

International Sales Terms

Bearbeitet von
By Prof. Dr. Patrick Ostendorf

3. Auflage 2018. Buch. XV, 186 S. In Leinen
ISBN 978 3 406 71052 0
Format (B x L): 16,0 x 24,0 cm

[Recht > Zivilrecht > Internationales Privatrecht](#)

Zu [Leseprobe](#) und [Sachverzeichnis](#)

schnell und portofrei erhältlich bei

The logo for beck-shop.de features the text "beck-shop.de" in a bold, red, sans-serif font. Above the "i" in "shop" are three red dots of increasing size. Below the main text, the words "DIE FACHBUCHHANDLUNG" are written in a smaller, red, all-caps, sans-serif font.

beck-shop.de
DIE FACHBUCHHANDLUNG

Die Online-Fachbuchhandlung beck-shop.de ist spezialisiert auf Fachbücher, insbesondere Recht, Steuern und Wirtschaft. Im Sortiment finden Sie alle Medien (Bücher, Zeitschriften, CDs, eBooks, etc.) aller Verlage. Ergänzt wird das Programm durch Services wie Neuerscheinungsdienst oder Zusammenstellungen von Büchern zu Sonderpreisen. Der Shop führt mehr als 8 Millionen Produkte.

Ostendorf
International Sales Terms



beck-shop.de
DIE FACHBUCHHANDLUNG



beck-shop.de
DIE FACHBUCHHANDLUNG

International Sales Terms

by
Patrick Ostendorf


beck-shop.de
DIE FACHBUCHHANDLUNG

Third Edition
2018



Published by

Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
email: bestellung@beck.de

Co-published by

Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,
online at: www.hartpub.co.uk

and

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5, 76530 Baden-Baden,
Germany, email: nomos@nomos.de

Published in North America (US and Canada) by Hart Publishing,
c/o International Specialized Book Services, 930 NE 58th Avenue, Suite 300,
Portland, OR 97213-3786, USA, email: orders@isbs.com


beck-shop.de
DIE FACHBUCHHANDLUNG

ISBN 978 3 406 71052 0 (C.H.BECK)
ISBN 978 1 5099 2619 0 (HART)
ISBN 978 3 8487 4677 4 (NOMOS)

© 2018 Verlag C. H. Beck oHG
Wilhelmstr. 9, 80801 München
Printed in Germany by
Kösel GmbH & Co. KG
Am Buchweg 1, 87452 Altusried-Krugzell
Typeset by
Reemers Publishing Services GmbH, Krefeld
Cover: Druckerei C. H. Beck Nördlingen

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Verlag C. H. Beck, or as expressly permitted by law under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to C. H. Beck at the address above.

Preface

International sales law is both a complex and consistently evolving area of law: The United Nations Convention on Contracts for the International Sale of Goods (CISG) has since long become a well accepted and widely used piece of uniform sales law. A multitude of other international instruments sponsored both by private and public institutions are contributing to the ongoing harmonization of international sales law and related areas as well. Nevertheless, domestic laws of individual states – 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 as well as in relation to the validity and enforceability of contractual terms and conditions. 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 a (genuine) international link of a commercial contract provides the parties in contrast with a purely domestic transaction and based on the widely accepted principle of party autonomy with substantially greater contractual freedom. However, in order to both avoid risks and 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 (CISG/Swiss law) that appears to be both flexible as well as 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 (to the inclusion of other relevant jurisdictions) in a broader sense.

The third edition of this book contains inter alia a new chapter on the seller's right to cure (and its impact on the rights and remedies of the buyer in case of any defect) enshrined in the CISG, a brief overview on English sales law due to its popularity in international trade and additional sections with regard to relevant legal areas outside of the scope of the governing law of the contract. Apart from the letter of credit, a new section on alternative means of payment securities has also been added. Furthermore, a variety of more recent developments had to be taken into account: The International Chamber of Commerce (ICC) has published new Rules of Arbitration (2017) and has launched the drafting process for the new generation of Incoterms (Incoterms 2020). Harmonization on the European level on the other hand has suffered from serious drawbacks: The European Commission's draft for a new Common European Sales Law (CESL) has not survived the fierce resistance of key member states of the EU and is therefore no longer addressed in this book. The planned withdrawal of the United Kingdom from the EU (the "Brexit") will trigger uncertainty as regards the future cooperation between the EU and the UK in civil and commercial matters including sales transactions once the respective EU Regulations, in particular the Brussels Ia Regulation will no longer apply in this regard. These developments may however not only reinforce the standing of the CISG, but also increase the importance of other international conventions such as the Hague Convention on Choice of Court Agree-

Preface

ments 2005 (in force since 1 October 2015) that are reaching beyond the geographical scope of EU law.

