

A publication from the EY Consumer Products & Retail
sector global legal team

EY Global Legal Commercial Terms Handbook

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We are pleased to present the first edition (2017) of the *EY Global Legal Commercial Terms Handbook*.

This guide was created in response to the requests of numerous clients, to have a readily available handbook which covers, at a high level, general key commercial provisions across multiple jurisdictions.

This guide's purpose is to assist an organization's internal team understand the possible risks associated with deviation from their national law as the applicable law to a given contract as early as possible in the negotiation timeline. This anticipation may be very helpful to secure the corporate strategy in contractual negotiations and minimum concessions to the contracting party to win the business.

This guide summarizes certain familiar terms and conditions (T&C) in commercial contracts, categorized under five main parts: formation of the agreement, essential obligations, duration, termination, performance or nonperformance and dispute. It also contains highlights on the recent local legislative trends.

We hope that the first issue of this annual handbook proves to be a useful tool for your cross-border contractual negotiations and a useful source for your internal teams and we welcome any feedback in order to add improvements for our next editions

Thanks to the EY member firms legal teams in around 28 jurisdictions (16 in Europe, 6 in the Middle East, 4 in North and South America, and 2 in Africa) have been mobilized to contribute to this project. To all of them, we extend our profound thanks for their time, care and experience.

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Introduction

The following tables summarize – at high level – the main strategic clauses and obligations in the commercial contracts that only corporate contracting parties entered into (i.e., business to business (B2B)) and their implementation in 28 different jurisdictions.

This guide does not address:

- ▶ Relationships with consumers (i.e., business to consumers (B2C))
- ▶ Certain legal matters, such as real estate, market regulation, competition, transportation, intellectual property, labor and employment (employment contracts), insurance, and administrative
- ▶ Agency, franchise or selective distribution
- ▶ Specific businesses or activities requiring particular licenses or permits (e.g., automotive, pharmaceutical sectors, chemical industry and regulated professions)
- ▶ Foreign investment regulations
- ▶ Transactional matters

The purpose is to summarize general guidance on clauses that are typical commercial clauses in a given jurisdiction and highlight drafting issues for consideration.

This document is not a legal opinion and contains summarized information. It is therefore intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgment. On any specific matter, expert technical legal advice should be obtained having regard to the particular facts and circumstances of each case. EY across its extended network can support all aspects of your project through a local team of legal professionals.

The guide is the collective work of a number of EY teams throughout the Global EY legal network, and has been prepared according to the law and the case law current at the time of drafting. Some information may be out of date at the time of your reading.

This guide is aimed primarily at in-house attorneys and legal teams in the EMEA Area, when working across various jurisdictions and expanding their business abroad.

EY member firms do not provide advice on US law.

The tables have been divided into the following sections:

1. Formation
2. Content
3. Duration and termination
4. Performance and nonperformance
5. Dispute
6. Recent legislation and trends (where relevant)

High-level takeaway

The gap between common law and civil law countries appears to be narrowing over the years as business tends to be more and more global.

The similarities include the following:

- ▶ Generally, prices must be determined or determinable, if necessary, through the subsequent intervention of a third party.
- ▶ The recognition of noncompete or exclusivity undertakings are general, subject however to limitations resulting from local competition laws.
- ▶ The criteria of reasonableness appears as one of the key recognized legal principles that come to play for different items, such as limitation of liability and advance notice.

Clear differences remain, however, such as:

- ▶ The “good faith” concept is characteristic of civil law countries, and the “consideration” concept is inherent to common law countries. However, several contractual provisions or other legal concepts (e.g., cause and essential obligations) may help to arrive close to the same positioning.
- ▶ Recent trends in civil law countries focusing on pre-contractual obligations are not shared by common law countries.
- ▶ The battle of forms outcome has different resolutions (such as knock-out or last shot), although these differences exist also among the civil law countries.

Not surprisingly, an important level of harmonization is noticeable in EC jurisdictions as a result of EC directives (such as agency and payment terms) or regulations (such as applicable law and recognition of foreign judgments).

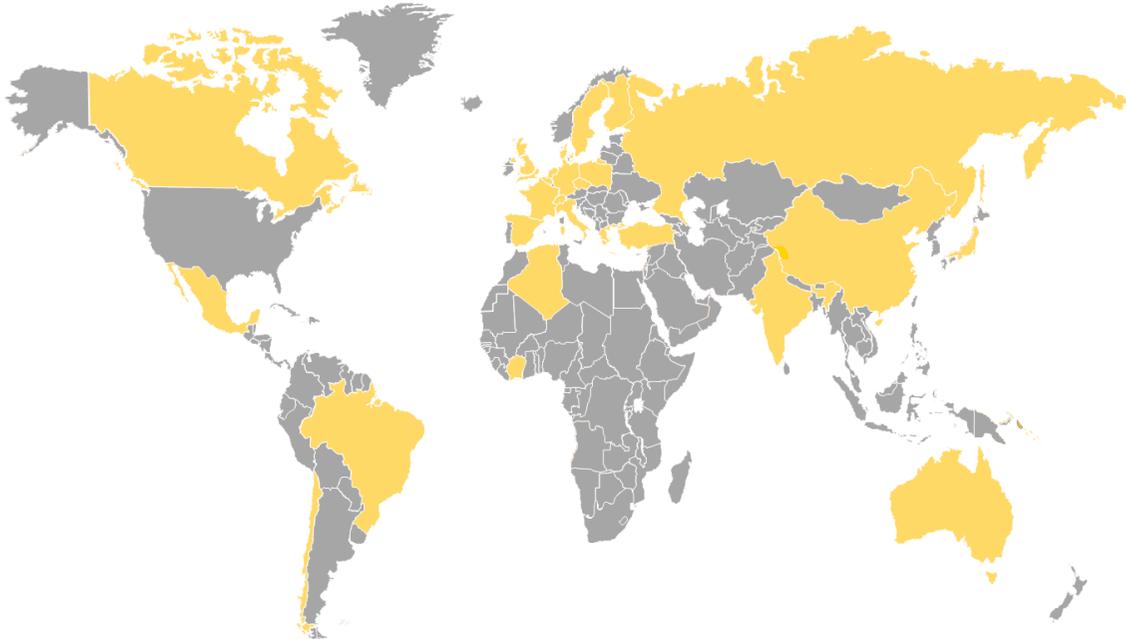
Global framework agreement may require an additional level of complexity due to possible local public policy contradictions (not covered in this handbook).

