International Trade Centre
UNCTAD/WTO

Правовое руководство по контрактам на международную поставку скоропортящихся товаров

(на английском языке)

This guide consists of a general presentation followed by a commentary on each of the provisions of the model contract.

- General presentation

A - Purpose of the model contract

International contract for business rather than consumer sales

The model contract has been developed for business users engaged in international trade in perishable goods. The aim is to offer a balanced, reliable and flexible general-purpose legal instrument which is simple to use. The contract is intended for business rather than consumer sales. Sales are considered to be international in nature if the contracting parties have their respective places of business in different countries. The model contract has therefore been elaborated with a view to offering a legal framework which is adapted to both international deliveries of goods and international payments.

Contract is intended for the sale of perishable goods

The perishable goods for which the model contract has been developed are foodstuffs subject to rapid physical deterioration, and which are therefore liable to become worthless just as quickly. They thus include fruit and vegetables in particular. This contract may prove difficult to apply if used for other types of products.

Check whether specialized contract forms exist for the type of goods to be sold

There exist model contract forms for the sale of specific perishable products such as coffee, grain, cocoa, oils and fats which are proposed by national and international associations of sellers and/or buyers specialized in a particular commodity. Depending on the product to be sold, it may be advisable for parties to consult such contract forms, as they may make provision for specific usages in the trade in question. Certain of these contract forms can be found on ITC's Juris international database at the following address: http://www.jurisint.org.

In preparing the model contract, every effort has been made to propose conditions which are compatible with those of the ICC Model International Sale Contract (Manufactured Goods Intended for Resale), published in 1998 by the International Chamber of Commerce, with a view to promoting the harmonization of international contracts. The present model nevertheless differs significantly as regards both form and content, owing to the different subject matter it covers. Thus, for example, there is no provision concerning retention of title, since this is less likely to be a matter of concern in the context of perishable goods.

B - Contract format

Initial each page

The contract is contained in a single document, and therefore effectively incorporates both specific and general conditions. It is presented in both electronic and printed paper forms. The paper version may be accompanied by any appropriate annexes. It is recommended that the parties initial each page of the contract including any such annexes.

Some precautions in using the electronic version

The electronic version of the model contract is available at http://www.jurisint.org. It can be adapted so that the annexes are incorporated into the contract document itself. It is recommended that a contract which exists in electronic form be printed for initialling and signature by each party. This precaution is particularly appropriate if the contract has been negotiated via electronic mail using a network which does not provide for either the authentication of signatures or the non-modifiable recording of data.

C - The underlying legal rules

The principal aim of this model contract is to ensure an equitable balance between the parties' respective positions by means of full information as to their rights and obligations. In other words, the buyer and the seller must each be able clearly to identify the extent of their respective undertakings as well as those of their business partner.

Certain key instruments for the development of international trade have been called upon with a view to achieving this aim, namely, the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), the 1994 UNIDROIT Principles of International Commercial Contracts, and International Chamber of Commerce initiatives such as the Incoterms. The texts of these various instruments are reproduced in part or in full in the present publication for ease of reference.

Parties using this model contract should not exclude application of CISG or the UNIDROIT Principles

Reference to such instruments has allowed the model contract to be greatly simplified, in that it is possible to dispense with the reproduction of provisions concerning matters which are dealt with in a satisfactory manner elsewhere. These texts also offer a standardized international vocabulary, which has been adopted in the contract. Thus, the provisions set out in the contract are essentially those which are specific to commerce in perishable goods. In these circumstances parties are advised not to exclude the application of these international instruments if they decide to use the model contract. If the parties prefer not to subject their contract to CISG and the UNIDROIT Principles, then they are recommended not to use the model contract. As mentioned previously, many product-specific contracts exist, which have been drawn up for more specialized markets, to which users could turn instead.

A further advantage of using such international instruments is the limited impact of any applicable domestic system of law. The model contract can therefore be used for transactions involving parties in any two countries. While it should not be susceptible to widely varying interpretations by different countries, certain precautionary measures nevertheless remain advisable, as indicated below.

