

PREFACE

The field of international commercial law has gained importance due to the increasing globalization of economies and international commerce in the last decades.

This book covers the most important legal issues when conducting business abroad. The legal environment of the business transactions is the central theme of the first part. The political and policy risks of doing business abroad are explained, as well as how they should be mitigated. The first part also covers European law with a focus on the four freedoms and competition law. It ends with strategies for entering foreign markets.

The second part of the book focuses on the individual contract of sale. This part of the book deals with a range of subjects, including general conditions of sale, retention of title, the CISG, product safety and product liability, Incoterms, contract of carriage, jurisdiction, choice of law and arbitration, standard contract clauses and payment conditions.

This book takes a practical approach and uses specific examples to systematically explain the main legal problems arising from selling products in foreign countries.

It is meant to be used as a textbook for business students and for introductory courses in law schools. No previous in-depth knowledge of law is necessary to use this book. It contains more than 100 multiple choice questions and 70 cases, giving students the possibility to apply the knowledge acquired in a chapter to real situations.

The book does not pretend to be exhaustive in scope: the field of international commercial law in particular is vast, and has many different angles. However, it does try to explain the main pitfalls of doing business in foreign countries and how to avoid them.

My gratitude goes to my colleagues and friends, Willem van Oosterom and Wim Vermeulen, for their valuable comments on earlier versions of this book.

The author wrote two other legal text books: on legal skills, *Juridische vaardigheden voor het Hoger Onderwijs* www.juridischevaardigheden.nl and on sports law, *Inleiding sport en recht* www.inleidingsportenrecht.nl. Both are in Dutch.

M.W. Mosselman

TABLE OF CONTENTS

Preface	v
Chapter 1	
INTRODUCTION	1
Part 1. Risks related to the environment of the transaction	5
1.1 Risks in international trade	8
1.1.1 Political risks	8
1.1.2 Foreign policy risks	8
1.1.3 Domestic policy risks	23
1.1.4 Economic policy risks	25
1.2 Credit insurance	27
1.3 Features of credit insurance	29
Part 2. International contract of sale	32
Chapter 2	
EUROPEAN LAW	35
2.1 Introduction	35
2.2 Institutions of the EU	36
2.2.1 The European Parliament	36
2.2.1.1 Legislative	37
2.2.1.2 Control of the executive	38
2.2.1.3 Budgetary powers	39
2.2.2 The European Council	39
2.2.3 The Council of the European Union	39
2.2.4 The European Commission	39
2.2.5 Court of Justice of the European Union	40
2.3 Other international courts	51
2.4 European legislation	54
2.4.1 Legal acts of the European Union	56
2.4.2 Directives, Article 288 under 3 TFEU	57
2.4.3 Regulations, Article 288 under 2 TFEU	61
2.4.4 Decisions, Article 288 under 4 TFEU	62
2.4.5 Recommendations and opinions	63
2.5 Multiple choice	64
2.6 Cases	68

Chapter 3	
EUROPEAN LAW: THE FOUR FREEDOMS	75
3.1 Introduction	75
3.2 The free movement of goods, Articles 28-30, 34-36 and 110 TFEU	77
3.2.1 Prohibition of customs duties between Member States, Articles 28-30 TFEU	77
3.2.2 Prohibition of fiscal discrimination, Article 110 TFEU	80
3.2.3 Quantitative restrictions on imports	85
3.2.4 Justifications for restrictions on imports, Article 36 TFEU	86
3.2.4.1 Public morality, public policy or public security	87
3.2.4.2 Protection of health and life of humans, animals or plants	88
3.2.4.3 The protection of national treasures possessing artistic, historic or archaeological value	89
3.2.4.4 The protection of industrial and commercial property	90
3.2.5 Court of Justice case law (rule of reason)	90
3.2.5.1 Cassis de Dijon	91
3.2.5.2 Keck case	91
3.2.5.3 Conditions for successful reliance on Article 36 TFEU or the rule of reason	92
3.2.6 Measures having equivalent effect to a quantitative restriction	95
3.2.6.1 Restriction on use	95
3.2.6.2 Technical regulations regarding presentation of the goods	96
3.2.6.3 Veterinary or sanitary controls	98
3.2.6.4 Obligation to have a representative in the importing State	98
3.2.6.5 Price controls	99
3.2.6.6 National ban on a specific product or substance	99
3.2.6.7 Type approval	100
3.2.6.8 Authorization procedure	101
3.2.6.9 Deposit-return systems	101
3.2.6.10 Incitement to buy national products	102
3.2.6.11 Obligation to use national language	104
3.2.6.12 Restrictions on distance selling	105
3.2.7 Export barriers	106
3.2.8 Harmonization of legislation	107
3.3 The free movement of persons, Articles 45-55 TFEU	110
3.3.1 Free movement of workers	110
3.3.2 Exceptions to free movement of persons	111
3.3.2.1 Employment in public service or exercising public authority	113
3.3.2.2 Restrictions based on public security, public policy or public health	113

