

International Business Transactions

Conducting business in the modern global economy offers great rewards, but involves risks, as well. Although companies can take a number of precautions to limit their risks in international business transactions, the primary legal tool for such purposes is the international business transaction agreement or contract. Examples of international business transaction agreements include: international sales contracts, international distribution agreements, supply agreements, intellectual property licenses, franchise agreements, development agreements, investment agreements, letters of credit, joint venture agreements, and others, as well as hybrids and combinations of these agreements.

Key considerations in an international business transaction contract include:

Choice of Law

Because of variations in legal heritage, culture and language, the law which would be applied to an international business transaction contract is often decisive. For example, it is likely that the application of Texas law to an international business transaction contract would lead to a different result than the application of Brazilian law to that same international business transaction contract. Therefore, if the parties to an international business transaction contract choose law that is acceptable to both of them, they can better anticipate how the international business transaction contract provisions might be interpreted.

Also, most domestic business transaction contracts are governed by the Uniform Commercial Code (UCC), a harmonized system of commercial laws adopted by almost every state in the U.S. However, in many international business transaction contracts for the sale of goods, the U.N. Convention on International business transaction contracts for the International Sale of Goods (CISG) will apply by default. The impact of CISG as governing law versus UCC as governing law can be of critical importance. Moreover, even for other types of international business transaction agreements, one should not assume that the UCC would apply – thus, it is imperative that the parties specify the governing law of the contract within the international business transaction agreement, itself.

Jurisdiction and Venue

In addition to selecting the choice of law for the international business transaction contract, the parties can select a jurisdiction to decide any disputes related to the international business transaction contract. International business transaction contracts make such provisions crucial because of issues related to jurisdiction over the parties and the transaction, enforcement of judgments, legal processes, and travel and litigation expenses.

Force Majeure

"Force majeure" clauses allow for a party to be excused from its international business transaction contractual obligations without punishment if certain unexpected events occur, such as natural disasters. Domestic contracts in the United States generally do not

address events such as terrorism, piracy, financial market collapse, war and so on. However, in international business transactions, these are often very real concerns.

Shipping Terms

Where the international business transaction agreement relates to the shipment of goods, the shipping terms will determine each party's respective responsibilities for elements of the shipping process. Instead of spelling out a number of elements related to the delivery of the goods, parties often use shipping terms — a short hand for allocating responsibilities between the parties with respect to such matters as transfer of risk of loss, arrangement of carrier, payment of freight charges, cargo insurance and so on.

Under U.S. law, these shipping terms are defined under state law in accordance with the UCC. Common domestic shipping terms include FOB (Free On Board) and CIF (Cost, Insurance & Freight). However, international business transaction contracts do not necessarily use the same terms. Instead, many international agreements incorporate a separate set of shipping terms called Incoterms (International Commercial Terms), which are promulgated by the International Chamber of Commerce, or ICC.

Payment

Making or receiving payment is also a bit more involved in international transactions. Because of governmental currency controls and fluctuations in exchange rates, a key consideration is the currency in which payment is to be made. Additionally, the method of payment merits special attention in international business transactions. Payment by check is often not an option; instead, parties to international business transactions often elect to use wire transfers or letters of credit. If a letter of credit is used, the parties must comply with strict documentary requirements if they expect to receive payment.

Translations

When dealing with international parties whose principal language is not English, the parties will often prepare and execute a translated version of the international business transaction contract. Because of subtle differences in translation, it is important for the parties to elect which version of the document will control if a dispute arises.

Compliance With U.S. Laws

Finally, exports and imports — as well as currency transfers — are subject to numerous U.S. laws. In some situations, U.S. companies can be held liable for violations of these laws by foreign customers, agents or affiliates. As such, a requirement written into international business transaction contracts requiring compliance with these laws can serve as a notice to the foreign party, and makes compliance a material term of the agreement.

If you are interested in additional information on international business transaction agreements, please contact our Dallas international business transaction lawyers. Our firm also offers an array of services in the areas of intellectual property including patents, trademarks, copyrights, trade secrets, as well as intellectual property litigation and enforcement, and technology transactions. Detailed information on these and other

services is available at www.kk-llp.com. In addition, we act as local counsel in patent, trademark, copyright, trade secret, and commercial litigation cases in the state and federal courts in the Northern District of Texas. Further information on our local counsel practice is available at www.kk-llp.com/localcounsel.

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