Drafting the International Commerce Agreement

Elizabeth F. R. Gingerich

Keywords: International Business Contracts, Global Trade, International Law, Dispute Resolution

I. Introduction

The international marketplace has become the standard venue for not only multinational corporate transactions, but for long-term business planning for visionary and resourceful entrepreneurs. By definition, international commerce — also referred to as global, foreign, and overseas trade — is the voluntary exchange of goods and/or services across national boundaries. Entering into a nongovernmental trade agreement may prove advantageous for all participants involved; however, crossing national borders does necessitate considerations which do not usually characterize domestic decision-making. As pitfalls are inevitable, fundamental knowledge of terms constituting the international agreement may serve to prevent or mitigate loss of trust, compromised business relationships, and adverse financial investment. Ostensibly, consultants are necessary to explain and navigate through the international contractual morass of considerations which lead to the execution and fulfillment of binding agreements.

As a disclaimer, this paper is neither intended to be a one-size-fits-all manual, nor even an exhaustive checklist in drafting the international trade agreement. However, it does attempt to highlight topics which should be considered in today’s global marketplace for mutual protection of the parties. It is also important to note that the majority of agreements do not incorporate all necessary terms within the main body of the document; rather, they provide straightforward core information which is then often supplemented by reference to additional terms and conditions. If the parties lack a history or tradition of customary dealing, both will most likely be hesitant to engage in a particular business venture without conducting preliminary, comprehensive research and acquiring professional assistance, taking all relevant and identified precautions into consideration. Attention to specificity of provisions will help forestall contractual disputes and costly judicial undertakings.

In this fashion, definitional sections are typically provided within the agreement proper to rectify ambiguities and provide clarity of terms to facilitate mutual understanding. Knowledge of important provisions and a widespread analysis of the context of the transaction are paramount.

Elizabeth F. R. Gingerich, J.D., Valparaiso University, Indiana, USA.
Email: Elizabeth.Gingerich@valpo.edu
II. The Parties

Knowing one’s business partner is akin to knowing one’s life partner. Simply identifying the other participant is the necessary first step. Whether the contract involves a collective labor group, business investors, or supply chain entities, or consists merely of a licensing or distribution agreement, accurate and thorough identification of the other party is required. For example, when dealing with a labor pool, the determination must be made about whether union representation exists and, if so, whether the anticipated contract may conflict with the terms of a collective bargaining agreement. If multiple businesses are involved, there must be an initial determination of the appropriate officer and/or other representative who has the necessary authority to participate in the negotiations and execute the required documents to consummate the expressed will of the parties. And with many international sales transactions, brokers are utilized (prompting expectation of a commission). Upon ascertaining the identities of all parties to an international agreement, cross-cultural understanding and core knowledge of the contextual character of the country from which each party emanates must then be the primary guiding principles of the subsequent negotiation process.

Reputation

Conducting trade transactions with foreign suppliers, companies, or governments generates well-founded trepidation. A firm may have a positive national, or even international, reputation for following a triple-bottom-line philosophy of doing business (i.e., people, planet, and profits) or, on the other hand, carry a stigma of supporting, indirectly or directly, exploitative economic, social, and/or environmental conditions. For instance, Foxconn, one of the world’s largest electronics manufacturers and historically the primary supplier of Apple products, has been associated with creating untenable working conditions and paying grossly inequitable wages to its workers in China. Apple has recently decided, partially in answer to public outrage over this situation, to widen its supplier base and demand reforms (Dou, 2013).

A more positive reputation can be ascribed to certain businesses that have been internationally recognized as producing or supporting superior products in an eco-friendly and socially-responsible manner, such as the Rainforest Alliance, Kimberly Process, the Organic & Fairtrade Competence Center, and the Energy Star.

---

1 See the Global Reporting Initiative reporting metrics used to comprise a Corporate Sustainability Report (CSR) found at http://www.globalreporting.org.
2 For example, widespread negative press has circulated globally regarding the decision of both The Gap and Wal-Mart to withhold supporting a safety mandate after the deaths of over 1,100 workers – predominantly young women and girls – in a Bangladesh garment factory collapse in early May, 2013.
3 The Rainforest Alliance is a nonprofit organization that provides a certification process of goods, services, and other activities that work to preserve biodiversity by most globally-respected sustainability standards. http://www.rainforest-alliance.org/.
4 The Kimberley Process is a means of certifying that diamonds do not originate from countries where their sale is used to help finance rebel movements and their allies seeking to undermine legitimate governments. http://www.kimberleyprocess.com.
certification process. Several internationally trading companies fall under this heading: *Patagonia* (outdoor clothing company headquartered in California), *Zaras* (a Spanish-based clothing and accessories retailer), *Burt’s Bees* (an American-based manufacturer of personal care products), *Toms Shoes* (a for-profit, California company, that operates the non-profit subsidiary, *Friends of Toms*), and *Interface, Inc.* (world-renowned for its sustainability philosophy; Interface is based in Atlanta, Georgia and is the world’s largest manufacturer of modular carpet).

**International Ratings**

Before agreeing to do business with a foreign entity, checking the national security rating of that entity’s home country and performing a security risk analysis may dictate if business will be transacted in a reasonably safe environment. There exist myriad websites and other sources of information which ascribe business risk ratings to countries. These ratings are both regional and international in scope and are typically based on criteria which include crime statistics, gender disparity, governmental stability, GDP, terrorism, quality of education, healthcare, and infrastructure, and per capita income.

Ratings of foreign enterprises provide an important service to the novice preparing to engage in the world marketplace. For instance, *Business Monitor International* (BMI), an independent company founded in 1984 and headquartered in London, offers security analyses, business data, and financial forecasts to businesses, banks, financial service companies, governments, academia, and research centers ([http://www.businessmonitor.com/aboutus.html](http://www.businessmonitor.com/aboutus.html)).

Another invaluable tool available to assist the international business newcomer is a bill of lading (described in a broader context, *infra*), regarded as a public document. Detailed activities and characteristics of particular businesses, countries, and governments as well as transaction specifics worldwide can be ascertained from these public documents (also known as *Shipping Manifests for Ocean Freight Imports*). Several private sector enterprises have digitalized this information.

**Bribery and Corruption**

The reputation of a particular trade partner may also be influenced by its laws and common business practices. Implemented under the auspices of the *Organization for Economic Cooperation and Development* (OECD), the Convention Combating Bribery of Foreign Public Officials in International Business Transactions (more commonly referred to as the OECD Anti-Bribery Convention) is the only legally-binding standard designed to criminalize acts of bribery of foreign public officials associated with

---

6 *Energy Star* is a voluntary program created by the U.S. Environmental Protection Agency that helps businesses and individuals produce products certified as superior energy-efficient consumables, [http://www.energystar.gov/](http://www.energystar.gov/).

7 For instance, during the last quarter of 2011, the *Business Monitor International Ltd.* assigned Kuwait a favorable rating based on data related to these criteria (*Kuwait Defence & Security Report*, Q4 2011).

