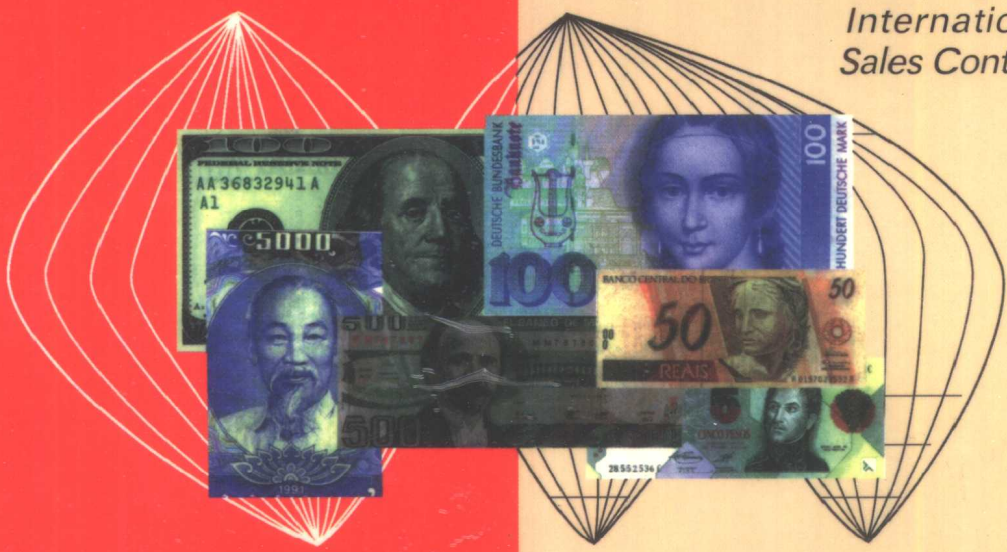
A SHORT COURSE IN

# INTERNATIONAL CONTRACTS

# 国际商务简明教程系列——国际商务合同

*Drafting the International Sales Contract*



THE SHORT COURSE IN INTERNATIONAL TRADE SERIES

KARLA C. SHIPPEY, J.D.



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# 出 版 前 言

当今世界经济全球一体化发展异常迅速。对许多国家而言，跨国商务在经济活动中的地位日益突出，了解国际市场并把握商机由此也显得极为迫切。

由上海外语教育出版社从美国世界贸易出版社引进出版的国际商务简明教程系列正合当前急需。本系列丛书的编写宗旨是：以全球性的眼光关注世界经贸活动，向全世界读者提供国际商务活动的理论、操作方法和案例。本丛书共有十三种，每种就一个主题进行深入浅出的讲解，介绍跨国商务的理论、实践与方法。丛书语言简明易懂，内容新颖实用，紧扣时代脉搏，并配有大量生动翔实的操作实例，能直接对实际商务操作起指导作用，是目前国内不可多得的原版商务教程。

国际商务合同一书是为了帮助读者了解国际商业交易中的商务协议而编写的。尽管起草国际商务合同会面临起草国内商务合同所面临的同样问题——商品的质量、政府的规章制度、知识产权的保护以及纠纷的解决等等，但商务合同的国际性所带来的一些因素，如合同双方遥远的距离、不同的文化背景和法律制度等将会给合同的磋商、起草和实施增加一层复杂性。起草一份令交易双方都满意的国际商务合同并不是一件容易的事。

本书介绍了国际商业交易合同、贸易术语、基本的合同条款、合同条款分析以及如何使用较清晰的文字起草合同等一系列读者感兴趣的问题。书中还提供了10份合同样本和1份法律术语词汇表。本书是法律界人士、国际贸易从业人员和外贸专业学生的必备参考书。

A SHORT COURSE IN

# *International Contracts*

**Drafting the international sales contract—for attorneys and non-attorneys**

Karla C. Shippey, J.D.

