CONCISE TESTBOOK
FOR
ENGLISH CONTRACT

商务英语合同教程

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Chapter 1

The introduction of sales 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 broader sense, a contract is simply an agreement that defines a relationship between one or more parties, which has legal binding. Two people exchanging wedding vows enter into a contract of marriage; a person who has a child contracts to nurture and support the child; shoppers selecting food in a market contract to purchase the goods for a stated amount. A commercial contract, in simple 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 faces an added significance. The creation of an international contract is a more complex process that 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 social

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 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.

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.

(1) 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 inclined to his 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.

(2) The party familiar with written contracts

In cross-border transactions, the balance of power may tip towards the party who is not 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 home contracts, and the other party, with less no understanding of those terms, may simply know. 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 considered a material breach of 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 one time deal.

(3) 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 unfair. 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.

2. 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 able to performe the contract without first modifying the terms. Moreover, enforcements 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.

(1) Difference 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 principal 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 originate from different legal systems and no doubt use dissimilar business practices. For this reason, it is essential for your international contracts to spell out in definite terms the rights and obligations of each party.

(2) International laws

In recognition of the difficulties that parties face in contracting across country boundaries, the international community has begun to

adopted systems of laws and rules to be applied instead of local laws in transactions between parties located in different countries. The purpose 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 contracts 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 laws 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 contract terms. The application of international laws to the interpretation of a contract can lead to unexpected and even un favourable 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 to 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.

(3) Preciseness and predictability

To avoid an unfavourable and uncertain result, it is best to define your rights and obligations in a written contract when yon are dealing across country borders. Hopefully your contract terms will be sufficient 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 forms, and thus the parties can more closely predict the outcome.

3. Cross — culture expectation

Well-drafted contracts can help to ensure that parties who have diverse culture background reach a mutual understanding with regard to their rights and obligations. All contracting parties come to the table with individual expectations, which in turn decrease their un-

derstanding 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 that of your own. Your contract provisions may need to be simplified so that they can be clearly understand, particularly if the contract will have to be translated into the other parties own language. You should review the provisions for shorthand phrases 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 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 is more likely to have gained an understanding of cross-culture 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.

A contract that reflects the culture expectations of each other 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 interpretes 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 disagreement over performance.

4. 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 mean 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 build on person commitment that each party demonstrates to the transaction, and therefore this aspect of any transaction whether domestic or international is especially significant.

Giving evidence of commitment in cross-border transactions, in which parties usually operate by different business practise, 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 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 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 bargin whether to accept the other party's evidence of commitment, insist on your own or reach a compromise. If you meet other party personally, shake hands and gain that party's respect and trust, you will decide that an oral agreement is sufficient to express commitment to the transaction.

If you do not feel comfortable with an oral agreement, 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 operate on a handshake, and that party may be insulted if you insisted on a written one. 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 partner, then if your partner seems open to the idea, you may suggest an informal

letter of memorandum as a compromise. If not, you may take or leave the handshake bargin, depending on whether you want the business and whether you can afford the risk.

Despite that, it is always best to insist on written evidence of personal commitment ever if you simply exchange a memorandum when dealing internationally. In relative terms, there is more cost--in time and money--involved in cross-border transaction 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, making, transporting and other trade-regulating laws of two or more countries. It is wise to ensure that the other party shares the same commitment.

5. Governing laws

When trading internationally, parties frequently assume that they can operate in accordance with their own domestic laws and practice. This assumption is erroneous and can led to grave misunderstanding. 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 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 countries law to your 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 if the absence of a statue, 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 support the expressed intent of the parties provided it is not contrary to statue. An expressed provision on governing law

therefore has a significant effect on which laws will be employed to interpret contractual rights and obligations in international transactions.

6.Necessary terms

In most countries, parties to commercial transactions may make their own bargins 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.

Glossary

1.contract 合同
2.memorandum 备忘录
3.certificate 证明书
4.receipt 收据
5.legal system 法律制度
6.commercial transaction 商业业务
7.corporation 公司
8.non-negotiable 不可商量的
9.draft a contract 起草合同
10.contracting party 合同当事方
11.written contract 书面合同
12.oral contract 口头合同
13.provision (合同)条款

14.enforcement (合同)执行
15.business practice 商业惯例
16.rights and obligations 权利和义务
17.commitment 承诺
18.bargin 交易
19.agreement 协议
20.governing laws 适用的法律
21.description of goods 货物的描述
22.quantity 数量
23.quality 品质
24.means of payment 支付方式

Notes

1.In the broader sense, a contract, is simply an agreement that defines a relationship between two or more parties, which has legal binding.

