





International Sales Agreement Checklist

for Sellers of Products and Services

SEVENTY-FIVE ITEMS TO CONSIDER WHEN DRAFTING AND RECEIVING INTERNATIONAL SALES AGREEMENTS.

Drafting an international contract can be a risky business, yet with the increasing globalization of markets, these cross-border contracts are becoming a common practice for most companies.¹ At the same time, international contracts remain a difficult and mysterious subject for companies.²

In your contract management activities supporting the seller of products and/or services, it is likely that you will be asked by your employer to either draft or review an international sales agreement from the seller's viewpoint. As with any substantive contract executed by an entity, international sales agreements are important contracts that contain numerous issues that need to be properly addressed.

In my contracts management career, I have drafted and reviewed many international sales agreements from both the seller's and buyer's viewpoints. Although this article focuses on international sales agreements for products and/or services from the seller's viewpoint, it is also quite useful to the buyer in identifying issues of importance to the seller.

In order to systematically cover the multitude of unique issues in a typical international sales agreement for products and/or services from the seller's viewpoint, I have developed the following "International Sales Agreement Checklist for Sellers of Products and/or Services."



- ✓ Are the parties to the international sales agreement accurately identified by full legal name, type of entity, country of entity creation, and entity physical address?
- ✓ Is legal consideration cited (i.e., “in consideration of the mutual promises of the parties, the parties agree as follows...”)?
- ✓ Is there a “Background” section that describes the reason for the agreement and states the purpose of the agreement?
- ✓ Is there a “Definitions” section that clearly defines the agreement’s key capitalized terms, such as:
 - Each party’s “Proprietary Information”;
 - Each party’s “Rights,” to include know-how, technical data, computer software, and inventions now in existence or later developed by each party, including all such party’s applicable copyrights, mask works, trademarks, service marks, trade dress rights, patents, provisional patents, patent applications, trade secrets, moral rights, and other related intellectual property including related future developments and improvements; and
 - Any other key terms that need to be capitalized and defined?
- ✓ Is there a “Relationship of the Parties” section that clearly states that each party is an independent contractor with regard to each other under the agreement and that neither the agreement nor the operation of the agreement in any way causes the parties to become legal partners, legal joint venture parties, or parties to any other legal entity?
- ✓ Does each party state that it is not—and will not—be a party to another contract that would prevent or impair its performance or obligations under the agreement?
- ✓ Is it clear that nothing in the agreement shall prevent, preclude, or restrict either party from dealings with outside parties to the extent such outside party dealings do not create a default under the agreement?
- ✓ Is the statement of work (SOW) adequate?³
- ✓ What is the “Term” and “Schedule” of the contract?
- ✓ Consider whether or not your work should start before adequate initial payment is received. What is the buyer’s financial condition?
- ✓ After receipt of the initial payment, is the remainder of the payment made under a letter of credit or secured by a standby letter of credit?
- ✓ Is the letter of credit irrevocable, advised, confirmed, transferable, issued by a bank that you approve, and paid for by the buyer?
- ✓ Can you receive payment under the letter of credit by presentation of your invoice to the issuing bank?
- ✓ Is the payment currency appropriate?
- ✓ Is there late payment interest?
- ✓ Is the contract type (e.g., firm-fixed-price, time and materials, etc.) appropriate for the work?
- ✓ If on-site work is required, is demobilization/remobilization recoverable?
- ✓ Is there an “Exchange of Proprietary Information” section in the agreement? If so, is this a mutual two-way nondisclosure/nonuse provision that addresses all the applicable nondisclosure/nonuse issues?⁴
- ✓ Is there a “Termination” section that properly addresses termination for default and termination for convenience?
- ✓ Is there a “Limitation of Liability” section that reasonably caps the seller’s monetary liability to the buyer for actions related to or arising out of the agreement (excluding the harmed party’s intellectual property infringement claims or wrongful disclosure/use of proprietary information claims against the harming party)?
- ✓ Is there a “Waiver of Consequential Damages” section that provides for an equitable, mutual waiver of consequential, indirect, special, and incidental damages between the parties?
- ✓ Is there an “Indemnification” section in which each party reasonably agrees to indemnify the other for:
 - Third-party general liability claims arising out of the agreement to the extent of the indemnitor party’s proportional negligence or willful misconduct, and
 - Third-party intellectual property infringement claims arising as a result of the indemnitor party’s activities under the agreement?⁵
- ✓ How is “Inspection and Acceptance” addressed? Is it reasonable? Are there definite acceptance criteria?
- ✓ Is there an appropriate “Warranty” provision, “Limited Warranty” provision, or a “Disclaimer of Warranties” provision?
- ✓ Is there a “Liquidated Damages” provision?



