trade, one party breaks the contract and causes losses to the other party directly or indirectly, the party suffering the losses may **ask for compensation** for the losses.
- **Satisfaction:** means that the party breaking the contract declares that he will **accept and handle** the claim.



Claim and Satisfaction

Determine the nature of breach

- a. **Based on trade terms of the contract**
 - According to the “British Law”
- b. **Based on the consequence of breach**
 - According to the “American Law”
- c. **Fundamental and non-fundamental breach**
 - According to the “United Nations Convention on Contracts for the International sale of Goods” (CISG)



Determine the nature of breach

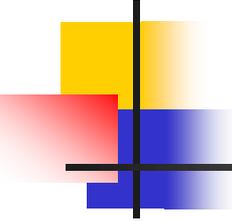
a. **Based on trade terms of the contract**

① **Breach of Condition**

- **Condition:** is a clause to which the parties, when making the contracts, attribute such importance that it can truly be described as being of **the essence of the contract**. It goes to the root of the contract.

② **Breach of Warranty**

- **Warranty:** The less important type of undertaking and does not go to the root of the contract



Determine the nature of breach

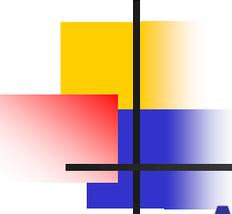
b. Based on consequence of breach

① Material breach

- If one party breaks the contract and makes the other party unable to obtain **the main profit**.

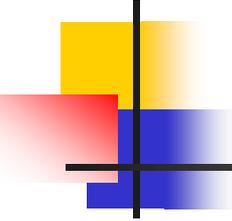
② Minor breach

- If one party breaks the contract, but the case is not so serious and the other party will **not lose any main profit**.



Claim and Satisfaction

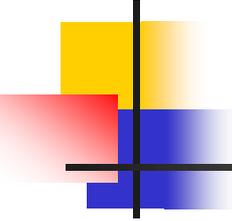
- According to the “United Nations Convention on Contracts for the International sale of Goods” (CISG)
 - ① Fundamental breach of contract
 - ② non-fundamental breach of contract



A: Disputes and claim

3. Points in Handling Claim and Satisfaction

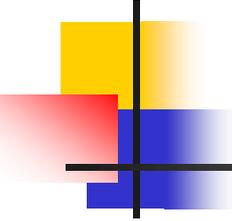
- ① Careful study on the contract and its clauses
- ② Careful study on facts and reasons and documents that support the claim
- ③ Further study on the nature of the breach
- ④ Further study on the correct standards and methods to calculate the losses.



A: Disputes and claim

4. Claim Clauses in the Contract

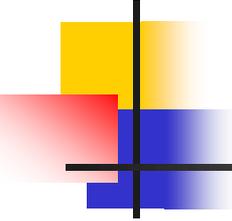
- ① Discrepancy & claim clauses
- ② Penalty clause



4. Claim Clauses in the Contract

① **Discrepancy & claim clause**

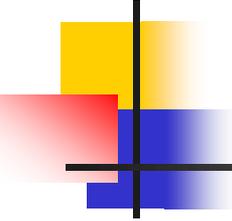
- Is stipulated in case the **quality, quantity or packing of the goods** delivered by the seller is **not in conformity with the contract**.
- Mainly includes:
 - the claim foundation
 - the time limitation



4. Claim Clauses in the Contract

① **Discrepancy & claim clause**

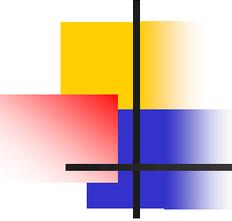
- **Example:** “Any claim by the buyers on the goods shipped shall be filed within **30 days** after the arrival of the goods at the port of destination and supported by **a survey report issued by a surveyor** approved by the seller.....”



4. Claim Clauses in the Contract

② **Penalty clause**

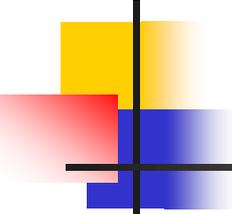
- Is stipulated in case of **delayed delivery** by the sellers or **delayed taking over the goods** by the buyers.
- **Feature:** stipulate a certain percentage of penalty in advance in the contract.



4. Claim Clauses in the Contract

② **Penalty clause**

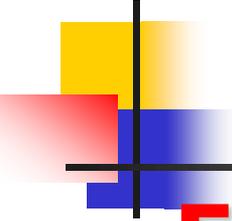
- **Example:** “ In case of delayed delivery, the seller shall pay to the buyers for every week of delay a penalty that amounts to **0.5% of the total value** of the goods whose delivery has been delayed.....”