D - Incorporation by reference

Contracting parties may also incorporate the terms of the model contract simply by reference. They should, however, note that the enforceability of the provisions set out in the model contract, particularly the arbitration clause, may be doubtful under the law of certain countries if such provisions have not been expressly incorporated into the contract. In view of this consideration, it is proposed that wording such as the following should appear in the signed contract document:

Recommended wording for incorporation by reference

"Any matter which is not the subject of a provision to the contrary in the present contract shall be governed by the terms of the Contract for the International Commercial Sale of Perishable Goods of the International Trade Centre, including the arbitration clause."

E - Three types of contractual provisions

As flexibility is clearly an important characteristic, the model contract can be adapted to the wide range of different situations that may arise in the context of sales of perishable goods. In response to this need, the model contract offers the parties a number of choices based on actual practice, particularly as regards international payment and international delivery.

In this connexion, the model contract comprises a variety of types of provisions, as follows:

- Provisions which the parties must complete (e.g. identity of the parties and description of the goods);

- Provisions to be completed at the parties' discretion (e.g. quality and inspection of the goods);

- Fall-back provisions: these provisions apply when the parties do not provide for any other alternative (e.g. as regards the price, delivery and payment terms).

II - Commentary on specific provisions of the contract

Article 1 - Parties

Clearly identify the parties

It is important that each party to the contract should be properly identified by reference to its name and address. If a party is a company, it should specify its official address, even if the transaction is to be handled by a branch or other place of business of the same company, in which case the address of such other place of business should also be given.

Who is the authorized signatory ?

If a party is an individual, he or she should personally sign the contract, unless represented by an agent.

If a party is a company or another type of legal entity, it is important to clearly identify the person signing on behalf of the party, together with details of any appropriate authorization to sign. Each party should verify that the other party's representative is duly authorized to represent that party.

Check addresses and contact details

It is also important that the correct addresses and contact details be given for the purpose of subsequent communications between the parties.

Article 2 - Goods

Description, specific details, quantity, checking and packaging

Article 2 is intended to contain all appropriate details in relation to the physical characteristics of the goods as well as their packaging. The article comprises, in effect, a checklist of items to which the parties' attention is drawn.

Only some of the items are likely to be fundamental to the existence of a contract, in particular the description of the goods and the total quantity. If the quantity of the goods is to be determined at a later stage or is variable, the parties must make provision for a mechanism for determining the quantity.

Checking operations, particularly as regards quality and weight, which are necessary for the purpose of placing the goods at the disposal of the buyer or for the purpose of delivering the goods are standard operations usually paid by the seller. These operations should be distinguished from the inspection of goods, the costs of which are usually borne by the buyer (see below).

Inspection of goods

Article 2 invites the parties to consider whether they need to arrange for the quality and quantity of the goods to be inspected and who should carry out the inspection. The time and place of such inspection,

usually referred to as "pre-shipment inspection", need to be fixed by reference to the delivery arrangements and the Incoterm chosen. The parties should also specify how the costs of inspection are to be borne. In many cases, the buyer will have to pay the costs for an inspection arranged at his request and in his own interest. If there is no specific arrangement as to the costs of inspection, then they will be borne in accordance with the Incoterm chosen.

Article 3 - Delivery

Choosing the appropriate Incoterm

It is proposed that, rather than specifying in detail the delivery arrangements and respective obligations of the parties, the parties should simply choose an ICC Incoterm. Parties are advised to become familiar with the Incoterms and the principal rules to be followed when applying them. The full text of the Incoterms is available from the International Chamber of Commerce. As of 1 January 2000, the 1990 version is to be replaced by the Incoterms 2000. The présent model contract refers to the latest Incoterms version in force on the date of formation of the contract.

Linking the Incoterm and the place and date of delivery

Once the Incoterm has been chosen, it is important to specify the agreed place and date or period of delivery taking due account of the particularities of the Incoterm. If the place and/or time for delivery have not been fixed, it is important to specify how they are to be determined.

If the parties do not wish to choose an Incoterm, they are nevertheless recommended to consult the relevant Incoterms, which provide a useful checklist of matters for which they should make specific provisions in their contract.

