

Contents

Preface 7

I. Forming International Commercial Agreements 11

One: Introduction

- § 1.1 INTERNATIONAL TRADE AND THIS BOOK 11
- § 1.2 AN OVERVIEW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 13
- § 1.3 HOW TO USE THIS BOOK 17

Two: Sources of the Law of International Commercial Agreements

- § 2.1 INTRODUCTION 21
- § 2.2 PROMULGATION AND ENFORCEMENT OF PRINCIPLES OF COMMERCIAL LAW 22
- § 2.3 THE WORLD'S MAJOR LEGAL SYSTEMS 24
- § 2.4 THE CIVIL LAW SYSTEM 26
- § 2.5 THE BRITISH COMMON LAW SYSTEM 30
- § 2.6 COMMERCIAL LAW IN THE UNITED STATES OF AMERICA 33
- § 2.7 SOCIALIST LEGAL SYSTEMS 34
 - § 2.7.1 *The Law of Contract in the Commonwealth of Independent States* 36
 - § 2.7.2 *The Peoples Republic of China* 37
- § 2.8 ISLAMIC LEGAL SYSTEMS 37
- § 2.9 THE IMPACT OF INTERNATIONAL PRINCIPLES OF COMMERCIAL LAW 39
 - § 2.9.1 *International Law Generally* 39
 - § 2.9.2 *The 1980 Vienna Convention on Contracts for the International Sales of Goods* 41

Three: Planning International Commercial Agreements

- § 3.1 INTRODUCTION 47
- § 3.2 SOME FUNDAMENTAL PRINCIPLES OF CONTRACT LAW 49
 - § 3.2.1 *Formation and Subject Matter* 50
 - § 3.2.2 *Performance* 57
 - § 3.2.3 *Breach of Contract and Excused Performance* 60
 - § 3.2.4 *Remedy* 64

- § 3.2.5 *Dispute Resolution* 66
- § 3.3 THE DIFFERENT FORMS OF INTERNATIONAL COMMERCIAL AGREEMENT 67
 - § 3.3.1 *Sales of Goods or Services* 67
 - § 3.3.2 *Agency and Distributorship Agreements* 72
 - § 3.3.3 *Franchises* 73
 - § 3.3.4 *Licensing and Technology Transfer* 76
 - § 3.3.5 *Joint Ventures* 79
 - § 3.3.6 *Other Forms of Agreement* 81
- § 3.4 PLANNING FOR DISPUTE RESOLUTION 81
 - § 3.4.1 *Adaptation* 83
 - § 3.4.2 *Renegotiation* 84
 - § 3.4.3 *Mediation/Conciliation* 84
 - § 3.4.4 *Arbitration* 85
 - § 3.4.5 *Litigation* 86
 - § 3.4.6 *Other Forms of Dispute Resolution* 87
- § 3.5 FINANCING AND PAYING FOR INTERNATIONAL COMMERCIAL AGREEMENTS 89
 - § 3.5.1 *Direct Payment* 89
 - § 3.5.2 *Payment Devices* 90
 - § 3.5.3 *Insuring Against Risks* 94
- § 3.6 OTHER CONSIDERATIONS IN PLANNING COMMERCIAL AGREEMENTS 95
 - § 3.6.1 *Tax Matters* 96
 - § 3.6.2 *Antitrust Issues* 97
 - § 3.6.3 *Antidumping and Countervailing Duty Issues* 99
 - § 3.6.4 *Export and Import Controls* 99
 - § 3.6.5 *Ethical Considerations* 100
- § 3.7 SPECIAL REGIONAL CONSIDERATIONS IN PLANNING INTERNATIONAL COMMERCIAL AGREEMENTS 102
 - § 3.7.1 *Trade with the European Community* 103
 - § 3.7.2 *The Canada-United States Free Trade Agreement* 107