Finally, and once again, a multitude of new publications on the subject of international sales contracts as well as new case law applying the CISG had to be duly taken into consideration.

This book could not have been written without the experience that I gained during my work as a lawyer (now of counsel) 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 30 April 2018.

Patrick Ostendorf

Berlin, July 2018



beck-shop.de
DIE FACHBUCHHANDLUNG

Table of Contents

Preface	V
List of Abbreviations	IX
Introduction	XIII
 A. General Part	 1
I. Role and impact of the law governing a sales contract	1
II. The suggested choice of law for the present International Sales Terms	4
III. The CISG	6
1. Part I of the CISG: Scope of application and other general provisions	7
2. Part II of the CISG: The formation of the sales contract	9
3. Part III of the CISG: Obligations, rights and remedies of the parties	10
IV. Swiss law as the supplementary governing law of choice	27
1. Overview on the relevant issues	27
2. Relevant Swiss statutory contract and tort laws	28
3. Validity of the contract	28
4. Limitation of actions	31
5. Set-off	33
6. Assignment	34
7. Contractual penalties and liquidated damages	34
8. Concurring claims under tort (product liability)	37
V. English law as an alternative?: A (very) short introduction into English sales law	38
1. Legal foundations	39
2. Main obligations of the seller	39
3. Remedies of the buyer in case of breach	40
4. Obligations of the buyer and remedies of the seller	42
5. Summary	42
VI. Relevant laws beyond the governing law of the contract	43
1. (Overriding-)mandatory rules: General issues	44
2. Essential examples of overriding mandatory provisions	48
3. Relevant laws outside of the scope of the lex contractus	55
 B. The Main Contract Document	 59
I. The benefit of a countersigned main contract document	60
1. Requirements for the incorporation of general terms into international contracts	60
2. The “battle of forms” problem	61
II. Price	63
III. Payment Terms	64
1. The legal position under the CISG	64
2. The preferred payment method: The letter of credit	64
3. Alternative means of settlement: Documentary collection, bank payment obligations, demand guarantees and suretyships	68
IV. Delivery and trade terms	70
1. The role of standardized trade terms in international sales transactions	70
2. The Incoterms © 2010	70
3. A first outlook: The Incoterms © 2020	75
 C. The International Sales Terms	 77
I. General provisions	77
1. The suggested clause	77
2. Annotations	77
II. Payment terms	78
1. The suggested clause	78
2. Annotations	79
III. Delivery terms	82
1. The suggested clause	82
2. Annotations	83

Table of Contents

IV. Retention of title	86
1. The suggested clause.....	86
2. Annotations	87
V. Product defects.....	89
1. The suggested clause.....	89
2. Annotations	91
VI. Limitation of damages	98
1. The suggested clause.....	98
2. General background.....	99
3. Annotations	101
VII. Limitation of actions.....	108
1. The suggested clause.....	108
2. General background.....	108
3. Annotations	111
VIII. Export control regulations.....	114
1. The suggested clause.....	114
2. Annotations	114
IX. Avoidance by the seller	115
1. The suggested clause.....	115
2. Annotations	115
X. Confidentiality obligations.....	116
1. The suggested clause.....	116
2. Annotations	116
XI. Force majeure	118
1. The suggested clause.....	118
2. General background.....	118
3. Annotations	120
XII. Entire agreement, written form, severability and anti-assignment clause.....	121
1. The suggested clause.....	121
2. Annotations	121
XIII. The governing law of the contract	126
1. The suggested clause.....	126
2. Annotations	126
XIV. Arbitration and litigation.....	130
1. The suggested clause.....	130
2. General background.....	130
3. Annotations	135
Appendix.....	143
I. The sales documentation put together	143
II. Samples payment securities: Form of letter of credit and payment bond.....	152
III. The United Nations Convention on Contracts for the International Sale of Goods (CISG)	153
IV. Excerpts from relevant Swiss statutes	174
1. Swiss Code of Obligations (Obligationenrecht)	174
2. Swiss Federal Act Against Unfair Competition (Obligationenrecht).....	178
3. Swiss Civil Code (Zivilgesetzbuch).....	178
Index.....	181

