

Summary of Contents

Preface to the First Edition	xxi
Preface to the Second Edition	xxiii
Preface to the Third Edition	xxv
Preface to the Fourth Edition	xxvii
List of Exhibits	xxix
CHAPTER 1	
Introduction to International Contracting	1
CHAPTER 2	
Principles of Contract Drafting	7
CHAPTER 3	
Common International Contract Clauses	63
CHAPTER 4	
The Documentary Transaction	125
CHAPTER 5	
National Laws Affecting International Contracts	163
CHAPTER 6	
International Sales Contract	235
CHAPTER 7	
International Sales Law: Convention on Contracts for the International Sale of Goods	285

Summary of Contents

CHAPTER 8	
General Principles of Service Contracting	329
CHAPTER 9	
Agency and Distribution Agreements	375
CHAPTER 10	
Intellectual Property Licensing	431
CHAPTER 11	
Joint Ventures, Franchising, and Long-Term Contracts	467
CHAPTER 12	
Confidentiality and Non-disclosure Agreements	513
CHAPTER 13	
Post-contract: Continuing Rights and Obligations	525
CHAPTER 14	
Electronic Contracting	557
Appendices	583
APPENDIX I	
General Sources	585
APPENDIX II	
United Nations Convention on Contracts for the International Sale of Goods (1980)	582
APPENDIX III	
United Nations Convention on the Limitation Period in the International Sale of Goods	615
APPENDIX IV	
UNIDROIT Principles of International Commercial Contracts	623
APPENDIX V	
The Principles of European Contract Law (1998)	651
APPENDIX VI	
Common European Sales Law (Proposed, Not Adopted)	685
APPENDIX VII	
Contract Law of the People's Republic of China (Excerpts)	765
Index	789

Table of Contents

Preface to the First Edition	xxi
Preface to the Second Edition	xxiii
Preface to the Third Edition	xxv
Preface to the Fourth Edition	xxvii
List of Exhibits	xxix
CHAPTER 1	
Introduction to International Contracting	1
CHAPTER 2	
Principles of Contract Drafting	7
§2.01 A Note on International Negotiations	7
[A] Strategy of Pre-contractual Negotiations	8
[1] Negative Strategic Posturing	9
[2] Positive Strategic Posturing	9
[3] Collaborative Strategic Posturing	10
[4] Negotiating Contracts Internationally: Case of China	10
[5] Contracting in China: Role of Lawyers and Arbitration in China	12
§2.02 A Note on Contractual Formalities	13
§2.03 Invalidity and Illegality of Contracts and Contract Clauses	15
[A] Examples of Invalidity	15
[B] Contract Clauses Related to Invalidity	16
§2.04 Principles of International Contract Law	17
§2.05 The <i>Bernina</i> Case	19
§2.06 The Limitations of Language	21
[A] Multiple Language Contracts	23
[B] Language Provisions	23

Table of Contents

§2.07	Generic Contract: Checklist	24	
	[A] Structure of Generic Contract	27	
§2.08	Reasonable Person Theory of Contract Writing	34	
§2.09	Interpreting Contracts: Fabricating the Reasonable Person	35	
§2.10	Standard Form Contracts	40	
§2.11	How Do Lawyers Begin Drafting a Contract?	42	
§2.12	Model Forms	43	
§2.13	Selecting the Right Form	45	
	[A] Fifteen Tips for Selecting the Right Form	45	
	[B] A Note on Maxims of Legal Interpretation	46	
§2.14	Structure of Agreement	47	
§2.15	Creating a Contract Review Checklist	48	
§2.16	Outsourcing of Legal Work	52	
§2.17	Using Information Technology in Contract Drafting	53	
§2.18	The Problem with Metadata	53	
§2.19	Proactive Contracting	55	
§2.20	Contract Design	56	
§2.21	Transactional Lawyer's Role	58	
§2.22	Risk and Uncertainty	58	
§2.23	General References: Contract Drafting	61	
§2.24	Strategic Contracting: References	61	
§2.25	Government Procurement References	62	
CHAPTER 3			
Common International Contract Clauses			63
§3.01	Incorporation of Standard Terms	64	
	[A] European Union Directive	65	
	[B] German Law	65	
	[C] English Law	66	
	[D] French Law	66	
§3.02	Preamble	67	
§3.03	Definitions	67	
§3.04	Contract Price	68	
§3.05	Taxes Term	68	
§3.06	Delivery Term	70	
§3.07	Payment Term	71	
§3.08	Merger or Final Integration Clause	72	
	[A] Common Law's Statute of Frauds and Parol Evidence Rule	72	
	[B] Convention on Contracts for the International Sale of Goods (CISG)	73	
§3.09	Modification or Change Clause: Writing Requirement	74	
§3.10	Modification or Change Clause: Substance	74	
§3.11	Assignment	75	
	[A] Assignment versus Delegation	76	
	[B] Formal Validity Requirements	77	
	[C] Statutory Prohibitions on Assignability	78	

