CONTRACT

Teacher : Lê Hồng Linh (MA)
Tel: 0903 978 552
Email : lehonglinh.ftu@gmail.com

CHAPTER 1
NEGOTIATING DELIVERY

1. The five steps in negotiating delivery

The problem

How can the exporter be sure that all the necessary delivery provisions are in the contract?

The principle

The exporter and the buyer should negotiate delivery systematically, making all necessary decisions and discussing how they will solve any problems that may arise.

CHAPTER 1
NEGOTIATING DELIVERY

In more depth

Certain questions arise when negotiating delivery:

What is the date of delivery?

Where the goods must be sent?

Who pays for transportation?

CHAPTER 1
NEGOTIATING DELIVERY

In more depth

Other questions are often overlooked.

Negotiating terms of delivery means working systematically, making sure that all foreseeable problems are discussed and that approaches to solving such problems are agreed.

CHAPTER 1
NEGOTIATING DELIVERY

Five negotiating steps:

Step 1: Timing: When must delivery take place?

Discuss a delivery schedule:

The date of dispatch from the factory;

The date of loading onto ship;

The date when goods should arrive;

CHAPTER 1

NEGOTIATING DELIVERY

The date of delivery: the key to many contract events, lying at the heart of sales contract. Although most negotiators fix this date, they often forget the “What-if?”

What if the Seller is late in sending the goods?

What if there is delay in loading the goods onto the ship?

What if the ship arrives late?

What if the delivery is late and there is no reasonable excuse what then?

CHAPTER 1
NEGOTIATING DELIVERY

Delay will cost the Buyer money: can the Buyer reclaim part of his losses from the Seller? And, if so, how much?

If the contract provides no answers, then the answers are found in the applicable law. Accordingly, good negotiators regulate such matters in their agreement.

CHAPTER 1

NEGOTIATING DELIVERY

Step 2: Location: What is the place of delivery?

The question of where delivery takes place is not as simple as it seems on the surface.

Fair principle: “the exporter should have no liability for the good when they are beyond his control”, “Control and responsibility go together”.

CHAPTER 1

NEGOTIATING DELIVERY

One common pattern is for exporter to transport the goods to the docks in his own country for the importer to organize transport from there (this is pattern of FOB delivery). Such an arrangement is usually cheaper than if the exporter tries to organize door-to-door transport. ..The parties are free to arrange anything that suits them.

CHAPTER 1
NEGOTIATING DELIVERY

Step 3: Transport

Questions:

How is transportation?

What mode of transport is most appropriate?

CHAPTER 1

NEGOTIATING DELIVERY

For the goods to arrive safely, correct packaging and shipping marks are essential. Such matters are often made the subject of separate clause in the export contract because claims arising from delay of damage can be settled only if it is clear who is responsible for packing or marking.

CHAPTER 1
NEGOTIATING DELIVERY

Transportation poses a different kind of problem: documentation. Whatever means of transport is chosen, correct documentation is essential: If payment is made by letter of credit – as is often the case – then the bank must refuse to pay if the shipping documents are in any way incorrect.

CHAPTER 1
NEGOTIATING DELIVERY

Transportation poses a different kind of problem: documentation. Whatever means of transport is chosen, correct documentation is essential: If payment is made by letter of credit – as is often the case – then the bank must refuse to pay if the shipping documents are in any way incorrect.

CHAPTER 1

NEGOTIATING DELIVERY

Step 4: Transfer of risk, transfer of ownership, insurance

The risk of loss or damage: if the good are smash by a fork-lift, stolen by stevedore of damage by a downpour – one side must bear the loss. Similarly if the goods cause harm to a third party – for example, a consignment of corrosives left in the sun explodes and severely burns a passer-by – who pays? Negotiators often decide, these risks are transferred at the point of delivery, and this is standard arrangement under the Incoterms.

CHAPTER 1

NEGOTIATING DELIVERY

Obviously the issue of risk and insurance go hand in hand. A prudent business man who faces a risk, arrange insurance.

In international trade, the signature of the contract and final payment are often widely separate. And transfer of ownership can take place at any point between them. The parties must decide what they want.

CHAPTER 1
NEGOTIATING DELIVERY

Step 5: Terms of trade

Example: FOB (free on board), CIF (cost, insurance and freight)...

CHAPTER 1

NEGOTIATING DELIVERY

One term covers a great deal of decision making.

