

Table of Contents

Preface and Acknowledgements	xiii
Chapter One	
Introduction	1
§1.1 International Trade and This Book	1
§1.2 An Overview of International Commercial Transactions	3
§1.3 How to Use This Book	8
Chapter Two	
Sources of the Law of International Commercial Agreements	11
§2.1 Introduction	11
§2.2 Promulgation and Enforcement of Principles of Commercial Law	12
§2.3 The World's Major Legal Systems	14
§2.4 The Civil Law System	17
§2.5 The British Common Law System	20
§2.6 Commercial Law in the United States of America	23
§2.7 Socialist Legal Systems	25
§2.7.1 Life After the Soviet Union	26
§2.7.2 China	27
§2.8 Islamic Legal Systems	29
§2.9 The Impact of International Principles of Commercial Law	31
§2.9.1 International Law Generally	31
§2.9.2 The UNIDROIT Convention and the UNIDROIT Contract Principles	33
§2.9.3 The European Contract Principles	35
§2.9.4 The 1980 Vienna Convention on Contracts for the CISG	36
[a] Scope	37

	[b] Individual Provisions	38
§2.9.5	The 1974 UN Convention on the Limitation Period in the International Sale of Goods	40
Chapter Three		
Planning International Commercial Agreements		43
§3.1	Introduction	43
§3.2	Some Fundamental Principles of Contract Law	45
§3.2.1	Formation and Subject-Matter	47
§3.2.2	Performance	53
§3.2.3	Breach of Contract and Excused Performance	55
§3.2.4	Remedy	60
§3.2.5	Dispute Resolution	62
§3.3	The Different Forms of International Commercial Agreement	62
§3.3.1	Sales of Goods or Services	63
	[a] The Sale of Goods Generally	63
	[b] Barter and Countertrade	63
	[c] The Sale of Services	65
§3.3.2	Agency and Distributorship Agreements	67
§3.3.3	Franchises	69
§3.3.4	Licensing and Technology Transfer	72
§3.3.5	Joint Ventures	72
§3.3.6	Other Forms of Agreement	74
§3.4	Planning for Dispute Resolution	75
§3.4.1	Adaptation	77
§3.4.2	Renegotiation	77
§3.4.3	Mediation/Conciliation	78
§3.4.4	Arbitration	78
§3.4.5	Litigation	79
§3.4.6	Other Forms of Dispute Resolution	81
§3.5	Financing and Paying for International Commercial Agreements	82
§3.5.1	Direct Payment	83
§3.5.2	Payment Devices	83
§3.5.3	Insuring Against Risks	87
§3.6	Other Considerations in Planning Commercial Agreements	89
§3.6.1	Tax Matters	89
§3.6.2	Antitrust Issues	90
§3.6.3	Anti-Dumping and Countervailing Duty Issues	93
§3.6.4	Export and Import Controls	93
§3.6.5	Ethical Considerations	94
	[a] Anti-Bribery Measures	94
	[b] Codes of Conduct	98
§3.6.6	Criminal Matters	99
§3.7	Special Regional Considerations in Planning International Commercial Agreements	99
§3.7.1	Trade with the EU	100

	[a] The Council of Ministers	102
	[b] The European Parliament	103
	[c] The Commission	103
	[d] The Court of Justice	103
§3.7.2	The NAFTA	104
	[a] Elimination of Tariffs on Goods	106
	[b] The Rules of Origin	106
	[c] Trade in Services	107
	[d] The Dispute Resolution Mechanisms	107
	[e] Other Aspects of the Agreement	108

Chapter Four

Drafting International Commercial Agreements

§4.1	Introduction	109
§4.2	Some Threshold Considerations	110
	§4.2.1 Identifying Goals and Objectives	112
	§4.2.2 Research as a Planning and Drafting Tool	114
	§4.2.3 Beginning the Drafting Process	116
§4.3	The Use and Effect of a Letter of Intent	127
§4.4	Choosing the Language and the Law of the Agreement	129
	§4.4.1 Choosing the Contract's Language	129
	§4.4.2 Choosing the Contract's Applicable Law	130
	[a] Affirmatively Choosing the Law	130
	[b] Choosing the Law When the Contract Is Silent	133
§4.5	Using Standardized Clauses and Forms	135
§4.6	Sample Clauses in International Commercial Agreements — Formation and Performance	137
	§4.6.1 The Quantity Term	138
	§4.6.2 The Price Term	138
	§4.6.3 The Payment Term	140
	§4.6.4 Provisions Allocating Risk of Loss During Shipment	141
	§4.6.5 Performance Clauses and Express and Implied Warranties	141
§4.7	Sample Clauses — Breach, Remedies and Miscellaneous	142
	§4.7.1 Force Majeure Clauses	143
	§4.7.2 Government Approval Clauses	144
	§4.7.3 Penalty and Liquidated Damages Clauses	144
§4.8	Drafting the Dispute Resolution and Choice of Forum Clauses	145
§4.9	Some Concluding Comments	150