3.4	The free movement of services, Articles 56-62 TFEU	116
3.4.1	Freedom to provide services	118
3.4.2	Risk of social dumping	119
3.4.3	Freedom of establishment	123
3.4.4	Main barriers to freedom of establishment and freedom to provide services	124
	3.4.4.1 Establishment and residence requirements	125
	3.4.4.2 Nationality requirements	127
3.5	The free movement of capital, Articles 63-66 TFEU	127
3.6	Multiple choice	131
3.7	Cases	134
Chapter 4		
COMPETITION LAW		141
4.1	Introduction	141
4.2	Agreements distorting, preventing or restricting competition, Article 101 TFEU	141
4.2.1	Agreement	142
4.2.2	Undertaking	143
4.2.3	Decisions by associations of undertakings	144
4.2.4	Concerted practices	144
4.2.5	May affect trade between Member States	145
4.2.6	Object or effect the prevention, restriction or distortion of competition	151
4.2.7	Exemptions from Article 101 under 1 TFEU	153
4.2.8	Punishment for taking part in cartel	153
	4.2.8.1 Claims of cartel victims	158
4.3	Abuse of dominant position, Article 102 TFEU	160
4.3.1	Dominant position	160
4.3.2	Abuse of dominant position	164
	4.3.2.1 Exploitative practice	164
	4.3.2.2 Exclusionary practice	164
4.4	Merger control	170
4.5	State aid, Article 107 TFEU	176
4.6	Multiple choice	183
4.7	Cases	186

Chapter 5	
ENTRY STRATEGIES	197
5.1 Introduction	197
5.2 Agent	202
5.2.1 Obligations on the principal	203
5.2.2 Obligations on the agent	203
5.2.3 Termination of an agency contract	206
5.2.4 Notice period	207
5.2.5 Compensation for termination	208
5.2.6 Damages	212
5.2.7 Restriction in trade	213
5.3 Distribution agreement	214
5.3.1 Distribution and Competition law	215
5.3.2 Obligation distributor to admit reseller	226
5.3.3 Tips for exporters	228
5.3.4 Duration and termination of distribution agreements	229
5.3.4.1 Freedom to terminate a distribution agreement	230
5.3.4.2 Reasonable termination period	230
5.3.4.3 Rules regarding the termination of an agency contract also apply to the termination of a distribution agreement	234
5.3.4.4 Distribution agreements in law	235
5.4 Multiple choice	235
5.5 Cases	237
Chapter 6	
GENERAL CONDITIONS OF SALE	241
6.1 Introduction	241
6.2 Do GCS apply to the contract?	242
6.3 Which GCS apply to a contract?	248
6.4 Multiple choice	250
6.5 Cases	250

Chapter 7		
RETENTION OF TITLE		253
7.1	Introduction	253
7.2	Simple retention of title clause	253
7.3	All monies or all sums retention of title	254
7.4	Extended retention of title	254
7.5	Multiple choice	255
7.6	Cases	256
Chapter 8		
THE INTERNATIONAL SALE OF GOODS		259
8.1	Introduction	259
8.1.1	Scope CISG	259
8.1.2	Opt out CISG	262
8.2	Content of CISG	263
8.2.1	Obligations on the seller	265
8.2.2	Passing of risk	270
8.2.3	Obligations on the buyer	271
8.3	Committing a breach of contract	272
8.3.1	Remedy for breach of contract: claim of damages	274
8.3.2	Remedy for breach of contract: requiring performance	275
8.3.3	Remedy for breach of contract: declare it avoided	276
8.4	Multiple choice	278
8.5	Cases	280
Chapter 9		
PRODUCT SAFETY AND PRODUCT LIABILITY		285
9.1	Product recall	290
9.2	Product liability	293
9.2.1	Producer	298
9.2.2	Product	300
9.2.3	Producer's exemption or reduction of liability	300
9.2.4	Defective	303
9.2.5	Damages	307
9.2.6	Consumers	309
9.2.7	Tort liability	310
9.3	Multiple choice	312
9.4	Cases	313