Likewise, Brexit (not reviewed here either) will likely have its toll on the desired foreseeability of contractual relationships.

As general advice, among other things, it is recommended to:

1. Ensure clarity at all times (i.e., written contract, example of price calculation, attaching TCs to the contract, clear any ambiguity in the negotiation or at the time of performance)
2. Avoid excessive (unbalanced) request to the other party
3. Articulate appropriately certain clauses with each other, for example, hardship with force majeure, to avoid overlap or ambiguity
4. Understand about where the contracting party’s request is coming from since there might likely be contractual ways to meet it – at least halfway – without downgrading its own bargaining position
5. Do not be afraid – in principle – of the applicability of foreign law

Jurisdictions covered



- Jurisdictions covered
- Jurisdictions not covered

Europe

Belgium (civil law)

Contacts: Peter Suykens and Ruben Schoenmaekers

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	In principle, contracts do not have to be written to be binding under Belgian law.	Evidence rules: priority of written agreements (Article 1341 of the Belgian Civil Code) does not apply in B2B trade or relations. In B2B trade or relations, evidence is, in principle, free (except for some specific cases provided for by law).
Pre-contractual obligation	<p>Contracts must be negotiated and formed in good faith (general principle of law).</p> <p>Each party has a duty at the pre-contractual stage to negotiate a contract carefully and loyally.</p> <p>Each party has a duty at the pre-contractual stage to disclose any information that is relevant and material to the other party's consent to enter the transaction.</p> <p>Fraud or coercion are prohibited.</p>	<p>Pre-contractual liability (culpa in contrahendo) is sanctioned in accordance with Article 1382-1383 of the Belgian Civil Code (tort law). Among others, liability can appear in one of the following situations:</p> <ul style="list-style-type: none">▶ Terminated negotiations as a consequence of acting in bad faith or by misconduct▶ Fraud or coercion (the doctrine of the lack of will)▶ Breach of information obligations
Signature by counterparts	A contract signed in counterparts will, in principle, be valid.	Signature in counterparts is more a matter of evidence: if a contract is signed in counterparts, and afterward, one of the parties is denying the existence of the contract, it would leave more room for discussion as to whether or not the contract has indeed been entered into by both parties.
Language of the agreement	In principle, the language of a commercial contract may be agreed freely between the parties. In practice, if different language versions exist, the parties need to draft some specific language clause dealing with potential resulting issues, such as choosing a prevailing language.	In the event where different language versions exist and when there is no language clause, both versions should be seen as equivalents. With regard to the interpretation, both language versions should be considered.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, and T&C	<p>The general T&C of a party are enforceable subject to the three following conditions:</p> <ul style="list-style-type: none"> ▶ The other party reasonably had the opportunity to take notice of the contractual clauses. ▶ It was prior to the formation of the contract. ▶ The other party has accepted these general T&C (explicitly or implicitly). <p>Battle of the forms: the “knock-out rule” generally applies with regard to conflicting clauses. Conflicting clauses will be replaced by alternative solutions provided for by Belgian law.</p>	<p>Battle of the forms: The “first-come-first-served” rule is also accepted by some Belgian judges and scholars. Under this rule, the terms which have been offered first will prevail on subsequent ones.</p> <p>Under the knock-out rule, the terms for which the forms do not match will cancel each other out and will be dropped from the contract.</p>
Essential obligations	<p>The concept of “essential obligation” (in the meaning of a tool used to correct some contractual injustice and allowing to cancel abusive clauses) has not been developed by the Belgian case law the way it has been potentially in some other jurisdictions.</p>	
Consideration	<p>Belgian law does not strictly recognize the common law concept of “consideration.”</p> <p>Belgian law does recognize the concept of “causa,” which has, however, different characteristics: it is general and subjective compared with the concept of consideration, which is characterized by the fact that it is rather narrow and objective.</p>	
Price: determination, revision, indexing and payment terms	<p>The price must be determined or determinable. A price is only determinable if sufficient elements, separate from the will of a party, are available, on which the price can be calculated.</p> <p>Adjustment methods and additional price (such as earn-out clauses) may validly be provided for.</p> <p>A price adjustment clause will be considered null and void if the price is not determinable. The calculation method must be precise.</p> <p>Payment terms may be freely decided upon between the parties.</p>	

<p>Exclusivity clauses</p>	<p>Exclusivity clauses are not explicitly regulated by the Belgian legislation; nevertheless, they are permitted.</p>	<p>In practice, different types of exclusivity clauses are used in commercial contracts:</p> <ul style="list-style-type: none"> ▶ An obligation of a contract party to reserve its activity solely for the other contract party ▶ An exclusive obligation of a contract party to buy certain products from the other contract party ▶ A right of a party to the exclusive exploitation of the clientele of the other party <p>There are, however, specific regulations around exclusivity in the framework of “exclusive distribution.” Indeed, with regard to exclusive distribution, the Belgian legislator has provided for a series of mandatory rules related to the termination of the distribution agreement for an indefinite duration. Basically, it is a protection mechanism for the distributor. The distribution agreement may only be terminated if a reasonable termination term has been taken into account. Furthermore, a distributor may be entitled to receive a compensation for the lost goodwill.</p>
<p>Noncompete obligation</p>	<p>Noncompete obligations are regulated in different fields of Belgian law (such as labor law, competition law and commercial agency). However, there is no general legal definition of the concept, except that:</p> <ul style="list-style-type: none"> ▶ According to the majority of the judges and legal scholars, a noncompete clause should stipulate clear limitations with regard to: <ul style="list-style-type: none"> ▶ The activity ▶ The location (territory where the company is active) ▶ The duration ▶ The clause may provide for a financial penalty in case of infringement. ▶ If a judge considers the consequences of a noncompete clause to be excessive, he can declare the clause null and void. 	<p>Historically, a judge had, in principle, no power to mitigate the consequences of such clause. But, there is an evolution in the more recent Belgian literature and case law for the purpose of entrusting Belgian judges with the power to mitigate the consequences of excessive clauses.</p>

