

CONTRACTS IN THE UNITED STATES: DRAFTING AND NEGOTIATION

Foreign companies doing business in the United States often consider using the same contract templates as in other Western countries, especially those governed by the Common Law system, given that, due to historical and political ties between the USA and the United Kingdom, the American legal system is based on the British Common Law System.

This article contains an outline of the legal System in the USA and the Contract Law related to the British Common Law as well as the [Contract Templates used in the USA](#) for foreign companies; it also offers the reader key issues for negotiating and drawing up contracts in the USA.

THE LEGAL SYSTEM IN THE USA AND CONTRACT LAW

Contract law in the USA is governed by three main sources:

- Common law created by courts through the interpretation of prior facts and circumstances. This is the primary source of contract law in many countries, as courts generally interpret and define the other sources as well; and
- Specific statutes in each jurisdiction, generally at the state level. For example, the Uniform Commercial Code ("UCC") of each state in the United States governs contracts pertaining to the sale of goods in that state.
- A federal law that is uniform in application, and governs in areas in which national consistency is seen as more important (e.g., federal taxation, patent law and copyright law).

For most contracts involving commercial transactions, all fifty states have enacted, at least partially, a body of statutory law (UCC), which governs a variety of commercial relations involving consumers and merchants, among others, Article 2 of the UCC governs the sale of goods, which are defined by the code as items that are "movable" at the time of the contract. Related to exclusive distribution agreements, there are some exceptions such as the states of Louisiana and Wisconsin and the associated state of Puerto Rico, which have statutes strongly protective of local distributors.

Nevertheless, English and American law have some important differences, especially with regard to business contracts. Although both countries share the common root of the Common Law, its evolution has been different and because of that, certain legal and jurisprudential developments have appeared in the United States. Perhaps the greatest difference is the absence of English law, of an implied duty of good faith when negotiating a contract. This duty, however, does exist in American law, which is aligned, in this sense, with most European legal systems, such as the French or Spanish systems, even with other systems of the Common Law and the Australian system, which do require bargaining in good faith by the parties and, therefore, the obligation to maintain confidentiality, or the transparent use of information and the responsibility for a sharp break from negotiations.

Besides these legal differences, there are also some linguistic differences between legal English in the United States and in the United Kingdom: there are some words that mean the same but spelled differently in the two countries (USA: labor / UK: labour) (USA: offense / UK: offence) (USA: defense / UK: defence). There are also specific legal expressions which vary from one country to the other, for example, the expression "best endeavours" - commonly used in Great Britain - to indicate that the parties will do everything in their power to achieve a particular result, in the United States it is replaced by the expression "best efforts". The same circumstance is found in the American expression "merchantable quality" to be used in contracts for the sale of goods to ensure (or not) product quality, meanwhile in the United Kingdom the equivalent expression is "satisfactory quality"

THE MOST COMMONLY USED COMMERCIAL CONTRACTS

In commercial relations between foreign companies and US companies, it is usually the American company which takes the initiative to draw up contracts, which, therefore, should be adapted to US practice and laws.

The contracts most commonly used for foreign companies doing business in the USA are:

- [Exclusive Distribution Agreement](#): when a company appoints a Distributor to distribute its products to authorized dealers or others who then sell them to their end-users. Because of the exclusivity of the relationship, the agreement contains marketing commitments by the Distributor to the Supplier.
- [Non-Exclusive Distribution Agreement](#): the Supplier promotes and sells its product in the American market through Distributors working on a non-exclusive basis. The Supplier should complete one of this type of agreement for each of its Distributors in the USA
- [Authorized Dealer Agreement](#): used for the distribution of certain products (consumer electronics, appliances, heating and cooling systems, etc.) that require special knowledge or expertise to sell them.
- [Sales Representative Agreement](#): when a company appoints an independent sales representative to promote and sell its products or services in the USA. The company appoints an individual or a legal entity to seek clients and carry out transactions, normally in certain states of the country. The representative receives its fees through commissions on the sales it achieves.
- [Consulting Services Agreement](#): used by independent consultants or consulting firms to establish the conditions of its service proposal to its customers.
- [Maintenance Service Agreement](#): in this contract a company provides maintenance services for products such as equipment, computers, machinery, etc.
- [Manufacturing Agreement](#): used for companies which subcontract in the USA the manufacturing of its products to a manufacturer based in the country which has to satisfy a number of specifications such as the materials used and which also

undertakes to keep the information strictly confidential and to comply with the intellectual property rights (patents, trademarks) of the company which hires it.