Chapter Five

Negotiating International Commercial Agreements

§5.1	Introduction	151
§5.2	Establishing a Basic Framework for Negotiation: A Short Excursus in Negotiation Theory	152

§5.2.1	Diagramming a Negotiation	152
§5.2.2	Separating the People from the Problem	160
§5.2.3	Focus on Interests, not Positions	160
§5.2.4	Create Options for Mutual Gain	161
§5.2.5	Insist on Objective Criteria	162
§5.2.6	Know your "BATNA"	162
§5.3	The Stages of Commercial Negotiation	163
§5.3.1	Orientation and Positioning	163
§5.3.2	Argumentation	165
§5.3.3	Emergence and Crisis	165
§5.3.4	Agreement or Breakdown	166
§5.4	Negotiating Styles, Strategy, and Tactics	166
§5.5	Cross-Cultural Negotiation	171
§5.6	Negotiation When Disputes Arise under an Existing Agreement	174
§5.7	The Ethics of Negotiation	175
§5.7.1	Ethics Generally	175
§5.7.2	Ethical Constraints on U.S. Lawyer-Negotiators	178
§5.7.3	Statutory Controls on Negotiator Conduct	179
Chapter Six		
International Electronic Commerce		181
§6.1	Introduction and Some Basic Definitions	181
§6.2	A Brief History of the Internet	185
§6.3	The Size and Scope of International Electronic Commerce	189
§6.4	Contract Formation and Digital Signatures	189
§6.4.1	Contract Formation Generally	190
§6.4.2	The Matter of Digital Signatures	195
§6.4.3	The Requirement of an "Original" Agreement	198
§6.5	Jurisdiction over E-Commerce Transactions	199
§6.5.1	Jurisdiction Generally	199
§6.5.2	Jurisdiction Over Internet Transactions in the United States	200
§6.5.3	Internet Jurisdiction in the EU and Elsewhere	202
§6.5.4	The Prospect of an Internet Jurisdiction Treaty	204
§6.6	Taxation	205
§6.6.1	Internet Taxation in the United States	206
§6.6.2	Internet Taxation in Other Countries	206
§6.7	Intellectual Property	209
§6.7.1	Copyright	209
§6.7.2	Patents	210
§6.7.3	Trademarks and Trade Names	211
§6.7.4	Domain Names and Cybersquatting	213
§6.8	Payment Systems	213
§6.8.1	Payment by Check	214
§6.8.2	Electronic Checks	215

§6.8.3	Credit Cards and Debit Cards	215
§6.8.4	Innovative Electronic Payment Systems	216
§6.9	Privacy	217
§6.10	The Future of International Electronic Commerce	217

Chapter Seven

Chapter Seven		219
International Intellectual Property and Licensing Agreements		219
§7.1	Choosing a Licensing Agreement	219
§7.2	The Forms of Intellectual Property: Patents	221
§7.2.1	Patents in the United States	222
§7.2.2	Patents Under the European Patent Convention	226
§7.2.3	The International Regime for Patent Protection	228
	[a] The Paris Convention	228
	[b] The Patent Cooperation Treaty	229
	[c] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	229
§7.3	Copyright	230
§7.3.1	Copyright in the United States	230
§7.3.2	Copyright in International Law and Practice	232
	[a] The Berne Convention	233
	[b] The TRIPS Agreement	234
§7.4	Trademarks	235
§7.4.1	Trademark in the United States	235
§7.4.2	Trademark in the EU	239
§7.4.3	International Protection for Trademarks	240
§7.5	Trade Secrets	241
§7.5.1	Trade Secrets Generally	242
§7.5.2	International Protection of Trade Secrets	247
§7.6	Components of a Licensing Agreement	247
§7.6.1	An Outline of a Typical Licensing Agreement	248
§7.6.2	An Analysis of Licensing Agreement Clauses	249
	[a] The Granting Clause	249
	[b] Duties and Representations	250
	[c] Fees and Royalty Payments	250
	[d] Termination and Non-compete	251

