

Table of Contents

Preface	xiii
Acknowledgment	xv
CHAPTER 1	
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 2	
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	24
§2.7.1 Life after the Soviet Union	26
§2.7.2 China	27
§2.8 Islamic Legal Systems	28
§2.9 The Impact of International Principles of Commercial Law	30
§2.9.1 International Law Generally	30
§2.9.2 The UNIDROIT Convention and the UNIDROIT Contract Principles	32
§2.9.3 The European Contract Principles	34
§2.9.4 The 1980 Vienna Convention on Contracts for the International Sale of Goods	35

Table of Contents

	[1] Scope	36
	[2] Individual Provisions	37
§2.9.5	The 1974 UN Convention on the Limitation Period in the International Sale of Goods	40
CHAPTER 3		
	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	59
§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
	[1] The Sale of Goods Generally	63
	[2] Barter and Countertrade	63
	[3] 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	Foreign Direct Investment	74
	[1] Some Basic FDI Concepts and Vocabulary	74
	[2] Setting Up a Foreign Direct Investment Project	77
§3.3.7	Other Forms of Agreement	81
§3.4	Planning for Dispute Resolution	82
§3.4.1	Adaptation	83
§3.4.2	Renegotiation	84
§3.4.3	Mediation/Conciliation	84
§3.4.4	Arbitration	84
§3.4.5	Litigation	85
§3.4.6	Other Forms of Dispute Resolution	87
§3.5	Financing and Paying for International Commercial Agreements	88
§3.5.1	Direct Payment	89
§3.5.2	Payment Devices	89
§3.5.3	Insuring Against Risks	93
§3.6	Other Considerations in Planning Commercial Agreements	95
§3.6.1	Tax Matters	95
§3.6.2	Antitrust Issues	96
§3.6.3	Antidumping and Countervailing Duty Issues	98
§3.6.4	Export and Import Controls	99
§3.6.5	Ethical Considerations	100

Table of Contents

	[1] Anti-bribery Measures	100
	[2] Codes of Conduct	105
§3.6.6	Criminal Matters	107
§3.7	Special Regional Considerations in Planning International Commercial Agreements	107
§3.7.1	Trade with the EU	108
	[1] The Council of Ministers	109
	[2] The European Parliament	110
	[3] The Commission	111
	[4] The Court of Justice	111
	[5] <i>Brexit</i>	112
§3.7.2	The NAFTA	113
	[1] Elimination of Tariffs on Goods	114
	[2] The Rules of Origin	115
	[3] Trade in Services	115
	[4] The Dispute Resolution Mechanisms	116
	[5] Other Aspects of the Agreement	117
	[6] The Election of President Donald Trump	117
§3.7.3	The Trans-Pacific Partnership	118
CHAPTER 4		
	Drafting International Commercial Agreements	121
§4.1	Introduction	121
§4.2	Some Threshold Considerations	122
§4.2.1	Identifying Goals and Objectives	124
§4.2.2	Research as a Planning and Drafting Tool	126
§4.2.3	Beginning the Drafting Process	128
§4.3	The Use and Effect of a Letter of Intent	139
§4.4	Choosing the Language and the Law of the Agreement	141
§4.4.1	Choosing the Contract's Language	141
§4.4.2	Choosing the Contract's Applicable Law	142
	[1] Affirmatively Choosing the Law	143
	[2] Choosing the Law When the Contract Is Silent	146
§4.5	Using Standardized Clauses and Forms	148
§4.6	Sample Clauses in International Commercial Agreements: Formation and Performance	150
§4.6.1	The Quantity Term	151
§4.6.2	The Price Term	151
§4.6.3	The Payment Term	153
§4.6.4	Provisions Allocating Risk of Loss During Shipment	154
§4.6.5	Performance Clauses and Express and Implied Warranties	154
§4.7	Sample Clauses: Breach, Remedies, and Miscellaneous	155
§4.7.1	Force Majeure Clauses	155
§4.7.2	Government Approval Clauses	156