- [Trademark License Agreement](#): this contract permits another party (the Licensee) to use one or more of the Licensor's trademarks in a designated territory
- [Confidentiality Agreement](#): used for companies which do business in the USA and which need to safeguard certain confidential information (in particular commercial and technological secrets) which are submitted during on-going negotiations.

KEY ISSUES FOR NEGOTIATING CONTRACTS IN THE UNITED STATES

Some of the key issues relating to negotiating contracts in the USA are explained below. It should be borne in mind that several of the points that are made in this legal context also have relevance to the negotiation of commercial agreements in general.

Contracts in writing

In the United States, "freedom of contract" is a very important legal principle, and in the absence of strong public policy to the contrary, courts will usually enforce written agreements. Accordingly, you should document your commercial relationships in writing, even if using "boilerplate" contracts such as standard terms and conditions of sale. Be warned, though, that US lawyers tend to be more verbose than other lawyers and frequently produce long and comprehensive contracts. Nonetheless, "Plain English" in legal documents has gained popularity over time.

Date

The date usually appears at the beginning of the document but it is normally the last item to be completed as it will usually be dated when it has been signed by all parties. Sometimes, however, work under an agreement will start before - or perhaps some time after - the date which appears in the agreement. This can be dealt with in the language of the contract. For example, in the Exclusive Distribution Agreement, the term "Commencement Date" is defined as which is the date upon which performance of agreement commences.

Parties

Be sure to insert full and accurate details here. The details will vary depending on whether a party to the contract is a company, partnership, individual or some other entity, and whether the party is based in the United States or another country. Unlike contracts in Europe or other countries, in the United States, it is not necessary to specify in this section of the contract the name and position of the person who actually signs the contract in the representation of each of the companies.

Sometimes the official address which appears on page 1 on the contract after the name of a party will be different from the address at which that party conducts its operations under the agreement. In that case, the "Notices" clause in the contract can refer to the address for routine communications.

General Provisions

Most contracts in the USA have a General Provisions clause that incorporates other clauses (Governing Law & Jurisdiction, Entire Agreement, Notices, Costs of Legal Action, Arbitration, Force Majeure, etc.) that in other countries are drawn separately.

Signature

Always ensure that whoever signs the contract has the authority to do so. In the case of a Corporation or a Limited Liability Company (LLC), the Bylaws or Operating Agreement may specify who can sign. Under US law, the signature of a director or executive officer can normally be relied upon by the other party as a director or executive officer will usually have ostensible authority with which to bind the entity of which he/she is a director or executive officer; in the case of a Partnership it is usually not practical to get all the partners to sign, so check to ensure that the partner or partners who sign have authority to do so; when the other party is a Sole Proprietor the individual who owns the business should sign; if it were an individual, clearly the individual should sign personally.

Notarization

The underlying purpose of having a signature notarized is for evidentiary reasons. The notary's stamp serves as proof that the signature on the agreement is indeed the signature of the party whose name appears.

In the United States, most contracts can be effective without any signatures being notarized; notarization is normally only required in respect of documents that are being registered (such as transfers of land, etc.). However, different jurisdictions have different rules, so always check the rules before finalizing the contract.

Number of Original Contracts

It is usual for each party to a contract to retain one original. Thus, where there are two parties, two original copies should be signed and one retained by each party. A contract can only be effective if the necessary formalities to create a binding agreement between the parties have been observed. If in doubt, obtain legal advice from lawyers in the appropriate jurisdiction.

Governing Law, Jurisdiction and Arbitration

In commercial contracts drawn in the United States between foreign companies and American companies, it is usual to refer disputes to US Contract Law and, specifically, to the law

of the specific state where the American party is located. Besides, it is usual to go Arbitration Courts to resolve conflicts. An example of Arbitration provision is as follows:

Any dispute relating to the interpretation or performance of this Agreement shall be resolved at the request of either party through binding arbitration. The arbitration shall be conducted in [County], [State] in accordance with the then-existing rules of the American Arbitration Association. Judgment upon any award by the arbitrators may be entered by any state or federal court having jurisdiction. Both parties intend that this Agreement arbitrate be irrevocable.

Negotiation procedure

Begin contract negotiations with the following steps:

- Understand what it is you want to accomplish with the contract and what the other party wants to accomplish;
- Identify your position and the other party's position (strengths vs. weaknesses);
- Be prepared and provide room for negotiation; and
- Bring solutions to the table – try to work towards resolution of disagreements rather than just butting heads!
- Until a final definitive agreement is reached, all draft agreements, term sheets or letters of intent should clearly state the following:

This document is not intended to create or constitute any legally binding obligation between the parties hereto, and no party shall have any liability or obligation to another with respect to this document until a fully integrated definitive agreement is prepared, authorized, executed, and delivered by all parties.