8 See, for example, [http://www.importgenius.com](http://www.importgenius.com).
international business transactions. The OECD is best characterized as an intergovernmental organization of 34 countries which primarily encourages economic growth and increased employment through coordinated efforts and membership dialogue.

The Anti-Bribery Convention has advanced these objectives by establishing legally-binding standards which criminalize bribery of foreign public officials in international business transactions. This instrument has the potential for halting projects deemed unsafe, thereby possessing the capacity to change the course of whole economies. Members of the Convention must combat bribes made by their own nationals to foreign public officials—even those operating in countries which may not even be signatories to the Convention. This uniform proscription thus attempts to obfuscate unfair competition while supporting more robust development (Ehlermann-Cache, 2008). Since the Convention is not self-executing, each member country is expected to have an enforcing law enacted in accordance with its own legal tradition. In the US, acts of bribery and extortion are regulated by the \textit{Federal Corrupt Practices Act} (FCPA).\footnote{The \textit{Federal Corrupt Practices Act of 1925} (FCPA) is codified at 2 USC. §241.}

The US not only prosecutes and punishes domestic and international entities that bribe public officials within the US, but also criminalizes such conduct carried on by US-based companies with public officials overseas. The Anti-Bribery Convention is the only anti-bribery instrument regulating supply-side commerce. As of June 7, 2013, 34 countries\footnote{Specifically, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.} and six non-member countries\footnote{Namely, Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa.} have adopted this OECD-sponsored Convention (http://www.oecd.org/corruption/oecdantibribery.convention.htm).

\textbf{Global Financial Stability}

A country’s credit ratings will inevitably affect one’s decision to enter into a commercial agreement with a business overseas. The stability of the subject country and its banking system are key to fostering greater private sector investment. As revealed by Standard & Poor’s (S&P), Moody’s, and Fitch credit rating agencies, the best places to invest currently are rated “AAA.” Examples of AAA-rated countries include the UK, Germany, the Scandinavian countries, Canada, Singapore, and Hong Kong.\footnote{The US was downgraded to an “AA” in 2009, but has recently been labeled as “stable,” garnering a AA+ rating. See, http://www.tradingeconomics.com/country-list/rating.}

Reacting to the global commercial fallout caused by the Great Recession of 2008 as well as in an attempt to stimulate and encourage international trade, President Obama introduced the \textit{Commercial Services National Export Initiative (NEI)} administered under the auspices of the US Department of Commerce (http://www.trade.gov/cs/). The NEI is part of the Obama Administration’s financial stimulus plan configured to improve foreign trade conditions and reduce economic and regulatory barriers that directly impact the private sector’s ability to export to new and existing markets. Loans, grants,
and other forms of governmental financial assistance are available to aid in this process. Currently, American businesses and individuals are selling goods and services to the 95 percent of consumers who reside outside US borders. The US Small Business Administration (SBA) provides similar financial assistance through various loan programs, surety bonds, and subsidized research options to further promote greater global trade and to help create Small Business Investment Companies (SBICs). These services are replicated, to a certain extent, by the Export-Import Bank, an independent federal agency.

**Unions**

As of May 1, 2013, and for several years prior, Wal-Mart has been named as the largest retail chain in the world (Fortune 500 Annual Rankings, http://money.cnn.com/magazines/fortune/fortune500/). However, the multinational parties with whom it deals may be constrained by the terms of viable collective bargaining agreements, that is, when Wal-Mart enters into an agreement, its trading partner – as well as its own company – must operate within the parameters set forward by currently existing union contracts.

Labor unions may be a considerable factor in the negotiating process. The United States is, ostensibly, the home country to many multinational companies. Thus, the participation of labor unions in any international business strategy appears critical for sustained success. Although weakened in recent decades in both strength and numbers (particularly in the US), coordinated labor interests remain a viable force in contract talks. It has been alleged that American-based unions have interceded at US corporate headquarters on behalf of foreign unions experiencing labor relations problems with overseas subsidiaries of US companies (Leonard, 1974). Even if the multinational firm does not regard local unions as necessary parties to contract talks, US unions may have the requisite influence to apply pressure to foster such recognition.

Disregard for union participation by contracting parties always carries the potential for the materialization of consumer boycotts. Various national unions have successfully exchanged information sufficient to unify bargaining objectives and create solidarity in the event of a conflict between international unions. Thus, the assumption that a potential overseas commercial partner has no unionized workforce to consider may be betrayed by the actual presence of a well-constructed network of union coalitions worldwide. Hence, it is imperative to research the potential demands of labor pools associated with multinational business partners in the course of bargaining.

---

13 According to the US Department of Commerce, in 2012 alone, U.S. exports reached an all-time record of $2.2 trillion and supported approximately 9.8 million jobs (http://www.trade.gov/nej).
Governments

Especially when dealing with a trading partner emanating from an emerging market or a developing nation, the business entity must be leery of potential government interference vis-à-vis acts of eminent domain, acts of state, repatriation of profits, or any combination of processes which facilitate a government takeover of a private company. This phenomenon is certainly not exclusive to non-industrialized countries, but may occur whenever economic instability could trigger government intervention. In the case of General Motors (GM), although the US government did not nationalize the company, it did step in after GM filed for reorganization in bankruptcy in 2009 to appoint a new CEO and temporarily acquire over 60% of the corporate stock to prevent anticipated financial ruin and the layoff of millions of workers (King & Terlep, 2009).

**Eminent Domain**, as primarily used in the US, is embodied in the Fifth Amendment to the US Constitution and permits the governmental “taking” of private property owned by individuals and companies in the US upon the showing of sufficient public need and upon giving reasonable compensation for the loss. In many countries, such takings do not have to be predicated upon provable public need nor accompanied by reasonable remuneration to the prior owner; these acts simply serve as a means to achieve national financial stability – legitimate or pretextual. These **Acts of State**, or of nationalization, have been used to gain control of utilities, transportation systems, banking operations, and mining operations (Jennings, 2012).

Political and/or economic instability – especially in emerging markets and developing countries – can alter the nature of risks, especially with respect to long-term agreements. Contracts which focus on massive infrastructure projects may likely succumb to unforeseen forces, opening the door to government intervention and control. Such shifts of power from private investor to government customer must be accounted for in any such international contract (Orr, 2006).

**Strategic Coalitions**

Achieving a bargaining equilibrium is of utmost importance in international contracts, but not always possible. Contracting parties certainly do not want to be placed in a position of inferiority by accepting a standardized contract proposed by the more established enterprise, especially where there is a paucity of fairness and mutuality of governing terms. Power in size and numbers can influence this equation through the creation and interjection of strategic coalitions. Noria & Garcia-Pont (1991) propose a theoretical framework to better understand the nature of networks of strategic linkages and partnerships in global industries. They argue that membership in **strategic groups** (based upon similarities in capabilities) and **strategic blocks** (based upon similarities in linkages) must be assessed to determine the actual level of bargaining power.
III. The Context of Negotiations

L.E.S.C.A.N.T. Factors

A thorough understanding of the contracting entity is largely influenced by the characteristics of the country in which it is based. L.E.S.C.A.N.T. (Language, Environment and Technology, Social Organization, Contexting, Authority, Non-Verbal Behavior, and Time Concept) are the universally-accepted, informal rules for international business transactions which help to provide insight into these intangible variables.

