



国际商会 (ICC) 出版物644号

国际商会中国国家委员会
(ICC CHINA) 组织翻译



国际商会

国际商业代理示范合同

THE ICC MODEL COMMERCIAL AGENCY CONTRACT

第二版



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前 言

国际商业代理是在国外组织货物销售时最简单也是最常用的方法,几乎每个出口企业在国外都有代理。因此,许多大大小小的出口商必须面对起草国际代理合同的问题。为了协助从事国际贸易的企业以及帮助他们起草及谈判合同的律师,国际商会(ICC)于1991年制定了国际商业代理示范合同。该示范合同不基于任何特定的国内法,而是以国际贸易中的惯例以及全世界通行的法律原则为管辖法律,增加了各方当事人对各自权利义务的认识的确定性和争议解决成本的可预见性。

当前版本为第二版,于2002年修订,反映了国际上有关代理的法律的最新发展。

国际商会(ICC)是一个世界性的商业组织,总部在巴黎。ICC通过其下设的十几个专业委员会和数十个工作组,制定许多国际商业领域的规则和惯例,如国际贸易术语、国际贸易结算规则等,为全世界广泛采用。ICC是联合国的重要对话伙伴,并与其他许多重要的国际组织,如世界贸易组织、欧盟、经合组织、西方七国集团等,保持着密切的关系,对这些组织在制订有关国际商业的政策时有着重要的影响。ICC为广大商界提供的实际服务如仲裁、临时进口单证系统、贸易信息网等,极大地便利了商界的国际经贸实务操作。

由于ICC在全球范围内代表各种行业的企业,其制定各种规则的过程都有来自全球各行业的会员企业参与,因此,其规则或示范合同等产品具有比较强的中立性,并不偏向买方或卖方、发达或不发达国家、大企业或中小企业。因此,使用ICC的示范合同,对于发展中国家的中小企业来说,可以增强自己的谈判实力,避免因考虑不周而留下条款漏洞隐患,为谈判对手所利用。

ICC制定的一系列示范合同,如《国际销售示范合同》、《唯一分销商示范合同》、《临时居间示范合同》、《国际特许示范合同》、《企业并购示范合同》、《交钥匙工程示范合同》等,为全世界广泛采用。本会将陆续翻译出版这些示范合同。请关注本会网站 www.icc-china.org, 获取最新信息。

李海峰

国际商会中国国家委员会执行主任

2004年2月13日

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INTRODUCTION

1. _____

A uniform model form for International trade

When negotiating agency agreements abroad, one of the main difficulties which parties engaged in international trade are faced with is the lack of **uniform rules** for agreements of this type. Since there is no internationally agreed uniform legislation on the subject (unlike for example in the case of the international sales contracts^①), parties must rely on national laws on agency which: (i) do not take into account the specific needs of international trade (since they have been enacted *in primis* for the domestic agreements, and (ii) substantially differ from one country to another.

An important step towards the **harmonization of national laws**, has been made within the European Union, in virtue of the EC Directive No. 86/653 of 18 December

① In particular the Vienna Convention on the international Sales of Goods of 1980 (CISG)

引言

1. --- 适合国际贸易的统一示范格式

在谈判国外代理协议时，从事国际贸易的商人面临的主要困难之一就是，这类协议缺乏统一的规则。由于在这个方面没有国际统一的立法（不像国际销售合同^①），当事人必须依赖于各国国内有关代理的法律，但是这些法律：（1）没有将国际贸易的特殊要求考虑在内（因为它们主要是为国内协议而立的）；（2）各个国家的法律差异巨大。

欧盟于 1986 年 12 月 18 日颁布了欧盟第 86/653

^① 具体而言，如 1980 年国际货物销售维也纳公约（CISG）。

1986^①, which has been implemented in all member states^②. However, the directive does not cover all aspects of the contract, and leaves the Member States free to choose, with regard to several matters, between alternative solutions; moreover, it leaves Member States free to maintain (or possibly adopt in the future) provisions which derogate the directive in favour of the agent. This means that even within the European Union there are still important differences between the national laws on commercial agency. And, if we consider the rest of the world the differences are much greater.

For the above reasons ICC believes that there is space for an **alternative solution**, consisting in the use of **uniform contractual rules**, not based on any specific national law, but incorporating the prevailing practice in international trade as well as the principles generally recognized by the domestic laws on agency.

In preparing this model form, the task force has tried to find fair and balanced solutions to the main problems arising from an agency relationship, in accordance with prevailing legislative standards (and in particular those indicated in the European directive). However, since it is impossible to make uniform rules and, at the same time, to respect every rule of the various national laws (which moreover may contradict each other), the model form may contain some clauses which are not in accordance with specific mandatory

① The text of the Directive is attached in Appendix 1.

② See Appendix 3 which indicates, *inter alia*, the laws having implemented the Directive.