WORLD TRADE PRESS®

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**A Short Course in International Contracts**

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# INTRODUCTION

A SHORT COURSE IN INTERNATIONAL CONTRACTS is intended to give you an understanding of commercial agreements between parties trading across country borders. For the most part, you will face the same issues in negotiating domestic contracts as you will when you make agreements with traders in other countries. For example, parties to any commercial contract, whether domestic or international, must consider quality control, compliance with government regulations, protection of intellectual property rights, and dispute resolution. The international aspect of the contract adds a level of complexity to negotiations, performance, and enforcement because the parties are distant, have diverse cultural backgrounds, and are subject to the laws of different countries.

## THE LAWYER'S POINT OF VIEW

International contracts must be understood within the context of the legal profession. If you should be so unlucky as to be in a crowd of practitioners of the legal profession, there are two words that you will hear spoken over and over again. Without a doubt, it is those two words that have led to the development of the complex language known to the general public as "legalese." No matter what the culture, regardless of the country, legal professionals from around the world live by this two-word creed. Ask them a question, and their eyes will take on a thoughtful gaze, their brow will furrow intently, and they will declare, "It depends" (or the equivalent in their own tongue).

Legal practitioners are trained to consider all options, and therefore they strive to state explicitly every possibility, leaving no room for argument or doubt. For example, if a sales contract requires a buyer to inform a seller that the goods being purchased must meet certain specifications, a question may arise as to the meaning of the word "inform." An attorney for the buyer might say, "it depends." In this case, the seller should have known that the buyer had particular specifications because the seller previously filled five orders for the buyer for the same goods. Then an attorney for the seller might say, "it depends." In this case, the buyer should have given written instructions because the buyer wrote the specifications on the previous five order forms. Thus, the attorneys might turn the simple phrase "the buyer must inform the seller of any particular specifications for the goods" into legalese: "the buyer, regardless of whether he or she has previously ordered any of the seller's goods to conform with any specifications whatsoever, shall inform, whether in writing, orally, or otherwise, the seller of any and all specifications with which the buyer demands conformance of the goods that are the subject of this contract."

## SIMPLE VS. COMPLEX CROSS-BORDER TRANSACTIONS

The author of this book has made every effort to avoid "legalese" and to recognize the extent to which different customs and laws will affect the creation, interpretation, and enforcement of cross-border contracts. To this end, the author has provided examples throughout the text to illustrate the effects of various regional business practices, a special section to explain how contracts are viewed

in different legal systems, and a glossary to define the technical legal meaning of common legal terms.

Nevertheless, you are forewarned that the author starts from a biased platform: she is a lawyer, and an American one at that. For this reason, the author must admit to a strong belief in the "contract-happy" American tradition that every commercial relationship is best defined in a written contract because, while the contracting parties offer each other mutual benefits, they also have at least potentially adverse interests in securing the best deal. Written contracts take on added significance when parties from different cultures and countries have different expectations and customs and are subject to contrary laws. Increasingly, parties who are trading internationally have begun to recognize the advantages of entering into written contracts. There is a distinct trend among parties to cross-border transactions to operate on something more than a handshake.

In answer to the question of how simple an international commercial contract may be, the author is compelled to answer in the tradition of her chosen profession, "it depends." On the one hand, any contract can be written in plain terms. On the other hand, the complexity of the relationship, rights, and obligations of the parties should be reflected in the length and intricacy of the contract provisions. When parties first meet and agree, they usually prefer not to think of what might go wrong and a simple contract is enticing. But if something does go wrong, parties who have fully set out their rights and obligations will be prepared for, if not protected against, the failure to complete the contract terms. While the author has presented "plain term" contract provisions, she has also included cautionary notes to alert you to the potential pitfalls in an effort to develop your awareness of whether a contract term states your intent. You should keep in mind that, while contract provisions should be as clear and definite as possible, when it becomes necessary to interpret the meaning of a contract provision—well, yes once again—*it depends* on the interpreter.

## SAMPLE CONTRACTS

Finally, a few comments must be made about the sample contracts included in this book. You may find these forms quite useful in your own transactions. However, you will most certainly need to change the provisions to fit your own special situation. The author has dealt with the common issues and has tried to bring to your attention the problems that frequently arise because of imprecise or missing contract terms. Always be careful that your contract covers the rights and risks of your particular transaction, and seek the assistance of a lawyer to draft or review the contract in light of your specific circumstances. If you decide to use any of the forms, you should be certain to note the conventions used to indicate alternative phrasing in the forms. The conventions are not part of the forms. Alternative phrasing is shown in brackets, and inside the brackets, by parentheses. The brackets contain both instructions (in italics) and actual text (in roman). A slash between words that are enclosed in brackets indicates that you must select one of the words, again, depending on your specific situation.

