

# Drafting and Negotiating International Commercial Contracts



## A Practical Guide

**Fabio Bortolotti**




**International Chamber of Commerce**

*The world business organization*



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**D**rafting an international contract can be a risky business. Yet, with the increasing globalization of markets, these cross-border contracts are becoming a common practice for most traders, as well as for the lawyers assisting them. At the same time, international contracts remain a difficult and mysterious subject for business people and their lawyers.

In *Drafting and Negotiating International Commercial Contracts*, Professor Fabio Bortolotti, a world-renowned expert on contract law, clarifies the issues surrounding these contracts and provides solutions to the thorny problems they raise: choice of the applicable law • choice of jurisdiction • international arbitration • the use of more international drafting techniques • hardship, force majeure and liquidated damages.

As an added feature, this volume provides insights into the basic requirements of a well-drafted contract and analyzes in depth the negotiating process. It concludes with incisive commentary on the model contracts developed by the International Chamber of Commerce.

Lawyers, laypersons and other professionals will find in *Drafting and Negotiating International Commercial Contracts* the tools they need to ensure their contracts meet the requirements of a globalized world.

**The International Chamber of Commerce, the World Business Organization, based in Paris, is the global leader in the development of standards, rules and reference guides for international trade.**



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**The contents of this book represent the personal views  
of the author and not necessarily those of ICC.**

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# Foreword

Law may become a science, but it is above all a technique: one which states the rules and applies them to govern social and commercial relations. Jurists have for a long time claimed to have a monopoly of it; particularly in the field of contracts. This monopoly is today largely contested by those who are its main recipients: businessmen, entrepreneurs, private individuals. The knowledge of contractual principles has developed and with it the autonomy of business law. The Law obviously remains important, but it is increasingly supplanted by the one which the parties set themselves, in accordance with the recognised freedom that is theirs.

Professor Bortolotti's work is an excellent illustration of this. Its title sets the scene. It is neither an abstract nor a theoretical presentation of the principles of international contract law but a practical approach to putting law into motion. The reader is, intelligently and patiently, taken charge of by the author and steered through the entire course, obstacle by obstacle as it sprouts up: from the negotiation, and the drafting of a contract to the resolution of disputes, arbitration in particular. No big, grand and abstract essays here; just the concrete and the practical, full of examples to follow and to avoid, of wise and sensible advice. That is the reason why it has been made clear in its introduction, that Professor Bortolotti's work addresses itself specifically to traders and to non-specialised lawyers, which by no means excludes specialised jurists happy to find a sound and intelligent guide.

The first distinctive feature is coupled with another: its presentation lies largely, as its subtitle indicates, on the model contracts proposed by the International Chamber of Commerce (ICC). We know that this organisation, one of the oldest and most important in the world of international business life has as one of its objectives, for over 80 years now, to propose models for some of the principal business contracts, notably in the fields of sales, agency and distribution. These models have been prepared by teams of professionals and jurists. They offer the very best of international business world experience. We have often neglected to highlight the very important role that the ICC has played and continues to play in the development of international rules. The presentation that follows, (another of its merits) includes precisely all of these models in the legal and practical framework of international law.

The evolution of international business law depends neither solely nor as much on the adoption of laws and international conventions. It is made up of the conjugated efforts of all of those concerned by the subject: judges, professionals and those, like the author, who know how to extract the essential facts from it.

## **Pierre Tercier**

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# Chapter 1

## INTRODUCTION

### 1. Scope of this Book

With the increasing globalization of markets, cross-border contracts are becoming a common practice for most traders (as well as for the lawyers assisting them). At the same time, however, international contracts are still considered to be a difficult and mysterious subject.

This is especially true for business people, to whom the basic notions of contract law, and particularly those concerning cross-border contracts, are unknown; but also for lawyers who do not have specific experience in cross-border transactions, who may find it difficult to deal with a number of rather sophisticated issues which normally do not arise when dealing with domestic matters. Examples are the choice of the applicable law, the choice of jurisdiction and/or international arbitration, the use of more “international” drafting techniques, etc.

The main purpose of this book is to give the reader a comprehensive view of the principles that govern cross-border contracts, so that he can situate the various issues in their right context and take the most appropriate decisions, possibly with the assistance of a lawyer having specific experience in the field of international contracts.

#### 1.1 The addressees: traders and non-specialized lawyers

This book will describe the basic principles of the law of international contracts so that non-specialists (traders or domestic lawyers without expertise in international contract law) can gather a better understanding of the problems they are facing in such a context.

In fact, one of the main difficulties for those who deal with international contracts, without having specific legal expertise in this field, is the lack of information about the rules and principles that govern cross-border contracts. Without the knowledge of a number of basic principles of international trade law, it is very difficult to understand what is going on when certain legal issues are raised and, consequently, to decide which actions should be taken.

This is particularly true for traders, who can avoid a number of pitfalls if they have learned to understand some major issues in international contract law.

A few examples can be helpful to support the above view.

### **Example 1-1 – Reacting to a claim brought before a foreign court**

Mr François Dubois, a French manufacturer of painted tiles, is notified by a Polish customer of a claim before the courts of Warsaw for defectiveness of the goods and pretended damages suffered by the purchaser. The exporter contacts a lawyer from the buyer's country who advises him to defend himself before the court in the customer's country. In the course of the proceedings difficulties arise. The seller knows that the alleged defects are not his responsibility, but language and communication problems make it difficult to prove his case before the court. When the court decides against the seller and awards damages to the purchaser, Mr Dubois discovers that he could have objected to the jurisdiction of the Warsaw court and that he lost that possibility by defending himself before this court without raising the exception.

**Comment:** It is rather common that a local lawyer – not specialized in international trade law – will not consider raising the question of a possible lack of jurisdiction of his country's courts. If Mr Dubois had known that under the EU jurisdiction rules (regulation No. 44/01, *infra*, Chapter 5, § 2.1), one must in principle, claim before the defendant's courts and that exceptions to this principle are limited, he could have insisted on this point with the local lawyer, or could have requested the advice of an expert.

The above example shows how a better understanding of the basic principles of jurisdiction in the EU would have given the exporter a chance to avoid a wrong decision. Of course, the businessman will not be in a condition to verify (without the advice of a lawyer) if the jurisdiction of the foreign court can actually be avoided in the specific case, and whether this would be the most appropriate solution. But if he knows that this is a critical issue, he will be aware that the strategy proposed by the local lawyer should be verified by an expert.