Ex Works used only as fall back Incoterm

If the parties make no specific provision as regards delivery, they are presumed to have opted for delivery Ex Works at the seller's place of business through which the contract is to be performed. This is a "fall-back" clause, or in other words a clause which applies only if the parties do not provide otherwise. It corresponds closely to the approach adopted in CISG (Article 31). In practice, however, parties will usually opt for another Incoterm for the sale of persishable goods, such as, for example an F – or C – term.

Article 4 - Price

This provision allows the parties to record all information required as regards the agreed price. The parties should be as precise as possible when specifying the price and the currency. A list of international currency symbols is appended at the end of this guide (see annex III).

Currency of account and currency of payment

The contract sets out the rule that payment is to be made in the currency of account. Here, some explanation is required. When specifying the currency, the parties should bear in mind that there may be a difference between the currency in which the price is expressed (currency of account) and the currency of payment. Normally, payment is made in the currency of account. However, this is not always the case. Where the currency of the place of payment is different from the currency of account, the UNIDROIT Principles (Article 6.1.9) give the buyer an option: to pay either in the currency of account or in the currency of the place of payment if that currency is freely convertible. As this option may take some parties by surprise, the model contract excludes the application of this alternative by specifying that payment is to be made only in the currency expressed in the price, unless otherwise agreed by the parties.

Different currency for price and payment: who bears the exchange rate risk?

If payment is to be made in a currency other than the currency in which the price is expressed, the parties should state this in their contract. In this event, the parties are advised to specify which of them shall bear the risk of exchange rate variations.

If the price cannot be fixed at the time of signature of the contract, the parties should specify the method for determining the price or modifying it.

Finally, it should be noted that the contract remains valid even if the price has not been recorded in it, since provision is made for the price to be established having regard to the market price, in accordance with the approach adopted in CISG (Article 55).

Article 5 - Payment

The model contract proposes several payment options commonly encountered in international trade. The parties are totally free as regards their payment arrangements, but if they do not opt for a specific payment mechanism, then the contract provides a fall-back arrangement for payment by bank transfer (see below).

The method of payment – by teletransmission to the seller's bank, bill of exchange (draft), cheque or other – is to be specified according to the payment options chosen by the parties. For example, where parties opt for payment in advance, they should specify whether payment will be made by cheque, bank transfer, etc.

Details of the seller's bank account should be given if appropriate – where the amount due is transferred by teletransmission to the seller's bank, for example.

Payment via teletransmission

Fall-back clause: payment by bank transfer within 30 days of date of invoice

Article 5 first details the fall-back payment option: payment is made 30 days after the date of the invoice via teletransmission to the seller's bank. This is presumed to constitute the parties' agreement in the absence of any other arrangement. Details of the seller's bank (name, branch, address) and, where appropriate, details of the seller's account should be given. Unless otherwise agreed, the teletransmission costs are to be borne by the sender, i.e. the buyer. The parties are free to modify the period for payment. They may, for example, opt for payment 60 or 90 days after the date of the invoice.

Other payment options

Various other payment possibilities are listed in the contract. If the parties wish to opt for one of these possibilities, then they should tick the appropriate box and provide the requisite details:

- *Payment in advance*

Check time limits for payment of remaining part

The parties may prefer payment in whole or in part before delivery – when the order is placed, for example. In this event, they must specify both the time of payment and any specific conditions which may apply. If the payment which is to be made in advance covers only part of the total price, the model contract provides for payment of the remaining part 30 days after the date of the invoice, unless the parties make some other provision.

Alternatively, the parties may provide for payment against documents, in the form of payment either by documentary collection or by documentary credit.

- *Documentary collection*

Documents tendered against payment: the general rule for documentary collection

Where payment is made by documentary collection, the buyer pays only after having had an opportunity to examine the documents corresponding to the seller's delivery obligations. The seller is exposed to the risk that the buyer will not pay or will not accept the documents, but retains control over the documents until it is assured of payment. There are two possibilities in documentary collection: either the buyer pays in order to receive the documents (documents against payment), or the buyer accepts the bill of exchange in order to receive the documents (documents against acceptance). Unless otherwise agreed, the contract provides that the documents will be tendered against payment. The ICC Uniform Rules for Collections standardize banking practice with regard to collection arrangements and apply to collections under the present contract.

