

International Business Contracting

International Business Contracting

Theory and Practice

Stephen C. Sieberson

Bruce A. King



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2015
Carolina Academic Press
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Sieberson, Stephen C. author.

International business contracting : theory and practice / Stephen
Sieberson and Bruce A. King.

pages cm

Includes bibliographical references and index.

ISBN 978-1-61163-662-8 (alk. paper)

1. Export sales contracts. I. King, Bruce A. (lawyer) author. II. Title.

K1030.S54 2014

346'.065--dc23

2014035674

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Preface	ix
---------	----

Part I

Background on Business, Law, and Contracts

Chapter 1 · Understanding the Company's Business	3
1.1 Introduction	3
1.2 The Project and Its Players	4
1.3 Structuring an International Business Relationship	7
1.4 Cultural Issues in Business Dealings	11
1.5 Questions and Exercises	13
Chapter 2 · Legal Issues and Negotiating Strategies	15
2.1 Introduction	15
2.2 Legal Issues that May Affect the Parties	15
2.3 Strategies for Business Negotiations	19
2.4 Questions and Exercises	24
Chapter 3 · Contract Law Concepts	25
3.1 Introduction	25
3.2 United States Common Law of Contract	26
3.3 United States Uniform Commercial Code	32
3.4 United Nations Convention (CISG)	34
3.5 English and Civil Contract Law	35
3.6 Questions and Exercises	38
Chapter 4 · Standard Contract Terms	39
4.1 Basic Considerations	39
4.2 Standard Clauses in International Business Contracts	41
4.3 Important Note about Forms in Subsequent Chapters	44
4.4 Questions and Exercises	44

Part II

International Sale of Goods

Chapter 5 · Purchase Order	47
5.1 MITSA and DEMI Decide to Do Business	47
5.2 Purchase Order Issues and Terms	48

5.3 Form of MITSA Purchase Order	49
5.4 Is MITSA's Purchase Order Too One-sided?	51
5.5 Boilerplate Notes	53
5.6 Questions and Exercises	54
Chapter 6 · Sale Order	55
6.1 DEMI Provides Its Own Contract Form	55
6.2 Form of DEMI Sale Order	55
6.3 Choice of Law and CISG	58
6.4 Researching and Using CISG	61
6.5 The “Battle of the Forms”	61
6.6 Boilerplate Notes	64
6.7 Questions and Exercises	65
Chapter 7 · Agreement of Sale	67
7.1 MITSA and DEMI Decide to Create a “Neutral” Contract	67
7.2 How Can the MITSA Purchase Order and DEMI Sale Order Be Reconciled?	67
7.3 Exercise: Draft a Fair Agreement	68
7.4 ICC Model Contract	69
7.5 Boilerplate Notes	69
Chapter 8 · Shipping Arrangements	73
8.1 MITSA and DEMI Agree on Shipping Arrangements	73
8.2 INCOTERMS	75
8.3 Moving the Goods	78
8.4 The Bill of Lading	78
8.5 BIMCO Bill of Lading	81
8.6. Other Shipping Patterns	83
8.7 Boilerplate Notes	84
8.8 Questions and Exercises	87
Chapter 9 · Financing the Sale: Letters of Credit	89
9.1 Risks Regarding Payment and Performance	89
9.2 Payment against Documents—Documentary Collection	90
9.3 Payment against Documents—Letter of Credit	92
9.4 DEMI and MITSA Use a Letter of Credit	94
9.5 Form of Letter of Credit	95
9.6 Sight Draft	96
9.7 Confirmed Letter of Credit	97
9.8 Form of Confirmed Letter of Credit	99
9.9 More on the LC Transaction	101
9.10 Standby Letter of Credit	103
9.11 Boilerplate Notes	106
9.12 Questions and Exercises	108
Part III	
Distribution Arrangements	
Chapter 10 · Appointing a Foreign Sales Agent	111
10.1 Introduction	111
10.2 DEMI Appoints MITSA as DEMI's Sales Agent	112