A: Disputes and claim

5. Settlement of Claim

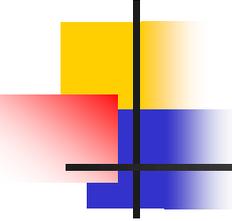
- ① Agree to the rejection of the goods and refund to the buyers the value of the rejected goods, and bear all direct losses and expenses
- ② Devaluation the goods
- ③ Replace the defective goods with new ones



B: Force Majeure Clause

Force Majeure

- “A party is **not liable** for the failure to perform any of his obligations if he proves that the failure was due to an **impediment beyond his control** and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”



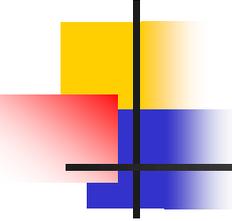
Consequences of Force Majeure Events

■ **Postponement of the contract**

- When the performance of the contract is delayed temporarily
- Contract shall be resumed after the force majeure event

■ **Termination of the contract**

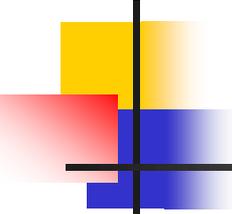
- When the performance of contract is impossible
- one of the party who suffers the force majeure event may ask for the termination of the contract



B: Force Majeure Clause

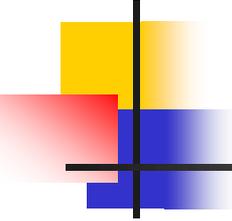
■ Scope of Force Majeure

- ① **Natural forces:** such as flood, earthquake, typhoon, fire etc.
- ② **Social forces:** such as war, strikes, government decrees of prohibition etc.



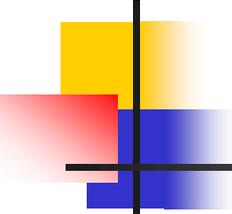
B: Force Majeure Clause

- **Two Requirement for Free from the Liability under Force Majeure**
 - ① The party should **timely inform** the other party right after the accident so that the latter can take necessary remedial measures.
 - ② Provide **effective documentation** describing the frustrating events and their consequences.



B: Force Majeure Clause

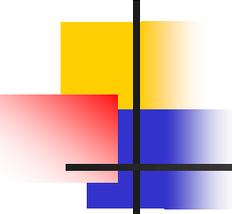
- **Three Ways to Stipulate Force Majeure Clauses**
 - ① In a general way
 - ② In a way to list the contents
 - ③ In a comprehensive way



Three Ways to Stipulate Force Majeure Clauses

① **In a General Way**

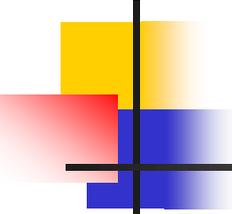
- “If the shipment of the contract goods is prevented or delayed in whole or in part **due to force majeure**, the seller shall not be liable for non-shipment or late shipment of the goods of this contract.”



Three Ways to Stipulate Force Majeure Clauses

② **In A Way to List the Contents**

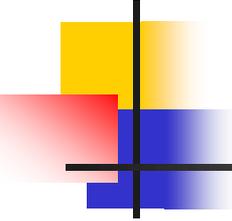
- “If the shipment of the contract goods is prevented or delayed in whole or in part **by reason of war, earthquake, flood, fire, storm, heavy snow**, the seller shall not be liable for non-shipment of the goods of this contract.”



Three Ways to Stipulate Force Majeure Clauses

③ **In A Comprehensive Way**

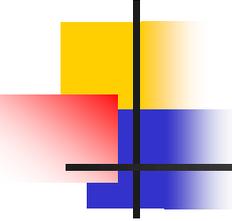
- “If the shipment of the contract goods is prevented or delayed in whole or in part **by reason of war, earthquake, flood, fire, storm, or other causes of force majeure**, the seller shall not be liable for non-shipment or late shipment of the goods of this contract.....”



C: Arbitration

- **Four Ways to Settle disputes**

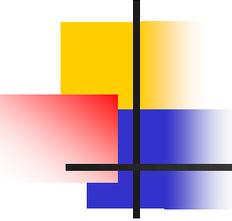
- ① Amicable negotiation
- ② Conciliation (mediation)
- ③ Arbitration
- ④ Litigation



C: Arbitration

■ **Arbitration**

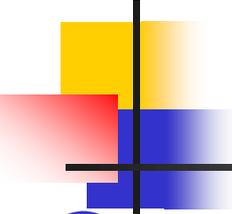
- Means that the two parties, before or after the disputes arise, reach **a written agreement** that they will submit the disputes which cannot be settled through amicable negotiations to the third party for arbitration.



