

21世纪高等院校国际经济与贸易专业精品教材

International Business Contracts Bilingual Course

EDITED BY YANGJING

本书内容充实、完整，对国际商务合同的结构进行较为精细的剖析和归纳，导入的案例贴近实际；附录中有 17 份操作性强、实效性高的国际商务合同。本书平衡了相关专业知识的理论性、实用性和语言上的可读性之间的矛盾，适合中国国情，达到专业知识传授和语言技能培养的统一，突出前沿性、新颖性、实用性，紧跟社会需求和时代发展，符合国际商务、国际贸易、商务英语等专业的人才培养目标。

国际商务合同 双语教程

杨静 主编

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Preface

前 言

当今中国正逐渐放开国内市场,以更稳健、自信的姿态走向国际市场,于是国际经济合作日趋密切,经济交往更加频繁。国际上的一切经济活动,如贸易、金融、投资、经济合作等都离不开相互制约的合同。因此,翻译、草拟、签订合同成为商务人士或相关从业人员必须具备的技能。深谙商务英语合同的翻译、草拟、签订之道的人,在业务实操中才能游刃有余,收获颇丰。为减少经济活动中的合同纠纷、普及对外贸易合同的基本知识,帮助合同当事人在经济活动中切实有效地保护自己的合法权益,我们几位在商务英语方面具有长期教学经验和实践经验的教师,在阅读大量原版教材的基础上,参考了国内外商务英语、商务基础理论和基本知识等各种应用性技能方面的教材,编写了这本双语教材。在编写过程中,我们努力解决相关专业知识的理论性、实用性和语言上的可读性之间的矛盾,使其适合中国国情,达到专业知识传授和语言技能培养的统一,突出前沿性、新颖性、实用性,紧跟社会需求和时代发展,符合国际商务、国际贸易、商务英语专业的人才培养目标。

全书内容充实、完整,其中包括对合同结构的较为精细的剖析和归纳,导入的案例贴近实际;附录中吸纳了主编从事国际商务合同谈判和制定的宝贵经验,添加了十多份操作性强、实效性高的国际商务合同,其中包括销售合同、代理合同、股权转让协议、雇佣合同和技术转让合同等。

编者在编写过程中得到了广西财经学院商务外国语学院刘艳萍教授等多位老师的帮助,也得到了经济与贸易学院的学生们的帮助。美国外教 Shawn Frazier 教授为该书英文校对做了大量工作。另外,编者在编写时参阅了多种国内外相关著作,在此表示衷心感谢!

由于编者水平和学识有限,书中难免出现差错、疏漏的地方,敬请读者不吝指正。

编 者

2016年7月

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Chapter 1

Basic Knowledge of International Business Contracts 国际商务合同的基础知识

Learning Objectives

◆ 重点掌握英语合同的用语、用词特点;掌握英语合同的句式特点;了解英语合同的基本概念、构成内容、分类。

Guide Case

Selling Water for China

1. Case Story

Overview: Acqua International (AQ) is a Europe-based multinational company that has interests in water and other environment-related businesses. In China, the company has joint ventures with medium-size and large municipalities to produce potable water. To increase its investments in China, the AQ Group arranged through its local subsidiary Pacific Acqua International (PAQ), to enter into a strategic alliance with Tak Foy Co., a Chinese conglomerate with strong roots in China in the service industry (mainly leisure-related). The ventures is called Haoyu China Limited (HCL).

2. The Scene

These negotiations concerned an urban water supply system providing potable water to around one million people. Through an agent in the province, the China subsidiary PAQ had secured a contract to construct a water treatment plant for the system.

Some time after the completion and commissioning of the plant, PAQ learned from the same agent that the municipality was short of funds for some urgent development projects. One of its options was to privatize the municipality's water supply facilities.

The sale value of the facilities was set by the municipality and bidders were sought from within its jurisdiction, there would be no recourse to the central government for approval. HCL,

located in the municipality, submitted a purchasing proposal to buy the facilities, to set up a joint ventures with the municipality's water company on a 3:1 ratio and to operate the facilities on a twenty five-year contract.

The unresolved issues when bids were called for were: Initial water charges. The only thing that had been agreed on up to this date was how much would be invested in the facilities and spent on improvements.

The demand for water: To make the business financially viable, a take-or-pay mechanism would have to be introduced and local wells would have to be closed.