10.3	Choosing a Structure; Forms of Association; Diagrams	112
10.4	What Is an Agent?	117
10.5	Diagram and Form of Agency Agreement	118
10.6	Does the Agreement Meet the Needs of Each Party?	125
10.7	Boilerplate Notes	128
10.8	Questions and Exercises	129
Chapter 11	· Appointing a Foreign Distributor	131
11.1	Introduction	131
11.2	DEMI Appoints MITSA to Sell DEMI's Products	132
11.3	Diagram and Form of Distributorship Agreement	132
11.4	Is the Form of Agreement Adequate?	135
11.5	Agency/Distributorship Comparison	137
11.6	Expanding the Distributor's Role	138
11.7	Legal Issues in Distributorships—EU Regulations	139
11.8	Boilerplate Notes	140
11.9	Questions and Exercises	142
Chapter 12	· Appointing a Foreign Licensee	143
12.1	Introduction	143
12.2	DEMI Authorizes MITSA to Manufacture DEMI's Products	144
12.3	Intellectual Property	144
12.4	When Is a License Desirable? What Are Critical Issues for the Parties?	145
12.5	Diagram and Form of License Agreement	146
12.6	Does the License Agreement Meet the Needs of the Parties?	155
12.7	Non-Disclosure Clauses and Agreements	159
12.8	Franchise as a Form of License	161
12.9	Boilerplate Notes	161
12.10	Questions and Exercises	162
Chapter 13	· Creating a Joint Venture	165
13.1	Introduction	165
13.2	DEMI and MITSA Create a Jointly-Owned Enterprise	166
13.3	What Is a Joint Venture? What Form Should It Take?	166
13.4	Critical Issues in Forming an Equity Joint Venture	167
13.5	Diagram and Form of Equity Joint Venture Agreement	169
13.6	Is the Joint Venture Agreement Adequate?	177
13.7	Boilerplate Notes	179
13.8	Questions and Exercises	180
Part IV		
A Cross-Border Acquisition		
Chapter 14	· Acquiring a Foreign Business	183
14.1	MITSA Offers to Purchase DEMI	183
14.2	What Type of Transaction?	184
14.3	MITSA Agrees to Purchase Stock of DEMI	186
14.4	Ownership and Control of an American Corporation	186
14.5	Components of an Acquisition	189
14.6	ABA Stock Purchase Forms	192
14.7	Exercise—Negotiate and Draft the Stock Purchase Agreement	192

Part V
International Lending

Chapter 15 · The Loan Agreement	195
15.1 DEMI Takes a Loan from Erasmusbank	195
15.2 Loan Types and Terms of a Loan Agreement	195
15.3 Eurocurrency and LIBOR Loans	199
15.4 How Is a Cross-Border Loan Different from a Domestic Loan?	201
15.5 Form of Loan Agreement	202
15.6 Boilerplate Notes	211
15.7 Questions and Exercises	214
Chapter 16 · Supporting Documents in a Loan Transaction: Securing the Loan	215
16.1 Erasmusbank Creates a Set of Loan Documents	215
16.2 Loan Closing Documents List	216
16.3 Promissory Notes	217
16.4 Form of Guaranty Agreement	219
16.5 Form of Security Agreement	223
16.6 Specialized Mortgages (Ships, Aircraft, Real Estate)	230
16.7 Other Financing Arrangements	230
16.8 Boilerplate Notes	232
16.9 Questions and Exercises	233
Chapter 17 · Legal Opinions	235
17.1 Erasmusbank Requires an Opinion from Borrower's Attorney	235
17.2 The Role of Legal Opinions; What Alternatives are Available?	236
17.3 Form of Legal Opinion from Borrower's Attorney	236
17.4 International Issues	243
17.5 Questions and Exercises	244
Index	245

Preface

For many years law students and business students have been offered classes in international business transactions, known in academic circles as IBT. These courses are part of the international law or business law concentrations in law schools, and the international track in business schools. IBT generally focuses on those aspects of business relationships that are unique to the international setting, topics such as shipping, financing, currency exchange, cross-border investment, trade regulation, and dealings with sovereign entities. The study of IBT also includes discussion of how ethnicity, culture, and geopolitics can affect companies and individuals lucky enough and bold enough to “go international.”

Between us, we have spent more than fifty years practicing international business law, and during that time we have attended and presented at seminars on IBT topics. We have also given lectures or taught IBT courses at law schools in the United States, Europe, and Asia. One thing we have always felt is that the typical course or seminar stops short of offering hands-on skills training in the actual practice of designing and drafting international business contracts. Understanding how law, culture, and established practice affect cross-border business relationships is one thing; knowing how such relationships are documented is, in our opinion, equally important and often given short shrift.

In the early 1980s Steve was asked by Erasmus University in Rotterdam to teach a one-week course on the drafting of international business contracts. The Erasmus law faculty at that time was innovating in its curriculum by inviting visiting instructors to teach short seminars on a variety of topics not otherwise covered in traditional legal studies. As he began to prepare for the course, Steve found no textbooks or treatises on point, so he sifted through his own client files to find examples of contracts that might be useful in the classroom. He selected a handful of agreements, amended them for teaching purposes, and once in the classroom, walked his students through the documents point by point. As he worked through the material, he explained what the parties hoped to accomplish in their business deals and how their lawyers tried to facilitate the transaction while protecting their clients’ rights. This proved to be a successful approach, and Steve repeated the course over the next several decades in a variety of university classes and professional seminars.