号条例^①，向协调各国国内法律迈进了一大步。该条例已经在所有成员国中施行^②。但是，该条例没有覆盖合同的所有方面，在一些方面留给成员国在几个解决方案中选择的自由；此外，条例还留给成员国保留（或者将来可能通过）比条例更有利于代理人的规定的自由。这意味着即使在欧盟内部，有关商业代理的国内法之间仍然存在重大差异。如果我们考虑世界的其他地方，这种差异更加巨大。

鉴于以上原因，国际商会相信存在一个替代的解决方案，即使用统一的合同规则，不基于任何特定的国内法，而是吸收国际贸易中的主流惯例，以及那些有关代理的为国内法律普遍承认的原则。

在起草本示范合同的过程中，工作组根据主流的立法标准（尤其是那些在欧盟条例中反映的），试图寻找公正而平衡的方案来解决代理关系中出现的主要问题。然而，因为不可能在制定统一规则的同时照顾到不同国家法律的每项规范（这些规范可能互相冲突），示范文本也许包含一些与某些法律体系的强制性规定不一致的条款。然而，因为其符合国内代理法的基本原则，与各国国内有关公共秩序的规定（尤其是那些无论合同的准据法为何，都适用于该合同的国

① 条例文本参见附录 1。

② 参见附录 3 各国有关实施该条例的法律。

provisions of a particular legal system. However, since it is in line with the basic principles of domestic agency laws, the risk of conflict with national *ordre public* provisions (and in particular with domestic rules which would remain applicable whatever the law applicable to the contract) should be almost non-existent; in any event, in order to cover exceptional situations of this kind, it is expressly stated that, if a conflict with *ordre public* rules of the country of the agent arises, the latter provisions should in any case be considered, if their application appears reasonable in the context of international trade (Article 24.2.).

2. ---

The applicable law

This model contract has been based on the assumption that it will **not be governed by a specific national law**, but only by the provisions of the contract itself and the principles of law generally recognized in international trade as applicable to agency contract (also called "*lex mercatoria*"). The purpose of this solution is to ensure that the rules of this model form can be applied in a uniform way to principals and agents of different countries, without the interference of national laws, which may differ on a number of points of detail^①, without giving one party the advantage, and the other party the disadvantage, of applying one party's national law.

① However, in particular cases mandatory rules of the law of the agent's country may be held to be applicable by the courts of such country notwithstanding the choice to submit the contract exclusively to general principles.

内法规范)产生矛盾的风险几乎不存在;无论如何,为了涵盖此例外情况,本合同明确规定,如果与代理人所在国家的公共秩序规范相冲突,这些规范应该总是被考虑,如果在国际贸易这一背景下适用这些规范看来是合理的话(第 24.2 条)。

2. --- 适用的法律

此示范合同建立的基础是其不受特定的国家法管辖,而只受合同本身条款以及国际贸易中被普遍认可的适用于代理合同的法律原则(也称为“商人法”)管辖。这一安排旨在保证示范合同的规范能以统一的方式适用不同国家的委托人和代理人,而免受国内法律的干涉^①,因为国内法律在一些细节方面可能有所不同,如果适用一方当事人的国内法的话,可能对其一方有利,而对另一方不利。

^① 然而,在个别情况下,尽管本合同选择只适用一般法律原则,代理人国家的法院可能仍然决定适用代理人所在国的强制性法律规范。

Of course this solution, while avoiding the particularities of national laws, implies (at least for matters not expressly governed by the contract clauses) the recourse to less precise (and predictable) rules than those contained in the domestic laws on agency (although not all countries have detailed rules on commercial agency contracts).

The drafting group is of the opinion that this can be overcome by making a reference to the **UNIDROIT Principles of International Commercial Contracts**^①, which offer a reasonably foreseeable legal framework for most issues which may arise.

In fact, the UNIDROIT Principles offer adequate solutions to the majority of contractual problems of a more general nature (e.g. formation of contract, validity, performance, non-performance, damages, etc.). Only in some very exceptional cases the provisions of the UNIDROIT Principles may not actually reflect the expectations of international trade^②; however, when this happens the general principles of international trade and the trade usages will prevail over such particular provisions of the UNIDROIT Principles on the basis of Article 24.1.A., which puts the various sources incorporated by reference in the following hierarchical

① The text of the Unidroit Principles can be found in Appendix 2.

② This may be the case with respect to certain rules which protect the disadvantaged party to an extent which goes beyond the standards which are usual in the business to business relations; see for instance, Article 3.10. on gross disparity (particularly as concerns the end of the sentence in para 1(a), where reference is made to "the improvidence, ignorance, inexperience or lack of bargaining skill" of a party in order to justify contract avoidance) and the rules on hardship contained in Articles 6.2.1. - 6.2.3. (particularly with regard to the rule authorizing courts to modify the contract terms). Of course, parties may also expressly exclude the application of specific rules they consider inappropriate.