Table of Contents

	[D] Contractual Prohibitions on Assignability	78	
§3.12	Drafting Assignment Clauses	80	
	[A] Anti-assignment Clause	80	
	[B] Third-Party Beneficiaries and Rights	80	
	[C] Exemption Clauses for Third Parties	82	
§3.13	Choice of Law Clause	82	
§3.14	Judicial Abrogation of Choice of Law	83	
§3.15	Forum or Choice of Law: Excluding Conflict of Law Rules	85	
§3.16	Dispute Resolution Clauses	86	
§3.17	Arbitration and Mediation Clauses	88	
§3.18	Standard Arbitration Clauses	90	
§3.19	Conciliation and Mediation	93	
	[A] ICC Rules of Optional Conciliation	93	
	[B] EU Mediation Directive	94	
	[C] European Code for Mediators	95	
	[D] Custom-Drafted Arbitration Clauses	97	
§3.20	International Bar Association Guidelines for Drafting International Arbitration Clauses	101	
	[A] Another Example of a Dispute Resolution Clause	101	
§3.21	Legality of Arbitration and Forum Selection Clauses	103	
§3.22	Force Majeure Clause	105	
	[A] Another Example of Force Majeure	109	
§3.23	Just-in-Time Contracting	111	
§3.24	Force Majeure and Hardship Clauses	111	
§3.25	Handcuffs Clause	114	
§3.26	Termination Clause	115	
§3.27	Liquidated Damages Clause	116	
§3.28	Warranty Provision	118	
§3.29	Anti-corruption Clause	120	
§3.30	Operative Clauses in Sales Contracts	120	
CHAPTER 4			
The Documentary Transaction			125
§4.01	Key Points in Documentary Collections (Without Letter of Credit)	126	
	[A] Basics of Documentary Transaction	126	
	[B] When to Use Documentary Collections	127	
	[C] Typical Simplified D/C Transaction Flow	127	
	[D] Documents Against Payment Collection	127	
	[E] Documents Against Acceptance Collection	127	
§4.02	The Sales Contract and Documentary Transaction	128	
§4.03	List of Export Documents	129	
§4.04	Bills of Lading	132	
§4.05	Issues Pertaining to Bills of Lading	133	
§4.06	Air Waybill of Lading	137	
§4.07	Letters of Credit	138	