**Language and Contexting** are inextricably interwoven. Low-context cultures are those that rely on the written word as the controlling factor in their relationship. Little weight is given to the context in which that agreement is reached. Low-context cultures include North America countries – including the United States – as well as Switzerland, Germany, and the Scandinavian countries, except Finland. With low-context cultures, the meaning of the text is explicit and self-contained (Palmer & Schoorman, 1998). Business practices in these countries often separate “the message from the messenger,” allowing critique of ideas and behaviors (Elmer, 1993). Mid-level-context cultures include France, England, and Asian countries. Business conducted in high-level context cultures emphasize relationship-building as well as how and in what setting an agreement is reached (Jennings, 2012). Additionally, high-level context communication can be characterized as being reserved and purposefully ambiguous; conversely, low-level context communication is aptly defined as explicit, direct, and in alignment with the party’s individual character (Gudykunst & Kim, 1997). However, while members of low-level context countries are more individualistic than their high-level, collective counterparts, it is important not to stereotype any group as characteristics may vary. Thus, the more research performed and communications made prior to entering into a commercial alliance could prevent disastrous consequences (Zweifel, 2003).

**Environment and Technology.** Although businesses have become accustomed to rapid communications systems geared to the exchange and verification of offers and acceptances, it is imperative to first research the type of communication and technology mutually available when considering contracting with a business entity in a developing country. However, as the World Bank (discussed more fully, infra) continues to permeate international lending practices – diffusing its particular accounting practices especially to borrowing countries – its loan agreements imbue a more sophisticated manner of contracting and impart a broader use of technological information. This often results in a heightened method of dealing and governance of behavior, ensuring the Bank’s legitimacy and strengthening its unanimity with financial partners (Neu, et al, 2006).

**Social Organization, Authority, and Non-Verbal Behavior** pertain to the social order of the country wherein the prospective business partner is headquartered. Before engaging in negotiations, it should be predetermined whether it is customarily
appropriate to interject women, mid-level managers, attorneys, or other classifications of persons into the bargaining process. Specific rules of etiquette involving situations like conducting business during meals, manner of dress, and position of hands, together with the meaning of non-verbal gestures, are also pertinent to this initial assessment.

**Time Concept.** Several countries, including the United States, Great Britain, Germany, Canada, New Zealand, Australia, the Netherlands, Norway, and Sweden are all considered *monochronic* nations where the immediate goal of businesspeople is to consummate the deal without delay. Conversely, countries that operate with greater flexibility in time and that consider the social setting, relationship-building, and networking implications of a business deal as important as completing the deal itself are termed *polychronic* nations. These regions include South America, the Middle East, sub-Saharan Africa, and Asian countries (*Cultural Differences*, 2011).

**Cross-Cultural Appreciation**

Understanding decision-making processes, core beliefs, negotiating roles, legal systems, governance processes, and bargaining styles of cross-cultural businesspeople should not be underestimated and never ignored. Learning and respecting differences are critical in developing and maintaining sustained business relationships (*Sebenius*, 2002). Encouraging mutual respect between potential business partners through learning and appreciating cultural differences is critical. It has long been said that American-based businesses are plagued with domestic workers who are culturally illiterate and monolingual. Certainly, the traditional emphasis placed upon foreign language instruction in US public school systems is wholly woeful and deficient; yet, as a nation of immigrants, successive generations are joining the mainstream of global citizens through cross-cultural exposure and multi-linguistic capabilities. This modern phenomenon of “inter-culturation” is, without question, presently permeating the global marketplace (*Chadraba et al*, 2010).

Cross-cultural understanding can also mitigate the development of conflicts, or if serious disputes arise, help in the resolution process. Preservation of relationships in the business venture must be viewed as importantly as the business pursuit itself (*Elmer*, 1993). By establishing realistic and effective communication channels based on mutual cultural understanding and goodwill, many disputes can be avoided entirely (*Tindal*, 2011).

**SWOT Analysis**

Any foreign commercial initiative requires both an internal and external assessment of strengths, weaknesses, opportunities, and threats (SWOT). Highlighting the positive aspects of a deal is endemic to contemplating a business relationship, but equally as important is identifying any negative factors. Too much risk or challenge may consequentially lead to the nullification of a contemplated deal. Many professional services exist to provide this function with relative ease. For instance, MarketLine
SWOT Company Profiles may be accessed via the Internet to evaluate performance ratings of myriad business enterprises to assist both private firms and public companies make informed decisions prior to pursuing business ventures both at home and abroad (http://www.marketline.com/overview/our-offering/company-swots/).

**Prohibited or Restricted Goods**

Although potential business partners may desire that certain goods or services constitute the basis of their contemplated course of dealing, inquiries must be made to ensure that the laws and rulings (i.e., common law, code or statutory law, and judicial decisions) of the countries of exportation or importation will not be violated. Failure to do so could potentially nullify the contract and subject one or both parties to fines, penalties, and even imprisonment. For instance, Article R645-1 of the French Criminal Code prohibits, in relevant part, individuals and enterprises subject to French jurisdiction to “wear or exhibit” in public, uniforms, insignias, and emblems which “recall those used” by an organization declared illegal under the Nuremberg Statute. In the case LICRA v. Yahoo!, the French High Court ruled that US-based Internet search engine Yahoo! could not use its Internet connections within French territories to sell or acquire such memorabilia. On May 22, 2000, the High Court confirmed the illegal nature of engaging in such forbidden sales under French law (http://news.bbc.co.uk/2/hi/europe/760782.stm).

Other examples of restricted goods or the laws that prohibit their transfer include the following:

- Through the US Arms Export Control Act of 1976 (AECA), the American government gave its President the authority to control the importation and exportation of defense items and services. The Act also requires foreign entities that receive weapons from US enterprises to use them solely for internal defense purposes.15

- In an attempt to bolster domestic economies, many countries invoke mandatory repatriation, or the return of profits and investments made by domestic companies overseas back to the home country. Likewise, under national procurement policies, governments and tightly-regulated firms may be directed to purchase locally-produced goods even if there are less expensive counterparts available overseas.

- Nation-states may also have import quotas, restricting the type or quantity of certain goods imported. With import quotas, licenses granted to businesses to import may be limited in scope and number. The license holder, then, is able to purchase these restricted goods and sell them at a higher price in their own home markets, i.e., generating quota rents. Fees assessed for the issuance of these licenses not only generate money for the home country, but stimulate local initiatives to produce these goods.