<p>Governing law (implied content and public order)</p>	<p>Parties are free to choose their governing law for international contracts (a principle enshrined in Article 3(1) of the EU Regulation EC no. 593/2008, Rome I-Vo, but other conventions or treaties may apply depending on the matter or type of contract), which may apply to the whole or part of contract.</p> <p>If the parties do not explicitly choose a governing law, specific clauses or events can still designate the governing law according to Article 3(1) Rome I.</p> <p>There are exceptions to the freedom of choice, which includes:</p> <ul style="list-style-type: none"> ▶ The mandatory local law of a country will apply despite the choice (Article 9 Rome I). ▶ The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). ▶ Public policy grounds (Article 21 Rome I) apply. 	<p>The Rome I Regulation sets out EU-wide rules for determining the national law that should apply to contractual obligations in civil and commercial matters involving more than one country.</p> <p>The clause, which stipulates the judge or court that is competent in case of a dispute, does not necessarily imply the law that will govern the dispute.</p> <p>We recommend choosing the applicable law according to the key aspects of the contract, such as maturity of the jurisdiction, flexibility of the law and commercial orientation.</p>
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
<p>Term and tacit renewal</p>	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term: In which case, it must be enforced until the expiry of the agreed term. ▶ An indefinite term: In principle, each party may terminate the contract at any time without cause, taking into account the agreed terms of termination (if any). 	<p>In principle, a contract with a fixed term comes to an end automatically once the agreed term has passed. However, if the parties continue to perform the contract, it is admitted that a new contract is tacitly born, this time for an indefinite term. It is also possible to stipulate that a contract with a fixed term will only be terminated with prior notice of one of the parties.</p> <p>By contrast, a contract with an indefinite term may, in principle, be terminated by each party at any time. However, if there are no agreed terms of termination stipulated, a reasonable prior notice needs to be complied with according to the dominant case law and the majority of legal scholars.</p>

<p>Prior notice of termination</p>	<p>Termination with prior notice (without cause) is, in principle, not possible for (un-renewed) contracts with a fixed term.</p> <p>In principle, a contract with an indefinite term may be terminated by each party at any time. Even if the terminable character of a contract with an indefinite term is of public order, this cannot mean that each party may terminate the contract in a brutal manner.</p> <p>As a general principle in Belgian contract law, parties are obliged to give a reasonable prior notice of termination. However, parties can agree to draft contract clauses where parties are exempted to give such notice. Those clauses should be drafted explicitly and unambiguously.</p>	<p>The exemption to give prior notice of termination cannot be a consequence of a liquidated damages clause or an explicit termination clause.</p>
<p>Termination for cause</p>	<p>It is possible to provide for specific grounds for the termination of the contract. The parties can identify the situations or events that they would consider to be a breach of contract and cause its automatic termination.</p> <p>The specific grounds for the termination of a contract may not result in conditions that are purely discretionary (potestative). An obligation is null and void if its realization is solely dependent on the will of one of the contracting parties.</p> <p>A contract may be considered null and void if it would contain provisions that go against rules of public order.</p> <p>The termination for cause may apply with immediate effect.</p> <p>If a party is not satisfying its obligations under the contract, the non-breaching party can do either of the following, according to an explicit termination clause:</p> <ol style="list-style-type: none"> 1. Alert the breaching party that the contract will be terminated – in which case, a motivation is required 2. Petition the judge to order the termination of the contract 	<p>Under Belgian law, the fact that one party has entered into a judicial proceeding (e.g., reorganization or bankruptcy) can never be a valid ground for the early termination of a contract.</p>

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Contracts must be performed in good faith. This is enshrined in the Belgian Civil Code.</p> <p>A party may be liable for damages in case of breach of this obligation.</p>	
Intuitu personae clause, or the change of control or assignment clause	<p>The intuitu personae character can be unilateral or reciprocal.</p> <p>It is essential and recommendable to clearly describe and define the features of the intuitu personae (e.g., reputation, creditworthiness and being the owner of material or intangible assets) in the contract to avoid ambiguity.</p> <p>The stronger the intuitu personae character, the stronger the consequences.</p> <p>In the absence of a clause, a party may not oppose the other party's change of control. The contract may validly specify change of control protection.</p>	<p>It is notable to mention that the rights and obligations following such contractual clauses are subject to the concept of "abuse of law." This is, for instance, the case when the caused damage is not in proportion with the expected benefit.</p>
Hardship clause (imprevision)	<p>This type of clause would be valid under Belgian law.</p> <p>In the presence of such a clause, each party (or – in very exceptional cases – only one party) will have the right to request renegotiation when one of the circumstances provided for in the clause comes to existence. Subject to the provisions of the clause, the discussion will focus on the entire agreement or part of it. In the meantime, the party seeking for renegotiation will be obliged to continue the performance of the contract.</p>	<p>Traditionally, Belgian case law is rather reluctant toward the doctrine of imprevision following the adagium <i>pacta sunt servanda</i> reflected in Article 1134 of the Belgian Civil Code. Parties can stipulate hardship clauses in order to protect themselves against this reluctance.</p> <p>It is also advisable to stipulate how a disagreement between the parties in the renegotiation (e.g., termination of the agreement by the parties) will have to be managed.</p>
Force majeure	<p>Force majeure is generally admitted under Belgian law.</p> <p>For this to be effective, the alleged event or circumstance must meet the following cumulative criteria:</p> <ul style="list-style-type: none"> ▶ Be unavoidable and unforeseeable ▶ Not be attributable to the party who is seeking exemption from force majeure ▶ Render performance of the agreement or obligation impossible 	<p>The concept of force majeure is reflected in the Belgian Civil Code, but can be extended, limited or clarified by the parties. It is even advisable to provide for the conditions and consequences of the force majeure in the contract, as well as clearly mention which of the force majeure events could trigger the termination of the contract (if any).</p> <p>If the force majeure becomes permanent, it will, in principle, lead to the termination of the contract without retroactive effect.</p>

Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>There is a specific regime regarding the latent defects that were not detected by the purchaser after a careful but normal inspection of the product.</p> <p>The legal obligation of the seller to indemnify the purchaser can intentionally be extended or limited by the parties.</p> <p>In case of limitation of the warranty, the following criteria should be taken into account to give effect to the limitation:</p> <ul style="list-style-type: none"> ▶ The seller has to act in good faith. ▶ The purchaser who had knowledge of the latent defect cannot ask for indemnification. ▶ The exoneration cannot be ambiguous.
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>In principle, limitation of liability clauses are permissible. However, they are subject to certain conditions:</p> <ul style="list-style-type: none"> ▶ Such clauses cannot be contrary to public order or prohibited by law. ▶ Such clauses cannot lead to depriving the contract or obligation of its purpose. ▶ Such clauses need to be clear and explicit, and accepted by the party against whom the limitation might be used. ▶ Equity and good faith serve as bridge guards. ▶ Limitation of liability with regard to (intentional) gross negligence are prohibited. 	<p>In principle, limitation of liability with regard to latent defects is prohibited, since it is assumed that a professional seller or manufacturer should have knowledge of such defect.</p> <p>However, recent case laws suggest that if the purchaser is also active in the same sector, then the abovementioned assumption does not count.</p>

Competent jurisdiction, execution of foreign decisions and exequatur

Parties are free to choose courts or arbitration, except in certain matters.

In principle, parties to an international commercial contract are free to choose the court (or, as the case may be, the arbitrator or arbitral tribunal) that has the jurisdiction to decide on issues arising out (or, as the case may be, relating to) the underlying contract.

Enforcement is carried out under the relevant international treaty or convention. Under the Belgian law, recognition and enforcement of international awards are ensured, regardless of the nationality or place of residence of the parties (according to the New York Convention).

In Belgium, to enforce a foreign judgment, an exequatur is required before the Belgian jurisdiction, except for judgments rendered in other EU Member States.

In principle, a competent jurisdiction clause exists besides the main contract in which it is taken up (the “doctrine of separability”). The clause would not be affected by the nullity of the contract and will remain in force after the termination of the contract.

The Belgian and international rules with regard to conflict of law (international private law) may provide limitations concerning the use in a certain jurisdiction.

6. Recent legislation and trend

We expect that a modernized Belgian Civil Code will be adopted in the next few years. We know that a new draft of the chapter dealing with obligations is under preparation and will be released in 2017.

Czech Republic (civil law)

Contact: Jan Turek

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written contract	A contract does not have to be in writing to be binding, subject to a number of exceptions.	<p>A scanned and signed contract should be considered as a reliable copy of the contract, and be used as the proof of the contract. However, a judge could require that the original version of the contract be produced, in the event of dispute.</p> <p>Generally, contract concluded by means of a simple exchange of emails is considered to be an “orally concluded” contract.</p>
Pre-contractual obligation: good faith and information obligations	<p>Contracts must be negotiated, formed and performed fairly and in good faith. This provision is enshrined in the Czech Civil Code. A person acts fairly and in good faith if that person believes he is acting in accordance with the law and that he is not harming the rights of others. Fairness and acting in good faith are presumed by the Czech law.</p> <p>A party has a general duty during the pre-contractual stage to disclose any information that is relevant and material to the other party's intention to enter into the contract.</p>	Freedom to terminate the contract negotiations is generally recognized. However, if the contract negotiations between the parties reach a point where the conclusion of the contract seems to be highly probable, the party that terminates the negotiations without a just cause, despite the reasonable expectations of the other party to the contrary, acts unfairly and has to compensate the other party for the damage caused.
Signature by counterparts	<p>With the exception of contracts relating to immovable property, the Czech law does not stipulate that contracts have to be signed by the parties on the same copy.</p> <p>Under the Czech law, a contract may be concluded via exchange of two or more counterparts (depending on the number of parties to a contract). Signatures of all the counterparts do not have to be on the same executed copy; i.e., each counterpart might be signed by one contracting party.</p>	<p>The parties are free to decide whether they will mutually confirm the contract in writing. If they do so in the course of business and one party provides the other party with confirmation that it accurately reflects the contents of the contract, then it is conclusively presumed to have been concluded with the contents specified in the confirmation, even where it shows variations from the actually stipulated contents.</p> <p>However, this only applies if the variations indicated in the confirmation do not substantially vary from the contents actually stipulated and are of such a nature that a reasonable entrepreneur (i.e., a business person or entity carrying on business) would still have approved them, and if the other party does not reject these variations.</p>

Language of the contract	<p>The language of the contract may be agreed upon freely between the parties.</p> <p>A translation into the Czech language might be required by public authorities. Czech courts usually require an official translation of the contracts into the Czech language for the purposes of court and registration proceedings.</p>	<p>If more than one language is used, it shall be specified which language prevails (especially for performance and dispute purposes).</p> <p>Since a term may mean one thing in one jurisdiction but something else in another, it is highly recommended to define as many terms as possible in the contract even to state the term in the original language for the avoidance of doubt.</p>
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2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>According to the Czech Civil Code, an expression of will (as the response to the offer), which contains addenda, reservations, limitations or other changes, constitutes a rejection of an offer, and is considered to be a new offer. However, a response with an addendum or a variation that does not substantially alter the terms of an offer constitutes an acceptance of the offer, unless the offeror rejects such an acceptance without undue delay. An offeror may exclude acceptance of an offer with an addendum or a variation in advance (either in the offer itself or in any other way that raises no doubts).</p> <p>If the T&C of the seller and the buyer differ, the contract is concluded under the terms that are not contradictory (common terms).</p> <p>If the T&C are contradictory to the wording of the contract itself, the wording contained in the contract shall prevail.</p> <p>The T&C of one party are enforceable toward the other party, if the other party accepts them (this can also happen implicitly, e.g., by delivery of goods or payment of purchase price).</p>	<p>The parties may also refer to the rules of interpretation that are generally used with regard to the nature of the contract (e.g., Incoterms, which are the trade terms published by the International Chamber of Commerce).</p>
Essential obligations and imbalance	<p>The Czech Civil Code provides for protection against provisions in a contract establishing an unfair imbalance between the parties, especially provisions unfavorable to a “weaker party.”</p> <p>Sanctions may be:</p> <ol style="list-style-type: none"> 1. Unenforceability of the respective provision 2. (ii) Adjustment of the mutual rights and obligations of the parties by the Czech court 	