Table of Contents

[A] Confirmed Letter of Credit	140
[1] Illustrative Letter of Credit Transaction	140
[2] Special Letters of Credit	141
[3] Tips for Exporters	141
[4] International Chamber of Commerce and the UCP 600	146
§4.08 Dispute Resolution Clause	146
§4.09 Guarantees of Performance	146
[A] Standby Letters of Credit Rules	147
[B] Demand Guarantees	148
[C] Company Guarantee	149
[D] Bonds	149
[1] Bid Bond	149
[2] Performance Bond	149
§4.10 Export License	154
§4.11 Foreign Import Restrictions and Requirements	155
§4.12 Assessment of Import Duties	159
§4.13 Trade Liberalization	
 CHAPTER 5	
National Laws Affecting International Contracts	163
§5.01 Negotiating an International Contract	163
§5.02 Pre-contractual Liability	165
§5.03 Common Law	167
[A] Bad Faith Negotiations	168
[B] Misrepresentation and the Duty to Disclose	174
[C] Breach of Confidentiality	175
§5.04 Civil Law	177
§5.05 Pre-contractual Instruments and Informal Writings	179
[A] Common Law View	179
[1] Agreement to Agree	181
[2] Letters of Intent	182
[3] Preliminary Agreements: Agreement in Principle, Memorandum of Understanding, and Heads of Agreement	184
[4] Lock-Out Agreements	186
[5] Disclaimers of Liability	187
[B] Civil Law View of Pre-contractual Instruments	189
[1] Preliminary Agreement Lacking Intent to be Bound to a Contract	191
[2] Financial Comfort Letters	191
[C] Summary	192
§5.06 Convergence and Divergence of National Laws	192
§5.07 National Contract Codes and Restatements of Law	195
§5.08 Russian Civil Code	195
§5.09 Contract Law of the People's Republic of China	202

Table of Contents

§5.10 Chinese Contract Law: A Closer Look	205
§5.11 Contract Formation Rules: CCL and the CISG	205
[A] Formal Requirements	207
[B] Condition Precedent and Good Faith	208
[C] Offer and Acceptance Rules	208
[D] Agreement and Filling in Gaps of Content	214
[E] Incorporating Standard Terms	216
§5.12 Summary of Selected Provisions of the Contract Law of China	217
§5.13 Standard Terms or General Conditions: PECL and German BGB	221
§5.14 Principles of European Contract Law	221
§5.15 Standard Terms Mandated by Law	223
§5.16 German Standard Provisions Law	224
§5.17 Conflict of Law Rules	227
§5.18 Issue Specific Regulations: Marking and Standards	229
§5.19 European Union: Products Liability and Unfair Practices Directives	230
§5.20 Anti-bribery Laws	230
[A] Anti-bribery Contract Clause	231
 CHAPTER 6	
International Sales Contract	235
§6.01 The Export-Import Contract	235
§6.02 Model International Sales Contract	236
§6.03 Menu of Terms for an International Sales Contract	239
§6.04 Selecting a Trade Term	243
§6.05 INCOTERMS® 2010	245
[A] Outsourcing and the CIF Term	250
[B] Multimodal Transport	251
[C] Application of INCOTERMS	251
[1] Express Reference in Contract	251
[2] Indirect Reference in Contract	252
[3] INCOTERMS as Trade Usage	252
[4] Improper Combinations: INCOTERMS and Modes of Transport	252
[5] "Time of the Essence" under INCOTERMS	253
§6.06 General Conditions (Standard Terms)	253
[A] Purchase Order for Customized Goods	254
§6.07 Unfair Contract Terms	261
[A] Australian Unfair Contract Terms Law	262
§6.08 Securing Payment	263
§6.09 Product Liability	263
§6.10 Limitation Period	265
§6.11 UNIDROIT Principles of International Commercial Contracts	266
§6.12 Principles of European Contract Law	270
§6.13 EU Consumer Sales Directive and 2015 Consumer Rights Act	275