Chapter 10	
INCOTERMS	317
10.1 Introduction: Incoterms 2010	317
10.2 EXW: Ex Works	320
10.3 F-terms	321
10.4 C-terms	322
10.5 D-terms	323
10.6 Free on Board (FOB) and Cost, Insurance and Freight (CIF)	324
10.7 Multiple choice	328
10.8 Cases	331
Chapter 11	
CONTRACT OF CARRIAGE	335
11.1 Introduction	335
11.2 General principles of contract of carriage	339
11.2.1 Limitation of liability of the carrier	340
11.2.2 Time limits within which claims for payment of damages have to be filed	340
11.2.2.1 Time limit for complaints	340
11.2.2.2 Time limit for legal action	341
11.2.3 Main obligations on the carrier	346
11.3 Sea carriage	348
11.3.1 Scope of Hague Visby Rules	349
11.3.2 Liability for sea carriage	351
11.3.2.1 Period carrier is responsible for the goods	351
11.3.2.2 Main obligations carrier	352
11.3.2.3 Liability under HVR	352
11.3.3 Difference liability under HVR, Rotterdam Rules and Hamburg Rules	357
11.3.4 Limitation of liability sea carriage	358
11.3.5 Jurisdiction under HVR, Hamburg Rules and Rotterdam Rules	361
11.4 Air carriage	362
11.4.1 Scope of the Montreal Convention	362
11.4.2 Liability for air carriage	364
11.4.3 Difference between the Warsaw Convention and Montreal Convention	365
11.4.4 Limitation of liability for air carriage	366
11.4.5 Jurisdiction under the Montreal Convention	366

11.5	Road carriage	367
11.5.1	Scope of the CMR	367
11.5.2	Liability for road carriage	368
11.5.3	Limitation liability road carriage	369
11.5.4	Jurisdiction under the CMR	376
11.6	Multiple choice	378
11.7	Cases	381
Chapter 12		
JURISDICTION AND ARBITRATION		391
12.1	Introduction	391
12.2	Scope Article 1 Brussels I recast	393
12.3	Rules on jurisdiction	393
12.4	Deviation from the general rule	398
12.4.1	Choice of court of law, Article 25 Brussels I recast	399
12.4.2	Limitation of choice of court	402
12.4.2.1	Jurisdiction relating to insurance, Articles 10-16 Brussels I recast	402
12.4.2.2	Jurisdiction over consumer contracts, Articles 17-19 Brussels I recast	402
12.4.2.3	Jurisdiction over individual employment contracts, Articles 20-23 Brussels I recast	406
12.4.2.4	Exclusive jurisdiction, Article 24 Brussels I recast	407
12.5	To execute a court judgment in another country	407
12.5.1	The recognition of a judgment of a foreign court, Articles 36-38 Brussels I recast	409
12.5.2	The enforcement of a judgment in another country, Articles 38-56 Brussels I	416
12.6	Multiple choice	416
12.7	Cases	418

Chapter 13	
APPLICABLE LAW	421
13.1 Introduction	421
13.2 The scope of Rome I	421
13.2.1 Universal application	422
13.2.2 Applicable law	423
13.2.3 Groups of contracting parties with extra protection	429
13.2.3.1 Carriage of passengers, Article 5 under 2 Rome I	429
13.2.3.2 Insurance contracts, Article 7 under Rome I	429
13.2.3.3 Consumer contracts, Article 6 Rome I	430
13.2.3.3.1 Obstacles for consumers	431
13.2.3.3.2 Obstacles for businesses selling in other countries	436
13.2.3.4 Employment contracts, Article 8 Rome I	439
13.2.3.5 Formal validity, Article 11 Rome I	443
13.2.4 Mandatory provisions in national law	443
13.2.5 Mandatory EU law, Article 3 under 4 Rome I	444
13.2.6 No choice of applicable law, Article 4 Rome I	445
13.2.7 Relation between Rome I and CISG	447
13.3 Law applicable to a tort or other non-contractual obligations (Rome II)	448
13.3.1 Scope Rome II	449
13.3.2 Applicable law, Rome II	449
13.3.2.1 Tort, Article 4 Rome II	449
13.3.2.2 Product liability, Article 5 Rome II	451
13.3.2.3 Unfair competition, Article 6 Rome II	452
13.3.2.4 Infringement intellectual property, Article 8 Rome II	452
13.3.2.5 Industrial action, Article 9 Rome II	452
13.3.2.6 Unjust enrichment, Article 10 Rome II	452
13.3.2.7 Negotiorum gestio (spontaneous agency), Article 11 Rome II	453
13.3.2.8 Culpa in contrahendo (Pre-contractual period), Article 12 Rome II	454
13.4 Multiple choice	456
13.5 Cases	457
13.6 Multiple choice integrating Chapters 8, 12 and 13	458
13.7 Cases integrating Chapters 8, 12 and 13	462