- If a private party successfully negotiates with an overseas entity to import certain goods, the market potential for this merchandise and the relative bargaining position

---

of the importer may result in the creation of voluntary export restraints (VER), whereby the exporter agrees to forestall other trade restrictions associated with that type or category of merchandise (Keegan & Green, 2002).

Finally, individual nation-states may have local content requirements which require that a certain portion of a good be produced domestically before public distribution. While this restriction does not necessarily impose an import quota on local businesspeople, the end result is that if they purchase more products from overseas markets, more capital will be required to be spent in the home country before those goods are sold (Keegan & Green, 2002).

IV. International Venues and Conventions

Traditional barriers (language, legal systems, cultures, dispute resolution institutions, and mandatory procedures) to cross-border trade transactions have been greatly reduced in part due to uniformity of worldwide business practices, adoption of internationally-recognized standards and guidelines, passage of international business conventions, and the general proliferation of international trade agreements and treaties. Several documents, guides, tribunals, and venues facilitating private international trade transactions include the following:

1. The International Institute for the Unification of Private Law (UNIDROIT), headquartered in Rome, is an intergovernmental organization designed to harmonize private international law by drafting global conventions and model laws. One of UNIDROIT’s accomplishments since 2010 has been the drafting of the Principles of International Commercial Contracts (PICC), designed to provide increased uniformity in international commercial contracts law (DiMatteo, 2001).

2. The United Nations Commission on International Trade Law (UNICTRAL) is the primary legal body of the United Nations, specializing in commercial law reform in the area of international trade law. The commission has worldwide membership and works toward the modernization and harmonization of international business rules by creating globally acceptable model laws, conventions, and procedures. This legal body also provides professional opinions, guides, and recommendations, updated information on various case rulings, and expert assistance in legal reform (http://www.uncitral.org/).

3. The Hague Conference on Private International Law (HCCH) was formed in 1893 and is universally regarded as the preeminent organization governing private international law. Its main charge is to “work for the progressive unification of the rules of private international law” and it has pursued this objective by creating and helping to implement various multilateral conventions. The HCCH continuously promotes the synchronization of laws permeating global trade. Currently, seventy-two nations are members of the Hague Conference, including the United States, the
BRIC countries (Brazil, Russia, India, China), and all 27 member states of the European Union (www.hcch.net).

(4) The **United Nations Convention on Contracts for the International Sale of Goods (CISG)** – also known as the **Vienna Convention** – is a treaty developed by UNCITRAL offering a uniform international sales law to avoid “choice of law” issues. As of August 2010, the CISG has been ratified by 76 countries (including France, the United States, and most recently, China – known as “Contracting States” – but excluding Brazil, India, U.K., and South Africa). The CISG governs a significant proportion of world trade. In preparing the international contract for the sale of goods between parties from different Contracting States, it is important to note that unless excluded by the express terms of the contract, the provisions of the CISG will be deemed to be incorporated into, or, where necessary, supplant, any otherwise applicable domestic law as it relates to transactions in goods (http://www.cisg.law.pace.edu/).

(5) The **International Chamber of Commerce (ICC)**, established in 1919 in Paris to serve global business by opening up new markets for trade and investment in goods and services, has advanced in its original mission by creating methods of resolving international trade disputes through its International Court of Arbitration. Recently, it has increased its activities to all continents, using all major languages associated with international trade. In addition to its civil services, the ICC provides Commercial Crime Services (London-headquartered) to the world business community equipped with a centralized commercial crime-fighting body designed to prevent, investigate, and prosecute maritime, counterfeiting, financial, and intellectual property criminal activities. The ICC has published a listing of trade terms together with their respective meanings (referred to collectively as “Incoterms” and discussed more comprehensively, infra).

(6) The **International Court of Justice (ICJ)**, also known as the World Court, was established in 1945 and is located at The Hague, Netherlands. It operates under the auspices of the United Nations and constitutes the primary judicial organ of the UN. Its main functions are to settle legal disputes submitted to it by states and to give advisory opinions on legal questions posited by duly authorized international organs, agencies, and the UN General Assembly. Its relevance to private sector global business is tangential (http://www.icj-cij.org/homepage).

(7) Formed in the US following WW II, the primary objective of the **International Monetary Fund (IMF)** was initially to expand international trade through a lending system designed to stabilize currencies in emerging markets and developing countries. The IMF created the International Bank for Reconstruction and Development, more commonly referred to as the **World Bank**. The IMF and the World Bank are essentially twin pillars of an intergovernmental financial institution, yet retain distinctive characteristics. While the fundamental purpose of the Bank is to foster global development, the IMF is more of a cooperative institution which maintains an orderly system of international payments and receipts (Driscoll, 1996).
The General Agreement on Tariffs and Trade (GATT) – replaced in 1995 by the World Trade Organization (WTO) based in Geneva, Switzerland – was a multilateral agreement regulating global commerce. Its core purpose was the reciprocal reduction of tariffs and other trade barriers throughout the world. While GATT constituted a set of rules agreed upon by member nations, the WTO is an institutional body which has broadened its purview to include trade in services and intellectual property (http://www.wto.org).

Organization for Economic Cooperation and Development (OECD), headquartered in Paris, is best characterized as an intergovernmental organization of 34 countries which primarily encourages economic growth, innovation, sustainability, and increased employment through coordinated efforts and membership dialogue worldwide (www.oecd.org).

As foreign trade in commodities and services has increasingly involved intellectual property components – i.e., copyrights, trademarks, trade secrets, trade dress, and patents – universal protections have been promulgated. The World Intellectual Property Organization (WIPO) (Geneva, Switzerland) administers twenty-five multilateral treaties, including the Berne Convention, currently comprised of 166 signatory countries. Under Berne, the copyright law of the country wherein the copyright is claimed (and its period of duration) is applied. The Convention requires its signatories to recognize the copyrights of authors’ works from other signatory countries in the same manner recognition is given to domestically-owned copyrights(http://www.wipo.int/treaties/en/). The primary alternative embodying coordinated attempts to protect copyrights worldwide is the Universal Copyright Convention (UCC), developed under the aegis of the United Nations Educational, Scientific and Cultural Organization in Geneva in 1952 (http://portal.unesco.org/). And with respect to patent protection, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement attempts to harmonize patent laws across countries; however, the extent of enforcement of this law continues to vary. Membership in TRIPS is inclusive in the WTO (Papageorgiadis et al, 2013).

V. The Agreement

Once parties and goods or services have been identified, relationships developed, risks assessed, and relevant laws researched, the terms of the transaction should be memorialized in a carefully prepared and precisely worded document. The topics which are explored below do not constitute an exhaustive list of contractual components; rather, they merely represent the fundamental underpinnings of an international business agreement.

Risk of Loss

The international transfer of goods is inherently complex and fraught with perils and risks as the journey involves transport to the carrier, loading, main transport, unloading, and ultimate delivery to point of destination. The transfer of goods from the seller to the
buyer presents an element of risk that implicates general economic and legal consequences. The parties must predetermine who will bear the responsibility for losses at every juncture of the journey.