Table of Contents

§6.14	Common European Sales Law	278
§6.15	Countertrade	278
§6.16	UNCITRAL Countertrade Guide	283
 CHAPTER 7		
	International Sales Law: Convention on Contracts for the International Sale of Goods	285
§7.01	International Sales Law	285
§7.02	Choice of Law and Conflict of Laws	286
§7.03	Seller versus Buyer: ICC Case No. 5713 of 1989	286
§7.04	Choice of Law under the CISG	290
§7.05	Sale of Goods Defined	290
§7.06	The Parol Evidence Rule and the CISG	291
§7.07	Issues of Contract Law: CISG and UCC	295
§7.08	Mechanics of Formation	299
§7.09	General Conditions and Standard Terms	301
§7.10	Written Confirmation	303
§7.11	Firm Offer Rule	304
§7.12	Battle of Forms	304
§7.13	Contract Interpretation	308
§7.14	Importance of the <i>Frigalimint</i> Case	309
§7.15	Warranty Law	310
§7.16	Disclaimer of Warranty	312
§7.17	Warranty of Title: IPR	312
§7.18	Buyer's Duty to Inspect, Give Timely, and Proper Notice	314
§7.19	<i>Nachfrist</i> Notice	315
§7.20	<i>Nachfrist</i> Case Study	315
§7.21	Seller's Right to Cure	316
§7.22	Anticipatory Breach and Adequate Assurance	317
§7.23	Damages	317
§7.24	Contractual Excuses	319
§7.25	Excuse of Frustration	320
§7.26	Summary	321
§7.27	Opting Out of the CISG	324
§7.28	Consignment	324
§7.29	Consumer Sales and the Internet	325
 CHAPTER 8		
	General Principles of Service Contracting	329
§8.01	Sale of Services	329
§8.02	The Employment Relationship	330
§8.03	The Independent Contractor Contract	333
§8.04	Commercial Agency Contracts: The Foreign Sales Representative	333
§8.05	Consulting and Services Contracts	338
§8.06	Consulting Agreement	348

Table of Contents

§8.07	Consulting Agreement: Alternative Provisions	351
§8.08	Simple Consulting or Retainer Agreement	358
§8.09	Government Regulation of Agency Relationship	359
§8.10	More on EU Agency Law	360
§8.11	Best Practices	361
§8.12	Logistical Services	361
§8.13	Carriage of Goods Contracts	361
§8.14	Law of Freight Forwarding	363
§8.15	Risk Insurance	364
§8.16	Transit Insurance	366
§8.17	Liberalization of Trade in Services	368
§8.18	Internationalization of Accounting and Taxation	368
§8.19	Advertising Law	370
§8.20	Comparative Advertising	371
§8.21	Professional Standards of International Advertising	372
 CHAPTER 9		
	Agency and Distribution Agreements	375
§9.01	Differences between Commercial Agency and Distribution	375
	[A] Self-employed Intermediary as Independent Contractor	377
	[B] Continuing Authority	377
	[C] Negotiation and Conclusion of Contracts	377
	[D] Goods Versus Services	378
	[E] Express Exclusions	378
	[F] Registration of the Commercial Agent	379
§9.02	Foreign Competition Law	379
	[A] Price-Fixing and Tying Agreements	380
	[B] Non-competition Provisions	380
	[C] Territorial Restrictions and EU Block Exemptions	381
§9.03	New Trend in Distribution of Goods: "Just in Case"	382
§9.04	Commercial Agency	383
	[A] Commission Agency	384
	[B] Foreign Sales Representatives and Independent Contractor Status	385
	[C] Evergreen Statutes	388
§9.05	General Obligations and Duty of Good Faith	389
	[A] Contractual Obligations of Agents and Distributors	389
	[B] Good Faith in Commercial Agency Contracts	389
	[C] Good Faith in Distribution	390
	[D] Change in Volume and Types of Products	390
§9.06	Negotiation of a Commercial Agency Contract	391
§9.07	Negotiation of a Distribution Contract	393
	[A] Selecting a Distributor	393
	[B] Due Diligence	394
§9.08	The Distribution Agreement	396
	[A] Nature of Relationship	397

