

A Series of New Century International Business
新世纪国际商务丛书

Elements of International Trade Practice

国际商贸合同精要

TU Dingwu 涂定武 编著

浙江大學出版社

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A Series of New Century International Business

新世纪国际商务丛书

Series Compiler: WENG Fengxiang 丛书主编: 翁凤翔

Elements of International Business Contracts

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About the Series Compiler

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Mr. WENG Fengxiang is a Guest Professor of the Business School of University of Central England, Birmingham, and of International College Britain, Edinburgh, and an associate professor of Shanghai Maritime University. He is author of 10 books of international business and of a number of theses which include:

Mastering Cambridge Business English. Fudan University Press, 1996

International Business English Translation. Zhejiang University Press, 2002

A Dictionary of Commonly-Used Words in International Business English with Both English and Chinese Definitions and Examples of Usage. Hunan Literature and Art Publishing House, 1998

Detailed Interpretation of International Business Graphs and Tables. Zhejiang University Press, 2002

Cambridge Business English Vocabulary and International Business English Synonyms. Shanghai Jiaotong University Press, 2003

Functional Equivalence and Translation of Maritime Rules and Regulations. *Shanghai Journal of Translators for Science and Technology*, Issue No. 5, 1996

Having been engaged in teaching and making researches on international business/business English for a long time, Prof. WENG Fengxiang is a consultant of some influential companies and a supervisor of postgraduate. Once working for companies, Prof. WENG Fengxiang has much experience in international business practice, especially in international trade. He worked as a visiting professor in the Business School of University of Central England, Birmingham for one year and is the academic team leader of his discipline in the university. During his stay in the United Kingdom, Prof. WENG Fengxiang finished PhD courses and worked as a supervisor of MBA and MSc. Prof. WENG Fengxiang holds a Master degree in international business translation. The Courses which he teaches include: International Business, International Trade, MBA Business English, etc.

Preface

Opportunities for careers in International Business have increased tremendously especially since China joined the World Trade Organization. As a result, the need for current knowledge about international business practices and terminology is crucial. Although there are many reference books available, some are published abroad and therefore can be very difficult to understand, while those published in China lack the necessary English international business terminology and expressions. *A Series of International Business*, edited by Professor Weng Fengxiang, solves these problems. The Series consists of four books written in simple English, but it also includes explanations of the more difficult points written in Chinese. Readers are sure to benefit from his explanations of English international business expressions. Professor Weng makes a great contribution to the teaching and learning of international business.

Professor Weng Fengxiang, having worked as a consultant for international companies, is very experienced in current international business practice. Currently, he is an Associate Professor of International Business at Shanghai Maritime University. As well as teaching International Business English, Professor Weng also teaches International Trade and International Payments. As a leading expert in his discipline, Professor Weng is among the supervisors of International Business Translation postgraduates. Having conducted academic research in the UK, he has been invited to be a Guest Professor at the Business School of University of Central England, Birmingham.

Professor Weng is the author of a number of books on International Business English. Changes in international business happen quickly, and keeping up with international issues and their impact on international business can be difficult. The Series addresses both the instructors' and the students' needs for current information. I highly recommend The Series to the International Business and Business English learners.

Han Zhonghua (韩忠华)

Professor of English & Translation
Shanghai Maritime University

January 28, 2004

Introduction

This book consists of theory and practice of international business contracts, model texts of international business contracts, and relevant international convention.

The part of theory and practice of international business contracts is divided into nine chapters. Each chapter is with a summary in Chinese. The author interpreted the theory and practice of drafting international business contracts pursuant to the stipulations provided in relevant law and international conventions, which can make readers have an overview of negotiation and clause-drafting of international business contracts.

The part of model texts of international business contracts presents sample international business contracts, some of which were drafted by the author, in providing professional legal services, together with foreign attorneys-at-law. The purpose of this part is to provide readers with model texts of international business contract, which could be references in drafting international business contracts.