C: Arbitration

■ **Characteristics of Arbitration**

1. An **agreement** between the two parties on solving the disputes through arbitration.
 - ① Arbitration Clause
 - ② Submission
2. The ruling of arbitration is in general **final**.



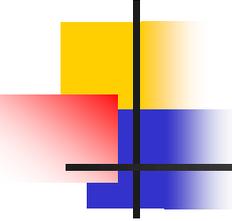
Difference between Arbitration and litigation

① The way to submit arbitration or litigation

- arbitration: on the agreement of both parties in advance
- litigation: unilaterally by one of the parties

② The appointment of arbitrator or judge

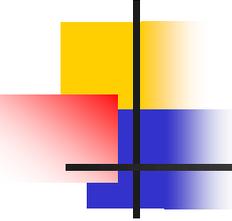
- arbitration: appointed by the parties themselves and the third appointed by the arbitration institution
- litigation: appointed by the government



Difference between Arbitration and litigation

③ The effectiveness of an award or verdict

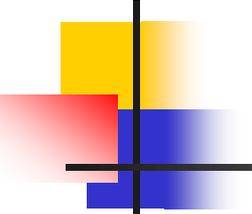
- arbitration: award is final and binding on both parties with no right given to revision before a law court
- litigation: verdict is not final, ie. If one party refuses, he can retain the right to appeal to a higher court



C: Arbitration

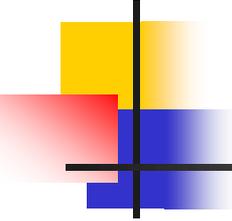
- **The Arbitral Proceedings**

1. Plaintiff's application
2. Formation of arbitral tribunal
3. Hearings
4. Award-making



Applying for arbitration

- Application shall be made in written form
 - the name address of the claimant and the claimee
 - the arbitration agreement
 - the facts of the disputes
 - the claimant's claim and
 - the facts and evidence of the claim
- Application shall be submitted to the Secretariat of the Arbitration Commission
- The arbitration fee shall be paid in advance to the Arbitration Commission



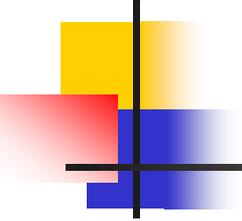
Forming arbitration tribunal

■ **sole-arbitrator tribunal**

- only one arbitrator involved
- both parties jointly appoint or jointly authorize the chairman of the arbitration body to appoint.

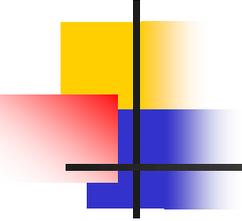
■ **collegiate tribunal**

- three arbitrators involved
- the claimant and claimee each appoint an arbitrators
- the third one either be jointly appointed by both parties or appointed by the arbitration body.



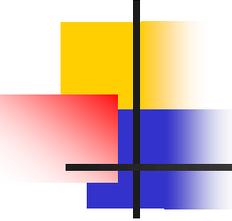
Hearing an arbitration case

- oral hearing
 - A date for oral hearing shall be fixed in advance
 - Communicate to the parties concerned **30** (in foreign-related cases) or **15** days (in domestic cases) before the date for oral hearing
 - the omission of an oral hearing
 - Omission of an oral hearing shall be made at the request of the parties or with the consent of the parties; and
 - be approved by the arbitration tribunal.
- If the oral hearing is omitted, an award shall be made based on the documents only.



Issuing an award

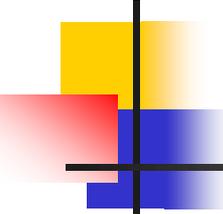
- **Time for the issuance**
 - for arbitration without oral hearing: within **9** months from the date of the formation of arbitration tribunal
 - for arbitration based on oral hearing: within **30** days from the date of the oral hearing
- The date of issuance is the date on which the award becomes effective.
- The arbitration award is **final** and binding upon both parties.



C: Arbitration

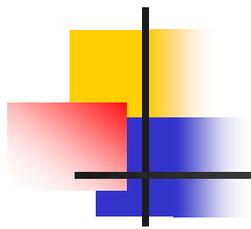
■ Contents of the Arbitration Clause

1. Place of arbitration
2. Arbitration authority
3. Arbitration rules
4. Effectiveness of award



Case Study

- In October, export company A of China signed a contract with a foreign client for the export of wheat with the time of delivery in December. However, in July and August of the same year, the producing area suffered great drought and the exporter was unable to make delivery within the time stipulated in the contract. As a result, the exporter asked for the termination of the contract on the basis of force majeure event.
- Is the exporter appropriate in asking for the termination? Why or why not?



END