

Ostendorf

International Sales Terms

C. H. Beck · Hart · Nomos

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by

Patrick Ostendorf

Professor of Commercial Law
University of Applied Sciences, Bielefeld

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Preface

International sales law is both a complex and consistently evolving area of law: The United Nations Convention on Contracts for the International Sales of Goods (CISG) is gaining pace as a well accepted piece of uniform sales law, and other international instruments (sponsored both by private and public institutions) on the European as well as on a global level are contributing to the ongoing harmonization of international sales law and related areas of law. Nevertheless, domestic laws – that are regularly unknown territory from the perspective of at least one of the parties to an international sales contract – still play a substantial role both with regard to gaps left behind by the international instruments and in relation to the interpretation and enforceability of individual contract clauses. Against this background, international sales contracts entail from a legal point of view both risks and opportunities: Risks because international commercial contracts give rise to specific legal problems and pitfalls that do not exist on the domestic level. Opportunities, given that the existence of an international link of a commercial contract provides the parties – compared to a purely domestic transaction – with substantially greater contractual freedom. However, in order to avoid risks and to benefit from opportunities, a general understanding of international sales law and an awareness of existing differences between domestic legal systems and their impact on standard sales terms are of the essence. This book tries to identify both opportunities and risks from the perspective of a commercial seller: The annotated international sales terms suggested in this book are tailored for a specific governing law that appears to be flexible as well as easily accessible for lawyers and business people from a variety of different legal backgrounds. At the same time, it is the aim of this book to illustrate the interaction between standard contractual clauses contained in international sales contracts and the governing law in a broader sense.

For the second edition of this book, a variety of more recent developments had to be taken into account. The International Chamber of Commerce (ICC) has published a new edition of its widely used trade terms, the Incoterms 2010, as well as new Rules of Arbitration (2012). The European Commission has proposed a draft for a new Common European Sales Law (CESL) that may (once enacted) constitute a potential alternative for the CISG, and has adopted a recast of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “Brussels I” Regulation). Relevant amendments of Swiss domestic law, in particular with regard to applicable limitation periods for warranty claims (Art. 210 Swiss Code of Obligations) and the statutory policing of general terms and conditions (§ 8 Swiss Federal Act on Unfair Competition) have been enacted. Also, the ongoing Euro crisis poses the question whether the draftsman of international sales contracts should insert appropriate terms into standard form contracts that may limit potential risks triggered by a complete or partial breakup of the Euro zone. Finally, since the publication of the first edition of this book, a multitude of publications on the subject of international sales terms have hit the shelves that had to be taken into consideration just as new case law applying the CISG.

Preface

This book could not have been written without the experience that I gained during my work as a lawyer with a specific focus on international sales and distribution law at Orth Kluth Rechtsanwälte in Berlin and Düsseldorf and the ongoing fruitful exchange and discussion with both colleagues and clients. I should also like to thank my editor at C.H. Beck, Dr Frank Lang, for his ongoing valuable support.

This book is based on the materials that were available to me up to 31 July 2013.

Patrick Ostendorf

Bielefeld, 20 September 2013

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List of Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch (General Civil Code, Austria)
A.C.	Appeal Cases
AcP	Archiv für civilistische Praxis
AGB	Allgemeine Geschäftsbedingungen (General Terms and Conditions)
AJP	Aktuelle Juristische Praxis
All ER	All England Law Reports
Am J Comp L	The American Journal of Comparative Law
Am Rev Int' Arb	American Review of International Arbitration
Antitrust L J	Antitrust Law Journal
Arb Int	Arbitration International
ASA Bull	ASA (Swiss Arbitration Association) Bulletin
AWG	Außenwirtschaftsgesetz (Foreign Trade Act, Germany)
AWV	Außenwirtschaftsverordnung (Foreign Trade Regulation, Germany)
BB	Der Betriebsberater
BeckRS	Beck Rechtsprechung
BG	Bundesgericht (Federal Supreme Court, Switzerland)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Official collection of the decisions of the Swiss Federal Supreme Court)
BGH	Bundesgerichtshof (Federal Supreme Court, Germany)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Official collection of the decisions of the German Federal Supreme Court)
B.L.R.	Building Law Reports
BR/DC	Baurecht/Droit de la Construction
Bus L Int'l	Business Law International
BW	Burgerlijk Wetboek (Civil Code, the Netherlands)
CA	Court of Appeal (England & Wales)
Campbell L Rev	Campbell Law Review
CC	Civil Code (Switzerland)
CCL	Commerce Control List
CCCL Journal	Journal of the Canadian College of Construction Lawyers
CESL	Common European Sales Law
CFR	Cost and Freight (Incoterms 2010)
CIETAC	China International Economic and Trade Arbitration Commission
CIF	Cost, Insurance and Freight (Incoterms 2010)
CIP	Carriage and Insurance paid to (Incoterms 2010)
CILL	Construction Industry Law Letter
CISG	United Nations Convention on Contracts for the International Sales of Goods 1980
CISG-AC	Advisory Council of the CISG
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CML Rev	Common Market Law Review
CO	Code of Obligations (Switzerland)
Colum. J. Transnat'l L	Columbia Journal of Transnational Law
Cornell Int'l L J	Cornell International Law Journal
Comm	Commercial Court (England & Wales)
CPT	Carriage Paid To (Incoterms 2010)
CUP	Cambridge University Press
DAP	Delivered At Place (Incoterms 2010)
DAT	Delivered At Terminal (Incoterms 2010)
DB	Der Betrieb
DDP	Delivered Duty Paid (Incoterms 2010)
Dick L Rev	Dickinson Law Review
EAR	Export Administration Regulations (USA)