Consideration	The common law concept of consideration is not familiar in the Czech law. The parties would usually expressly identify the cause of the contract in order to limit the risk of significant imbalance.	
Price: determination, revision, indexing and payment terms	<p>The price must be determined or at least be determinable; otherwise, the contract is disregarded (does not exist). However, when it is clear the parties intended to conclude a purchase contract without determining the price, then the stipulated price is presumed to be the price at which the same or a comparable thing is usually sold at the time of the conclusion of the contract and under similar contractual terms.</p> <p>Also, framework contracts are valid even if they do not provide the price (e.g., distribution contract).</p> <p>An adjustment method and additional price (such as an earn-out or indexation clause) may be validly provided for in the contract.</p> <p>The price may be stipulated in a foreign currency.</p> <p>Payment terms are regulated by the Czech Civil Code. In case of deliveries of goods and provisions of services, unless stipulated otherwise, the price is due without the need for a special request for payment, within 30 days as from the delivery of goods or provision of services, or issuance of the invoice (whichever occurs later). However, the parties may stipulate a due date exceeding 60 days only where it is not grossly unfair to the creditor.</p>	<p>If the price is not stipulated in or determinable from the contract, the court cannot itself set the contract price.</p> <p>It is possible to appoint an expert to determine the price (either the contract may provide for expert appointment or the parties may request the court to appoint an expert to determine the price).</p>
Exclusivity provisions	The granting of exclusivity (whether on the sale or buy side) is generally permitted under the Czech law.	<p>Specific to distribution law, the clause must be limited in time or the territorial scope to be valid.</p> <p>In case of commercial agency contracts, if a contract does not indicate that commercial agency is exclusive, it is considered as nonexclusive.</p> <p>Exclusivity must not constitute or result in an anti-competition practice (i.e., an abuse of dominant position or an anti-competition contract).</p>

Noncompete obligation	<p>A noncompete clause shall determine at least a territory, range of activities or a group of persons subject to such a prohibition; otherwise, it shall be disregarded.</p> <p>A noncompete clause may be stipulated validly for the duration of the contract and up to five years after termination of the relevant contract. Should a noncompete clause be concluded for the duration longer than five years, it is assumed by law that such a clause was concluded for five years only.</p> <p>A specific regulation applicable to noncompete clause concerns commercial agents: the post-termination, noncompete duration is limited to two years.</p> <p>Noncompete clause may stipulate the payment of a contractual penalty in case of breach.</p>	<p>Such a clause is subject to specific consideration from the competition law perspective. Moreover, if such a clause limits a party more than it is required for protection of the interests of the other party, the court may limit, abolish or set aside such non-competition at the request of the affected party.</p>
Governing law (implied content and public order)	<p>Parties are free to choose the governing law of the contract that may apply to the whole or part of the contract. This is in accordance with the principle enshrined in Article 3(1) of EU Regulation EC No. 593/2008, Rome I Regulation; but other conventions or treaties may apply depending on the matter and type of contract.</p> <p>If the parties do not choose the governing law, it will be determined by the courts on the basis of the relevant conflict of law rules.</p> <p>There are exceptions to freedom of the choice of law in contracts, such as:</p> <ul style="list-style-type: none"> ▶ The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). ▶ In contracts with customers or employees, the governing law cannot be avoided. ▶ In some cases, some mandatory provisions of a country (typically the laws of the seat of the court) will apply despite the choice of law (Article 9 Rome I Regulation). ▶ It is an exception on grounds of public policy (Article 21 Rome I Regulation). 	<p>The Rome I Regulation sets out EU-wide rules for determining the national law that should apply to contractual obligations in civil and commercial matters involving more than one country.</p>

3. Duration

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A contract may be concluded for a fixed or indefinite term.</p> <p>Tacit renewal is not possible (with the exception of lease contracts) if such renewal has not been specified in the contract. However, parties' behavior may lead to consider that a new contract has been entered into (i.e., the parties continue to fulfill their obligations under the original contract).</p> <p>A contract concluded for an indefinite period may be generally terminated without any reason upon expiry of a prior notice of termination (there may be some exceptions for specific cases).</p>	
Prior notice of termination	<p>In case it is possible to terminate the contract on the basis of a prior notice of termination, the said prior notice must be effectively communicated to the other party, even if the contract is silent on this issue.</p> <p>The notice period should better be stipulated in the contract; otherwise, the Czech Civil Code will impose a three-month notice period in connection with indefinite term contracts.</p>	
Termination for cause	<p>If the contract provides for specific grounds of termination of the contract, such grounds must be identified precisely in the contract.</p> <p>If the contract does not provide for specific grounds of termination, the party may, under specific circumstances, withdraw from the contract.</p>	

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>This is a general principle imposed by the Czech law. A party may be liable for damages in case of breach of this obligation.</p>	

<p>Intuitu personae clause, or the change of control or assignment clause</p>	<p>The assignment of a contract as a whole, or of the obligations arising therefrom, generally requires consent of both parties. On the other hand, the rights (i.e., the receivables) arising from the contract may be assigned without the consent of the other party, unless stipulated otherwise in the contract.</p> <p>A party may not oppose the other party's change of control in case of silence of the contract. The change of the control protection clause may be validly provided for in contracts under the Czech law.</p>	<p>It is recommended to clearly define the circumstances that will fall under the change of control clause. Change of control clauses are usually included in financial contracts (e.g., credit contracts) and lease contracts relating to the commercial property.</p>
<p>Hardship clause (impresvion), i.e., unforeseeable circumstances and renegotiation</p>	<p>Generally, a party may claim the renegotiation of a contract if:</p> <ol style="list-style-type: none"> 1. There are circumstances establishing a gross disproportion in the rights and duties of the parties by disadvantaging one of them. This is done by either: <ul style="list-style-type: none"> ▶ Disproportionately increasing the costs of the performance ▶ Disproportionately reducing the value of the subject of the performance 2. Such circumstances were not reasonably foreseeable or manageable by one party at the time of conclusion of the contract and these circumstances occurred or became known after the conclusion of the contract. <p>In case of refusal or failure of negotiations, the court may review (and adjust) the contract or terminate the contract at the request of either party (in the meantime, it has to continue to perform the contract).</p> <p>The parties are free to decide the conditions under which the renegotiation of the contract will take place in order to amend the contract to address the unforeseen event.</p> <p>However, such a hardship provision stipulated by the Czech Civil Code is not mandatory and, therefore, the parties may decide to exclude it from the contract.</p>	<p>If included in the contract, the force majeure provisions and hardship clauses have to be carefully drafted.</p>