Karla C. Shippey, J.D.
Orange, California 1998

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CHAPTER 1

# The Role of Contracts in International Commerce

CONTRACTS ARE SO MUCH a part of living in a society that you are probably unaware of how many contracts you make every day. In the broadest sense, a *contract* is simply an agreement that defines a relationship between one or more parties. Two people exchanging wedding vows enter into a contract of marriage; a person who has a child contracts to nurture and support that child; shoppers selecting food in a market contract to purchase the goods for a stated amount. 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.

When one party enters into a commercial contract with an unfamiliar and distant party across a country border, a contract takes on added significance. The creation of an international contract is a more complex process than the formation of a contract between parties from the same country and culture. In a cross-border transaction, the parties usually do not meet face-to-face, they have different societal values and practices, and the laws to which they are subject are imposed by different governments with distinct legal systems. These factors can easily lead to misunderstandings, and therefore the contracting parties should define their mutual understanding in contractual, and preferably written, terms. The role of a contract in an international commercial transaction is of particular importance with respect to the following aspects.

## 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 nonnegotiable terms—take it or leave it—to the buyer.

### 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.

### 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, a 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.

### 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.

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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.

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## 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.

### 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.

### 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.

### 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.

## 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. What is reasonable to one may not be to the other, in which case mutual understanding—an essential element in the creation of an enforceable contract—is lacking.

The key is in the drafting of the agreement. You should write the provisions to reflect the culture of the foreign party, while at the same time keeping in mind your own requirements. Such drafting requires that you have an understanding of the other party's culture and the extent to which it differs from your own. Your

contract provisions may need to be simplified so that they can be clearly understood, particularly if the contract will have to be translated into the other party's own language. You should review the provisions for shorthand phrases, legalese, and slang familiar to you but not to the other party—these provisions should be written in plain terms to ensure mutual understanding.

Further, you will need to determine the extent to which the other party is familiar with international business. If the other party has been trading internationally for some time, he or she is more likely to have gained an understanding of cross-cultural transactions. During your negotiations, you should explore the business history of the other party so that you can draft your contract to the appropriate level of sophistication.

A contract that reflects the cultural expectations of each party is more likely to be performed to the satisfaction of both. Mutual understanding means not only that each party knows its rights and obligations before signing the contract, but that the parties are in complete agreement as to each other's rights and obligations. Disputes typically arise when one party interprets a right or obligation differently than the other party. A contract drafted to ensure mutual understanding of culturally diverse parties will help to avoid, or at least to settle, subsequent disagreements over performance.

10 TIPS TO CULTURAL SUCCESS

Follow your host's lead

Practice fundamental politeness and business courtesies

Listen attentively and with interest

Keep hand motions and body movement to a minimum

Speak firmly, with conviction, and in a warm tone that invites the other party's comments; avoid boisterous talk and slang

Personally sign all correspondence

Respond promptly to inquiries and orders

Ask what language is spoken and arrange for a translator if necessary

Avoid generalities and preconceived expectations

Laugh at yourself, and be serious when it counts

See *A Short Course in International Business Culture*, also by World Trade Press.

## Personal Commitment

When dealing with a distant party in another country, you may be uncertain of the extent to which that party is making a commitment to perform the contract. While you are no doubt serious about the bargain, you have no evidence as to whether the other party has equal resolve. Does timely delivery of your order have

the same importance to the other party as it does to you? Is the other party committed to producing quality products that meet or even exceed your expectations? Trust is built on the personal commitment that each party demonstrates to the transaction, and therefore this aspect of any transaction whether domestic or international is especially significant.

Gaining evidence of commitment in cross-border transactions, in which parties usually operate by different business practices, can be more difficult than in domestic transactions, in which parties typically share the same business practices. A party who orally agrees to become obligated has made a commitment to the other party, but the terms of that commitment depend exclusively on the word of one party against the other. In many cultures, bargains are struck only when the parties meet personally; a handshake seals the promise. Other cultures insist on the signing of written informal or formal contracts before a final commitment is made.