Documentary credit

Letters of credit: safe, but expensive and require careful management

Payment made by irrevocable documentary credit is the safest payment option for the seller, since it provides an independent and irrevocable undertaking from a bank in its favour. However, it requires careful document management. The relevant documentary credit procedures are set out in the ICC Uniform Customs and Practice for Documentary Credits which can be consulted in most banks.

In order to make proper use of a documentary credit, it is important to specify in the contract the date by which the credit is to be sent to the seller or beneficiary by the buyer's bank (via a notifying bank) and the date upon which the credit will expire – in other words, the end of the period during which the seller or beneficiary may present the documents so as to obtain payment. The model contract specifies the various periods which will apply unless the parties agree otherwise.

Seller should consider requiring confirmation

The model contract does not provide for confirmation of the credit by a bank in the buyer's country. It may, however, be prudent for the seller to require confirmation if reliable information concerning the bank issuing the credit is not available. It is foreseen that the seller will bear the costs of confirmation, but the parties may agree upon some other rule for sharing such expenses.

The proposed Article also allows partial shipments and transhipments. The parties should make it clear that such possibilities are excluded if that is indeed the case.

The clause provides for immediate payment (payment at sight). If, however, the parties prefer to apply any given method of acceptance, they should make specific provision for it as appropriate.

Demand guarantees and standby credits

A demand guarantee is not a payment instrument

The parties are also given the opportunity to back a deferred payment by a first demand bank guarantee or a standby credit, which the seller may call should the buyer fail to pay. It is to be noted that a demand guarantee or a standby credit is primarily a security instrument and not a payment mechanism. Therefore, notwithstanding the provision of a guarantee, the parties must still specify how and when payment will be made.

Article 6 - Documents

It is particularly important to specify the various contract documents, especially if payment is conditional upon the production of certain documents by the seller. This Article comprises a checklist based upon the documents generally used in practice. It is proposed that where phytosanitary certificates are required, they be mentioned under "other documents".

Check that seller is able to provide the required documents

It is important to check that the seller is actually able to produce the documents in question, and to verify the content of the list against the Incoterm which has been chosen.

The rule concerning the strict conformity of the documents to be presented to the bank should not be overlooked. It is therefore essential for the list to identify as clearly as possible each of the documents to be presented in order to obtain payment.

Article 7 - Late payment

In line with general practice in international trade, it is proposed that a party should be entitled to compensation, in the form of interest, in the event of late payment. The parties are recommended to verify whether there may be any legal difficulty in recovering interest calculated by reference to an average bank short-term lending rate prevailing for the currency of payment, as well as inquiring as to the types of bank lending rate to be used by way of reference.

Seller may be able both to claim interest and to terminate contract

The seller's entitlement to interest for late payment does not affect its right to terminate the contract in accordance with CISG (Articles 61-65) in the event of non-payment. The provision specifies also the period after the expiry of which the seller may terminate the contract in the event of late payment.

Article 8 - Late delivery

Rate and amount of damages may be modified

The daily rate and maximum amount of liquidated damages proposed are relatively high as a result of the particular importance which buyers of perishable goods generally place upon timely delivery. Both the said rate and maximum amount may require modification by the parties in view of the specific subject matter of their contract.

The importance attached to timely delivery is the reason why a relatively short period is proposed before the buyer is entitled to terminate the contract on grounds of non-delivery. This period may always be modified by the parties.

Article 9 - Force majeure

The force majeure clause is based upon the standard form of Force Majeure (Exemption) Clause of the International Chamber of Commerce (see ICC Publication No. 421), which itself was inspired by Article 79 of CISG.

Check that the proposed 30-day period is adequate

While a party clearly cannot be blamed for failing to perform its obligations as a result of an event of force majeure, the commercial prerogatives of trade in perishable goods mean that the other party

should nevertheless be entitled to terminate the contract in the event of force majeure upon expiry of a relatively short extension of the period for performance. The proposed period of 30 days needs to be reviewed by the parties in light of the particular circumstances of their respective fields of business.

