

In this study, we will try to discuss the distinguishing features of the ICC Model Contracts, their role in the international trade and state the advantages of their use by the merchants who are active in the international trade. We will not explain, however, specific provisions of all different Model Contracts but will limit our study with their general common characteristics.

I. In General

The most outstanding feature of the ICC Model Contracts is that they are not drafted to be imposed by one of the parties to the other party in a manner to restrict the freedom of will principle. Thus, they must be distinguished from other contracts where one of the parties is economically and socially more powerful and manipulating the other party to its detriment.
The ICC Model Contracts must be distinguished from contracts of adherence. A contract of adherence is imposed by one of the contracting parties to the other and the terms and conditions of it can not be negotiated\(^1\). A Model Contract does not imply such a “take it or leave it” approach. On the contrary, it is a draft that may be fully altered and adapted to meet the situation in hand\(^2\).

The ICC Model Contracts are also different from the standard general conditions and standard contracts whose content legally, in theory, may be negotiated between the parties\(^3\). However, the de facto situation is that the general standard conditions may not be altered and negotiated by the parties but is imposed to the weaker party. Standard contracts refer to the whole of the contract drafted by the inclusion of standard general conditions\(^4\).

The ICC Model Contracts are intended to help parties with equal bargaining power to negotiate a fair contract. These Model Contracts should be further “modeled” by the parties to reflect a fair balance between the parties’ interests\(^5\).

Schmitthoff described a Model Contract as a form “the terms of which have been formulated in advance by an international agency in harmony with international commercial practice or usage, and which has been accepted by the contracting parties after having been adjusted to the requirements of the transaction in hand”\(^6\).

It should be noted, however, that the Model Contracts do not form any independent statutory regulation applicable by themselves; they need to be incorporated to the contracts by the will of parties. Thus, they are binding as contractual terms and conditions\(^7\).

The Model Contracts are prepared upon a decision of the Commission on Commercial Law and Practice (“CLP Commission”) by different Task Forces formed by the members appointed by the National Committees (“NCs”). When the CLP Commission decides to elaborate

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5. Van Houtte, p. 256.
a new Model Contract upon the proposal of its members or NCs or other interested parties, it launches an invitation to the NCs to propose candidates for Task Forces. The CLP Commission encourages that different legal systems and different countries are represented in the Task Forces. The Task Forces meet regularly depending to the complexity of the model contract. Once the draft of the model contract is finalized and approved by the CLP Commission, it is sent to the NCs for comments. The Task Force implements the views of the NCs and submits the last draft to the CLP Commission. This draft, following the approval of the CLP Commission, will be submitted for approval to ICC’s Executive Board. The Model Contract will then be published by ICC Publishing SA, an affiliate of ICC and will be distributed through NCs and iccbooks.com. As it can be observed from the procedure followed to adopt a Model Contract, the NCs are deeply involved in the preparation phase of the Model Contracts by appointing members to Task Forces (which members normally inform their NC on the progress of a particular Task Force) and by reviewing and commenting on the draft model contract. Therefore, it can be said that the Model Contracts are the results of a common understanding among the NCs and therefore reflect a large acceptance of the interested bodies.

II. The Features of ICC Model Contracts

A. The Purpose of the Model Contracts

The differing national legislations and their various interpretations form a threat to the legal security of the international merchants. The purpose of the Model Contracts is to replace the choice between differing national legislations, which are often not adapted to the needs of international trade, by a detailed set of contractual provisions. These contractual provisions are not based on any specific national law but incorporate the prevailing practice in international trade as well as the principles generally recognized by the domestic laws. Notwithstanding the foregoing, in very limited cases, the interested parties object that the model reflects the current

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10 Van Houtte, p. 255.
international practice. It was the case for example for the ICC Model International Franchising Contract.\textsuperscript{11}

**Primacy of the transaction.** The ICC Model Contracts cover a specific kind of transaction regardless of which sector of trade is concerned. The Model Contracts are therefore not directed towards parties who are looking to draft a contract that meets the specific needs of their trade. They are meant for parties, who want a solid, general and well-balanced contract.\textsuperscript{12}

**B2B transactions.** The Model Contracts are shaped to regulate contractual relations between international merchants and therefore business to business transactions (“B2B”). To the extent necessary the users are warned that for some specific issues, national laws may provide different solutions under their “protection of consumers regulations” applicable to the relevant type of contractual relations.