The formula to calculate annual water tariff revisions. Devaluation of the Yuan would affect foreign exchange-based investment.

The new company's structure. Who would be the shareholders, board members, and those responsible for its day-to-day management?

3. Selling Negotiations Begin

At the request of the Chinese, a memorandum was signed by HCL and the municipality to record the issues still outstanding.

It was only then that PAQ—and through it HCL—was informed by the local PAQ agent (who was supposedly very close to high levels in the municipality) that other international competitors had also visited the municipality in connection with the same project.

After meeting high-ranking officials in the city, the PAQ team was advised to lower its starting price for water supply if it wished to remain the preferred partner.

In a bid not to lose the municipality's interest, PAQ organized visits to PAQ operations in other provinces for a group of municipal officials whose reaction was positive. Then believing it a good time to start negotiations, PAQ submitted a revised proposal, which it followed up by visits requesting discussion.

The mayor's office arranged a negotiating session to be attended by representatives of all the municipal departments concerned, at which PAQ and HCL were represented by four people: John King, Hans Christian, Cheng Peng Li, and Xu Jing.

For several weeks the unresolved issues and other matters were discussed, and every evening the municipality hosted a formal banquet, which lent ambiance to the talks. Cheng and Xu were the representatives on these social occasions, while King and Christian remained in the background.

4. Strategy Applied

PAQ did not begin negotiating using the water rates as the deciding factor in the belief that, were its ideas not well accepted, the entire project might be placed on hold. Instead, it picked secondary issues with no critical impact to give both parties some wins to balance the losses.

Discussions started with water demand...Next to be negotiated was the tariff adjustment formula...Due to PAQ's favorable reputation, agreements on the shareholding structure and management were reached without too much difficulty. Last came the water rate negotiations. PAQ

impressed on the municipality that, as an old friend, it was right for the project, being technically and financially sound with a good track record in China. PAQ's sincerity was demonstrated by the number of Chinese staffs on its team.

Agreement was reached in two weeks, with the mayor himself voicing his support. Wishing to give face to their lead negotiator and aware of Chinese sensitivity to pricing, PAQ then offered to reduce the starting water rate. In return, to give face to PAQ, the municipality offered preferential tax treatment over a five-year period.

资料来源: MARCH B. Chinese water selling negotiation [EB/OL]. [2016-07-02]. <http://www.negotiations.com/case/selling-water-china>.

思考题:

(1) 描述案例中提到的公司的基本情况, 如公司间的业务关系。

(2) 合同当事方是谁? 合同的关键条款是什么? 当进行上面所提到的合同谈判时, 难题是什么? 什么策略适合用于处理这些难题?

(3) 对于本案中的合同谈判, 欧洲方面通常会面临什么样的问题? 这些问题最终如何解决?

(4) 假设你代表中方与外商谈判, 哪些文化问题可能会影响你的谈判? 请给出一些合同谈判的技巧。

1.1 Basic Concept of Contracts

合同的基本概念

Contracts are so much a part of living in a society that nobody can calculate how many contracts are made every day. In the broadest sense, a contract is simply an agreement that defines a relationship between two or more parties. However, this notion is simply too broad to cover commercial matters which are different from everyday's life. So, to come down a little, a commercial contract, in simplest terms, is merely an agreement made by two or more parties for the purpose of transacting business.

Any contract may be oral or written. Written terms may be recorded in a simple memorandum, certificate, or receipt. Because a contractual relationship is made between two or more parties who have potentially adverse interests, the contract terms are usually supplemented and restricted by laws that serve to protect the parties and to define specific relationships between them in the event that provisions are indefinite, ambiguous, or even missing.

合同是社会生活的一部分, 没有人可以计算出每天有多少合同产生。广义上讲, 合同是一项定义了两个或两个以上当事人之间关系的协议。然而, 这个概念太宽泛, 不能覆盖所有有别于日常生活的商务事项。因此简单地说, 商业合同仅仅是一项由两个或两个以上当事人为了交易目的而缔制的协议。

商务合同可以是口头合同, 也可以是书面合同。书面条款可以用简单的备忘录、证书或收据来记载。由于合同关系是因两方或多方潜在的相对利益建立的, 因此为了保护当事人

和定义特定关系,合同条款如果是不确定的、模糊的甚至缺失的话,它们通常是通过法律来补充和限制的。

1.2 Main Features of International Business Contracts

国际商务合同的主要特征

Contracts referred to in this Law are agreements between equal natural persons, legal persons and other organizations for the purpose of establishing, altering and terminating mutual civil rights and obligations. According to this definition, we can understand the general legal characteristics of the contract.