Force majeure	<p>Force majeure is generally recognized under the Czech law.</p> <p>The following criteria are required to result in the parties' exemption to perform its obligations under the contract. The event or circumstance (unless defined otherwise in the contract) must be:</p> <ul style="list-style-type: none"> ▶ Unavoidable (i.e., makes the performance of the contract impossible) ▶ Unpredictable (i.e., could not have been foreseen when the contract was entered into) ▶ Beyond the control of the parties 	<p>The court will determine whether the conditions of force majeure have been met.</p> <p>It is recommended providing a precise definition of the events and circumstances that would qualify as force majeure in the contract, and to detail the rules for the implementation and effect of such a clause. The legal definition of force majeure can be extended by the parties, for instance, to include strikes.</p> <p>The clause may also provide for the conditions for the termination of the contract or its renegotiation upon occurrence of a force majeure.</p> <p>A prior notification of the force majeure event to the other party is required.</p>
Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>Latent defects shall be notified by the claiming party to the other party without undue delay and at the latest within:</p> <ol style="list-style-type: none"> 1. Two years from the date of delivery (purchase contract or contract for work), in case of movable assets 2. Five years from registration in the cadastral register in case of purchase contract or from the handover in case of a contract for work, or in case of construction (i.e., immovable assets) <p>Nevertheless, the terms may be set differently by the parties in the contract.</p> <p>A specific set of warranties may be agreed between the parties in the contract.</p>	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>The principle under the Czech law is that a breach of contract leads to compensation only for losses or damage that were foreseeable by the parties at the time of conclusion of the contract.</p> <p>The contractual limitations of liability are valid. However, certain exclusion or limitation clauses are inapplicable, for instance:</p> <ul style="list-style-type: none">▶ In cases of damage caused to the natural rights of an individual, or caused intentionally or due to gross negligence▶ Exclusion or limitation in advance from the right of the weaker party to obtain compensation for the damage caused by the stronger party	It is also possible to extend a party's liability, such as by excluding the right to claim force majeure, or including unforeseeable or indirect damages.
Competent jurisdiction, execution of foreign decisions and exequatur	<p>The jurisdiction may be agreed upon freely by the parties in accordance with the Rome I Regulation.</p> <p>When it comes to commercial contracts, the parties are free to choose arbitration or courts.</p> <p>In the Czech Republic, to enforce a foreign judgment, it is necessary to first request the so called exequatur (i.e., the official recognition of a foreign judgment by a local judicial authority). An exequatur is not necessary for judgments rendered in other EU Member States.</p> <p>Under the Czech law, recognition and enforcement of international arbitration awards are ensured, regardless of the nationality or place of residence of the parties, through the New York Convention.</p> <p>Enforcement is generally carried out under the relevant legal regulations of the state where the award is to be enforced.</p>	<p>In connection with international commercial matters, parties are usually entitled to choose a court or arbitration court to settle the dispute.</p> <p>If the Czech Republic is selected as the seat of arbitration, the imperative provisions of the relevant Czech laws, and, in particular, the Czech Civil Procedure Code, will apply.</p>

6. Recent legislation and trends

As of 1 January 2014, the Czech civil law has undergone a major change because of the effectiveness of a completely new Civil Code, which was supplemented by various other laws. The meaning of numerous provisions in the Czech Civil Code is still not completely clear and no relevant case-law exists in connection to those provisions.

Denmark (civil law)

Contact: Eluise Pavlenić

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	An agreement does not have to be in writing, as both oral and written contracts are binding under the Danish law. Although some exceptions apply, written agreements are often advisable in view of better clarity and proof for the terms of the agreement.	Scanned documents with a signature may be accepted by a Danish court depending, for instance, on the type of document and on the situation.
Pre-contractual obligation: good faith and information obligation	The obligation to act in good faith is recognized under the Danish law. A mutual duty of honest conduct, integrity and reasonableness relies on the parties in the phase of formation of a contract. A wrongfully obtained contract may, in some cases, be considered nonbinding.	As a post-contractual provision, a contract may be modified, or deemed partly or completely disregarded, if the contract is unreasonable or entered into under fraudulent behavior by anyone of the parties.
Signature by counterparts	As a standard provision, the signed contract is often to be signed in two originals and stored digitally by each party. Signature on different copies can be valid, although it is subject to some practical and circumstantial exceptions; for instance, evidential purposes in regards to formation of documents.	Contracts may be entered into by a signatory authority, authority by position or by a given proxy. Contracts may, in some cases, be signed electronically.
Language of the agreement	The parties are, with some exceptions, free to decide the contractual language, as long as the contract is understandable to all parties of the contract. Contracts with public authorities on domestic matters are generally drafted in Danish. English is the second most commonly used language in Denmark.	In principle, the language of the courts is Danish. Certain Danish courts may approve foreign language documents generally. If the court and the parties agree, the English language (or, in very rare cases, other languages) may be used for witnesses or documents. Contracts in English may then be presented to the court without the need to have a translation into Danish.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>Inconsistency in standard terms may be challenged by the other party in the case of a dispute. They can do so by declaring the given provision as non-validly agreed upon or claiming interpretation for a less-unprofitable result. The case law shows that the more disadvantageous a term is, the more strictly it is interpreted by the Danish court for validity.</p> <p>If the respective standard terms have not been presented to the other party or have not been subject to prior negotiation between the parties, terms may become enforceable over time in long-term relations, if the terms have not been disputed at an earlier point of time.</p>	<p>In limited scenarios, a contract or parts of a contract may be deemed invalid because of unreasonableness, conferring the Danish Contracts Act, section 36. However, the case law is highly restrictive in that regard.</p>
Essential obligations	<p>The parties are generally free to decide the obligations of a contract, unless otherwise prescribed by law (e.g., the labor law). No difference is made under the Danish law between essential obligations and others.</p> <p>The only exception is that contracts produced with usury, fraud or duress are not binding.</p>	
Consideration	<p>The Danish law does not recognize the common law concept of consideration.</p>	
Price: determination, revision, indexing and payment terms	<p>The price is to be determined in the contract. If not, the price should be on usual, comparable terms.</p> <p>Benchmark clauses, i.e., the mechanism for price determination and price regulation, may be incorporated in the contract.</p> <p>Terms of payment are often included in the standard terms.</p>	
Exclusivity provisions	<p>The Danish law recognizes exclusivity provisions. These provisions have to be clearly specified in the contract; failure of which, exclusivity is not likely to be enforceable.</p>	
Noncompete obligation	<p>The Danish law prohibits companies from entering into contracts with the purpose of limiting the competition directly or indirectly.</p> <p>Concrete circumstances determine whether this is the case.</p>	