The part of relevant international convention provides the General Rules for International Factoring, newly promulgated by Factors Chain International (FCI), which is included herein by availing of the advantage that the author is a member of the Association of Legal Research of FCI, to furnish corporations and/or enterprises willing to explore the business of international factoring with the present prevailing international convention.

TU Dingwu (涂定武)

February 28, 2004

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Chapter 1

Chapter 1 Negotiating & Concluding International Business Contracts

第一章 国际商贸合同的洽谈和订立



The Objectives of This Chapter 本章目的

1. To understand the negotiating styles applied in international business negotiations. 了解国际商贸洽谈方式。
2. To understand the procedures of concluding international business contracts. 了解订立国际商贸合同的程序。
3. To understand the special regulations in connection with the establishment of international E-commerce contracts. 了解订立国际电子商贸合同的特别规定。
4. To get to know the legal elements of business contracts. 了解商贸合同应具备的法律要素。

1.1 Negotiating International Business Contracts

Negotiating international business contracts involves style, procedure and substance. As substantial interest of the parties to contracts is concerned, it is always time-consuming for an international business contract to be finally settled and signed.

1.1.1 Negotiating Style

Negotiating styles differ from person to person and culture to culture. Traditionally, styles applied in international business negotiations are the Adversarial-standoff Style and the Consensus Building Style. Nowadays, the Getting-to-yes Style established by Harvard Negotiation Project is getting more and more popular as it is helpful for parties concerned to arrive at the same point.

1.1.1.1 Adversarial-standoff Style

The Adversarial-standoff Style emphasizes upon pressing the maximum advantage over the opponent. As the bad will engendered by this style may affect improperly the opponent's judgment, in some cases killing the deal, it is always

counterproductive. Nowadays, this style is seldom used in international business negotiation.

1.1.1.2 Consensus Building Style

The Consensus Building Style requires that negotiators shall rapidly find some kernels of contract and expand upon those kernels to build a momentum for a contract. Such momentum may overcome differences among the parties. In addition, the style demands that the parties to the contract research, in advance, their opponent's goals, cultural limits, and political, legal and business milieu to determine a strategy for concluding a contract.

1.1.1.3 Getting-to-yes Style

The Getting-to-yes Style suggests a party endeavoring to find a scheme from which all parties concerned can benefit. When there is a contradiction amongst the interests of parties, the principle of justice shall be applied to solve the dispute. The style emphasizes upon value, so the atmosphere of negotiating is amicable, which enables a party to gain his ends in the good graces of his opponent. Presently, the style is most popularly applied in international negotiations.

1.1.2 Negotiating Teams

To decide upon the persons who are necessary members to take part in the negotiation, the party shall understand, in advance, the minimum consideration that the negotiating opposite really must have.

Generally, a negotiating team may consist of three people. A team too large can be intimidating while a team too small can be insulting. Of the three members, one shall be with enough status or importance to have the final saying. All the members shall be of background knowledge relating to the objective of such negotiation.

It is essential that a negotiating team shall have a good command of the cultural background of negotiating opposites. Understanding and appreciating the opponent's cultural background is propitious to decreasing misunderstandings and increasing the chances to conclude contracts.

To have initiative in international business negotiations, the parties shall inquire of, in advance, the business status, credit, and reputation of the opponent in the field. If the opponent has ever involved in misdeeds in international business transactions, such opponent shall be treated cautiously, and the party shall neither

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make concessions to the opponent's aggressive demands nor devilishly trust the extra favorable conditions promised by the opponent for a transaction.



1.1.3 Negotiating Procedures

Prior to an international business negotiation, negotiators shall select a place preferable for conducting the negotiation. If the negotiation is conducted in procedures facilitating building of personal relationships, prospects for a successful negotiation will increase. In negotiation, courtesy may keep a consensus momentum going.