1.Contract is a Legal Act

This refers to certain rights and obligations relations between the parties for a certain purpose, which are protected by the state coercive power. Any party, who fails to perform the contract or incompletely perform the contract, should bear legal responsibility.

2.Contract is a Legal Law Behavior

It is an agreement reached by both sides in accordance with the requirements of the legal norms, which result in legal consequence expected by the parties, and it is a legal behavior which can be recognized and protected by the country.

3.Contract is an Agreement between the Parties

It is not said that any agreement is a contract between the parties; it is only an agreement between the parties about the establishment, change or termination of civil rights and obligations relations.

4.Contract is Civil Juristic Act of the Parties on the Basis of Equality, Voluntariness

International business contract is of duality of law and English. The first attribute is a contract. As standard legal documents, international business contracts should meet the general requirements of form and content legality, which have the normative in structure, words, and elements etc. The second attribute of international business contracts is English, which belongs to a kind of practical English writing. Investigated its characteristics, as a highly professional practical writing, international business contracts need to meet firstly is requirements of formatting and specifications, fixed expressions, whose format should be fixed, sentence patterns and structure should be exquisite, wording should be accurate, and professional and has long, conservative, accurate and other characteristics.

合同是平等主体的自然人、法人、其他组织之间设立、变更、终止民事权利和义务关系的协议。根据这个定义,我们可以了解一般合同的法律特征。

1.合同是一种法律行为

这是指当事人之间为特定的目的而产生的一定的权利和义务关系,而且这种权利和义务关系受国家强制力的保护,任何一方不履行或不完全履行合同,都要承担法律责任。

2.合同是合法的法律行为

合同是双方当事人按照法律规范的要求达成的协议,产生双方所预期的法律后果。它

是一种合法行为,因而为国家所承认和保护。

3. 合同是双方或多方当事人之间的协议

这并不是讲当事人之间的任何协议都是合同,它只是当事人之间关于设立、变更、终止民事权利、义务关系的协议。

4. 合同是当事人在平等、自愿的基础上所进行的民事法律行为

国际商务合同具有法律和英语双重性。其第一属性是合同,作为制式法律文件,国际商务合同应满足形式和内容合法性的一般要求,具备结构、文字表达、要素等方面的规范性。国际商务合同的第二属性是英语,属于英语应用文的一种。究其特点,作为专业性极强的应用文,国际商务合同首先要满足的是格式化要求和规范、固定的用语表达。其格式固定,句式与结构考究,用词准确专业,具有冗长、保守、精确等特征。

1.3 Categories of International Business Contracts

国际商务合同的种类

At the very moment when an offer is accepted, the transaction is completed and a contractual relationship between the seller and buyer is concluded. However, according to international trade practice, the seller and buyer still have to sign a written contract or a confirmation, binding on both parties, to further define their rights and obligations respectively. In international trade, contracts vary in both names and forms. The names that often appear are contract, confirmation, agreement and memorandum. According to the different trade forms, the contract can be classified into different types as follows:

- (1) Contract of International Goods Sales, Sales Confirmation/Sales Contract, Purchase Confirmation/Contract for Purchase;
- (2) Agency Contract, Sole Agency Agreement, Sole Distributorship Agreement, Exclusive Sales Agreement;
- (3) Contract for Assembling, Agreement on Compensation Trade;
- (4) Finance Lease Agreement, Contract of Operating Lease, Contract for International Leasing Affairs;
- (5) Joint Venture Contract, Contractual Joint Venture Contract;
- (6) Labor Service Contract;
- (7) International Technical Consultancy Service Contract, Contract for Technology Transfer and Importation of Equipment and Materials, Technology Transfer and Technical Assistance Agreement;
- (8) International Loan Agreement;
- (9) Contract for Works of Civil Engineering Construction;
- (10) Outsourcing Agreement;
- (11) Service Agreement;
- (12) Venture Capital Management Agreement;
- (13) Share Transfer Agreement;

1. Balance of Power

The essence of a contract is the mutual understanding reached by two parties who hold adverse positions against each other. In most contractual situations, one party will have a stronger position than the other. For example, a large corporation that offers goods for sale may be able to insist on contract terms that are highly favorable to the corporation while restricting the rights of individual buyers. The corporation may offer a standard form sales contract with non-negotiable terms—take it or leave it—to the buyer.