**International contracts.** The Model Contracts are formulated to govern in the first instance the contractual relations in international trade. If the parties wish to use the Models for domestic transactions, they have to be reminded of the Models’ international characters and the fact that they are designed for that purpose. Therefore, in the case that the parties prefer to use them for domestic transactions, they have to modify the Models accordingly. Most of the Models provide a warning to the users for that purpose.\textsuperscript{13}

### B. Contribution to lex mercatoria

\begin{itemize}
  \item In the 1st footnote of the Introduction there is the following statement: “The United States Council for International Business (USCIB) disassociates itself from this model contract. USCIB members do not believe that this model contract reflects current international franchising practice, or that model contracts can adequately capture the variety of contracts used in the franchising field”.
  \item Van Houtte, p. 254.
  \item “The parties are therefore advised not to use this model form for domestic contracts, unless they check which amendments are necessary in order to comply with a local situation”, see The ICC Model Commercial Agency Contract, Article 7.1.
  \item “The Model Occasional Intermediary Contract has been prepared on the assumption that it would apply to a cross-border relationship. However, this does not prevent parties from using the model with reference to domestic agreements, provided they check accurately to what extent it is compatible with the applicable national law and provided they make the necessary amendments (e.g. deleting provisions not applicable to domestic contracts). ICC Model Occasional Intermediary Contract, Introduction par. 2.
  \item “The parties are therefore advised to use this model form for domestic contracts only after having checked what amendments may be necessary in order to comply with local laws and practices”. ICC Model Distributorship Contract -sole importer-distributor- (second edition), Introduction, par. 2.1
\end{itemize}
One of the main goals of drafting of Model Contracts by ICC is to contribute to the development of lex mercatoria. The Model Contracts serve to the establishment of a uniform system of rules, capable of becoming, if and when they are concretely accepted by the operators, the foundation for a lex mercatoria. Of course, all depends on whether the Model Contracts are widely used. If the Contracts are widely used they may either reflect or create a norm that becomes binding for third parties\(^\text{14}\). Nevertheless, the frequent use of a Model Contract could indicate a common understanding within the community of international merchants that certain standards have to be accepted for certain transactions. These convictions could be a first step towards the creation of lex mercatoria\(^\text{15}\).

C. Well-balanced Provisions

The national laws in the fields of law which ICC has conducted Model Contracts on do not take into account the specific needs of international trade and substantially differ from one country to another. Moreover, many countries have no elaborated laws for these specific contract types\(^\text{16}\). Elimination of the application of insufficient national provisions is the main reason of ICC’s motive to draft Model Contracts.

The ICC Model Contracts are the products of some of the finest legal minds in the field of international commercial law. The Model Contracts do not suffer from the fact that they were drafted by lawyers and not by businessmen considering that the aim is to offer a legal framework applicable to all branches of trade for a specific type of transaction. Moreover, the members of the Task Forces are not only familiar with the drafting of international contracts but also with the type of transactions at stake\(^\text{17}\). The representation of various legal systems in the Task Forces helps to foresee conflicts and problems that might arise out of different interpretations and applications of law in different jurisdictions.


\(^{16}\) ICC Model Agency Contract. Introduction, par. 1.

\(^{17}\) Van Houtte, p. 264.
The ICC Model Contracts are drafted in a balanced way without favoring one or the other side of the transaction. It would be improper for the ICC, which represents all parties of international trade, to take sides. The Model Contracts are constructed to protect the interests of all the parties, combining a single framework of rules with flexible provisions allowing the parties to insert their own requirements. They are drafted to be fully altered and adapted to meet the situation in hand.

D. User-friendly Format

Introduction. All of the Model Contracts have a detailed Introduction part. These Introduction parts explain to the users several important issues concerning the drafting of the contract as well as the significant characteristics of the contract at stake and the drafting technique that are used. The different definitions of the basic terms are discussed and the purpose of choosing a specific definition is set forth. In order to help the users, certain antitrust rules and some national mandatory rules are mentioned if necessary to be complied with by the users. This is the case for example for the ICC Model Commercial Agency Contract where the users are warned for the antitrust rules of the European community (Article 81 of the Treaty and Regulation 2790). Precautions for the use of the model form are listed to guide the users in how to adapt the model contract to the circumstances of a specific case.