International trade is agreed, standardized terminology and provided by the International Chamber of Commerce in Paris in its set of 13 Incoterms issued most recently in 1993.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

The problem

The main considerations in drafting provisions about timing and delay

The principle

Any losses to the buyer caused by non-excusable delay must be compensated.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

In more depth

Both seller and buyer should know the exact delivery date for their own benefit. The delivery date is extremely important to be a marker to consider payment time, risk and title passing, delay compensating, etc.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

a. Naming the date

The simplest way to name the delivery date is to use a clear calendar date. But in complicated cases, common precondition of timing are usually:

Receipt of import and/or export approval

Receipt of foreign exchange approval from the central bank

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

a. ***Naming the date***

Insurance of a letter of credit or bank guarantee

Making a down-payment be the buyer

Insurance of insurance-policy

Insurance of a certificate of origin

Delivery of the buyer of plans, drawing or other documentation.

CHAPTER 1
NEGOTIATING DELIVERY

Page 27: Coming into force

This agreement shall come into force after execution by both parties on the date of the last necessary approval by the competent authorities in the country of the seller and the buyer.

If the contract has not come into force within ninety days of execution, it shall null and void.

CHAPTER 1
NEGOTIATING DELIVERY

Page 27:

The date of delivery shall be twenty - eight days after the date of coming into force of the contract.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

b. Timing and "Time is of the Essence" clauses

Most legal systems do not assume that time is of the essence of the contract because late delivery hardly enriches the buyer

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

b. Timing and "Time is of the Essence" clauses

Most legal systems do not assume that time is of the essence of the contract because late delivery hardly enriches the buyer

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

Page 27:

Time is and shall be of the essence of this contract

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

d. Excused delay and Force Majeure

Unavoidable circumstance is called “force majeure”

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

Page 28:

For each week of late delivery the seller shall pay the buyer 0.1 % of the contract price.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

Page 29:

If delivery is not effected within one month of the agreed delivery date, then the seller shall pay the buyer 0.1 % of the contract.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

Page 29:

If either party is prevented from, or delayed in, performing any duty under this contract by an event beyond his reasonable control, then this event shall be deemed force majeure, and this party shall not be considered in default and no remedy, be it under this contract or otherwise, shall be available to the other party.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

Page 29:

Force majeure events include, but are not limited to: war (whether war declared or not), riots, insurrection, acts of sabotage, or similar occurrences; strikes, or other labor unrest; newly introduced laws or Government regulations; delay due Government action or inaction; fire, explosion, or other unavoidable accident; fire, flood, storm, earthquake, or other abnormal natural event

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

Grace period brings benefit to both parties: early delivery is possible, the buyer gets the goods and the seller receives the payment.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

e. Unexcused delay and the Buyer's Remedies

If one party to a contract causes harm or loss to the other, then the law will find the way to redress this harm or loss. Common law prefers to award damages, while Civil law usually enforce performance.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

f. Liquidated damages

Normally the seller and the buyer agree a fair figure, a lump sum to be paid per day (or week or month) of late delivery. This is so called liquidated damages.

Sometime the court increase or decrease this figure, it depends on the country's law.

CHAPTER 1
NEGOTIATING DELIVERY

2. Timing

g. Penalties

This is an agreed clause to punish party who delay, or to achieve acceptable performance.

CHAPTER 1

NEGOTIATING DELIVERY

2. Timing

Page 34:

If the Seller fails to supply any of the Goods within the time period specified in the Contract, the Buyer shall notify the seller that a breach of the contract has occurred and shall deduct from the Contract Price per week of delay, as liquidated damages, a sum equivalent to one half percent of the delivered price of the delayed Goods until actual delivery up to a maximum deduction of 10% of the delivered price of the delayed Goods.

CHAPTER: 1
Part: 3

*3. **Place of delivery***:

What is the Place of delivery?

is the point at which the exporter passes responsibility for the Goods to the Buyer. Delivery can take place at a number of places between manufacturer's factory and the Buyer's warehouse.

CHAPTER: 1
Part: 3

Delivery of the Goods shall be made FOB (Mombasa)

Delivery of the Goods shall be made CIF Durban.

CHAPTER: 1
Part: 3

Delivery of the Goods shall be made (Incoterm). The schedule date of Delivery shall be (date of delivery). Risk and title to the Goods shall pass from the Seller to the Buyer on Delivery.

The place of Delivery under this Contract is (port of shipment)

CHAPTER: 1
Part: 3

“If the vessel named by the Buyer fails to arrive on or before the agreed delivery date, then the seller may at his discretion deliver the Goods to a bonded warehouse in the port of Mombasa, and shall be deemed to have fulfilled his delivery obligations under this Contract.”

CHAPTER: 1
Part: 4

4. Transport.

- Negotiators should mention the type of packaging and the shipping marks in the Contract.

CHAPTER: 1
Part: 4

4. Transport.

“Goods are to be packed in new, strong, wooden cases suitable for long-distance ocean transport and are to be well protected against dampness, shock, rust or rough handling. The Seller shall be liable for any damage to or loss of the Goods attributable to improper or defective packaging.”