List of Abbreviations

EBLR	European Business Law Review
EC	European Community
ECR	European Court Reports
EEA	European Economic Area
EEC	European Economic Community
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Act to the Civil Code, Germany)
EJCL	Electronic Journal of Comparative Law
EJCCl	European Journal of Commercial Contract Law
EJLR	European Journal of Law Reform
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
EU	European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWCA	Court of Appeal of England and Wales
EWCA Civ	Court of Appeal of England and Wales, Civil Division
EWHC	High Court of Justice of England and Wales
EWS	Europäisches Wirtschafts- und Steuerrecht
Ex	Court of Exchequer (England & Wales)
EXW	Ex Works (Incoterms 2010)
FAS	Free Alongside Ship (Incoterms 2010)
F.2d	Federal Reporter, Second Series
FCA	Free Carrier (Incoterms 2010)
FIDIC	Fédération Internationale des Ingénieurs Conseils (International Federation of Consulting Engineers)
FOB	Free on Board (Incoterms 2010)
Franchise L J	Franchise Law Journal
FSR	Fleet Street Reports
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Law against Restraints of Competition, Germany)
IBLJ	International Business Law Journal
IBLR	International Business Law Review
IBR	Immobilien- und Baurecht
ICC	International Chamber of Commerce
I.C.C.L.R.	International Company and Commercial Law Review
ICLQ	International & Comparative Law Quarterly
ICL Rev	International Construction Law Review
IIC	International Review of Intellectual Property and Competition Law
IHR	Zeitschrift für Internationales Handelsrecht
IMF	International Monetary Fund
Ind J Global Legal Stud	Indiana Journal of Global Legal Studies
Int'l Law	The International Lawyer
Int'l L Rev	International Law Review
Int'l Trade & Bus L Ann	International Trade and Business Law Annual
Int'l Trade & Bus L Rev	International Trade & Business Law Review
Int. T.L.R.	International Trade Law & Regulation
IP	Intellectual Property
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
HAVE	Haftung und Versicherung
HCA	High Court of Australia, Court Reports (Australia)
HG	Handelsgericht (Commercial Court, Switzerland)
HGB	Handelsgesetzbuch (Commercial Code, Germany)
HL	House of Lords (United Kingdom)
Hong Kong L J	Hong Kong Law Journal
Hous Bus & Tax L J	Houston Business & Tax Law Journal
J Bus L	Journal of Business Law
J Int Arbitrat	Journal of International Arbitration
J L & Commerce	Journal of Law and Commerce
JPIL	Journal of Private International Law
KB	Law Reports, King's Bench Division (England)
LCIA	London Court of Arbitration