Article 10 - Fundamental non-performance

The right to terminate is linked to the concept of fundamental non-performance of the contract (known as fundamental breach in CISG). The contract does not seek to set out an exhaustive list of matters constituting fundamental non-performance, but limits itself instead to highlighting certain particularly important examples with a view to helping the parties to appreciate the potential consequences of certain developments, and therefore to manage their relationship better as a result.

In the event of fundamental non-performance, the party which is the victim of the default may terminate the contract and recover damages, and/or sell or purchase the goods, as appropriate, with a view to mitigating the losses resulting from such default. The latter alternative is commonly encountered in contracts for the sale of perishable goods.

Article 11 - Expertise procedure

Expertise may avoid court litigation or arbitration

Disputes as to the quality of goods are encountered quite frequently in trade in perishable goods. This Article proposes an expertise procedure which should allow the parties to deal quickly and efficiently with any difficulties of this order. The aim is to obtain an expert report from an independent third party on the basis of which the parties will be able to take any measures for the purposes of their contractual relationship. In this regard, the dispute resolution procedure (see Article 15) will come into play only if a disagreement persists between the parties as regards either the quality of the goods or the consequences of the expert's findings for the parties' contractual relationship. It is hoped that the mechanism which is proposed will allow the parties to find a solution without having to apply the dispute resolution procedure.

Choosing an independent expert

It is important that the expert chosen be totally independent of the parties. Should the parties not be able to identify a suitable institution or person at the time of signature of the contract, then this choice will fall upon the buyer at the time of delivery, unless the parties agree otherwise at that time. The parties may wish to consider using the services of an independent inspection company. Copies of the "World Directory of Inspection Companies" (ITC, 1999, 265 pages) covering 55 inspection companies present in some 182 countries, may be obtained free of charge to developing countries from the International Trade Centre UNCTAD/WTO, Palais des Nations, 1211 Geneva 10, Switzerland.

Article 12 - Mitigation of harm

It is a well-established principle in international commerce that parties are obliged to mitigate any harm or loss which may arise by virtue of their contractual relationship. This principle is particularly important in the context of contracts involving perishable goods. The aim of this Article is to specify the measures which the parties should take, and to deal with liability for the costs which those measures involve.

Article 13 - Communications between the parties

This Article sets out the rules for communications between the parties and deals in particular with the subject of proof of receipt when using electronic means of communication. The Article also specifies that every day counts in the calculation of applicable time periods.

Article 14 - Applicable rules of law

The applicable rules have an order of precedence starting with the contract

The model contract specifies the rules which govern the parties' agreement and specifies their order of precedence when interpreting the terms of the contract. The order of precedence is: first, the ITC contract document as completed by the parties; second, the United Nations Convention on Contracts for the International Sale of Goods; third, the UNIDROIT Principles of International Commercial Contracts; fourth and finally, the law specified by the parties or, in absence of a specific choice, the law applicable at the seller's place of business.

The model contract thus incorporates two international instruments which are well adapted to the requirements of contracts for the international sale of perishable goods.

The Vienna Sales Convention

The first is the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) which has been ratified by more than 55 countries. By virtue of the reference to CISG in the model contract, the provisions of CISG will apply to all contracts even if one or more of the parties does not belong to a country which has ratified CISG. The text of CISG is reproduced in annex I for ease of reference.

The UNIDROIT Principles

The second instrument which it is proposed to incorporate by reference is the UNIDROIT Principles of International Commercial Contracts. This instrument seeks to set out standard international practice applicable to all commercial transactions. The reference to the UNIDROIT Principles allows the contract to be supplemented by a set of provisions specifically conceived for international transactions. The text of the UNIDROIT Principles is reproduced in annex II.

In the event that any provisions contained in either of these instruments raise any particular difficulties, a specific qualification to this effect should be recorded in the contract. If any such qualification is to be made, care should be taken to ensure that the internal logic and equilibrium of the instrument in question are not affected. Given, however, that the model contract has been drawn up on the basis of both instruments and the vocabulary they use, it is considered that it would be difficult to do this successfully. The parties are advised instead to set down in writing all the terms and conditions which are to apply to their transaction, or to have recourse to some other standard form.

