INTERNATIONAL COMMERCIAL AGREEMENTS

A Functional Primer on Drafting, Negotiating and Resolving Disputes

By William F. Fox, Jr.

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INTERNATIONAL COMMERCIAL AGREEMENTS

A FUNCTIONAL PRIMER ON DRAFTING, NEGOTIATING AND RESOLVING DISPUTES

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For my parents, William F. and Mary S. Fox, who did a pretty good job setting me on the road to literacy.

Several years ago I participated in a number of international business transactions. Some concerned the drafting and negotiating of international commercial agreements. Some had to do with disputes that arose between the contracting parties after the contract was signed. One case required commencing a proceeding in a federal court in the United States to confirm a Swiss arbitral award rendered on behalf of a Greek company against a mid-eastern petroleum company that was a wholly owned subsidiary of a U.S. corporation. These cases taught me about the incredible complexity of the typical international commercial transaction and how different an international transaction is from a domestic transaction. As I tried to educate myself on all the issues that arise in either drafting or disputing an international contract, I found that the bulk of the literature in this area was either concentrated in multivolume treatises or scattered among law journal articles. Most of this literature was written by experts for experts. Legal jargon in a domestic setting is troublesome, but the assumptions of expertise and the jargon used in the literature of international commercial transactions can be overwhelming. These experiences revealed a need for a one-volume text that lawyers could turn to for fundamental information and analysis.

Although U.S. lawyers are almost always heavily involved in commercial transactions from start to finish, elsewhere in the world lawyers are brought in late in the process, if at all, and often consulted only when something goes wrong with an agreement. My research told me that there was a need for a book on the fundamentals of international commercial transactions that could be read and understood by *both* lawyers and business executives. As international trade expands, more people need basic, precise information on initiating and dealing with these transactions.

Accordingly, this book addresses the needs of the increasing numbers of persons who are not lawyers but who deal with some of the legal aspects of international business transactions on a regular basis and who can profit from straightforward explanations of the law. If the book accomplishes that goal, it also will be helpful to less experienced lawyers who enter this often overwhelming field and lawyers who may be experienced in narrow issues of international trade but need an introduction to other areas.

I hope that persons who have in the past found the various aspects of transnational contracts impenetrable will use this book as a guide and introduction to a highly important area. I hope those who are not lawyers will join me in my belief that law is too important to be left exclusively to the lawyers.

The manuscript was written at my permanent academic home, the Columbus School of Law, Catholic University of America, Washington, D.C., an institution that may be the best unsung law school in the United States. My good friend and colleague, Professor Rett Ludwikowski, gave me a number of suggestions on the organization of the book. My other friends on the faculty were, as usual, valuably supportive. The director of the Catholic University Law Library, Professor John Valeri, and the library's associate director, Pat Petit, were very helpful in obtaining copies of the multivolume treatises. My two research assistants, Scott Squillace and Andrew Palmieri, showed great diligence in ferreting out the more obscure journal articles. Research on many of dispute resolution chapters was conducted while I was on sabbatical leave in 1983–84 as a Senior Associate Member at St Antony's College, Oxford University. While at Oxford I was generously given study and research space at the Bodleian Law Library. That same year I enjoyed an appointment as a Visiting Scholar in the Law Department, London School of Economics and Political Science. The LSE library and the superb library at the Institute for Advanced Legal Studies in London provided me with additional research support.

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PART ONE

FORMING INTERNATIONAL COMMERCIAL AGREEMENTS

INTRODUCTION

§1.1 *International Trade and This Book*

International trade has long been accepted as a fundamental requirement for survival in an interdependent world. Although trade among different countries and regions has often waxed and waned depending on economic and political conditions, overall figures show that trade between nations will continue to increase as world population continues to grow. That does not mean, of course, that international trade is completely unfettered. The idea of totally free world trade is a notion whose time has not yet come. It is probably true that no country has ever been completely consistent on matters of trade. Most countries have shifted back and forth over the years between protectionism and uninhibited exchange of goods and services depending on how the internal political climate of a particular country meshes with the worldwide economic climate. Virtually every country has an interest in both import and export matters. In dollar terms, world trade is now worth hundreds of billions of dollars per year and will surely continue to grow over the lifetime of any reader of this book.

There has always been a substantial amount of government intervention in trade even though by far most transactions occur between two private entities or between a private entity and a national government (or component of government). Because these transactions involve firms in two or more countries and often directly affect the economy of both the exporting and importing nations, it generally is impossible for national governments *not* to get involved. Virtually

every government imposes controls on the export and import of goods and services, generally by requiring firms to secure government permission in the form of a license to export or import the thing in question. Governments often seek to ensure fair dealings for domestic companies by prohibiting practices such as the dumping of goods into a foreign market below market costs. Governments normally permit businesses injured by unfair international trade practices to seek remedies (such as countervailing duties) as recompense for the unfair practices. Some countries attempt to extend their domestic trade laws, including antitrust principles, to international transactions. A few countries have gone even further in attempting to impose domestic business standards and ethics on international trade matters. For example, the United States has been particularly aggressive in extending certain controls on bribery of public officials to the international sector through a statute called the Foreign Corrupt Practices Act. These instances of government regulation of international trade are important and must be addressed by anyone drafting and negotiating an international contract, but they are normally unique and often idiosyncratic and must be dealt with on a case-by-case, country-by-country basis.