§4.7.3	Penalty and Liquidated Damages Clauses	157
§4.8	Drafting the Dispute Resolution and Choice of Forum Clauses	158
§4.9	Using International Technical Standards as Contract Clauses	163
§4.9.1	Standards: Some Basic Concepts and Definitions	163
§4.9.2	The International Organization for Standardization (ISO)	165
§4.9.3	The Use of Standards in International Commercial Agreements	167
§4.10	Artificial Intelligence and Contract Drafting	170
§4.10.1	Artificial Intelligence: Some Basic Definitions and Concepts	170
§4.10.2	Artificial Intelligence and the Legal Profession	172
§4.10.3	Artificial Intelligence and Contract Drafting	173
§4.10.4	Artificial Intelligence and Contract Review and Management	173
§4.10.5	Artificial Intelligence and Contract Drafting	174
§4.11	Some Concluding Comments	177
CHAPTER 5		
	Negotiating International Commercial Agreements	179
§5.1	Introduction	179
§5.2	Establishing a Basic Framework for Negotiation: A Short Excursus in Negotiation Theory	180
§5.2.1	Diagramming a Negotiation	180
§5.2.2	Separating the People from the Problem	187
§5.2.3	Focus on Interests, Not Positions	188
§5.2.4	Create Options for Mutual Gain	189
§5.2.5	Insist on Objective Criteria	189
§5.2.6	Know Your "BATNA"	190
§5.3	The Stages of Commercial Negotiation	191
§5.3.1	Orientation and Positioning	191
§5.3.2	Argumentation	193
§5.3.3	Emergence and Crisis	193
§5.3.4	Agreement or Breakdown	193
§5.4	Negotiating Styles, Strategy, and Tactics	194
§5.5	Cross-Cultural Negotiation	198
§5.6	Negotiation When Disputes Arise under an Existing Agreement	202
§5.7	The Ethics of Negotiation	202
§5.7.1	Ethics Generally	202
§5.7.2	Ethical Constraints on U.S. Lawyer-Negotiators	205
§5.7.3	Statutory Controls on Negotiator Conduct	206
CHAPTER 6		
	International Electronic Commerce	207
§6.1	Introduction and Some Basic Definitions	207
§6.2	A Brief History of the Internet	211

§6.3	The Size and Scope of International Electronic Commerce	214
§6.4	Contract Formation and Digital Signatures	216
§6.4.1	Contract Formation Generally	216
§6.4.2	The Matter of Digital Signatures	222
§6.4.3	The Requirement of an "Original" Agreement	224
§6.5	Jurisdiction over E-commerce Transactions	225
§6.5.1	Jurisdiction Generally	225
§6.5.2	Jurisdiction over Internet Transactions in the United States	226
§6.5.3	Internet Jurisdiction in the EU and Elsewhere	228
§6.5.4	The Prospect of an Internet Jurisdiction Treaty	230
§6.6	Taxation	231
§6.6.1	Internet Taxation in the United States	232
§6.6.2	Internet Taxation in Other Countries	232
§6.7	Intellectual Property	235
§6.7.1	Copyright	235
§6.7.2	Patents	236
§6.7.3	Trademarks and Trade Names	237
§6.7.4	Domain Names and Cybersquatting	238
§6.8	Payment Systems	239
§6.8.1	Payment by Check	239
§6.8.2	Electronic Checks	240
§6.8.3	Credit Cards and Debit Cards	241
§6.8.4	Innovative Electronic Payment Systems	242
§6.8.5	The Phenomenon Known as "Bitcoin"	242
§6.9	Privacy	245
§6.10	The Future of International Electronic Commerce	245
CHAPTER 7		
	International Intellectual Property and Licensing Agreements	247
§7.1	Choosing a Licensing Agreement	247
§7.2	The Forms of Intellectual Property: Patents	249
§7.2.1	Patents in the United States	250
§7.2.2	Patents under the European Patent Convention	254
§7.2.3	The International Regime for Patent Protection	255
[1]	The Paris Convention	255
[2]	The Patent Cooperation Treaty	256
[3]	The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	257
§7.3	Copyright	257
§7.3.1	Copyright in the United States	257
§7.3.2	Copyright in International Law and Practice	260
[1]	The Berne Convention	260
[2]	The TRIPS Agreement	262
§7.4	Trademarks	263