**Incoterms**

When trading partners are in different parts of the world, trade terms must be specific. There exist several sets of international guidelines for interpreting trading terminology that attempt to simplify the preparation of commercial contracts. The complexity of the issues involved in drafting a final commercial agreement warrants a thorough knowledge of the practice of foreign trade, international shipment and customs practices, and ultimately, calculations of profitability. Hence, the selection and inclusion of the most favorable terms for both the seller and buyer in commercial contracts will guide their relations (Căruntu, 2010).

If one of the contracting parties is located in the United States, the contract may be subject to the provisions of the *Uniform Commercial Code (UCC)*\(^\text{16}\) which supplies key words and phrases as well as prescribed remedies for transactions in goods. Supplementing, or at times supplanting, UCC or even the CISG terminology is found in the ICC’s set of International Commercial Terms – more commonly referred to as **Incoterms**. International trading agreements will often refer to particular acronyms or words that appear, at first glance, to have simple, uniformly understood meanings. However, in trading with different individuals and companies emanating from various foreign countries, not only must the presiding language be established, but the particular terms of trade should be ascribed a detailed meaning. The ICC has helped facilitate this process. As there are various versions of Incoterms, it should be noted that the most current are those adopted in 2010. While many of these words appear to parallel those contained in the UCC and the CISG, their meanings may be quite different and contracting parties need to be apprised accordingly (Morrissey & Graves, 2008).

**Subject-Matter Description**

Upon completing preliminary research and ultimately deciding to proceed forward, memorializing the parties’ intent and objectives must be accomplished very carefully. While seemingly obvious, the contract will identify the subject-matter of the agreement – whether it pertain to goods (tangible or intangible) or services. The subject-matter should also be expressly noted as either “exported” or “imported.” If the parties’ principal places of business are located in different countries, the contract may be subject to the CISG unless stated otherwise. Identifying the subject-matter for shipment necessitates a preliminary determination of export/import tariffs and other related costs. To simplify this process, the US Department of Commerce has provided a **Harmonized System (HS)** which assigns a 6-digit number to each good traded internationally and adds four additional numbers assigned from foreign countries that voluntarily participate in this

---

\(^{16}\) Article 2 of the UCC dealing with transactions in goods has been adopted by every state in the US except for Louisiana.
coding framework. The US maintains a comprehensive register of products under what it terms as the Schedule B System. This schedule shows the tariff rate affiliated with each product as well as any associated import fees assessed by the destination country (http://www.census.gov/foreign-trade/schedules/b/).

**Pricing**

**Arm’s-Length Transfer Pricing**

In pricing items for trade, one must be cognizant of the OECD international guidelines that regulate trading between business entities of member nations, particularly those between parent corporations and their subsidiary companies. With the rapid advancement of globalization, it is not uncommon – especially with multinational companies – to trade within the company. An electronics manufacturer in Germany may have a subsidiary, or “controlled” company, in Thailand. Basic accounting principles would naturally dictate that the purchase price of the chips, used in making the electronic goods, be as low as possible. The result is that any profit made in Thailand would be de minimus, garnering very little tax revenue for the supplier’s country. The sale of the final product from Germany to the open market would invariably generate higher profits, resulting in more substantial tax revenue to the more developed nation. Thus, not only would the parent company be subject to double taxation by two different countries, but the developing country would receive very little tax revenue comparatively.

OECD guidelines on “transfer pricing” thus have been modified to be at arm’s length. Arm’s-length transfer pricing thus attempts to shield the parent company from paying tax twice – once for the inter-company component sale and second, from the ultimate distribution of the finished goods. This arm’s-length principle (ALP) seeks to provide a formula based upon market prices used generally for that particular transaction, thus attempting to fairly apportion taxes to the various taxing authorities involved. Hence, each stage of the business deal is based upon actual market prices as if the two “controlled” businesses were transacting as independent enterprises (Article 9, OECD Model Tax Convention). ALP has not only assisted in providing the framework for treaties between OECD countries, but has also been accepted by many non-OECD nation-states. The main drawback is creating an equitable apportionment when the natural tendency of multinational companies has been to register as much of a share of the total profit in a low-taxing government, usually characterized as poor or developing (Neighbour, 2008). International trade author, Kenji Matsui (2011), has used quantitative research to demonstrate that countries which engage in intra-firm product trading, actual produce more economic disparity worldwide as subsidiaries are purposefully placed in underdeveloped countries.

**Terms and Methods of Payment**

There are several options of payment which may be used in overseas commercial transactions. For instance, when the manner of payment is stated as “cash,” the parties could be agreeing to an exchange of currency in the form of hard money, electronic debits, bank notes, securities, bills of exchange (banker’s or commercial draft), personal
checks, letters of credit, promissory notes, or bonds. International payment clauses may include the phrase, “cash against warehouse receipts,” which indicates transferal of the agreed upon method of consideration only when documentation of ownership is produced by a holding facility to the buyer/importer. Payment can be additionally extended for an agreed upon period of time to give the buyer a sufficient opportunity to inspect the quality of the cargo (Keegan & Green, 2002). Other common terms of payment include the following:

(1) **Bill of Lading (B/L).** A B/L is technically a document of title to the goods in question as well as evidence of the contractual relationship between the consignor of the merchandise and the shipping firm or carrier. More generally, it pertains to shipping documents, railway bills, and air transport bills, which indicate that the goods have been loaded on board the shipping vessel or have been delivered into the custody of the carrier. The B/L functions as a receipt from the carrier company which provides the details of a particular shipment. The buyer/importer often uses the B/L to secure the necessary loans from its bank to make payment for the imported goods even before the arrival of the shipment. These documents are the primary manner for the seller to prove that it has fulfilled the duty of delivery while providing the buyer with the confirmation to pay the purchase price (Keegan & Green, 2002).

(2) **Letter of Credit (L/C)**

The primary instrument of payment for an international sales transaction is through a Letter of Credit. An L/C is a mechanism which allows the buyer/importer to offer a secure method of payment to the seller/exporter. Several banks may be involved in this process, allowing the buyer to shift the risk of loss to the financial institution. Thus, an LC is a payment undertaking given by a bank that is issued on behalf of the applicant (usually, the buyer/importer or its agent) (Keegan & Green, 2002).

**Choice of Currency**

Recent austerity measures implemented across many member-states of the EU, as well as effects of the global credit and financial crisis of 2008 generally, have invariably affected the value and stability of foreign currencies. Unstable economies could easily trigger currency devaluations, leaving predictability of any given monetary unit in flux (Lee, 2013). The contracting parties must come to an agreement as to the form of currency to be used in business negotiations and financial forecasts. Again, if either of the contracting parties has an edge in bargaining power, this term may well be dictated with little input from the aspiring, subordinate partner.