[B] Contract Clauses and Restrictions	397
[1] Standard Terms (General Conditions)	398
[2] Best Efforts Clause	398
[3] Products Liability and Warranties	399
[4] Intellectual Property Protection	399
[5] Territorial Restrictions	400
[6] Non Agency and No Partnership Clause	401
[7] Default Clause	401
[8] Confidentiality Clause	402
[9] Post-termination	402
[C] ICC Guide to Drafting International Distribution Agreements	403
§9.09 Other Examples of Contract Terms	408
[A] General Terms	408
[B] Grant Clause	409
[C] Terms of Sale	411
[D] Best Efforts Provisions	412
[E] Warranty and Limitation of Remedy	414
[F] Protection of Intellectual Property	415
[G] Default Provisions	418
[H] Choice of Law and Dispute Resolution	420
§9.10 Termination of Agency and Distribution Contracts	420
[A] Fixed and Indefinite Duration Contracts	421
[B] Termination for Breach	421
[C] Failure of Commercial Agent to Reach Sales Target	422
[D] Consequences of Termination	423
[1] Applicability to Distributors	423
[2] Calculation of Termination Payment	424
[E] Termination of Agency Contract: A Sampling of Laws	424
[F] Escape Clause	426
[G] Legal Grounds for Termination and Termination by Mutual Consent	426
[H] Symbiotic Relationship of Default and Termination Clauses	427
§9.11 Consulting Contracts	429
CHAPTER 10	431
Intellectual Property Licensing	431
§10.01 International Conventions	431
§10.02 National Intellectual Property Law	433
§10.03 Protecting Your Product from IPR Infringement	435
§10.04 Revision of Russian Intellectual Property Law	437
§10.05 Business Method and Software Patents	438
§10.06 Technology Licensing	439
§10.07 Licensing in Germany	440
§10.08 Extraterritorial Application of United States Law	442

§10.09 The Gray Market	442
§10.10 Foreign Transfer Restrictions	444
§10.11 European Union Regulations	444
§10.12 Regulations of the People's Republic of China	446
§10.13 Chinese Technology Contract Law	447
§10.14 Due Diligence	448
§10.15 Intellectual Property Agreement	450
[A] Important Contractual Provisions	451
[B] Grant and Grant-Back Clauses	452
[C] Other Common License Clauses	452
[D] Choice of Law Clause	454
§10.16 Generic Transfer Clauses	454
[A] Grant Restrictions	455
[B] Royalties and Accounting	455
[C] Best Efforts, Indemnification, and Product Liability	457
[D] Warranties, Disclaimer, and Limitation of Liability	458
[E] Confidentiality and IPR Protection	460
[F] Termination Clause	462
[G] Liquidated Damages, Choice of Law, Forum Selection, and Notice	463
[H] Ancillary Agreements	464
§10.17 Software Contracts	464
§10.18 Foreign Registration and Approval	466
CHAPTER 11	
Joint Ventures, Franchising, and Long-Term Contracts	467
§11.01 Due Diligence	468
§11.02 Defining Joint Venture	470
§11.03 Selecting the Organizational Entity	471
§11.04 Key Joint Venture Negotiation Issues	472
§11.05 Generic Joint Venture Provisions	475
[A] Formation of Joint Ventures	475
[B] Purpose and Scope	475
[C] Purchase Price	475
[D] Required Capital Contributions and Subsequent Funding	475
[E] Mutual Representations and Warranties	476
[F] Conditions to Closing	476
[G] Covenants	476
[H] Indemnification Provisions	476
[I] Termination	477
[J] Dispute Resolution	477
[K] Transfer of Joint Venture Interests	477
[L] Restrictive Covenants	477
[M] Miscellaneous Issues	478
§11.06 Ancillary Agreements and Documentation	478