In transacting business with a person of another culture, you should keep in mind the way in which they are likely to show their commitment. You will need to decide in advance of negotiating the bargain whether to accept the other party's evidence of commitment, insist on your own, or reach a compromise. If you meet the other party personally, shake hands, and gain that parties respect and trust, you may decide that an oral agreement is sufficient to express commitment to the transaction.

If you do not feel comfortable with an oral arrangement, consider the other party's culture before you act. The other party may be from a culture where contracts are usually in writing, and thus without much fuss, you may simply mention that you will put the contract in writing and send it for signing. On the other hand, the other party's common practice may be to operate on a handshake, and that party may be insulted if you insist on a written contract. In that event, you may have to find an indirect approach. For example, you might tactfully explain the custom of your country, and ask the custom of your host's country. Then, if your host seems open to the idea, you might suggest an informal letter or memorandum as a compromise. If not, you may take or leave the handshake bargain, depending on whether you want the business and whether you can afford the risk.

If you have previously done business with the other party, you might well be willing to accept a handshake to seal the bargain, but such practice should be the exception not the rule. When dealing internationally, it is always best to insist on written evidence of personal commitment, even if you simply exchange a memorandum. In relative terms, there is more cost—in time and money—involved in cross-border transactions than in domestic ones. When you agree to sell or buy goods internationally, you are also responsible for complying with import, export, customs, consumer product, marking, transport, and other trade-regulating laws of two or more countries. It is wise to ensure that the other party shares the same commitment.

## Governing Law

When trading internationally, parties frequently assume that they can operate in accordance with their own domestic laws and practices. This assumption is erroneous and can lead to grave misunderstandings. When you trade across country borders, you are subject to not only the laws of your own country but to the laws of other countries where you do business. You need not physically enter

another country to become subject to its laws—merely selling goods by mail or electronic means may establish a sufficient connection to bring you within the jurisdiction of another country's courts.

To a certain extent, you may control the application of a country's laws to your particular transaction by expressly setting forth the law that will govern the contract. However, parties do not have complete freedom of contract in choosing the governing law. Most countries have laws that mandate domestic jurisdiction over particular types of contractual arrangements, such as those involving land transactions.

Even in the absence of a statute, the determination as to which law will be applied is nearly always left to the discretion of the court, which may or may not respect the choice you have made. In practice, courts tend to uphold the expressed intent of the parties provided it is not contrary to statute. An express provision on governing law therefore has a significant effect on which laws will be employed to interpret contractual rights and obligations in international transactions.

## Enforcement

As you move from a domestic to an international setting, enforcement issues increase in complexity. Local laws and practices will usually determine the evidence required to prove contract terms. An oral contract may be sufficient in one country, while another may require a written and even notarized agreement.

TIP You should always try to secure the best possible proof of your agreement—which is a precisely drafted, written contract—in the event that enforcement becomes necessary. Remember, even if you avoid a court action, you will have more power in negotiating amended terms if you have clear and definite proof of your agreement.

Most jurisdictions require certain contracts to be written to be enforceable. Typically, contracts for the sale of goods with a total value exceeding the amount specified by law must be in writing to be enforceable. Contracts for the sale or lease of real property may have to be written to be enforced. Although parties may make such contracts orally and may voluntarily agree to perform the terms to completion, their contractual rights will not be involuntarily enforced if a dispute should arise.

## Choice of Remedies

Most contracting parties expect that all will go smoothly and that both parties will mutually benefit from the transaction. These positive expectations are more likely to be realized if you have provided for contingencies. Even in the simplest of transactions, you must think about the possible problems that may develop later.

TIP: The first rule of a successful international business transaction is also the last: decide how to resolve disputes before they happen.

The best time to decide how to handle a conflict is at the time the contract is made when both parties are feeling positive toward the bargain. The contract should include provisions as to which remedies a party may seek in the unlikely event that the other party fails to perform the requisite obligations. If you are

unable to reach an agreement on the choice of remedies when drafting the contract, you are even less likely to do so after a problem arises. By selecting a mutually acceptable remedy in the beginning, both parties will know what to expect should performance fail.