List of Abbreviations

LD	Liquidated Damages
LG	Landgericht (Regional Court, Germany)
Lloyd's Rep	Lloyd's Law Reports
MMR	Multimedia und Recht
NCPC	Nouveau code de procédure civil (New Civil Procedure Code, France)
NJW	Neue Juristische Wochenschrift
No	Number
OGH	Oberster Gerichtshof (Supreme Court, Austria)
OJ	Official Journal of the European Union
OJLS	Oxford Journal of Legal Studies
OLG	Oberlandesgericht (Higher Regional Court, Germany/Austria)
Orgalime	European Engineering Industries Association
OSCE	Organization for Security and Cooperation in Europe
OUP	Oxford University Press
Pace Int'l L Rev	Pace International Law Review
para(s)	paragraph(s)
PECL	Principles of European Contract Law
PILA	Federal Code on Private International Law (Bundesgesetz über das Internationale Privatrecht, Switzerland)
QB	Law Reports, Queen's Bench Division (England)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RIW	Recht der Internationalen Wirtschaft
SchiedsVZ	Die neue Zeitschrift für Schiedsverfahren
SGA 1979	Sale of Goods Act 1979 (United Kingdom)
SJZ	Schweizerische Juristen-Zeitung
SMU L Rev	Southern Methodist University Law Review
UCC	Uniform Commercial Code (USA)
UCP 600	Uniform Customs and Practice for Documentary Credits (ICC)
UCTA	Unfair Contract Terms Act 1977 (United Kingdom)
UN	United Nations
UN ECE	United Nations Economic Commission for Europe
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institut International pour l'Unification du Droit Privé (International Institute for the Unification of Private Law)
UPICC	Unidroit Principles of International Commercial Contracts 2010
US	United States Supreme Court Reporter
USC	United States Code
UWG	Bundesgesetz gegen den unlauteren Wettbewerb (Federal Code against Unfair Competition, Switzerland)
TCC	Technology and Construction Court (England & Wales)
TFEU	Treaty on the Functioning of the European Union
TransportR	Zeitschrift für Transportrecht
Unif L Rev	Uniform Law Review
VAT	Value Added Tax
Vict U Well L Rev	Victoria University of Wellington Law Review
VJ	The Vindobona Journal of International Commercial Law and Arbitration
Vol	Volume
WLR	Weekly Law Reports (England)
YPIL	Yearbook of Private International Law
ZBJV	Zeitschrift des Bernerischen Juristenvereins
ZEuP	Zeitschrift für Europäisches Privatrecht
ZGS	Zeitschrift für das gesamte Schuldrecht
ZIP	Zeitschrift für Wirtschaftsrecht

Introduction

The use of **standardized sales terms** and conditions is indispensable in the operation of the daily business of companies in order to minimize transaction costs and to enable sales departments to conclude sales contracts without having the need to take costly and comprehensive legal advice in any individual case. At the same time, legal problems arising from sales contracts are often multiplied in international transactions. Besides obvious obstacles such as differing languages, legal cultures and legal systems, the parties face specific complexities in case of an international transaction that will not or at least not to the same extent arise from purely domestic contracts. Contrary to a domestic transaction, the parties to an international sales contract need not only deal with the question which laws will govern their contractual relationship and which court or arbitral tribunal should resolve any potential disputes. They must also take a multitude of both domestic as well as foreign laws into account that cover international trade, such as, – but not limited to –, export and import as well as currency exchange control regulations, antitrust laws (sometimes with extraterritorial effect), international taxation rules, insolvency and product liability laws and so forth.

The use of specific **international sales terms** therefore offers two valuable benefits: On the one hand, international trade demands specific contractual provisions that are often not appropriately dealt with by standard sales terms tailored for domestic transactions. Secondly, the parties enjoy with regard to an international commercial contract (contrary to consumer and employment contracts) substantially more leeway to deviate from applicable statutory provisions of their home jurisdiction and to structure a sales transaction according to their specific needs. The latter holds true in particular from the perspective of a German exporter of goods and services given that German statutory law and its interpretation by German jurisprudence to this day applies a particular strict approach as regards the policing of general terms and conditions that deviate from statutory provisions.¹ For instance, it remains doubtful whether a seller can rely on an effective limitation of liability clause contained in standard terms governed by German law² although such a clause must be considered as fairly industrial standard in international sales contracts in order to reasonably limit the seller's overall risk exposure.

The parties to an international commercial contract are, at least from the perspective of European private international law but also pursuant to the conflict of laws provisions of many other jurisdictions, in principle free to choose the substantive law which they deem most appropriate to govern their sales contract –

¹ For an in-depth discussion of this problem in relation to commercial contracts see inter alia K Berger, “Abschied von der Privatautonomie im unternehmerischen Geschäftsverkehr” [2006] ZIP 2149 ff.; S Brachert and A Dietzel, “Deutsche AGB-Rechtsprechung und Flucht ins Schweizer Recht” [2005] ZGS 442 ff.; more recently W Müller, “Die AGB-Kontrolle im unternehmerischen Geschäftsverkehr – Standortnachteil für das deutsche Recht” [2013] BB 1355 ff.

² For an excellent critical appraisal of German jurisprudence with regard to the statutory control of limitation of liability clauses in standard sales terms and conditions see P Tettinger, “Zu den Freizeichnungsmöglichkeiten des Verkäufers einer mangelhaften Sache” (2005) 205 AcP 2 ff.

regardless of whether or not the sales transaction has any genuine link to the chosen governing law.³ It goes without saying that the **choice of a foreign law** often entails substantial legal uncertainties and ambiguities⁴ and for this reason requires a comprehensive understanding of the legal system in question, including its interpretation and construction by courts and arbitrators and its effect on contract terms, given that the governing law of the contract will not only determine the scope of discretion enjoyed by the parties to set up their own system of obligations, rights and remedies but will also operate as a gap filler – bearing in mind that even the most comprehensive contract will in all likelihood not fully cover any and all legal issues that may arise from a sales transaction.