- In some circumstances, a party will insist on using its form contract and will not be willing to negotiate terms. This is called an “adhesion contract” and the other party will not be able to obtain the desired product or service unless it acquiesces to the form contract. This could be the case of the Authorized Dealer Agreement. Adhesion contracts may not be enforceable to the extent they contain unreasonable terms.
- When dealing with government entities or political subdivisions such as cities and towns, be aware of legal requirements applicable to those entities, including public bidding requirements, fair wage laws, open door laws and others.

Drafting a contract

Once the basic outline of terms is negotiated, contract drafting may begin. When given the opportunity, it is generally best to be the party that drafts the contract. Advantages of “controlling the draft” are that it:

- Provides extra control over the negotiations;
- Allows you to define the issues
- Prevents hidden or surprise issues;

- Enables the deal to be structured on your terms; and
- Helps you influence the timing of the drafting process.

From the key issues that have been mentioned above it is evident that as far as drawing up and signing international contracts in the USA is concerned, commercial practices are fairly similar to those in Western countries (mainly the United Kingdom) and based on the basic principles of Common Law, although some significant differences appear; it should also be noted that when specific issues or questions between the parties arise, legal advice should be sought.



To obtain model contracts for the United States click here:
[**CONTRACTS FOR THE UNITED STATES**](#)

INTERNATIONAL CONTRACTS TEMPLATES



INTERNATIONAL CONTRACTS IN ENGLISH

- International Sale Contract
- International Distribution Contract
- International Commercial Agency Contract
- International Sales Representative Agreement
- Intermediary Contract for Trade Operations
- International Joint Venture Contract
- International Strategic Alliance Agreement
- International Franchise Contract
- International Services Contract
- International Consulting Contract
- International Technology Transfer Agreement
- International Trademark License Agreement
- International Supply Contract
- International Manufacturing Contract
- International Buying Agent Contract
- Logistics Services Contract
- Export Contract
- Confidentiality Agreement
- Expatriate Contract of Employment
- Memorandum Understanding International distribution
- Memorandum of Understanding for Joint Venture
- **Pack 10 Contracts in English**
- **Pack All Contracts in English**



INTERNATIONAL CONTRACTS IN SPANISH

- Contrato de Compraventa Internacional
- Contrato de Distribución Internacional
- Contrato de Agencia Comercial Internacional
- Contrato de Representación Comercial Internacional
- Contrato de Intermediación Comercial Internacional
- Contrato de Joint Venture Internacional
- Contrato de Alianza Estratégica Internacional
- Contrato de Franquicia Internacional
- Contrato Internacional de Servicios
- Contrato Internacional de Consultoría
- Contrato Internacional de Transferencia de Tecnología
- Contrato Internacional de Licencia de Marca
- Contrato Internacional de Suministro
- Contrato Internacional de Fabricación
- Contrato de Agente de Compras Internacional
- Contrato de Servicios Logísticos
- Contrato de Exportación
- Contrato de Confidencialidad
- Contrato de Trabajo para Expatriado
- Memorándum Entendimiento Distribución Internacional
- Memorándum de Entendimiento para Joint Venture
- **Pack 10 Contratos en Español**
- **Pack Todos los Contratos en Español**



INTERNATIONAL CONTRACTS IN FRENCH

- Contrat de Vente Internationale
- Contrat de Distribution Internationale
- Contrat d'Agent Commercial International
- Contrat de Représentation Commerciale Internationale
- Contrat de Joint Venture Internationale
- Contrat de Franchise Internationale
- Contrat International de Services
- Contrat International d'Approvisionnement
- Contrat International de Fabrication
- Contrat de Confidentialité
- Protocole d'Accord pour Distribution Internationale
- Protocole d'Accord pour Joint Venture Internationale
- **Pack Tous les Contrats en Français**



INTERNATIONAL CONTRACTS IN GERMAN

- Internationaler Kaufvertrag
- Internationaler Vertriebsvertrag
- Internationaler Handelsvertretervertrag
- Internationaler Vertretungsvertrag
- Internationaler Joint Venture Vertrag
- Internationaler Franchisevertrag
- Internationaler Dienstleistungsvertrag
- Internationaler Liefervertrag
- Internationaler Herstellungsvertrag
- Geheimhaltungsvereinbarung
- Absichserklärung Internationalen Vertriebsvertrag
- Absichserklärung Joint Venture
- **Pack Alle Verträge in Deutscher**

