



## ***International Contracting Key Issues***

When drafting an international sales contract, the drafter should consider each of the following. Failing to include any of the following will likely lead to disputes when performance is due, which may then result in costly litigation.

### **The Parties:**

- ☐ Identify the parties (buyer and seller) by their legal names, as registered in their respective countries. List registered (not mailing) addresses and registration numbers when available.
- ☐ If dealing with a Chinese party, write the name of the company using Chinese characters, and identify the “legal representative.”

### **The Goods:**

- ☐ Clearly identify the goods to be purchased, the quantity/amount, and any specifications.
- ☐ Explain when title will transfer.
- ☐ Indicate whether an inspection will be conducted, who must pay for it, and whether any payments or other obligations are conditioned upon a clean inspection certificate.
- ☐ Explain whether any warranties and/or any installation, maintenance, or other services are provided.

### **Delivery:**

- ☐ Use the correct Incoterm® to designate delivery duties. Use the Incoterm® correctly, referencing the book from the International Chamber of Commerce as appropriate.
- ☐ Identify when delivery must be made.
- ☐ Identify the agreed-upon mode of transportation, if necessary (*e.g.*, fast boat or slow boat).
- ☐ Identify the documents that will be exchanged (bill of lading, commercial invoice, inspection certificate, certificate of origin, *etc.*).
- ☐ Procure sufficient cargo insurance to cover the entire voyage.

### **Price:**

- ☐ Clearly identify the price, including currency.
- ☐ For long-term contracts, indicate whether the price may change due to fluctuations in the price of materials, *etc.* Consider building in an escalation clause or options.

### **Payment Terms:**

- ☐ Identify the method of payment the buyer will use (cash in advance, L/C, documentary collection, open account, *etc.*).
- ☐ If using an L/C, ensure that an appropriate Incoterm® is used (*e.g.*, CIP).
- ☐ Explain escrow arrangements, if necessary.
- ☐ Explain when payments will be made.

- ☐ If credit is extended, include a provision for security interests.
- ☐ Will a performance bond be required? Factor this into price during negotiation as it could tie up money for a very long time.

**Other:**

- ☐ Choose governing law and venue for disputes, including arbitration if desired. Will the CISG or UNIDROIT principles apply? If so, which state law (if any) will fill in gaps? Will the New York Arbitration Convention apply?
- ☐ If multiple orders are contemplated under the contract, explain the method of submitting and accepting purchase orders.
- ☐ List out what remedies each party will have in case of the other's non-performance.
- ☐ Include confidentiality and non-compete provisions, as appropriate.
- ☐ Include provisions relating to intellectual property, as appropriate.
- ☐ If there is a Non-Disclosure Agreement, incorporate it by reference.
- ☐ List force majeure events. Indicate whether such an event will delay buyer's obligation to pay, or only seller's obligation to deliver.

## US Import Compliance

- ☐ Engage a competent US customs broker, who will file entries on your behalf.
- ☐ Secure an import bond.
- ☐ Ensure proper classification of the goods according to the Harmonized Tariff Schedule of the US.
- ☐ Ensure goods are properly valued (accounting for packing costs, seller's commissions, assists, royalty/license fees, proceeds paid back to seller, rebates, transportation charges, etc.) and duty correctly applied.
- ☐ Calculate currency conversions for valuing the goods as of the appropriate date.
- ☐ If importation is sought under a duty-free program, make sure a proper country-of-origin analysis is conducted, including for the materials used to make the goods.
- ☐ Include all required information in invoices.
- ☐ Mark the goods with the country of origin.
- ☐ Ensure compliance with all drawback requirements.
- ☐ Ensure compliance with all quota requirements.
- ☐ Analyze whether anti-dumping and/or countervailing duties will apply.
- ☐ Fulfill all recordkeeping requirements.
- ☐ Ensure compliance with the following agencies, when applicable:

<i>Type of Goods:</i>	<i>Regulating Agencies:</i>
Foods	Food and Drug Administration Food Safety and Inspection Service Animal and Plant Health Inspection Service U.S. Fish and Wildlife Service