The Body. The ICC Model Contracts do not impose a specific regime for a given issue. They invite the parties to agree on one of the stated alternatives, either by filling in a blank space on the contract or by simply ticking a box. Such alternative solutions are presented side by side under the letters A and B, in order to point out that only one of them can apply. However, the model contracts provide also default solutions: if the parties do not make a choice by canceling one alternative, one of them will automatically apply. The default solution is always explained in the Introduction. The provision of such alternatives and default solutions enable the parties to see all the solutions to specific problems together and make their choice. This is especially important

\begin{itemize}
  \item Van Houtte, p. 264.
  \item ICC Model Commercial Agency Contract, Introduction, par. 3; ICC Model Distributorship Contract, Introduction, par. 9.
  \item ICC Model Distributorship Contract, Introduction, par. 9; ICC Model International Franchising Contract, Introduction, par. 2; ICC Model Commercial Agency Contract, Introduction, par. 8;
\end{itemize}
and efficient for single merchants who do not possess a thorough knowledge regarding the specific contract. Moreover, the most significant and contradictory issues for all types of contracts, for example good will compensation in distributorship contracts, are regulated in detail in order to prevent possible future conflicts.

**Annexes - Appendices.** There are also numbers of points where the parties must insert their requirements. All such points are incorporated in the annexes, so that the parties can complete and where necessary, by mutual agreement, modify such annexes during the life of the contract, without making changes to the basic text of the agreement. This is the case for example for the ICC Model Distributorship Contract, ICC Model Commercial Agency Contract and ICC Model Mergers and Acquisitions Contract where a large numbers of Annexes are provided. Annexes always contain the text of a particular legislation which is relevant for the model contract and sometimes difficult to find for a single merchant user such as a Directive of the European community or UNIDROIT Principles of International Commercial Contracts. Annexes may also contain useful information for the user such as indications on national laws for a particular topic.

**Different form of publication.** All of the ICC Model Contracts are not only published in print out version but also supplied on CDs, so that the contracting parties can easily alter the model-text at their wishes and delete or add provisions, whenever necessary. The model contracts are also provided in e-books format (www.iccbooks.com) which permit the parties to download the model and reshape it in line with their specific needs.

**III. Provisions of the ICC Model Contracts**

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21 For example EC Directive 86/653 (Appendix 1 to ICC Model Commercial Agency Contract) or EC Regulation 2790/1999 of 22 December 1999 (Appendix 1 to ICC Model Distributorship Contract).

22 In the most recent models, the applicable law provision refers to the UNIDROIT Principles of International Commercial Contracts. Therefore, the Task Forces believe that to have the text of the UNIDROIT Principles will facilitate to understand these provisions in particular for the users who are not familiar with the Principles. Therefore, UNIDROIT Principles can be found in ICC Model Distributorship Contract (Appendix 2), ICC Model Commercial Agency Contract (Appendix 2), ICC Model Mergers and Acquisitions Contract.

23 This the case for example in the ICC Model Commercial Agency Contract where the Appendix 3 contains indications on national law on commercial agency.
A. Common Provisions

There are some common provisions which are included in most of the Model Contracts. The effect of previous agreements between the parties, modifications, nullity, prohibition of assignment, no waiver, notices may be listed as examples to such common provisions.

B. Good Faith Provision

All of the Model Contracts provide for a “Good Faith and Fair Dealing” provision\(^{24}\). This provision is sometimes criticized because it says what is obvious. However, I am supporting this clause since it makes clear and reminds to the parties that “good faith” is the essence of all international commercial transactions.

Accordingly, the parties acknowledge the obligation to act in accordance with good faith and fair dealing in carrying out their obligations arising out of the contract. It is expressly prescribed that the provisions of the contract and the statements of the parties shall be interpreted in good faith.

C. Force Majeure

The ICC Model International Franchising Contract and the ICC Model International Sales Contract contain a force majeure clause largely inspired by the Force Majeure clause of the ICC in force at the date of preparation of the models\(^{25}\). However, the force majeure clause of ICC Model International Sales Contract is modified (article 13) and a very similar approach of article 79 of the United Nations Convention on Contracts for the International Sale of Goods has been accepted. The ICC Model Contract for the Turnkey Supply of an Industrial Plant has incorporated the ICC Force Majeure Clause 2003 (ICC Publication No 650). The Introduction of the ICC

\(^{24}\) The text of the clause is as follows:

“Good faith and fair dealing

In carrying out their obligations under this contract the parties will act in accordance with good faith and fair dealing.

The provisions of this contract, as well as any statements made by the parties in connection with this [], shall be interpreted in good faith”.