**Choice of Language**

There should always be a “choice of language” clause designating the official language to be used in interpreting and guiding the terms of the agreement. The choice should be agreed to without compromising or minimizing the culture of the other. Although English
is regarded as the “language of international business” (Jennings, 2012), it is highly recommended that the commercial firm or businessperson ascertain sufficient knowledge of the other to demonstrate deference and respect while facilitating business travels. Even with a mutually chosen language, it should be noted that various meanings could still be ascribed to the contractual verbiage used without the inclusion of a comprehensive definitional section. At present, an increasing number of multinational enterprises are requiring the use of English in their corporate chains of command\(^\text{17}\) to facilitate communication, geographical performance, and cultivate new endeavors (Neeley, 2012).

**Choice of Law**

Increasing competitive challenges and globalization and have resulted in the adoption and application of newly-developed, legally binding and voluntary standards, developed at both national and international levels to help improve trade and investment as well as to foster ethical dealings and maintain mutual integrity. Before particular laws are chosen under which the terms of the contract are to be interpreted, the parties should thoroughly assess their respective bargaining positions and the general economies of the countries of origin and destination. Implementation and enforcement of particular standards may have far-reaching consequences impacting investment opportunities, international ratings, and loan policies. As mentioned supra, the UCC and the CISG represent codes governing the sale of goods, each possessing key differences which should be explored by the parties. For instance, under the UCC, parties can enter into a valid contract even though the price has not yet been established (substituting common industrial standards instead) whereas pursuant to the CISG, a contract must provide for an exact price.

**Application of Trade Agreements**

Free trade agreements (FTAs) and Regional Trade Agreements (RTAs) collectively represent a type of treaty which guides the flow of commerce in particular regions in the world. The primary objective of most FTAs and RTAs has been to encourage foreign investment between nation-members by reducing trade barriers and tariffs. An amalgamation of geo-political, security, and economic concerns are typically the main motivating factors supporting the creation of these alliances (Khatoon, 2010). The US and the EU are parties to a number of regional FTAs\(^\text{18}\) while the number of RTAs acknowledged by the WTO has dramatically increased from 250 in 2003 to 462 in 2010 (Khatoon, 2010).

**Choice of Forum**

In addition to pertinent treaties and laws, the parties should decide where disputes should be settled. Forum clauses, which specify a particular court, jurisdiction, or

\(^{17}\) Several examples include Airbus, Daimler-Chrysler, Fast Retailing, Nokia, Renault, Samsung, SAP, Technicolor, and Microsoft (Beijing).

\(^{18}\) One example is the North American Free Trade Agreement (NAFTA). Its member nations are the US, Canada, and Mexico.
authority, are increasing in importance especially as over-the-border e-commerce proliferates. A distinction should be made, however, between business-to-business (B2B) contracts and business-to-consumer (B2C) contracts. Generally, with respect to a B2C agreement entered into within the EU, although a forum may have been preselected to hear disputes, consumers will usually be allowed to have their cases heard in their own countries. The rationale is simple: it is presumed that the business party has far greater bargaining power. However, if a Swiss company and a Brazilian company engage in a business transaction and problems subsequently arise without any forum of dispute resolution having been designated, would Swiss or Brazilian courts preside? Each would inevitably desire a “hometown advantage.” Arguments could be made that the relevant jurisdiction would be where the primary business activity occurs, e.g., the manufacture of goods. Precious time and resources would inevitably be wasted while the parties attempted to agree upon a tribunal not previously determined. A more common practice today is to attempt to avoid judicial forums altogether in favor of alternate methods of dispute resolution (Encyclopedia of Business, 2009).

**Dispute Resolution**

As previously discussed, even the best crafted agreement will result in contentious conflict—over the meaning of certain contractual terms, the quality of goods or services proffered, or which party bears the risk of loss for a compromised shipment. A plethora of obstacles exist to potentially subvert uninterrupted business relations. Commercial contracts should set forth in great detail the method of alternate dispute resolution preferred (assuming that judicial intervention is waived as the primary means of resolution). Alternate dispute resolution mechanisms include mediation and arbitration (binding and non-binding). Both offer ways to overcome impediments inherent in international commercial disputes and prevent the breakdown of the business relationship while offering flexibility, creativity, privacy, and less delay and cost. There are international forums for each method.

Mediation is a process designed to quell more adversarial processes such as litigation and arbitration. A third party—often an individual or panel of individuals well-versed in the type of transaction involved—acts to promote more effective inter-party communication to help resolve the problem or issue at hand. Mediation can be an effective means of negotiating resolution and repairing business relationships as an objective third entity is interjected into the fray (Bowen, 2005). If a provision for mandatory mediation is not set forth in the contract, it is often agreed to by the parties after an impasse is reached.

In the majority of cases, however, parties involved in international commerce have relied upon international arbitration to rectify disputes (Bowen, 2005). Non-binding arbitration allows the parties to present their respective cases before an arbiter; however, if one or both disagree with the decision rendered, they are still free to proceed to a more formal judicial venue. Binding arbitration does not permit either party to disagree with the decision of the third-party arbiter unless in cases of provable fraud
and collusion. There is generally no right to appellate challenge or public record of binding arbitration proceedings (Gingerich, 2007).

Arbitration clauses in international commerce agreements often refer to a particular industry’s “Rules of Arbitration” by reference. A sample clause binding the parties to this form of contract dispute resolution might be worded: “All controversies relating to or in connection with, or arising out of this contract, its modification, making, or the authority or obligations of the signatories hereto, and whether involving the principals, agents, brokers, or others who actually subscribe hereto, shall be settled by arbitration in accordance with the rules of arbitration as set forth by the ICC. Arbitration is the sole remedy hereunder, and it shall be held in accordance with the laws of the State of California and the judgment of any award may be entered in the courts of that venue, or any other court of competent jurisdiction. All notices or judicial service in reference to arbitration or enforcement shall be deemed given if transmitted as required by the aforesaid rules.” Long-term collaborative ventures either between countries or private business entities need a reliable dispute resolution mechanism\textsuperscript{19} that can promptly and efficiently address problems as they materialize to ensure unfettered commercial success and decrease any unforeseen delays while problems are being addressed. There are certain unique characteristics of long-term, foreign-trade agreements whereby a strong system of international commercial arbitration is argued to be the most effective method of handling such issues (Holtzmann, 1969).

**Tender**

“Tender” is a trade term which means that the seller/exporter places goods that conform to their contractual description at the buyer's/importer's disposition. A valid tender indicates that the goods have met all import regulations and are ready for pickup, usually at an independently-owned warehouse, by the buyer. During the time of storage, goods usually can be kept without the incursion of tax liabilities until they are removed. In some instances, the seller is given a specific time period within which to deliver the goods – as opposed to being required to deliver on a specific date – as well a reasonable time thereafter to rectify any portion of the merchandise that fails to pass inspection.