§7.4.1	Trademark in the United States	263
§7.4.2	Trademark in the EU	266
§7.4.3	International Protection for Trademarks	268
§7.5	Trade Secrets	268
§7.5.1	Trade Secrets Generally	269
§7.5.2	International Protection of Trade Secrets	274
§7.6	Components of a Licensing Agreement	274
§7.6.1	An Outline of a Typical Licensing Agreement	275
§7.6.2	An Analysis of Licensing Agreement Clauses	276
	[1] The Granting Clause	276
	[2] Duties and Representations	277
	[3] Fees and Royalty Payments	277
	[4] Termination and Noncompetete	278
CHAPTER 8		
	The Less-Drastic Forms of Commercial Dispute Resolution	279
§8.1	Introduction	279
§8.2	Contract Adaptation	280
	§8.2.1 Gap-Filling Mechanisms in the Underlying Law	283
	§8.2.2 Coping with Uncertainty Through Express Contractual Provisions: Some Typical Adaptation Clauses	285
§8.3	Renegotiation	287
§8.4	Fact Finding and Early Neutral Evaluation	288
§8.5	Mediation and Conciliation	289
	§8.5.1 Mediation and Conciliation Generally	289
	§8.5.2 A General Theory of Mediation	289
	§8.5.3 Procedures for International Commercial Mediation	292
	§8.5.4 Mediation in the Future	294
§8.6	The Minitrial	294
	§8.6.1 The Minitrial Generally	294
	§8.6.2 Specific Minitrial Rules	295
	§8.6.3 Minitrials in the Future	296
CHAPTER 9		
	Commencing Arbitration, the Arbitration Hearing, and the Arbitral Award	299
§9.1	Introduction	299
§9.2	A Brief History of Commercial Arbitration	305
§9.3	The Statutory Basis for Arbitration	308
	§9.3.1 The Federal Arbitration Act	308
	§9.3.2 The English Arbitration Act	310
	§9.3.3 The UNCITRAL Model Law on International Commercial Arbitration	311
§9.4	The Lex Loci Arbitri and "Ad Hoc" Versus "Institutional" Arbitration	312
§9.5	A Description of the Major International Arbitral Institutions Including a Brief Summary of Their Rules	315

§9.5.1	The International Chamber of Commerce	316
§9.5.2	AAA Procedures	320
§9.5.3	The UNCITRAL Procedures	324
§9.5.4	The WIPO Rules	326
§9.6	Commencing the Arbitration	327
	§9.6.1 Determining the Issues to Be Arbitrated	329
	§9.6.2 Drafting the Request for Arbitration	330
	§9.6.3 Selecting the Arbitrator	332
§9.7	Preparing for and Conducting the Hearing	334
	§9.7.1 Discovery	335
	§9.7.2 The Prehearing Conference	336
	§9.7.3 Interim Relief Pending the Hearing	337
	§9.7.4 The Hearing	338
	[1] Order of Presentation	338
	[2] Rules of Evidence	339
§9.8	Drafting the Arbitral Award	340
§9.9	AI and Arbitration	345
CHAPTER 10		
	International Commercial Arbitration: Arbitration in the Courts	349
§10.1	Introduction	349
§10.2	Actions to Compel or Stay Arbitration	353
§10.3	Recognition and Enforcement of Arbitral Awards	355
§10.4	International Recognition and Enforcement of Arbitral Awards	361
	§10.4.1 The New York Convention	361
	§10.4.2 Enforcing Awards Not Subject to the New York Convention	366
CHAPTER 11		
	International Commercial Arbitration: Special Regional Considerations	367
§11.1	Introduction	367
§11.2	The International Centre for the Settlement of Investment Disputes (ICSID)	367
§11.3	The European Union (EU)	371
§11.4	The Iran-United States Claims Tribunal	374
§11.5	Latin America	376
§11.6	The Middle East and Africa	380
§11.7	The Pacific Rim	383
§11.8	China	385
§11.9	The Former Soviet Union	388
CHAPTER 12		
	Litigation	391
§12.1	Introduction	391
§12.2	Litigation: Generally	392
§12.3	Subject-Matter Jurisdiction	393

Table of Contents

§12.4	Foreign Sovereign Immunity and the Act of State Doctrine	394
§12.4.1	Sovereign Immunity	394
§12.4.2	The Act of State Doctrine	397
§12.5	Personal Jurisdiction over Private Parties	399
§12.6	Service of Process	403
§12.7	Choice of Forum, Venue, and Forum Non Conveniens	405
§12.8	Choice of Law	409
§12.9	Discovery and Gathering Information and Evidence Abroad	411
§12.10	Trial Procedure	415
§12.11	Enforcement of Judgments at Home and Abroad	417
§12.12	Conclusion	421
CHAPTER 13		
	Online Dispute Resolution	423
§13.1	Introduction	423
§13.2	ODR: Categories and a Suggested Definition	426
§13.3	The Possible Contributions of ODR to Commercial Dispute Resolution	427
§13.3.1	Renegotiation and ODR	428
§13.3.2	Mediation and ODR	429
§13.3.3	Arbitration and ODR	429
§13.4	The Future of ODR	431
CHAPTER 14		
	Future Trends in International Commercial Agreements and International Commercial Dispute Resolution	433
§14.1	Introduction	433
§14.2	Trends in International Commercial Agreements	433
§14.3	Trends in International Commercial Dispute Resolution	437
§14.4	Conclusion	443
	Index	445