Chapter Eight

Chapter Eight		
The Less-Drastic Forms of Commercial Dispute Resolution		253
§8.1	Introduction	253
§8.2	Contract Adaptation	254
§8.2.1	Gap Filling Mechanisms in the Underlying Law	257
§8.2.2	Coping with Uncertainty through Express Contractual Provisions — Some Typical Adaptation Clauses	259
§8.3	Renegotiation	261
§8.4	Fact Finding and Early Neutral Evaluation	262

§8.5	Mediation and Conciliation	263
§8.5.1	Mediation and Conciliation Generally	263
§8.5.2	A General Theory of Mediation	263
§8.5.3	Procedures for International Commercial Mediation	266
§8.5.4	Mediation in the Future	269
§8.6	The Minitrial	269
§8.6.1	The Minitrial Generally	269
§8.6.2	Specific Minitrial Rules	270
§8.6.3	Minitrials in the Future	271

Chapter Nine

International Commercial Arbitration: Commencing Arbitration, the Arbitration Hearing and the Arbitral Award		273
§9.1	Introduction	273
§9.2	A Brief History of Commercial Arbitration	278
§9.3	The Statutory Basis for Arbitration	281
§9.3.1	The Federal Arbitration Act	282
§9.3.2	The English Arbitration Act	283
§9.3.3	The UNCITRAL Model Law on International Commercial Arbitration	285
§9.4	The Lex Loci Arbitri and “Ad Hoc” Versus “Institutional” Arbitration	286
§9.5	A Description of the Major International Arbitral Institutions Including a Brief Summary of Their Rules	288
§9.5.1	The International Chamber of Commerce	289
§9.5.2	American Arbitration Association Procedures	293
§9.5.3	The UNCITRAL Procedures	296
§9.5.4	The WIPO Rules	298
§9.6	Commencing the Arbitration	300
§9.6.1	Determining the Issues to be Arbitrated	301
§9.6.2	Drafting the Demand for Arbitration	302
§9.6.3	Selecting the Arbitrator	304
§9.7	Preparing for and Conducting the Hearing	306
§9.7.1	Discovery	307
§9.7.2	The Pre-Hearing Conference	308
§9.7.3	Interim Relief Pending the Hearing	309
§9.7.4	The Hearing	310
	[a] Order of Presentation	310
	[b] Rules of Evidence	311
§9.8	Drafting the Arbitral Award	312

Chapter Ten

International Commercial Arbitration: Arbitration in the Courts		319
§10.1	Introduction	319
§10.2	Actions to Compel or Stay Arbitration	323
§10.3	Recognition and Enforcement of Arbitral Awards	325

§10.4	International Recognition and Enforcement of Arbitral Awards	330
§10.4.1	The New York Convention	331
§10.4.2	Enforcing Awards not Subject to the New York Convention	336
Chapter Eleven		
International Commercial Arbitration: Special Regional Considerations		337
§11.1	Introduction	337
§11.2	The International Centre for the Settlement of Investment Disputes	337
§11.3	The EU	341
§11.4	The Iran-United States Claims Tribunal	343
§11.5	Latin America	346
§11.6	The Middle East and Africa	350
§11.7	The Pacific Rim	353
§11.8	China	355
§11.9	The Former Soviet Union	358
Chapter Twelve		363
Litigation		363
§12.1	Introduction	363
§12.2	Litigation: Generally	364
§12.3	Subject Matter Jurisdiction	366
§12.4	Foreign Sovereign Immunity and the Act of State Doctrine	367
§12.4.1	Sovereign Immunity	367
§12.4.2	The Act of State Doctrine	369
§12.5	Personal Jurisdiction over Private Parties	371
§12.6	Service of Process	376
§12.7	Choice of Forum, Venue and Forum Non Conveniens	378
§12.8	Choice of Law	382
§12.9	Discovery and Gathering Information and Evidence Abroad	384
§12.10	Trial Procedure	388
§12.11	Enforcement of Judgments at Home and Abroad	390
§12.12	Conclusion	394
Chapter Thirteen		397
Online Dispute Resolution		397
§13.1	Introduction	397
§13.2	ODR: Categories and a Suggested Definition	400
§13.3	The Possible Contributions of ODR to Commercial Dispute Resolution	401
§13.3.1	Renegotiation and ODR	402
§13.3.2	Mediation and ODR	403
§13.3.3	Arbitration and ODR	404
§13.4	The Future of ODR	406

Chapter Fourteen	
Future Trends in International Commercial Agreements and International Commercial Dispute Resolution	407
§14.1 Introduction	407
§14.2 Trends in International Commercial Agreements	407
§14.3 Trends in International Commercial Dispute Resolution	410
§14.4 Conclusion	416
Index	417