Governing law (implied content and public order)	The parties may freely decide on the governing law, according to the private international law. If the governing law has not been determined in the event of a dispute, the courts may determine the applicable law as a last resort.	In sale of goods, the location of the seller may be chosen. The United Nations Conventions on Contracts for the International Sale of Goods (CISG) may be considered.
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3. Duration

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	Contracts may be for a fixed or undetermined duration. Express renewable clauses are permitted if no party objects to it, although such a renewable clause does not apply in all scenarios.	
Prior notice of termination	<p>The prior notice of termination is generally determined in the contract.</p> <p>If a contract does not specify termination terms, a contract may be terminated with a reasonable notice period (typically three to six months).</p> <p>Fixed term contracts may not be terminated earlier, except if an earlier termination clause has been provided.</p> <p>In bankruptcy cases, an indefinite term contract may be terminated with a usual and reasonable termination period, even though it contains an unusually long termination period or, in case of a fixed term contract, does not provide for early termination right.</p>	
Termination for cause	<p>Termination for cause requires a material breach of the contract. The termination is also required to happen without delay.</p> <p>Often, compensation by the breaching party to the non-breaching party will apply.</p>	Wrongful termination will likely result in counterclaim for compensation.

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Good faith is a fundamental principle of the Danish Contract Act, and is also a pre-contractual obligation.</p> <p>Even in absence of fraud, a contract may be declared inadmissible because of the lack of common integrity and honesty.</p>	
Intuitu personae clause, or change of control or assignment clause	<p>A clause for change of control may allow a party to terminate the contract in case of a change in ownership of the other party.</p> <p>Assignment of the rights or obligations of a contract require the consent of the parties. Formal agreements of transfer may be required depending on the type of assignment of agreement.</p>	
Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation	<p>The Danish law does not recognize hardship clauses; therefore, force majeure is the generally used provision to deal with unexpected events.</p>	
Force majeure	<p>Contracts may be suspended in the event of an unforeseen adverse event. This possibility only applies to events or disasters defined as such under the Danish law; including war, embargoes and natural disasters (i.e., a non-exhaustive list)</p>	
Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>The Danish law does not recognize the concept of warranty of latent defects.</p> <p>The obligation for latent defects is partly determined by the sellers' obligation of loyal disclosure and partly by that of the buyers' to examine the good, product or service delivered properly.</p>	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	Limitation of liability clauses are quite often used in contracts under the Danish law.	
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are free to choose arbitration to settle their dispute. Recognition and enforcement of international arbitration awards are ensured, regardless of the nationality or place of residence of the parties, through the New York Convention.	

England¹ (common law)

Contacts: Laura Fox and Phil McDonnell

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	<p>An agreement does not have to be in writing to be binding, subject to certain exceptions, such as:</p> <ul style="list-style-type: none">▶ A guarantee▶ Agreements relating to the sale, transfer, option or lease of land▶ Agreements for the assignment or exclusive licensing of certain intellectual property rights	<p>The question has arisen whether the requirements of writing and signature can be satisfied electronically. The digital form of a communication is not writing, but its visible representation in words is writing.</p>
Pre-contractual obligation: good faith and information obligation	<p>There is no general doctrine of good faith in English contract law and the courts are very unwilling to imply such a duty (either in terms of contract performance or in pre-contract negotiations). There is no general duty to disclose information at the pre-contract stage.</p>	<p>A contract may be voidable because of external vitiating factors, such as deceit, misrepresentation, duress, undue influence and mistake as to identity induced by a fraudulent misrepresentation in face-to-face dealings.</p> <p>Parties to a contract may include express duties of good faith.</p>
Signature by counterparts	<p>Parties are free to use counterparts and, in practice, contracts are often executed in counterparts. This means that each party to the contract will sign separate but identical copies of the same document. The signed copies will together form a single binding agreement.</p>	<p>Contracts typically contain a clause expressly allowing the document to be executed in counterparts.</p>

¹ This does not include any consideration for Brexit.

Language of the agreement	<p>The language of the agreement may, in principle, be agreed upon freely between the parties.</p> <p>The language of the agreement is the principal tool used by the courts to determine what the parties have agreed and, therefore, has to be understood by all parties to the agreement.</p>	<p>The contract will be interpreted in accordance with the principles that the courts apply to the interpretation of contracts and any rules of interpretation that may be provided by the contract itself.</p> <p>Technical terms will be accorded their technical meaning. The language that is accorded a special meaning by custom or usage will be considered to bear that meaning if the contract was entered into in the light of such custom or usage. The remainder of the contract will be read according to the normal and popular sense of the language used.</p> <p>If more than one language is used, parties should specify the one that prevails.</p>
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2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>In cases of the battle of the forms, English law uses the “last shot rule.” A party’s T&C that is communicated after the contract has been formed, do not form part of the contract.</p> <p>The last shot rule is a method of contract interpretation and so can be displaced by documents or conduct that indicate the parties did not intend the last shot rule to apply.</p>	<p>English courts are only likely to displace the last shot rule in complex cases where there has been a course of dealing between the parties; for instance, where both parties have continually refused to accept the other’s T&C. English courts will rarely find that there is “no contract,” preferring to identify the terms that have been agreed upon, and then relying on general statutory and common law to govern the remainder of the contract.</p>
Essential obligations	<p>Essential obligation is not a concept known under English law.</p> <p>However, English law makes a difference between “key” terms of the contract (known as a condition) as opposed to “innominate” terms (see below for the “termination for cause” section).</p>	
Consideration	<p>Consideration is an essential part of any contract under English law.</p> <p>Contracts must contain mutual promises, or a promise made in consideration of obligations or actual performance, between the parties to the agreement.</p> <p>Consideration must be sufficient, but need not be adequate. Providing that consideration has some economic value, the courts will not investigate its adequacy.</p> <p>Consideration is not required where the contract is executed as a deed.</p>	<p>A promise by a contracting party to perform its existing contractual duties is not a good consideration for a promise of additional payment – contract variations must be supported by fresh consideration.</p> <p>Consideration must be provided by the promisee – i.e., the person who wishes to enforce the contract must show that they provided consideration. The consideration does not have to move to the promisor.</p>