§11.07 Strategic Contracts: Joint Ventures and Global Alliances	479
[A] Strategic Joint Venturing	480
[B] Exit Strategies for International Joint Ventures	481
[C] Associated Issues in Exiting or Dissolving of Joint Venture	483
§11.08 Foreign Government Regulation	484
[A] People's Republic of China	484
[B] People's Republic of China Commercial Joint Venture Laws	485
§11.09 Franchising	487
§11.10 United States Franchise Law and the Franchise Agreement	488
§11.11 International Franchising	492
§11.12 UNIDROIT Guide to International Master Franchising	494
§11.13 EU Franchise Regulations	495
§11.14 Franchise Law of China	496
§11.15 Long-Term Contracting	497
[A] Installment and Supply Contracts	498
[B] Sampling of Laws	499
[1] German Bürgerliches Gesetzbuch	499
[2] French Code Civil	499
[3] American Uniform Commercial Code	500
[4] Chinese Contract Law	501
[5] Summary of Law in Relation to Long-Term Contracts	501
[C] Early Termination	502
[D] Events of Default	503
[E] Boilerplate Clauses	503
[F] Arbitration and Mediation	503
[G] Escalation Clauses	504
[1] Indexing	505
[2] Gross Inequities and Market Reopener Clauses	505
[3] Price Adjustments and Hardship	506
[H] Inflation, Cost Changes, and Commodity Markets	506
[I] Output and Requirements Contracts	507
[J] Renegotiation Clause	508
[1] Triggering Events	509
[2] Understanding the Renegotiation Obligation	509
[3] Renegotiation and Force Majeure Clause	510
[K] Strategic Use of Recitals	511
[L] Defining Material and Minor Breaches	511
[M] Long-Term Just-in-Time Contracting	512
§11.16 Concession Agreement	512
 CHAPTER 12	
Confidentiality and Non-disclosure Agreements	513
§12.01 Introduction	513
§12.02 Unilateral Versus Reciprocal Non-disclosure Agreements	514

§12.03 Specification of Uses of Information and Parties Gaining Access	514
§12.04 Agreement to Share Information	516
§12.05 Consultant Confidentiality Agreement	517
§12.06 Confidentiality Agreements	518
[A] Confidentiality, Non-solicitation, and Non-circumvention	518
[B] Post-termination Confidentiality Obligations	519
§12.07 Covenants Not-to-Compete	520
[A] Drafting a Covenant Not-to-Compete under American Law	521
[B] Best Practices	522
[C] Inevitable Disclosure Doctrine	522
[D] Garden Leave Clause	523
 CHAPTER 13	
Post-contract: Continuing Rights and Obligations	525
§13.01 Introduction	525
§13.02 Sampling of Laws	527
§13.03 Warranties and Representations	530
§13.04 Warranty of Title	530
§13.05 Express Warranties of Quality	533
§13.06 Limitation of Liability	535
§13.07 Seller's Intellectual Property Rights	536
§13.08 Products Liability Claims	537
§13.09 Consignment of Goods	537
§13.10 Confidentiality Obligations	537
§13.11 Contractual Restrictions: IPR, Confidential Information, and Products Liability	540
§13.12 Competition Restrictions	545
[A] Territorial Restrictions	545
[B] Covenants Not-to-Compete	545
§13.13 Foreign Representation, Commercial Agency, and Distribution Contracts	548
§13.14 Other Clauses	553
 CHAPTER 14	
Electronic Contracting	557
§14.01 UNCITRAL's Convention on the Use of Electronic Communications in International Contracts	561
§14.02 EU Data Transfer Agreement	561
[A] Data Termination Clause	565
§14.03 National Contract Laws and E-Commerce	566
§14.04 E-Contracting and Standard Terms	568
§14.05 Electronic Data Interchange	569
§14.06 Electronic Commerce	570
§14.07 UNCITRAL Model Law on Electronic Commerce	573
[A] Model Law and Guide	573

Table of Contents

[B] Jurisdiction and Choice of Law	575
§14.08 United Nations Convention on the Use of Electronic Communications in International Contracts	576
[A] Purpose, Scope, and Definition of Electronic Communication	576
§14.09 Domain Names and Trademark Infringement	577
§14.10 Personal Jurisdiction	578
§14.11 The "Shrink-Wrap" Contract	579
§14.12 Electronic Documentation	581
§14.13 E-Commerce Ethics	581
§14.14 General References: Electronic Contracting	582
Appendices	583
APPENDIX I General Sources	585
APPENDIX II United Nations Convention on Contracts for the International Sale of Goods (1980)	589
APPENDIX III United Nations Convention on the Limitation Period in the International Sale of Goods	615
APPENDIX IV UNIDROIT Principles of International Commercial Contracts	623
APPENDIX V The Principles of European Contract Law (1998)	651
APPENDIX VI Common European Sales Law (Proposed, Not Adopted)	685
APPENDIX VII Contract Law of the People's Republic of China (Excerpts)	765
Index	789