**Terms of Delivery**

The global market mandates that delivery terms should be one of the essential clauses of a contract between international partners. Where the goods will be delivered is determined by the language used. There exist trade terms uniquely associated with the entry of goods from one foreign country to another.

- **Advice of Arrival** is a phrase that mandates that the seller – directly or through a pre-designated agent – must inform the buyer – directly or through a pre-designated agent – when the goods have arrived at their destination. Such advice usually

---

\textsuperscript{19} One such forum is the American Arbitration Association, headquartered in Chicago, Illinois.
accompanies the warehouse name and location. If the notification is given verbally, it must be followed with written confirmation on the same day such as by express letter, printed message, or telegram (http://www.ace-group.net/Glossary.aspx).

- **With a Destination Contract**, the seller has the obligation to deliver the goods to the buyer’s stated point of destination (e.g., the buyer’s headquarters or a particular bonded public warehouse) — not simply deliver them into the hands of a carrier. Under these terms of delivery, the seller would bear the risk of loss until the goods are delivered to their agreed upon destination.

Delivery terms are commonly placed in all sales contracts. The ICC has supplied a list of Incoterms, or trade terms, which are commonly used by international businesspeople. Several examples are set forth as follows:

1. **Delivered Duty Paid** or “DDP” requires the seller to arrange shipment, obtain and pay for import or export permits, and guide the goods through customs to a named destination.

2. **Cost, Insurance, and Freight** or “CIF” – requires the seller to bear the risk of loss until the goods reach the buyer’s destination port. Unless stated differently, the buyer must present proof of ownership documents to seller’s selected carrier, pay for customs dues, inspections, and ultimately for port-to-door transportation.

3. **Ex Works** or “EXW” obligates the buyer to bear all of the expenses and risks associated in moving the seller’s goods from the seller’s place of business (factory or warehouse) to the established destination arranged with the buyer. This type of delivery poses minimal risk for the seller and applies to all modes of transport.

4. **Delivered Duty Paid** or “DDP” provides minimal risk for the buyer by requiring the seller to deliver the goods (bearing all risk and costs involved) to their import destination.

5. **Delivered at Terminal** or “DAT” is a relatively new Incoterm and refers to the delivery of goods by any means of transport. It obligates the seller to bear the risk of loss until the goods reach their designated terminal and are unloaded. From that point, the buyer assumes the risk. In a DAT-type of delivery, the seller typically bears the expense and risk associated with the activities inherent in export clearance procedures while the buyer must undertake importation customs clearance (http://www.free-logistics.com/incoterms/entregado-en-terminal-dat.html).

6. **Free on Board** or “FOB” denotes the passage of the risk of loss to the buyer. With an FOB contract, the seller’s obligations are fulfilled when the ordered goods are tendered to a vessel chosen by the buyer. Even though a stated price of particular good appears reasonable, costs of insurance, transportation, customs, and inspections must still be calculated. With an FOB contract, it is imperative for the buyer to ascertain these costs in advance to produce the true price of the item and assess the risks inherent in the contemplated transaction. The term “Free” alone, in the context of a trade transaction, typically means that the seller must deliver the

---

20 For a more comprehensive listing, see http://www.wescargo.com/wordpress/shipping-dictionary/incoterms/.
desired item to a particular place named by the buyer. These terms must be used with extreme specificity to avoid trade delays (http://www.wcscargo.com/wordpress/shipping-dictionary/incoterms/).

**Quantity**

Precise language delineating the quantity of the item to be imported or exported is one of the most important terms to include in an international commercial contract. Without it, a court may be precluded from enforcing the contract in its entirety. The parties must agree to a particular form of measurement, e.g., kilos, bags, bales, or drums.

**Packaging**

Packaging requirements can be used as a condition for acceptance of imported commodities and subsequent payment therefor. The contract should clarify the type of packaging to be used, including the exact materials to be used to construct the main container, the outer covering, and the inner lining; how such materials are to be assembled (e.g., stapled, adhered, or sewn – by hand or machine) and the exact size and condition (e.g., new, used, clean, or uniform). Bales may be the preferred type of packaging for bulk road transport, but with shipping freight, sturdier barrels of steel or other like materials may be required.

**Weight**

In some contracts, delivered and shipped weights should be distinguished. During shipping, some loss can be attributed to the type of goods transported (spoilage of fresh produce, for example) or the mode of transportation chosen. Weight clauses should also specify accepted standards of measurement (e.g., the metric system). Bulk shipments are typically only allowed if expressly agreed to by the parties. The precise weight per unit can be exactly stated or approximately stated. If not indicated at all, customary international trade practices may serve as a default substitution. The parties’ agreement that the subject goods may be delivered in partial shipments must be unambiguously stated.

**Modes of Transport**

Common acceptable means of transport include air, ship, railway, and parcel post. It must be determined not only who is responsible for the costs associated with the transportation of the goods, but the costs incurred from the seller’s point of origin to the primary carrier, then from the port or tarmac to a holding facility, and ultimately to the buyer’s final point of destination.

**Force Majeure**

All parties to trade agreements need to protect themselves from uncontrollable or unforeseen events which may render the performance of their respective obligations impracticable or impossible. Thus, certain language known as a “force majeure” clause should be inserted. The clause should include language stating that neither party should
be liable to the other for damages or have the right to terminate the contract if the performance of their duties is hindered by conditions beyond their control. These events could include natural disasters (earthquakes, hurricanes, floods), governmental actions (withholding of licenses or denial of customs processing), and manmade events (workers’ strikes, insurrections, and/or acts of terrorism). To ensure that the parties are able to properly identify a legitimate excuse for nonperformance, it is important to specify the circumstances under which the parties’ obligations would be excused.

**Markings**

Markings defining goods – which may consist of descriptions, models, or samples – are considered to give express warranties. Pursuant to the express terminology of the UCC, any affirmation of fact or promise made relating to the goods to be sold become part of the “basis of the bargain” and the seller is obligated to ensure the goods “conform to the affirmation or promise” (UCC, §2-313). Thus, as trading partners increasingly rely upon visuals and prototypes, these markings must be selectively and accurately used.

As labor practices and environmental activities capture worldwide media attention, consumers are becoming more discerning and socially conscious about how their purchases may affect other stakeholders worldwide. To bolster domestic economies, many local consumers are demanding that goods be branded with the name of the country of origin. The label, “Made in the USA,” has garnered much public support in American markets while “Made in Bangladesh” may indicate a connection with a manufacturer who is supportive – either directly or indirectly – of exploitative and unsafe working conditions. Contracting parties need to research their own local laws regarding “country of origin” labeling as they must, regardless of the choice of law for contract interpretation, still comply with the laws and regulations governing the placement and context of markings of imported merchandise in effect at the time of their entry. Any expenses incurred by failure to comply with such regulations must be relegated to one of the parties, or, in the absence of such agreement, the local taxing authorities will ostensibly assign such liabilities.