Through their association as Seattle lawyers—occasionally representing clients on opposite sides of the table—Bruce learned of Steve’s courses. Bruce had had many years of experience representing business clients in countries such as Norway, England, Germany, Japan, and Bangladesh, and we decided to team up. Our first jointly offered course was at the University of the Netherlands Antilles in Curaçao. Later we served together as Fulbright Senior Specialists at Comenius University in Bratislava, Slovakia. As we discussed our teaching and the materials we had developed, we decided that one day we would prepare them more formally as a textbook, to fill a void that continued to exist. Thus, this book was conceived, and we decided to distinguish it from the traditional IBT text by calling it *International Business Contracting*, shortened to IBC.

Two more developments were significant in the crafting of this book. First, at the University of Washington in Seattle, Steve on several occasions taught his contracting materials at the School of Business, twice in courses jointly offered with the School of Law. From those experiences it became clear that the study of contracts was as useful to business students as to those in the law school.

The second occurrence took place in the fall of 2000, when the UW law school invited Steve to create a course for its students in coordination with a class being taught to law students at the University of Tokyo, whose professor, Daniel H. Foote, was a former UW faculty member. Steve and Dan used several of Steve’s contracts, along with other materials, and they coordinated their classes as best they could with the technology available at the time. A key component of the courses was a negotiation and drafting exercise, in which teams of Japanese students, representing a fictional Japanese client, negotiated with counterpart American teams who represented an American client. At the end of the semester, a joint video conference of all the students was memorable.

A dozen years later Steve recreated the UW-Tokyo experience with Professor Manuel Alba Fernández of Carlos III University of Madrid, Spain. In fact, through a faculty exchange Steve taught IBC at Carlos III, while Manuel taught a parallel course at Steve’s home institution, Creighton University in Omaha. This time the two courses were taught in lock-step, using a single syllabus, and once again the capstone experience was the negotiating and drafting of a cross-border contract for hypothetical Spanish and American companies.

Thirty years after Steve started gathering these materials, and more than a dozen years after Bruce signed on, we believe it is time to share this material with others. Here is what we have to offer:

—Part I describes international business relationships, legal issues affecting such relationships, negotiation strategies, the law of contract, and standard terms in international business agreements.

—Part II addresses the international sale of goods, shipping arrangements, and letters of credit. It is here that we present our first contract forms, along with point-by-point analysis of their provisions. In each chapter we also introduce topics for discussion and drafting exercises. A major assignment is to negotiate and draft a sale agreement acceptable to two parties whose own contract forms have proven to be too one-sided.

—Part III is a series of chapters on international distribution arrangements. Here, the same parties who were involved in the purchase and sale negotiations have decided to expand their relationship into first an agency, then a distributorship, then a license, and finally a joint venture. Again, form contracts are provided, along with detailed analysis of their terms.

—Part IV is a single chapter in which one of our two parties decides to purchase the stock of the other. This material is designed to provide a challenging negotiation and drafting exercise for a sophisticated transaction.

—Part V describes in detail the process of international commercial lending and the documentation that is standard for a cross-border loan.

Along with this book we offer a teacher's manual containing suggested course syllabi, ideas for class-by-class coverage, and other commentary. We have tried to make this book and the manual as logical and accessible as possible. We look forward to hearing your comments and suggestions on how we can do this better. We truly hope your course on IBC will be memorable and useful.

We express our gratitude to the Practising Law Institute for permission to use and adapt the form of Purchase Order in Chapter 5, the form of Sale Order in Chapter 6 and the form of Distribution Agreement in Chapter 11. These materials have been published as part of "*The Preparation of Commercial Agreements*" by Ludwig Mandel, © Practising Law Institute. Reproduced with Permission. All rights reserved. No part of these materials may be reproduced, stored in a retrieval system, or transmitted in any form by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of Practising Law Institute.

We also thank The Baltic and International Maritime Council for permission to reproduce the BIMCO Liner Bill of Lading, Code Name "CONLINEBILL 2000" in Chapter 8. Copyright, published by The Baltic and International Maritime Council (BIMCO), Copenhagen, 2000.

We also wish to thank the staff at Carolina Academic Press for publishing this book. We also thank Professors Daniel H. Foote, Manuel Alba Fernández, and David P. Weber, along with Bryan Hanson and Laurel Johnson, for commenting on portions of these materials, and we offer our gratitude to all of the students who have responded so positively to the subject of IBC. We thank our law firm and law school colleagues who gave us the opportunity to teach and write. Finally, we dedicate this book to Carmelicia Sieberson and Theresa Townsend, who supported us so enthusiastically along the way.

Stephen C. Sieberson

Bruce A. King