List of Abbreviations

ABA	American Bar Association
ABGB	Allgemeines Bürgerliches Gesetzbuch (General Civil Code, Austria)
A.C.	Appeal Cases (England & Wales)
AcP	Archiv für die civilistische Praxis
AGB	Allgemeine Geschäftsbedingungen (General Terms and Conditions)
AJP	Aktuelle Juristische Praxis
All ER	All England Law Reports (England & Wales)
ALQ	Arab Law Quarterly
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
Art(s)	Article(s)
ASA Bull	ASA (Swiss Arbitration Association) Bulletin
AWG	Außenwirtschaftsgesetz (Foreign Trade Act, Germany)
AWV	Außenwirtschaftsverordnung (Foreign Trade Regulation, Germany)
B & Ald	Barnewell and Alderson's Reports (England & Wales)
BB	Der Betriebsberater
BeckRS	Beck Rechtsprechung
BG	Bundesgericht (Federal Supreme Court, Switzerland)
BGB	Bürgerliches Gesetzbuch (Civil Code, Germany)
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 (England & Wales)
BR/DC	Baurecht/Droit de la Construction
Bus L Int'l	Business Law International
Bus Lawyer	The Business Lawyer
BW	Burgerlijk Wetboek (Civil Code, the Netherlands)
CA	Court of Appeal (England & Wales)
Campbell L Rev	Campbell Law Review
CC	Civil Code (Switzerland)
CCCL Journal	Journal of the Canadian College of Construction Lawyers
CCL	Commerce Control List
CFR	Cost and Freight (Incoterms 2010)
Ch	Chancery division, Court of Appeal (England & Wales)
CIETAC	China International Economic and Trade Arbitration Commission
CIF	Cost, Insurance and Freight (Incoterms 2010)
CILL	Construction Industry Law Letter
CIP	Carriage And Insurance Paid To (Incoterms 2010)
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
CISG-AC	Advisory Council of the CISG
Civ	Civil division, Court of Appeal (England & Wales)
CLJ	Cambridge Law Journal
CLOUT	Case Law on UNCITRAL Texts
CLP	Current Legal Problems
CML Rev	Common Market Law Review
CO	Code of Obligations (Obligationenrecht, Switzerland)
Colum. J. Transnat'l L	Columbia Journal of Transnational Law
Comm	Commercial Court (England & Wales)
Cornell Int'l L J	Cornell International Law Journal
CPT	Carriage Paid To (Incoterms 2010, ICC)
CUP	Cambridge University Press

List of Abbreviations

DAP	Delivered At Place (Incoterms 2010, ICC)
DAT	Delivered At Terminal (Incoterms 2010, ICC)
DB	Der Betrieb
DDP	Delivered Duty Paid (Incoterms 2010, ICC)
Dick L Rev	Dickinson Law Review
EAR	Export Administration Regulations (USA)
EBLR	European Business Law Review
EC	European Community
ECLI	European Case Law Identifier
ECR	European Court Reports
ed(s)	editor(s)
edn	edition
EEA	European Economic Area
EEC	European Economic Community
eg	exempli gratia (for example)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Act to the Civil Code, Germany)
EJCCCL	European Journal of Commercial Contract Law
EJCL	Electronic Journal of Comparative Law
EJLR	European Journal of Law Reform
EPC	Engineering, Procurement and Construction
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
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, ICC)
F.2d	Federal Reporter, Second Series (USA)
F.3d	Federal Reporter, Third Series (USA)
FAS	Free Alongside Ship (Incoterms 2010, ICC)
FCA	Free Carrier (Incoterms 2010, ICC)
FIDIC	Fédération Internationale des Ingénieurs Conseils (International Federation of Consulting Engineers)
FOB	Free On Board (Incoterms 2010, ICC)
FOFSA	Federation of Oils, Seeds and Fats Associations
Franchise L J	Franchise Law Journal
FSR	Fleet Street Reports
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
GAFTA	Grain and Feed Trade Association
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Law against Restraints of Competition, Germany)
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
IBA/ABA	International Bar Association/American Bar Association
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
I.C.R.	Industrial Case Reports (England & Wales)
IIC	International Review of Intellectual Property and Competition Law
IHR	Zeitschrift für Internationales Handelsrecht
IMF	International Monetary Fund