\(^{25}\) It was the ICC Force Majeure and Hardship Clause (ICC Publication No. 421).
Model Contract for the Turnkey Supply of an Industrial Plant warns the users for the cases where the parties may wish to make an exception with respect to the acts of authority. For such a case, the Model recommends to add an additional paragraph to Article 33.

Surprisingly, the other Model Contracts, which cover long-term relations such as distribution, selective distribution and agency, do not contain a force majeure clause, although they also undoubtedly run the risk of being affected by force majeure. In the event that the contract is not governed by a specific national law, UNIDROIT Principle Article 7.1.7 and the general commercial principles of force majeure will be relevant.\textsuperscript{26}

D. Resolution of Disputes Clause

In the older contracts like the ICC Model Commercial Agency Contract (1\textsuperscript{st} edition) and ICC Model Distributorship Contract (1\textsuperscript{st} edition), the dispute resolution clause refers straightforwardly to ICC arbitration.

In the ICC Model International Sale Contract and the ICC Model Occasional Intermediary Contract, the parties are invited to choose between any arbitration and court litigation. In the more recent Model Contracts such as ICC Model Distributorship Contract (2\textsuperscript{nd} edition), ICC Model Commercial Agency Contract (2\textsuperscript{nd} edition), ICC Model Mergers and Acquisitions Contract, ICC Model International Franchising Contract, ICC Model Selective Distributorship Contract and ICC Model Contract for the Turnkey Supply of an Industrial Plant, the parties may choose to submit possible disputes to arbitration or to an identified national court.

In case of arbitration, only the possibility of ICC arbitration is mentioned. However, the parties may of course decide on other arbitration rules by mutual consent.

The ICC arbitration clause is also the “default solution” which applies automatically if the parties do not make any choice. This is clearly stated in the “automatic inclusion under the present contract” clause.\textsuperscript{27}

\begin{footnotesize}
\begin{enumerate}
\item Van Houtte, p. 263.
\item For example article 25.1 of the ICC Model Selective Distributorship Contract reads as follows: “If the parties have not made a choice between the alternative solutions provided in Articles 18, 23.1 and 24.2
\end{enumerate}
\end{footnotesize}
The preference for ICC arbitration in the Model Contracts is justified by three reasons:

(i) The ICC arbitration is an institutional arbitration. This prevents many possible conflicts as to procedural rules, especially the arbitration request and the method of choice of arbitrators. It also helps the parties to deal with the secretarial issues.

(ii) The need for a uniform settlement of uniform contractual rules. Since the model form is a set of uniform contractual rules, it is appropriate that possible disputes be solved by a uniform resolution system organized on an international level. From this point of view the best solution appears to be international commercial arbitration which offers a more neutral approach by overcoming the option between the domestic courts of one or the other party. For the sake of uniformity, the choice of ICC arbitration shall be the best option considering that there are already more than 14,000 resolved cases where many aspects of problems related to different Model Contracts have been dealt with.

(iii) Arbitration is highly recommended in the case that general principles of law (lex mercatoria) is chosen as applicable law, since such choice of law is under the risk of not being understood or accepted by domestic courts.

Since 2001, the ICC disposes of ADR Rules and has embarked on Alternative Dispute Resolution Services (ADR). It may be advisable to try to solve the dispute without litigation through the recourse to an amicable method of dispute resolution. In fact a qualified neutral mediator will often be able to help the parties to agree upon a settlement, thus avoiding the recourse to arbitration or to courts. The Model Contracts drafted after 2002 also provide for ADR in their dispute resolution clause. The ADR clauses are drafted in two different ways. It is either confirmed that the parties may at any time seek to settle the dispute in accordance with ICC ADR Rules (ICC Model Commercial Agency, ICC Model Mergers & Acquisitions Contract); or two tiers are introduced. The parties undertake to submit any possible dispute first to settlement proceedings under the ICC ADR Rules; only if the dispute has not been settled within 45 days under the letters A and B, by deleting one of the alternatives, and provided they have not expressly made a choice by other means, alternative A shall be considered applicable”.

28 Introduction to the ICC Model Commercial Agency Contract.
following the request for ADR or within such other period as the parties might have agreed, they may recourse to arbitration or to the national court.

\textit{E. Applicable Law}

The ICC Model Contracts are not based on any specific national law but incorporate the prevailing practice in international trade as well as the principles generally recognized by the domestic laws. Consequently, they have been based on the assumption that they should be governed not only by a specific national law, but only by the provisions of the contracts and the principles of law generally recognized in international trade.