Most countries are interested in promoting trade, and to this end governments have cooperated on both a regional (for example, the European Economic Community) and a worldwide basis (the General Agreement on Tariff and Trade) to promote free trade. Many countries have negotiated and ratified bilateral treaties of friendship, commerce, and navigation (FCN) whose primary purpose is to declare and clarify the rights of the nationals of each country to trade, invest, or establish and operate businesses in the other country. Virtually all of the major trading countries have entered into FCN treaties with each other. The United States, for example, has ratified no fewer than 130 such treaties. Most if not all of the major trading nations recognize the concept of most favored nation, a concept of international trade that attempts to promote nondiscrimination in trade by giving the same trade benefits to any country that the host country extends to any other country.

Nonetheless, the day-to-day business of international trade remains primarily a private matter — that is, an undertaking between two private businesses based on a contract drafted and negotiated between the two contracting parties to be performed by them with the occasional assistance of third parties such as financial institutions

and carriers of freight. This book concentrates on private dimensions of international trade and more precisely on the contractual aspects of that trade. On occasion, the book will touch on other matters, such as the need to secure government permission to export or import goods or services, but will do so only insofar as those peripheral matters are important to drafting and performing a valid contract.

Most private international transactions involve contracts for the sale of goods. For that reason, a significant part of the discussion concentrates on issues relating to sales of goods. The book does not ignore, however, the various other international commercial transactions, including contracts for services (such as engineering or telecommunications services), licenses for the transfer of patents and technology, joint ventures, and franchises. Subsequent chapters discuss how to draft contracts to cover a wide variety of business relationships and not merely purchase and sale transactions.

§1.2 *An Overview of International Commercial Transactions*

A business executive entering into an international commercial transaction is interested in drafting a private agreement that will satisfy both parties and will be performed as drafted. This is the first principle of contract drafting. People in business rarely enter into a business transaction assuming that the contract will never be performed or that one or more of the parties will violate some aspect of the agreement. For the most part, business transactions, both domestic and international, are fully and quietly performed by the parties. This principle also reflects a basic consideration in contract negotiation: parties sign contracts because they want to do business, not because they want to have at each other in court. At the same time, the consequences of breach or nonperformance must be taken into account when drafting and negotiating the initial document.

These preliminary assumptions always affect a firm's approach to designing a contract. Among other things, the parties must understand how contracts are formed, which requires at least a basic knowledge of the "law" of contracts and a sophisticated understanding of the technical aspects of the specific transaction entered into. For example, if a contract is for the sale of telecommunications equipment, the document itself or documents appended to the contract will contain

technical specifications for the equipment. Persons drafting and negotiating the contract should have a good idea of the equipment's technical capabilities (or should be able to call on experts who are familiar with the equipment) because these details often figure importantly in both the negotiation and drafting of the agreement.

Even persons who are highly experienced in purely domestic contracts should be careful not to overgeneralize. Numerous considerations enter into the drafting and execution of an international agreement that simply are not pertinent to contracts between domestic companies. First, oral contracts while not unheard of are rare. Virtually all international transactions are agreements that have been committed to paper. Second, most international contracts involve sufficient amounts of money to warrant tailoring a contract to the specific setting. Like oral contracts, standard form international contracts are rare. Third, language differences frequently demand that the parties agree to a single-language version of the contract, even if the document is translated for purposes of convenience. Thus, international contracts tend to be longer and more comprehensive to fully ensure that each party's rights are protected. Geographical separation suggests that the parties should leave as little as possible to happenstance. The parties frequently have never done business before, and they have not developed the degree of trust present in many domestic settings. Because parties often lack this element of personal trust, drafters of international contracts must pay particular attention to an often crucial portion of the document — the dispute resolution clause. All these matters must be addressed in some fashion if the contract is to have a solid foundation.

Negotiation is intimately related to the drafting process. The timing of the negotiation can differ from transaction to transaction. Parties occasionally sit down with a blank page and hammer out the entire agreement on a face-to-face basis. But most transactions begin with one side's proferring a draft contract for the other side's consideration. The parties then negotiate only those provisions in the original draft over which they disagree. This normally is an efficient process but also can give the negotiation momentum to the party that writes the draft. Negotiating to get the best possible result requires thinking through the negotiation process. Certain techniques of negotiation and guidelines for preparing for negotiation, which are discussed in later chapters, can be taken into account prior to the actual negotiation. Planning the negotiation, even to the point of rehearsing