1.2 Procedures of Concluding International Business Contracts

Under the CISG, the Contract Law of the People's Republic of China ("the Contract Law") and most national laws, an agreement or a contract is established by an offer and an acceptance. If one person makes an offer to another person and the other person accepts the terms provided in such offer unconditionally, we can say that they have reached some sort of mutual understanding to do something or not to do something as a result of their consensus ad idem.

1.2.1 Offer

An offer is a promise to do something or to refrain from doing something in the future. The party who makes the offer is referred to as the offeror, and the party to whom the offer is made is referred to as the offeree.

1.2.1.1 Content of an Offer

Under the CISG, Article 14, a proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and price.

In accordance with the Contract Law, content of an offer shall be concrete and precise. Furthermore, an offer shall state clearly that once the offeree accepts the offer, the offeror shall be bound by his expression of intention.

Under the Uniform Commercial Code (UCC), some terms of an offer (like price or quantity, but not both of them at the same time) don't have to be precise and concrete, but can be implied. In the United States of America, if an offer does not have a price term, but the parties seriously intend to make a contract, and the quantity and type of goods or services are identified, if there is certain reasonable method to determine the price (an average of market price), then the law will find that the offer is definite, and a contract could be formed.

1.2.1.2 Offer and Invitation to Make an Offer

An invitation to make offers is a proposal addressed to non-specified persons to invite them to make offers to the addressor.

The case of *Carlill v. Carbolic Smoke Ball Co.* indicates perfectly the difference between an offer and an invitation to make offers. The defendants, who were the proprietors and vendors of a medicine called "The Carbolic Smoke Ball", inserted in the *Pall Mall Gazette* of November 13, 1891, and in other newspapers, the following advertisement: £100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter. The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's and used it as directed. When she was attacked by influenza she held that she was entitled to recover the £100, but was refused by the defendants. So she brought an accusation against the Carbolic Smoke Ball Co. The court was of the opinion that the advertisement was specific enough to constitute an offer other than an invitation to make offers and adjudged £100 reward to the plaintiff.

Under the Contract Law, mailing of a price list, an auction announcement, a call for tenders, a share prospectus, a commercial advertisement, etc., are all deemed to be invitations to make offers. But if the content of a commercial advertisement satisfies the requirements necessary for it to constitute an offer, it shall be deemed to be an offer.

1.2.1.3 Effective Time of Offer

Under the CISG and the Contract Law, an offer becomes effective when it reaches the offeree.

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Under the CISG, if a contract is concluded through the use of electronic documents and recipient of the offer specifies the use of a particular system for the receipt of electronic documents, the time at which the relevant electronic document enters the said system shall be deemed to be the time at which the offer reaches the offeree; if the recipient has not specified the use of a particular system, then the first time at which the electronic document enters any of the recipient's system shall be deemed to be the time at which the offer reaches the offeree.

1.2.1.4 Withdrawal & Revocation of Offer

An offer may be withdrawn and revoked. To withdraw an offer, the CISG and the Contract Law require that the notification of withdrawing an offer must reach the offeree before the offer reaches the offeree or at the same time at which the offer reaches the offeree. Until a contract is concluded, an offer may be revoked by the offeror if the notice of revocation reaches the offeree before the offeree dispatches an acceptance. To revoke an offer, the notification of revocation must reach the offeree before the offer reaches the offeree or at the same time that the offeree issues a notification of acceptance of the offer. However, an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable or if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. Article 18 of the Contract Law stipulates that if the offeror specifies an acceptance period or in some other ways makes it clear that the offer is irrevocable; or the offeree has grounds for believing that the offer is irrevocable, and has already completed some preparatory work relating to the performance of a contract, an offer may not be revoked.

1.2.1.5 Termination of Offer

Under the CISG, an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror. In accordance with the Contract Law, an offer can be terminated in several ways, including: revocation by the offeror, rejection by the offeree, a counter-offer by the offeree, lapse of time, destruction of the subject matter of the offer, the offeree materially altering the content of the offer, and death or incompetence of the offeror or offeree.

1.2.2 Acceptance

Acceptance is a declaration by the offeree to the offeror that it agrees with the