Thus, the Model Contracts encourage the parties to refer the questions relating to the Contract which are not expressly or implicitly settled by the provisions contained in the Contract to the principles of law generally recognized in international trade as applicable to that specific contract (also so called “\textit{lex mercatoria}”), the relevant trade usages, and the UNIDROIT Principles of International Commercial Contracts, with the exclusion of national laws. The aim of this solution is to ensure that the provisions of the model contracts can be applied in a uniform way to the parties of different countries, without giving one party the advantage and the other party the disadvantage, of applying one party’s national law\textsuperscript{29}

There is a hierarchical order of these various sources: contract clauses, general principles of law, trade usages, UNIDROIT Principles\textsuperscript{30}. Therefore, the provisions of the contract itself will have the priority in the resolution of disputes. Thus, drafting of sufficiently detailed contract rules which expressly address most of the critical problems that might arise shall be emphasized.

The UNIDROIT Principles of International Commercial Contracts, on the other hand, offer a reasonably foreseeable legal framework for most issues of a general nature, normally not envisaged in the contract itself. In fact, the UNIDROIT Principles offer adequate solutions to the

\textsuperscript{29} Introduction to the ICC Model Commercial Agency Contract, par. 2.

\textsuperscript{30} Introduction to the Model Selective Distributorship Contract; Introduction to the Model Distributorship Contract.
majority of contractual problems of a more general nature; i.e. formation of contract, validity, performance, non-performance, damages etc\textsuperscript{31}.

It should be noted however, that the exclusion of national laws are limited with the mandatory rules in national laws. In any event, consideration shall be given to mandatory provisions of the law of the relevant country which would be applicable even if the contract is governed by a foreign law. Not all mandatory national provisions shall be taken into consideration. The mandatory rules will be taken into account to the extent that they embody principles which are universally recognized and provided their application appears reasonable in the context of international trade\textsuperscript{32}.

The similar discussions can be put forward for the ordre public (public policy) rules of relevant countries. However, since the Model Contracts are in line with the basic principles of domestic laws, the risk of conflict with national ordre public provisions should be almost non-existent. In any event, the ordre public provisions should be considered if their application appears reasonable in the context of international trade.

The choice of a national law is an alternative for the parties. Such choice of national law probably will not often affect the scope of the contracts as the contracts are in line with the basic principles of domestic laws; however parties should check carefully whether any provisions of the model contract violate mandatory provisions of the national law they have chosen\textsuperscript{33}.

Choice of general principles of law is the “default solution” in most of the Model Contracts but not in all of them. The ICC Mergers & Acquisitions Contract accepts the choice of a national law as the default solution. This is because the law of the country of the target company may be relevant for many aspects of the contract as the law governing the company\textsuperscript{34}.

\textsuperscript{31} Introduction to the Model Commercial Agency Contract; Introduction to the Model Distributorship Contract.  
\textsuperscript{32} Van Houtte, p. 261.  
\textsuperscript{33} Introduction to the ICC Model Distributorship Contract; Introduction to the ICC Model International Franchising Contract.  
\textsuperscript{34} Introduction to the ICC Model Mergers & Acquisitions Contract.
Conclusion

The main purpose of the Model Contracts is to replace the choice between differing national legislations, which are often not adapted to the needs of international trade, by a detailed set of well-balanced contractual provisions.

The most outstanding characteristic of the ICC Model Contracts is that they are not drafted to be imposed by one of the parties to other party in a manner to restrict the freedom of contract principle. To the contrary, the Model Contracts are constructed to protect the interests of all the parties, combining a single framework of rules with flexible provisions allowing the parties to insert their own requirements. The provision of alternatives and default solutions enable the parties to see all the solutions to specific problems together and make their choice. This is especially important and efficient for single merchants who do not possess a thorough knowledge regarding the specific contract. Therefore, it is possible to say that the use of Model Contracts help the merchants to regulate all the aspects of a given contract and relation without letting one of the more experienced or more powerful one to manipulate the weaker party.

The drafting of Model Contracts by ICC also aims to contribute to the development of lex mercatoria. The Model Contracts serve to the establishment of a uniform system of rules. Of course, it is vital that the Model Contracts are widely used in practice.

The provisions of the contract have the priority in governing the contractual relationships of the parties which becomes especially important when a dispute arises between them. Thus, drafting of sufficiently detailed contract rules which expressly address most of the critical problems that might arise is highly significant.