2. The Party Who Drafts the Contract

The balance of power between contracting parties usually tips in favor of the party who drafts the written contract. Even if the essential contract terms have already been negotiated and agreed by both parties, the drafting party will typically include provisions that are more skewed to his or her favor. To illustrate, a seller who drafts a sales contract may provide trade terms by which the risk of loss passes to the buyer at the first possible moment of the transfer.

3. The Party Familiar with Written Contracts

In cross-border transactions, the balance of power may tip toward the party who is most familiar with written contracts and whose country has a more highly developed system of contract enforcement. This party may insist on terms that are common in his or her domestic contracts, and the other party, with less or no understanding of those terms, may simply acquiesce. As an example, clause that is commonly inserted into contracts in the United States is, "Time is of the essence". If such a clause is included, failure to perform the contract within the time allowed is considered a material breach of the contract, entitling the other party to claim damages or other remedies. In cultures that place more emphasis on continuing business relationships, this clause has little meaning because contract terms are commonly renegotiated to allow for a party's difficulties in performing the contract. The ongoing relationship is more important than the one-time deal.

4. Enforcement of One-Sided Contracts

In the context of enforcement, the balance of power can work against the stronger party in a contract negotiation. Courts and arbitrators often refuse to enforce terms that unreasonably burden one party or that are otherwise unconscionable. Furthermore, contract provisions are typically given a strict interpretation against the party who drafted the terms, since that party had the opportunity to draft a clear and definite contract.

Tip: Because of the problem with enforcement, parties to cross-border transactions should avoid taking unfair advantage. A contract that is in accord with fair business practices will encourage both parties to perform their obligations, and therefore the need for enforcement and the need to outlay the costs attendant to enforcement may be avoided.

5. Cross-Border Rights and Obligations

In any contractual arrangement, it is important to establish clearly the rights and obligations of each party. If these terms are absent or ambiguous, the parties will probably not be able to perform the contract without first modifying the terms. Moreover, enforcement will be

unpredictable, because a court will have to imply terms based on what the court believes would have been the intent of the parties.

6. Differences in Business Practices

For contracts made between parties within the same country, missing or indefinite terms may be filled in by local laws or practices. The rationale is that the parties likely intended to follow the local laws and practices with which they were familiar.

If the parties are from different countries, their intentions cannot be so easily implied because they herald from different legal systems and no doubt utilize dissimilar business practices. For this reason, it is essential for your international contract to spell out in definite terms the rights and obligations of each party.

7. International Laws

In recognition of the difficulties that parties face in contracting across country boundaries, the international community has begun to adopt systems of laws and rules to be applied instead of local laws in transactions between parties located in different countries. The intent behind adopting uniform, international laws is to ensure that all parties to a cross-border transaction are subject to the same set of rules, regardless of whether the laws of their home countries are dissimilar. If parties to an international sales contract are nationals of countries that have acceded to an international treaty or pact, such as the United Nations Convention on the International Sale of Goods (CISG), they may rely on international law to determine at least some of their rights and obligations.

In general, it is unwise to rely on the law, even international law, for implied contractual terms. The application of international laws to the interpretation of a contract can lead to unexpected and even unfavorable results. Thus, if an international contract of sale fails to provide a delivery time and the buyer sues for breach when the seller fails to deliver within one month, the contract may be deemed invalid under the local law of the buyer's country because of the absence of an essential term. But if a court applies international law, it may imply a reasonable delivery time of two months in accordance with the practice of the industry and therefore may enforce the contract.

8. Preciseness and Predictability

To avoid an unfavorable and uncertain result, it is best to define your rights and obligations in a written contract when you are dealing across country borders. Hopefully your contract terms will be sufficiently explicit that both parties will understand what they are supposed to do and what they are entitled to receive. In the event of a breach, there is a greater chance that a court will enforce explicit terms (unless the provisions are unconscionable), and thus the parties can more closely predict the outcome.

9. Cross-Cultural Expectations

Well-drafted contracts can help to ensure that parties who have diverse cultural backgrounds reach a mutual understanding with regard to their rights and obligations. All contracting parties come to the table with individual expectations, which in turn tint their understanding of the terms.