List of Abbreviations

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
ISDA	International Swaps and Derivatives Association
IUA	International Underwriting Association of London
IWRZ	Zeitschrift für Internationales Wirtschaftsrecht
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
JZ	JuristenZeitung
KB	Law Reports, King's Bench Division (England & Wales)
LCIA	London Court of International Arbitration
LD	Liquidated Damages
LG	Landgericht (Regional Court, Germany)
lit	litera
LJ	Lord Justice
Lloyd's Rep	Lloyd's Law Reports (England & Wales)
LMA	Lloyd's Market Association
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
MDR	Monatsschrift für Deutsches Recht
MMR	Multimedia und Recht
n	note
NCPC	Nouveau code de procédure civil (New Civil Procedure Code, France)
NJW	Neue Juristische Wochenschrift
No	Number
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law & Business
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	Organisme de Liaison des Industries Métalliques Européennes (European Engineering Industries Association)
OSCE	Organization for Security and Cooperation in Europe
OUP	Oxford University Press
p. a.	per annum
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 & Wales)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RIW	Recht der Internationalen Wirtschaft
S.	Sentence
SchiedsVZ	Die neue Zeitschrift für Schiedsverfahren
Sec.	Section
SGA	Sale of Goods Act 1979 (United Kingdom)
SJZ	Schweizerische Juristen-Zeitung
SMU L Rev	Southern Methodist University Law Review
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TCC	Technology and Construction Court (England & Wales)
TFEU	Treaty on the Functioning of the European Union
TransportR	Zeitschrift für Transportrecht
UCC	Uniform Commercial Code (USA)
UCP	Uniform Customs and Practice for Documentary Credits (ICC)

List of Abbreviations

UCTA	Unfair Contract Terms Act 1977 (United Kingdom)
UKSC	Supreme Court of the 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 Prive (International Institute for the Unification of Private Law)
Unif L Rev	Uniform Law Review
UPICC	Unidroit Principles of International Commercial Contracts 2016
URBFO	Uniform Rules for Bank Payment Obligations (ICC)
URC	Uniform Rules for Collections (ICC)
URDG	Uniform Rules on Demand Guarantees (ICC)
URL	Uniform Resource Locator
US	United States Supreme Court Reporter
USC	United States Code
UWG	Bundesgesetz gegen den unlauteren Wettbewerb (Federal Code against Unfair Competition, Switzerland)
v	versus
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
Wis. 2 d	Wisconsin Reports
WLR	Weekly Law Reports (England)
WM	Wertpapier-Mitteilungen
YPIL	Yearbook of Private International Law
ZBJV	Zeitschrift des Bernischen Juristenvereins
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfPW	Zeitschrift für die gesamte Privatrechtswissenschaft
ZGS	Zeitschrift für das gesamte Schuldrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZVertriebsR	Zeitschrift für Vertriebsrecht

beck-shop.de
DIE FACHBUCHHANDLUNG

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 not only have to deal with the question which laws will govern their contractual relationship and which court of law respectively 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 (often contrary to consumer and employment agreements) 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 in particular true 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 notoriously 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,³ but also pursuant to the conflict of laws provisions

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", ZIP 2006, 2149; S Brachert and A Dietzel, "Deutsche AGB-Rechtsprechung und Flucht ins Schweizer Recht", ZGS 2005, 442; more recently W Müller, "Die AGB-Kontrolle im unternehmerischen Geschäftsverkehr – Standortnachteil für das deutsche Recht", BB 2013, 1355; L Leuschner, "Grenzen der Vertragsfreiheit im Rechtsvergleich", ZEuP 2017, 335.

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", 205 AcP 2015, 1.

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; A Briggs, *Private International Law in English Courts* (2014) para 7.114. 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.

Introduction

of many other jurisdictions⁴ in principle free to choose the substantive (contract) law which they deem most appropriate to govern their sales contract – regardless of whether or not the sales transaction has any genuine link to the chosen governing law. It goes without saying that the **choice of a foreign law** often entails substantial legal uncertainties and ambiguities⁵ 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 expedient 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 explicitly 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 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.⁶ 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 neutrality⁷, the frequent choice of Swiss law for international commercial contracts in the past has 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 than other civil law jurisdictions.

⁴ MM Albornoz and NG Gonzalez Martin, “Towards the uniform application of party autonomy for choice of law in international commercial contracts”, JPIL 2016, 437.

⁵ 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”, RIW 2003, 3.

⁶ Recent surveys have once again confirmed that Swiss law remains a popular choice by the parties to international commercial contracts, see inter alia the 2014 ICC Dispute Resolution Statistics, ICC Dispute Resolution Bulletin 2015, Issue 1, p. 9. According to this report, Swiss and English law were (again) the most popular choices in ICC arbitration proceedings in 2014.

⁷ See for instance C Fountoulakis, “The Parties Choice of “Neutral Law” in International Sales Contracts”, EJLR 2005, 303, 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.

Introduction

It goes without saying that a seller can often not successfully prevail as regards the exclusive incorporation of his own terms and conditions into a sales contract. In times of buyer's markets, lack of bargaining power may substantially restrict the insistence on the seller's terms. 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 English 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. The suggested terms are also 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.



beck-shop.de
DIE FACHBUCHHANDLUNG