广义上讲，合同是确立双方或多方关系的一种协议，它具有法定约束力。

2.The contract terms are usually supplemented and restricted by laws that serves to protect the parties and to define specific relationships between them in the event that provisions are inadequate, ambiguous or even missing.

如果合同条款不完整、模糊甚至缺失，合同条款通常可由保护合同双方和确定其明确关系的法律补充和限制。

3.The essence of contract is the mutual understanding reached by two parties who hold adverse position against each other.

合同的本质是合同双方达成的相互理解，而双方的利益是相对立的。

4.The balance of power between contracting parties usually tips in favour of the party who drafted the written contracts.

合同双方力量的平衡对起草书面合同的那一方有利。

5.However, in most jurisdictions, the courts will enforce a contract only if the parties have agreed to four basic terms.

然而，在大多数国家的司法做法中，法院认为双方只有就四项基本条款达成一致时，合同才有法律效力。

Chapter 2

Things contractual parties should take into account on international sales contracts

What should buyers take into account

1.The buyer as consumer

A buyer consumes goods or services in return for compensation to the seller. The buyer may be in the middle of the consuming chain, in which case goods or services are purchased and resold to other buyers who in turn consumers utilize them to produce other goods or services. Alternatively, the buyer may be the ultimate consumer, who uses the goods or services without selling them to other buyers.

2.The buyer's goals

A buyer's goal,whether the buyer is a middleman or end-users, is to obtain the best quality and most quantity for the least cost. To attain this goal, you must have a good understanding of the market for the goods or services that you want to buy. The primary factors that will affect the market are supply and demand. If there are many suppliers but only a few buyers, you will have a strong negotiation position because the suppliers will be in competition for your business. If there are many suppliers and many buyers, your position will be weaker because you will face competition from other buyers, and yet you will have an advantage in that suppliers are also in competition.

If there are few suppliers, you will also have the weakest negotiating position because you will have fewer purchase options.

3.The buyer's safeguards

As a buyer, you should seek assurance of quality and protection against defective or damaged goods or unsatisfactory services. It is wise to do a background or reference check on the seller who is unknown to you. Whether you are buying goods or services, you might ask to meet the seller at his or her place of business. If the transaction is substantial, you should request a tour of your seller's facilities.

4.The buyer's hidden costs

When considering the cost of the transaction, remember to add in the hidden expenses before you agree to a price. What are the goods or service actually losting you? Will you be able to calculate the entire cost of the goods, plus make a profit? Will the services increase your profitability by a sufficient percentage beyond the real cost? These hidden expense might include the following items.

(1) International shipping

If the seller is not responsible for transporting goods to your door, you will have to arrange and pay for at least part of the shipping, which may include a switch between modes of transport with attendant costs and delays of unloading, reloading, inspecting and administering by two or more shippers.

(2) Customs clearance

If the seller is not responsible for clearing goods through customs, you will be. Customs clearance must usually be obtained twice: first, to export the goods from the seller's country; second, to import the goods into your country. Clearance costs may involve costs for preparation of the documents to satisfy customs authorities, for temporary holding or storage of the goods while awaiting clearance, and for the goods available for inspection. You will probably have to pay someone to clear the goods through customs, and you may have to hire an

import-export broker to assit you in the process, In addition, there are the fees charged by various governments that control the import and export of the particular goods you are buying, which may include special license or permits fees, customs processing charges and VATS.

(3) Insurance

You should consider obtaining insurance against the risk of loss or damage to the goods in transport, particularly if a substantial amount of money is involved, although it may be difficult to obtain insurance on goods until the risk of loss passes from the seller before or during the transportation. If this insurance is available, you should balance the losses you are likely to incur if a shipment does not arrive in satisfactory condition against the cost of the insurance. Be certain that you can afford the risk.

A separate insurance involves the question of product liability. If you will be reselling the goods and if product liability is a recognized legal claim in your country, you may become liable to a consumer who is injured when using the product. Such claims have been made and won for millions of dollars. You should consider whether your product could cause injury if defectively designed or made, and if so whether you can afford the risk of a product liability claim. Although the suer is likely to be held primarily responsible for a design or a manufacturing defect, if you sell a product that you know or should have reasonably known is defective or likely to cause injury without proper caution warnings to the consumer, you will probably be ordered to share in the liability.

(4) Interruption of business

You should consider whether you will have any interruption in your own business when the goods arrive, whether for training, installation, testing, maintainer, or otherwise. How much it will cost to put one of your top managers at the convenience of a supplier to ensure proper handling of the goods.

(5) Hospitality costs

Whether you are buying goods or services, you may incur costs for entertaining a visiting seller. For goods must be installed or