Chapter 14		
STANDARD CONTRACT CLAUSES		473
14.1	An entire agreement clause	473
14.2	Force majeure and frustration	475
14.3	Severability clause	477
14.4	No assignment clause	477
14.5	Multiple choice	478
14.6	Cases	479
Chapter 15		
PAYMENT CONDITIONS		481
15.1	Introduction	481
15.2	Payment in advance	481
15.3	Payment in open account	483
15.4	Cheque	483
15.5	Bill of exchange	483
15.6	Letter of credit or Documentary Collection	484
15.7	Standard forms of documentation	489
15.7.1	Commercial invoice, Article 18 UCP600	489
15.7.2	Clean bill of lading, Article 20-23 UCP600	489
15.7.3	Insurance certificate, Article 28 UCP600	489
15.7.4	Certificate of Origin	489
15.8	Types of letter of credit	490
15.9	Common defects in letter of credit documentation	491
15.10	Risks using letter of credit	492
15.11	Documentary Collection	493
15.12	Multiple choice	495
15.13	Cases	498
Jurisprudence		501

CHAPTER 1

INTRODUCTION

Discovering and conquering new markets in other countries is a huge adventure for any company. It offers great opportunities, but also has many pitfalls. An exporting company is well aware of the opportunities and potential rewards of a new market. This book focuses on the pitfalls and legal dangers a company encounters when exporting to other countries. These pitfalls and dangers are best illustrated with an example.

EXAMPLE

A Dutch company, Shoes Unlimited BV, has been successfully producing and selling shoes in the Netherlands for years and decides to try and gain a share of the lucrative Spanish market.

One of the first questions to be answered is how Shoes Unlimited BV is going to achieve this goal, in other words they have to select an entry strategy. Will Shoes Unlimited BV sell their shoes themselves on the Spanish market (direct sale), will they start their own chain of shops in Spain (subsidiary), or will they sell their shoes through an agent or distributor? The various entry strategies are discussed in detail in Chapter 5.

After the first steps in the new market have been taken, many things can still go wrong. If Shoes Unlimited BV has a legal dispute with one of its Spanish customers, e.g. the customer does not pay or the shoes are of a bad quality, there is an international dispute and in international disputes there are always three questions to be answered:

1. What court has jurisdiction? In other words, which country? Is Spain, the Netherlands or perhaps even a third country competent to deal with this dispute? The answer to this question can be found in the Brussels I Regulation.
2. The fact that Spanish courts have jurisdiction does not necessarily mean that Spanish law should be applied. The answer to the question of applicable law can be found in the Rome I Regulation.
3. If a Spanish court orders Shoes Unlimited BV to pay damages to a Spanish customer, the question is whether the Spanish judgment can be executed in the Netherlands. This is something not so obvious since normally a country only recognizes the judgments of its own courts. The Spanish customer will want to have the court's decision executed in the Netherlands because Shoes Unlimited BV will probably have their money in Dutch bank accounts. In the European Union, the Brussels I Regulation gives uniform rules for executing a judgment given by a court of another Member State.

The answers to these three questions will be discussed in depth in Chapter 12 and 13.

A court which is called upon to decide an international dispute will always have to wonder if there is an international treaty applicable to the case. If the agreement is about the sale of goods, the most important treaty is the Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention. For example, if the parties have failed to agree on a place of delivery in their contract, the Vienna