Four: Drafting International Commercial Agreements

- § 4.1 INTRODUCTION 113
- § 4.2 SOME THRESHOLD CONSIDERATIONS 114
 - § 4.2.1 *Identifying Goals and Objectives* 115
 - § 4.2.2 *Research as a Planning and Drafting Tool* 117
 - § 4.2.3 *Beginning the Drafting Process* 119
- § 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
- § 4.5 USING STANDARDIZED CLAUSES AND FORMS 136
- § 4.6 SAMPLE CLAUSES IN INTERNATIONAL COMMERCIAL AGREEMENTS—FORMATION AND PERFORMANCE 138
 - § 4.6.1 *The Quantity Term* 139
 - § 4.6.2 *The Price Term* 139
 - § 4.6.3 *The Payment Term* 141
 - § 4.6.4 *Provisions Allocating Risk of Loss During Shipment* 142
 - § 4.6.5 *Performance Clauses and Express and Implied Warranties* 144

- § 4.7 SAMPLE CLAUSES—BREACH, REMEDIES AND MISCELLANEOUS 143
 - § 4.7.1 *Force Majeure Clauses* 144
 - § 4.7.2 *Penalty and Liquidated Damages Clauses* 145
- § 4.8 DRAFTING THE DISPUTE RESOLUTION AND CHOICE OF FORUM CLAUSES 146
- § 4.9 SOME CONCLUDING COMMENTS 152

Five: Negotiating International Commercial Agreements

- § 5.1 INTRODUCTION 153
- § 5.2 ESTABLISHING A BASIC FRAMEWORK FOR NEGOTIATION 154
 - § 5.2.1 *Diagramming a Negotiation* 155
 - § 5.2.2 *Separating the People from the Problem* 161
 - § 5.2.3 *Focus on Interests, not Positions* 162
 - § 5.2.4 *Create Options for Mutual Gain* 162
 - § 5.2.5 *Insist on Objective Criteria* 163
 - § 5.2.6 *Know Your "Best Alternative to a Negotiated Agreement"* 164
- § 5.3 THE STAGES OF COMMERCIAL NEGOTIATION 165
 - § 5.3.1 *Orientation and Positioning* 165
 - § 5.3.2 *Argumentation* 167
 - § 5.3.3 *Emergence and Crisis* 167
 - § 5.3.4 *Agreement or Breakdown* 168
- § 5.4 NEGOTIATING STYLES, STRATEGY, AND TACTICS 168
- § 5.5 CROSS-CULTURAL NEGOTIATION 173
- § 5.6 NEGOTIATION WHEN DISPUTES ARISE UNDER AN EXISTING TRANSACTION 177
- § 5.7 THE ETHICS OF NEGOTIATION 177
 - § 5.7.1 *Ethics Generally* 177
 - § 5.7.2 *Ethical Constraints on U.S. Lawyer-Negotiators* 181
 - § 5.7.3 *Statutory Controls on Negotiator Conduct* 182

II. Resolving International Commercial Disputes 183

Six: The Less-Drastic Forms of Commercial Dispute Resolution

- § 6.1 INTRODUCTION 183
- § 6.2 CONTRACT ADAPTATION 184
 - § 6.2.1 *Gap Filling Mechanisms in the Underlying Law* 187
 - § 6.2.2 *Coping with Uncertainty Through Express Contractual Provisions—Some Typical Adaptation Clauses* 190
- § 6.3 RENEGOTIATION 192
- § 6.4 MEDIATION AND CONCILIATION 193
 - § 6.4.1 *Mediation and Conciliation Generally* 193
 - § 6.4.2 *A General Theory of Mediation* 193
 - § 6.4.3 *Procedures for International Commercial Mediation* 196
 - § 6.4.4 *Mediation in the Future* 198
- § 6.5 THE MINITRIAL 198
 - § 6.5.1 *The Minitrial Generally* 198
 - § 6.5.2 *Specific Minitrial Rules* 200
 - § 6.5.3 *Minitrials in the Future* 201