Important to stipulate a domestic law

Finally, the parties should be aware that the CISG and UNIDROIT Principles do not cover all potential legal eventualities as regards any given transaction. It is therefore appropriate to stipulate the domestic law which will apply in addition. The parties are invited to specify the domestic law which they consider to be appropriate to their transaction. In the absence of such choice, the domestic law which will apply, under the terms of the model contract, is the law which is commonly considered to be applicable to an international sales contract, namely the law applicable at the seller's place of business through which the contract is to be performed. This is one of the reasons why the address of the place of business must be specified in the contract.

Article 15 - Dispute resolution

The parties are free to choose the dispute resolution procedure which they consider to be appropriate. Thus, they can choose between giving jurisdiction to a State court to decide upon any disputes which may arise, and arbitration.

The State court option

If the parties choose to give jurisdiction to a specific State court, then, in order to be effective, the jurisdiction clause should be exclusive in nature – in other words, it should exclude the possibility that other courts can deal with a matter. The parties should, however, be aware that an exclusive jurisdiction clause is generally a lesser guarantee of a legally secure outcome than arbitration, because if proceedings are commenced in a different State court from that foreseen, the said court may well refuse to accept the consequences of the parties' choice as regards its own jurisdiction.

The arbitration option

This is one of the reasons why arbitration has become the standard option for settling disputes in international commerce, particularly as the State courts of all of the countries (of which there are now more than 120) which have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 are obliged to accept the parties' decision, in opting for arbitration, to exclude the jurisdiction of those courts.

UNCITRAL arbitration

The parties may prefer to foresee an ad hoc arbitration, which they will have to manage themselves. In this event, they are recommended to specify that they will use the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules and that the International Chamber of Commerce shall be the appointing authority for the purposes of constituting the arbitral tribunal, if necessary.

The recommended UNCITRAL arbitration clause is as follows:

> *"Any dispute, controversy or claim arising out of or relating to the contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules at present in force.*
>
> *It is recommended to add the following details.*
>
> *(a) The appointing authority shall be the International Chamber of Commerce (ICC)*
>
> *(b) The number of arbitrators shall be one.*
>
> *(c) The place of arbitration shall be (City or Country)*
>
> *(d) The language to be used in the arbitral proceedings shall be English."*

Quality arbitrations

If, however, the parties do not have the benefit of the assistance of a lawyer experienced in international dispute resolution, they are recommended instead to opt for institutional arbitration, and to choose among the numerous centres for international dispute resolution in existence. There exist, in the perishable goods sector, numerous institutions which organize what is known as "quality arbitration", in other words tailor-made arbitration and expertise procedures for specific goods (such as cocoa, coffee, grain and feed, rice and sugar). Parties may well prefer to have recourse to such procedures in appropriate circumstances. In any event, there is no single international quality arbitration institution covering the entire commodities spectrum.

ICC arbitration

Unless the parties specifically prefer to have recourse to some other institution, it is proposed that they use the arbitration rules of the International Chamber of Commerce.

With a view to keeping to a minimum the cost of arbitrating disputes which involve relatively small amounts, it is recommended that the tribunal should be made up of a single arbitrator and that if, in addition, the amount in dispute is less than 100,000 United States dollars, the proceedings should take place entirely on the basis of written exchanges, to the exclusion of hearings. Hearings, including travel and other costs of the persons involved, are generally the most expensive

cost item in arbitration. A case dealt with at a distance, on the basis of documents alone, should not prevent an arbitral award of good quality from being produced, particularly as the ICC International Court of Arbitration will provide the same amount of supervision of the arbitrator's award as for any other case, at a relatively low cost. If the parties nevertheless require a hearing, they may so agree, but a single party may not insist upon a hearing (unless otherwise agreed in the arbitration clause).

For more substantial disputes, the parties may always agree to proceed on the basis of documents alone. However, if one of them prefers to have a hearing then this will be possible under the ICC Rules.

If the dispute is substantial, a party may request the ICC International Court of Arbitration to appoint a tribunal comprising three arbitrators. The court will decide at its discretion whether this is appropriate.

Those wishing to consider alternative possibilities for institutional arbitration are advised to consult the International Trade Centre's Juris International Web site (http://www.jurisint.org).