Against this background, it is the purpose of this book to provide its user with a set of annotated international sales terms as well as a proposal on how these terms can be effectively incorporated into the individual contract. The suggested terms are predominantly tailored for exporters of goods based in the EU, but they should also be useful for sellers residing in other jurisdictions. Contrary to many other model sales contracts and terms and conditions, the sales terms in this book do also suggest a specific governing law clause. Given the essential impact of the governing law of a contract, it is from the author's point of view essential to draft contractual terms on the basis of a given governing law instead of choosing the governing law as the last step in the drafting and negotiation process. Accordingly, the proposed international sales terms in this book are governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) and Swiss law as the recommended "supplementary" choice of law with regard to those contractual (and partially non-contractual) issues that are not covered by the CISG.

The CISG, an international sales convention (that also forms part of the domestic laws of a multitude of jurisdictions), offers a comparably simple structure. The parties to the sales contract are pursuant to Art 6 CISG also able to amend its application in the way they desire. The advantages of Swiss law as the supplementary governing law on the other hand are twofold: First, Swiss law is often used in international commercial contracts due to its widespread classification as a "neutral" body of law.⁵ Though it is without doubt arguable that this classification confuses the search for a legal system striking a balance between different legal traditions (such as civil and common law traditions) with political neutrality⁶, the frequent choice of Swiss law for international commercial contracts in the past has

³ See Art 3 (1) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6; G van Calster, *European Private International Law* (Hart Publishing, Oxford and Portland 2013) 132. The Rome I Regulation applies pursuant to its Art 28 in relation to all contracts concluded on or after 17 December 2009, see Corrigendum to Regulation (EC) No 593/2008 [2009] OJ L309/87.

⁴ For the advantages and disadvantages of the choice of a foreign legal order see P Mankowski, "Überlegungen zur sach- und interessengerechten Rechtswahl für Verträge des internationalen Wirtschaftsverkehrs" [2003] RIW 3, 4.

⁵ Recent surveys have once again confirmed that Swiss law remains a popular choice of parties to international commercial contracts, see inter alia the ICC 2010 Statistical report, ICC International Court of Arbitration Bulletin, Vol. 22 No 1 (2011). According to this report, Swiss and English law were the most popular choices in ICC arbitration proceedings in 2010.

⁶ See for instance C Fountoulakis, "The Parties Choice of "Neutral Law" in International Sales Contracts" [2005] EJLR 303, 304, who describes the designation of the law of a "politically neutral state" as a popular fallacy from which states such as Switzerland have greatly benefited.

fostered its reliability and acceptance particularly in international trade. Secondly, it is familiar to lawyers educated in a civil law system (in particular German lawyers) and offers – due to an absence of any direct policing of general terms and conditions utilized in commercial transactions – significantly more leeway with regard to the use of standard contractual provisions deviating from statutory law.

It goes without saying that a seller cannot always demand the exclusive incorporation of his own terms and conditions into a sales contract. In times of economic recession, the lack of bargaining power and other factors may restrict the insistence on the seller's terms to an even greater extent than usual. In particular foreign public entities calling for tenders for the supply of industrial goods regularly request that their standard purchasing terms must exclusively control the contract and accordingly minimize the seller's ability to influence the applicable contract terms. Even in that case, however, the suggested international sales terms may serve as a **point of reference** in order to review suggested purchasing terms while some of the clauses promoted by this book may at least be used on a stand-alone basis. By the same token, this book offers different alternatives for individual terms at least in relation to the most disputed issues in a sales contract in order to facilitate the negotiation of the contract.

Finally and for the reasons indicated above, it is also the aim of this book to provide both a **general understanding** of the impact of typical contractual clauses used in international sales contracts as well as an illustration of the interaction of other legal systems beyond the suggested governing law (with a special emphasis on Anglo-American law) with those fairly standard “boilerplate” clauses.

Standardized sales terms can never cover the particularities of all possible sales transactions. The terms and conditions in this book are for this reason tailored for the **sale of manufactured goods** that are either intended for resale or production purposes. Sales of raw materials and commodities on the other hand may require specific contractual terms that are not adequately catered for by the annotated international sales terms suggested in this book. Finally, the suggested terms are not appropriate for use in consumer contracts given that mandatory consumer laws both in the EU and elsewhere leave the parties with substantially less contractual freedom with regard to the content of a sales contract and the deviations from statutory law contained therein.

Though this publication was created to provide its reader with accurate information on its subject matter, it cannot replace legal or other expert advice. Given that both relevant case law and statutory provisions are permanently evolving and may substantially alter the legal background of international sales terms, neither the validity nor the suitability of any terms and conditions suggested in this book can be guaranteed.