## Necessary Terms

In most countries, parties to commercial transactions may make their own bargains free of legal restraints. However, in most jurisdictions, the courts will enforce a contract only if the parties have agreed to four basic terms:

1. The description of the goods in terms of type, quantity, and quality
2. The time of delivery
3. The price
4. The time and means of payment

These terms are considered essential because they cannot be easily implied by law—they are the necessary parameters to the contractual relationship. Every international contract should provide for these terms.

### INTERNATIONAL TRENDS

As a brief aside, a current trend in the law of several nations—and eventually, no doubt, in international law among nations—is to recognize contracts that are the basis of commercial transactions even if they fail to provide the essential terms. If a dispute arises and any of the essential terms are missing or ambiguous, the intent of the parties may be implied from customary trade or financial practices. The bottom line is that judges, arbitrators, rule makers, and law makers prefer to uphold a bargain made by business folks—who are presumed to know what they are doing. In comparison, private individuals and consumers are given more protection against bad bargains that do not cover all of the essential agreement terms because there is a presumption that they are at the mercy of the business folks. In any event, it is best not to rely on trends or implied contract terms. You should always state your intent in clear and definite written terms.

### PAYMENT AND DELIVERY TERMS

Two of the essential terms take on further significance in international contracts: the payment terms and the delivery terms. In international transactions, it is essential to establish the payment terms. It may be assumed in a domestic transaction that the traders intend to exchange goods for domestic currency. When dealing cross-border, there will probably be a choice of currencies. You may also be subject to foreign exchange restrictions on the currency. Payment terms should be clearly defined to ensure that the contract will be enforceable.

In an international contract, a clear definition of the transport and delivery term is also essential. This term can have different meanings in domestic as opposed to international contracts. If each party interprets this provision differently, a breach of the contract is quite likely, and there is a greater risk of incurring a loss on the sale. Mutual agreement on the meaning of the transport and delivery term is extremely important.

CHAPTER 2

# Issues Affecting International Contracts

## Cultural Issues

Your success in foreign trade will depend on how flexible you are in recognizing and respecting the culture of other people. Cultural differences will affect not only your negotiations with foreign traders, but also the acceptance of your goods or services in foreign markets. In a business context, culture is a set of rules that govern the way in which commercial transactions are conducted between nationals of particular nations. These rules dictate the etiquette, traditions, values, communication, and negotiating styles of a group of people. You must be aware and sensitive to other cultures, and you must adapt your products and services to the preferences of the foreign market.

Culture should be considered as applying to people, not to nations. Although it may be possible to identify an overall culture for a particular country, many subcultures are likely to exist. Even if you have identified a foreign trader's country and have learned the rules that you think will apply, you should avoid clinging to preconceived notions. In today's world, people are on the move, and even more importantly, cultures are crossing country borders and cultural rules are constantly evolving.

Cultural awareness will be most important in the initial contact and negotiation, since in subsequent contacts you will have figured out many of the rules. In making initial contact, you should first establish whether the general protocol in the country tends to be rigidly applied. The next step is to determine what that protocol is, especially for the issues that will arise at the first stage of contract negotiations. These issues include greetings, courtesies, business ethics, decision making, gender, meeting formalities, and business attire.

The final step should be to ensure that you are approaching cultural issues with the proper attitude. Once you have researched the rules, learned what you believe is the proper protocol, and made an attempt to practice it, be willing to laugh at yourself. Cultural missteps are inevitable and will be made on both sides. Humor will usually ease even the tensest situation. Pull out your cultural pocket guide, show the rules and illustrations to your host, and have a good laugh together.

## Trends Toward Globalization and Uniformity

Doing business with the world is the theme for the decade. The 1990s has seen a multitude of trade agreements spring up between nations all around the world. The Uruguay Round of the General Agreement on Tariffs and Trade (GATT), signed by 117 nations in 1993, went into effect in 1995. Regional agreements encouraging trade have included the North American Free Trade Agreement (NAFTA) of 1993 and the United States Andean Trade Preference Act (ATPA) of