CHAPTER: 1
Part: 4

4. Transport.

"On the surface of each package delivered under this Contract shall be marked: the package number, the measurements of the package, gross weight, net weight, the lifting position, the letter of credit number, the words RIGHT SIDE UP, HANDLE WITH CARE, KEEP DRY, and the mark: DNP/36/Q"

CHAPTER: 1
Part: 5

5. Risk, Title and Insurance

Risk passes on delivery.

Two risks are involved in the sale of goods: the risk of the goods injuring a third party and the risk of loss or damage. These risks are covered by insurance. In international trade, ownership (title) is of doubtful value and passes from exporter to buyer.

CHAPTER: 1
Part: 5

5. Risk, Title and Insurance

Title to the goods passes with risk.

CHAPTER: 1
Part: 6

6. Terms of Trade

The equipment listed in Annex 1 shall be delivered FOB (Beira) (Incoterms 1990)

CHAPTER: 1
Part: 6

6. Terms of Trade

“For the equipment listed in Annex 1 the price is for delivery free on board carrying vessel designated by the Buyer at the port of Beira including the cost of packing, as well as expenses incurred before loading the equipment on board the carrying vessel.”

CHAPTER: 1
Part: 6

6. Terms of Trade

“Incoterms 1990 as used in this contract means the publication Incoterms 1990, being the international rules for the interpretation of their terms published by the International Chamber of Commerce. When a term from ‘Incoterms 1990’ is used in this Contract, the rules and definitions applicable to that term in Incoterms 1990 shall be deemed to have been incorporated in the Contract except insofar as they may conflict with any other provision of the Contract, in which case the Contract provisions shall prevail.”

CHAPTER: 1

1. What are 5 steps in negotiating delivery?
2. Why is location important?

CHAPTER: 1

2. Why is location important?

- Risk and Responsibilities.
- Date of payment depends on palce of delivery.

CHAPTER: 1

3. Why is transportation important?

CHAPTER: 1

3. Why is transportation important?

- Costs
- Appropriate type

CHAPTER: 1

4. What are modes of transportation?

CHAPTER: 1

4. What are modes of transportation?

- Sea transport
- Air transport
- Inland transport (by road, by rail, by barge, by mail, or by mixture)

CHAPTER: 1

5. Where is risk often passed from the exporter to the importer?

CHAPTER: 1

5. Where is risk often passed from the exporter to the importer?

- At the point of delivery.

CHAPTER: 1

6. Where does transfer of ownership take place?

CHAPTER: 1

6. Where does transfer of ownership take place?

- At any point between the signature of the contract and the final payment for the goods.

CHAPTER: 1

7. How many kinds of delay in delivery?

CHAPTER: 1

7. How many kinds of delay in delivery?

- Excusable delay
- Non- excusable delay

CHAPTER: 1

8. What events does delivery date trigger?

CHAPTER: 1

8. What events does delivery date trigger?

- Exporter fulfills duties under the contract.
- Payment may become due.
- Risk and title pass to the buyer.

CHAPTER: 1

9. How to fix delivery date?

CHAPTER: 1

9. How to fix delivery date?

- To use a straightforward calendar date.

CHAPTER: 1

10. When is a contract binding?

CHAPTER: 1

10. When is a contract binding?

- After the signature date.

CHAPTER: 1

11. When is a contract binding and effective?

- After the date of coming into force

.

CHAPTER: 1

12. How does the date of coming into affect the delivery date?

CHAPTER: 1

12. How does the date of coming into affect the delivery date?

- The delivery date is normally fixed for a certain days after the date of coming into force.

CHAPTER: 1

13. What is excused delay?

CHAPTER: 1

13. What is excused delay?

- In the grace period
- Due to FM

CHAPTER: 1

14. What are the 3 outcomes of FM?

CHAPTER: 1

14. What are the 3 outcomes of FM?

- Resumption of delivery
- Termination of contract
- Unclear and dangerous situation.

CHAPTER: 1

15. What are liquidated damages?

CHAPTER: 1

15. What are liquidated damages?

- Normally the exporter and the buyer agree a fair figure, a lump sum to be paid per day (week or month) of late delivery. The Compensation fixed in advance is called liquidated damages.

CHAPTER: 1

16. What are penalties?

CHAPTER: 1

16. What are penalties?

- Damages are paid to compensate one party for a loss.

CHAPTER: 1

17. When do people pass risk and title of the goods ?

- On delivery

CHAPTER: 1

18. Name types of risks?

CHAPTER: 1

18. Name types of risks?

- Risk of loss and damage
- Risk of goods injuring the third party.

CHAPTER: 1

19. Name types of Insurance policy?

- Floating policy
- Open cover
- Valued policy
- Unvalued policy
- Time policy
- Voyage policy