- ✓ Is there an “Insurance” provision that states the types of coverage and coverage limits that will be required of the seller? Are the insurance requirements reasonable? Will there be any endorsements (e.g., waiver of subrogation, additionally insured party, etc.)?
- ✓ Is there a “Governing Law” provision? Is the chosen country’s law suitable? Does the provision exclude the chosen country’s choice of law provisions?
- ✓ Is there a provision that properly addresses “Public Announcements, News Releases, and Advertising Materials”?
- ✓ Is there a reasonable “Allocation of Technology and Intellectual Property” provision? This should address the current “Rights” of each party individually as to its currently existing technology and related intellectual property. Also, it should address the future “Rights” of each party individually as to its technology and related intellectual property solely developed by each party under the agreement. Additionally, the provision must also address how the ownership and rights of use will be equitably allocated between the parties with regard to jointly developed technology and intellectual property under the agreement.
- ✓ Is the “Termination” clause reasonable? Does it include termination for convenience without cause?
- ✓ Is there a “Stop Work” clause?
- ✓ Will an *International Traffic in Arms Regulations (ITAR)* or Bureau of Industry and Security (BIS)/*Export Administration Regulations (EAR)* export license be required?
- ✓ Is there an advanced payment bond, performance bond, or warranty bond requirement?
- ✓ How are taxes, tariffs, and import duties handled?
- ✓ Is English the controlling language of the agreement?
- ✓ Is a Foreign Corrupt Practices Act (FCPA)⁶ clause required?
- ✓ Is the agreement compliant with anti-boycott laws?
- ✓ Are there any antitrust issues to consider?
- ✓ Is the customer listed as a “Denied Party” under any U.S. Denial Orders?
- ✓ Should software or technology licensing be addressed?
- ✓ Will a carnet be required?
- ✓ Has the inflation rate in the customer’s country been considered?
- ✓ Have exchange rate issues been considered?
- ✓ Are there any repatriation problems?
- ✓ Will the contract create a “presence” in a foreign country that may create certain foreign country registration requirements?
- ✓ Are there specific foreign country quality standards that must be met?
- ✓ Will power of attorney documents be required?
- ✓ Will the metric system apply?
- ✓ Are there any political risks?
- ✓ Are there any in-country safety risks?
- ✓ Will you need to protect any of your company’s patents or trademarks in another country in order to do the work?
- ✓ Are there any special cultural considerations?
- ✓ Do any aspects of the legal/judicial system of the customer’s country present a problem?
- ✓ Are there any foreign country economic/financial concerns?
- ✓ Are there any labor-related issues to consider in the customer’s country?
- ✓ Are there any applicable import restrictions?
- ✓ Are there any local content requirements?
- ✓ Are there any ISO 9000⁷ quality issues?

- ✓ Are there any ISO 14000 environmental issues?
- ✓ Are there any sustainability issues?
- ✓ Do EU laws and regulations apply?
- ✓ Has “The United Nations Convention On Contracts For The International Sale Of Goods” been waived?
- ✓ Do any “international commercial terms” (INCOTERMS)⁸ apply?
- ✓ What are the foreign trade barriers in the customer’s country?
- ✓ Is there a reasonable “Force Majeure” clause?
- ✓ Is there a “Dispute Resolution” provision (e.g., arbitration, mediation, etc.) that addresses how disputes between the parties will be resolved?
- ✓ Is there a “Business Continuity” (i.e., disaster recovery) provision to address how each party plans for continuation of its business in the event of interruptions?
- ✓ Is there a “Business Ethics” provision to address how each party will operate ethically with integrity?
- ✓ Is there a “Data Privacy” provision that addresses how individual privacy will be safeguarded?
- ✓ Is there a “Records Retention” provision that properly addresses how long applicable records and data will be retained and stored before deletion and destruction?
- ✓ Is there a “Score Card” provision so that the buyer can periodically assess and evaluate the products or services?
- ✓ Is there an “Anti-piracy of Employees” provision that reasonably prohibits one party from soliciting or hiring the other party’s employees?
- ✓ Is there an “Export Compliance” provision that requires compliance with the *EAR*, *ITAR*, FCPA, anti-boycotting laws, and other export compliance laws and regulations?
- ✓ Is the agreement assignable?
- ✓ Is there a provision addressing compliance with applicable laws and regulations?
- ✓ Is there a “General” provision that addresses notices between the parties, waivers, headings, severability, survival, order of precedence, complete agreement, and modifications?



The goal of an international sales agreement is to facilitate an ongoing, mutually beneficial, “win-win” contractual relationship between your entity and the other party or parties. A good international sales agreement helps the parties in creating, sustaining, and enjoying the journey of the relationship. This checklist will certainly help in creating or reviewing an international sales agreement. However, this checklist is not exhaustive. Every international sales agreement has some unique aspects that may not be addressed above. However, if you routinely use this checklist as one of several resources when you draft or review an international sales agreement, you will be pleasantly surprised with the large number of substantive, material, risk reduction, performance improvement, and cost-savings issues that will be surfaced for proper resolution. **CM**

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ENDNOTES

1. See Fabio Bortolotti, “Drafting and Negotiating International Commercial Contracts” (February 2009), available at www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=904112859X.
2. *Ibid.*
3. See John E. Miller, “Fifty Tips for Your Statement of Work,” *Contract Management* (August 2007): 58–61.
4. See John E. Miller, “Forty-five Nondisclosure Agreement Review Tips,” *Contract Management* (November 2006): 64–65.
5. See John E. Miller, “Forty Indemnification Clause Review Tips,” *Contract Management* (March 2007): 55–56.
6. 15 U.S.C. §§ 78dd-1, *et. seq.*
7. A family of quality management system standards maintained by the International Organization for Standardization (ISO), www.iso.org.
8. A series of international sales terms published by the International Chamber of Commerce (ICC), www.iccwbo.org.