**Noncompetitive Covenant**

Either or both parties may strongly desire a restricted agreement – one which narrows where business activities are to be transacted and forbids engaging in similar practices with competitors. These protective clauses are often referred to as “covenants not to compete” or “restricted covenants.” The two most salient features of the covenant concern geographical and time restrictions. Maintaining exclusivity of dealing with a certain supplier or importer for the transfer of particular goods and services for a set period of time and covering a demarcated region may be regarded as a burden on commerce, but is typically upheld if reasonable in scope and duration.
**Contract Defenses**

Since many international contracts are prepared by the dominant, more established business enterprise, the other party possessing less bargaining power is not without defenses. If the terms are so one-sided, the subordinate party may interject the defense of “unconscionability” – which indicates the terms of the contract are excessively unfair to the weaker party. Good faith and fair dealing are expected of both actors when CISG tenets are invoked, regardless of the economic orientation or the political or ideological differences of the parties’ home states. UNIDROIT’s “Principles of International Commercial Contracts” furnish a supplementary set of principles used in conjunction with the CISG. Specifically, Article 1.7 of these principles “indicates that the parties' behavior must conform to good faith and fair dealing throughout the life of the contracts, including the negotiation process.” Likewise, if liquidated damages provisions (discussed *infra*) transcend the assessment of fair damages in the event of a breach, or if the predetermined damages are disproportionate to the actual harm caused or losses sustained, the clause may be forfeited as a penalty and stricken from operation accordingly (DiMatteo, 2001).

**Rulings**

Depending upon the type of product concerned, the parties may incorporate by reference a set of business rulings adopted for the circumstances the trade partners may experience in the course of their dealings. Private businesses that operate within a specific industry often form and fund trade associations. These entities participate in marketing endeavors, educational activities, and rule-making. This type of company collaboration can result in the creation and dissemination of a set of rulings applicable for specific situations encountered by international business partners. These rulings can be incorporated by reference into the contract and act as a form of expeditious dispute resolution.

**Guarantee Clause**

The buyer/importer is well advised to demand a set of contingencies which must occur before its performance is due. For instance, wording may be used that differs from relevant provisions of the CISG or the UCC pertaining to products refused admission into the country of importation due to violations of that particular nation’s regulations, laws, or acts. The parties may agree that the seller/exporter has a certain time period after receipt of a notice of violation within which to deliver conforming replacement goods and if such action is not timely undertaken, the buyer should be refunded any monies incurred by reason of the denial of entry. Of course, if the buyer accepts such goods admitted in violation of its own country’s regulations without sending a proper notice of entry violation(s) to the seller, then the seller should be absolved of further responsibility due to buyer’s waiver. The phrase “No Pass-No Sale” – coupled with

---

21 *See, for example*, rules pertinent to the grain industry at [www.ngfa.org/rules-arbitration.cfm](http://www.ngfa.org/rules-arbitration.cfm).
refund stipulations – would constitute adequate wording to protect both parties in this fashion.

**Quality Claims**

Typically, the parties may want to specify the exact number of calendar or business days after the goods either are properly admitted into the country of importation or after the delivery of the imported goods to a specific storage facility during which time the buyer must inspect the goods and either reject all or a portion of the merchandise by asserting a claim of total or partial nonconformity. Unless the buyer properly files a deficiency claim within the relevant time period, the seller should be relieved of all further duties.

**Insurance**

The parties must delegate who will be ensuring not only the safe passage of the goods, but for each step that the possession of the goods is transferred. The expiration of coverage must be unequivocally stated, e.g., seller’s insurance duties terminate when the imported goods are delivered at a bonded public warehouse in the country of importation. As insurance coverage can be segregated to cover various segments of the journey, one option would be to purchase a “W/W” or warehouse (exporter/seller; point of origin) to warehouse (importer/buyer; point of destination) policy of coverage (Keegan & Green, 2002).

**Customs: Duties, Taxes, and Tariffs**

Exported and imported goods are subject to duties, taxes, and other charges imposed by the governments of all countries involved. International contracts should precisely designate the entity that is responsible for these charges. Typically, the seller/exporter in an international trade agreement is responsible for all export taxes, duties, or other charges levied whereas similar fees assessed by the importing country are usually borne by the buyer/importer.

There are different types of levies. A tax which produces government revenue – more commonly referred to as a tariff or a duty – can be assessed on both imported and exported items by the customs authorities of that country. This charge also helps to protect domestic industries from would-be predatory competitors overseas. Customs duties may consist of a charge based upon the value of the items or be premised upon the volume and/or weight of the cargo shipped (http://www.businessdictionary.com/definition/customs-duty.html#ixzz2W1wqmbgJ).

**Insolvency or Financial Failure of Either or Both of the Parties**

Whereas a force majeure clause protects the parties against unforeseen events which may adversely impact their ability to perform, other concerns relating to either party’s
financial circumstances may generate different outcomes. If, at any time before the contract is fully executed, either party shows signs of economic distress – either due to a general inability to make required payments to creditors, a formal filing in bankruptcy, or simply a failure to meet trade obligations, there should be contractual language permitting the financially stable partner to, at its option, declare the other in default and seek appropriate relief. This provision will allow the non-breaching party to also suspend further payments or shipments, safeguarding its remaining resources. Insolvency circumstances must be articulated with specificity and may be subject to the machinations of a particular country’s laws.

**Breach or Default of Agreement**

The parties have a tremendous opportunity with their international commercial agreement – not only to begin the business relationship formally – but to predetermine damages. Whereas alternate dispute resolution is intended to facilitate a decision to resolve a conflict by injecting a neutral entity into the debate, the parties can easily also determine how much one would owe the other in monetary damages upon the occurrence of an avoidable breach. Thus, in the event either party fails to perform, and its nonperformance is neither excused nor waived, damages can be ascertained by relying upon the parties’ predetermination of damages. If a particular formula or document is expected to be used by the parties to calculate such reparations, then reference should be made to this instrument directly in the agreement ([http://legal-dictionary.thefreedictionary.com/ Uniform+Commercial+Code](http://legal-dictionary.thefreedictionary.com/ Uniform+Commercial+Code)).

**Remedies**

If there is no provision for liquidated, or predetermined, damages, compensatory or “make whole” damages are usually sought. If a party’s breach or default results in lost business and other intangibles, the actual losses sustained may be quite significant. “Consequential” damages – or those damages resulting, directly or indirectly, as a result of a party’s nonperformance – are typically regarded as very risky and thus, are usually avoided ([www.consilium404.com](http://www.consilium404.com)).

**VI. Conclusion**

With increasing globalization and Internet-based trade transactions, the rapid proliferation of international business initiatives is unparalleled in history. Because of the inherent challenges posed by entering unchartered territories with new business initiatives, all parties negotiating trade agreements must be fully cognizant of the risks involved as well as the topics to be researched and addressed to create a situation of trust, sustained relationship-building, and responsible, long-lasting success.
References

Article 9, *OECD Model Tax Convention.*


US Constitution (5th Amendment, Bill of Rights).