Animals	Animal and Plant Health Inspection Service U.S. Fish and Wildlife Service National Marine Fisheries Service Public Health Service
Arms, Ammunition, Explosives, and Implements of War	Bureau of Alcohol, Tobacco, Firearms and Explosives Directorate of Defense Trade Controls
Radioactive Materials and Nuclear Reactors	Nuclear Regulatory Commission Food and Drug Administration
Household appliances	Department of Energy, Office of Codes and Standards Federal Trade Commission
Commercial and industrial equipment	Department of Energy, Office of Codes and Standards Federal Trade Commission
Consumer Products	Consumer Product Safety Commission
Radiation- and Sonic Radiation-Producing Products	Food and Drug Administration
Radio Frequency Devices	Federal Communication Commission
Medical Devices and Drugs	Food and Drug Administration
Conflict Diamonds	Customs and Border Protection
Gold, Silver, Currency, Stamps	Customs and Border Protection Federal Bureau of Investigation
Pesticides, Toxic, and Hazardous Substances	Customs and Border Protection Environmental Protection Agency
Textile, Wool, and Fur Products	Federal Trade Commission
Petroleum and Petroleum Products	Department of Energy
Products of Convict or Forced Labor	Customs and Border Protection
Artifacts/Cultural Property	Customs and Border Protection Bureau of Educational and Cultural Affairs
Alcohol	Alcohol and Tobacco Tax and Trade Bureau
Motor Vehicles	Customs and Border Protection U.S. Department of Transportation Environmental Protection Agency
Boats	Coast Guard Maritime Administration

## Exporting under the EAR

- ☐ Classify the items with an ECCN or as EAR99.
- ☐ Ensure all staff understand how commodities, technology, and software can be exported/re-exported/transferred, including “deemed exports.”
- ☐ Review the Commerce Control List to determine if a license is required for the export/reexport.
- ☐ For foreign-made items containing US-origin content, review the *de minimis* rules to determine if a license is required for the export/reexport.
- ☐ For foreign-made items that are “direct products” of US-origin technology or software, review the applicable rules to determine if a license is required for the export/reexport.
- ☐ Ensure a denial order hasn’t been issued with respect to the party to whom you are exporting (including owners of the company)
- ☐ Ensure that the items are not being exported to a party subject to a denial order, a prohibited end user, a prohibited end use, or a country subject to embargo.
- ☐ Ensure that activities don’t support proliferation of nuclear explosive devices, missiles, and chemical or biological weapons.
- ☐ Determine if a license is required for goods to pass through certain listed countries in transit to their destination.
- ☐ When a license is required, determine if a license exception applies. Execute associated documentation, if any.
- ☐ If a license is required, and no exception applies, then apply for a license before engaging in the activity, and ensure compliance with any conditions that may be on the license.
- ☐ If a license is required, but an exception applies, ensure that all requirements of the exception are met at all times.
- ☐ Look out for red flags identified by BIS.
- ☐ Comply with all recordkeeping and special reporting requirements.

## Exporting under the ITAR

- ☐ Determine whether items are “Defense Articles” and services are “Defense Services.”
- ☐ Classify the items under the US Munitions List.
- ☐ Register your business if your activities include (a) manufacturing, exporting, temporarily importing, or brokering in defense articles, or (b) furnishing or brokering in defense services.
- ☐ Ensure all staff understand how commodities and technical data can be exported/re-exported/transferred, including “deemed exports.”
- ☐ Apply for a license or other approval before (a) exporting/re-exporting or brokering in any defense article or (b) furnishing or brokering in a defense service.
- ☐ Mark packages as appropriate.
- ☐ Make appropriate pre-export DDTC filings for technical data and defense services to include establishing a TAA or MLA, if needed.
- ☐ Comply with all recordkeeping requirements.

## Other Issues

- ☐ Report commissions, fees, and political contributions, as required.
- ☐ File Electronic Export Information with CBP.
- ☐ Include harmonized destination control statements and obtain non-transfer and use assurances, when applicable.
- ☐ Screen foreign parties to the transaction against the various government lists.
- ☐ Ensure no party violates the Foreign Corrupt Practices Act or any anti-corruption laws of any other country. This should be built into the Termination for Default provisions of the contract.
- ☐ Analyze how the transaction might unintentionally cause tax liability (e.g. by creating a permanent establishment).
- ☐ If using a foreign agent or distributor, review foreign laws protecting such parties and ensure you are following local laws governing third parties.
- ☐ Make sure there are no provisions that would result in participation with the Arab League boycott of Israel.
- ☐ Check if you will incur any offset requirements in the country of end use and comply or negotiate accordingly.

**Disclaimer:** This checklist does not contain a complete listing of every issue that a party to an international trade transaction should be aware of. This document is not legal advice, nor is it a substitute for legal advice.