Price: determination, revision, indexing and payment terms	<p>The contract price or, if not stated in the contract, the method of its determination must be certain. References can be made to other documents to determine the price.</p> <p>Revisions to and indexation of the price can be provided for – again, the method of their determination must be certain.</p> <p>Transfer of ownership (i.e., the title) is not linked to the payment of the price, unless specified by the parties in the contract.</p> <p>The price may be stipulated in a foreign currency.</p> <p>There is no regulation of payment terms under English law.</p>	<p>The contract price is a material term.</p> <p>The requirement that contract terms be certain – i.e., clear – is a general requirement under English contract law.</p> <p>While there is no regulation of payment terms under English law, there are statutory rules on late payment – i.e., the payment after the due date under the contract.</p>
Exclusivity provisions	<p>A grant of exclusivity (whether on the sale side or buy side) is permitted under English law, provided certain conditions are satisfied.</p>	<p>Exclusive dealing arrangements must comply with the English law restraint of trade doctrine, i.e., they must be reasonable and not contrary to the public interest. These must also comply with UK and EU competition laws relating to anti-competitive agreements and abuse of dominance.</p> <p>Reasonableness will be assessed in relation to:</p> <ol style="list-style-type: none"> 1. The length of time of the exclusivity provision 2. The geographical area of the exclusivity provision 3. The scope of the exclusivity provision (i.e., the range of activities covered) <p>Exclusive dealing agreements that are valid under EU competition law cannot be invalidated under the restraint of trade law.</p> <p>In practice, most exclusive dealing provisions are drafted in accordance with the EU block exemption regulation, if applicable.</p>
Noncompete obligation	<p>A noncompete obligation, including a restriction on dealing in competing products, is permitted under English law, both during the term of the contract and for a period post-termination, provided certain conditions are satisfied.</p>	<p>Noncompete obligations must comply with the English law of restraint of trade doctrine (i.e., they must be reasonable and not contrary to the public interest). These must also comply with UK and EU competition laws relating to anti-competitive agreements and abuse of dominance.</p> <p>Post-termination, noncompete obligations must be carefully drafted in order to be enforceable.</p> <p>In practice, most noncompete obligations are drafted in accordance with the EU block exemption regulation.</p>

<p>Governing law (implied content and public order)</p>	<p>Parties are free to choose their governing law for international contracts, which may apply to the whole or part of contract. This is in accordance with the principle enshrined in Article 3(1) of EU Regulation EC n°593/2008, Rome I; but other conventions or treaties may apply depending on the matter or type of the contract.</p> <p>If the parties do not choose a governing law, it will be determined by the courts.</p> <p>There are exceptions to freedom of choice, such as:</p> <ul style="list-style-type: none"> ▶ Mandatory local law of a country will apply despite the choice (Article 9 Rome I). ▶ The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). ▶ It is an exception on grounds of public policy (Article 21 Rome I). 	<p>When wishing to choose English law, parties should specify “English law” or the “laws of England & Wales” and not the “laws of the United Kingdom”: the contract laws of Scotland are in some ways different from those of England and Wales.</p>
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
<p>Term and tacit renewal</p>	<p>A contract may be entered into for a fixed term or an indefinite term. If a fixed term applies, the contract must be enforced until the term expires. The contract may also provide for the ability to renew the contract. If an indefinite term applies, either party may terminate the contract at any time without any justification.</p>	<p>Where contracts are for an indefinite term, the parties must follow the contract terms for termination, which is, typically, the giving of notice (see the section on the silence of the contract).</p>

<p>Prior notice of termination</p>	<p>Termination should take place in accordance with the terms of the contract, such as a specified notice period or expiry of a fixed term.</p> <p>There is no requirement under English law for a contractual notice period to be reasonable or for notice to be given prior to the end of a fixed term.</p> <p>If the contract does not provide for a termination mechanism, a party must give reasonable prior notice of the termination of a contract.</p> <p>The reasonable notice is on the basis of the duration of the contract prior to the termination notice.</p> <p>Unlawful termination of a contract may give rise to damages and, in appropriate cases, injunctive relief, to prevent early termination causing irreparable harm.</p>	<p>Notice periods in commercial agency contracts must comply with the provisions of the EU Commercial Agents Directive, as implemented in the UK.</p>
<p>Termination for cause</p>	<p>If the contract provides for grounds of termination, the clauses should identify the breaches that are grounds for termination precisely.</p> <p>If the contract does not provide for grounds of termination, only a repudiatory breach by the defaulting party will give the non-defaulting party grounds to terminate the contract.</p> <p>There is no requirement for the non-defaulting party to give the defaulting party a notice to cure the repudiatory breach.</p> <p>There is no requirement to apply to a judge to terminate the contract.</p>	<p>A repudiatory breach is a serious breach of the contract.</p> <p>Whether the breach is sufficiently serious to be repudiatory depends on the nature of the contract term that has been broken and the seriousness of the breach.</p> <p>The breach of a key term of the contract (known as a condition) entitles the non-defaulting party to terminate the contract as well as to claim damages.</p> <p>The consequences of the breach of an innominate term depend on the seriousness of the breach. If it deprives the other party of the main benefit of the contract, it will allow that party to terminate.</p>

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
<p>Obligation to act in good faith</p>	<p>There is no general doctrine of good faith in English contract law and the courts are very unwilling to imply such a duty, either in terms of contract performance or in pre-contract negotiations.</p>	<p>Parties to a contract may include express duties of good faith. Such a provision would be enforced by the English courts.</p> <p>Certain types of contractual relationships do contain duties of good faith, such as agency and partnership.</p>

<p>Intuitu personae clause, or change of control or assignment clause</p>	<p>An assignment is only effective to transfer the benefit of a contract. An assignment of the benefit of a contract can take place between the assignor and the assignee without the consent of the other contracting party.</p> <p>To transfer obligations under a contract (the “burden”), a novation is required. This terminates the existing contract and replaces it with a new contract between the new parties. Accordingly, a novation requires the consent of the other contracting party.</p> <p>In commercial contracts, a change of control of one party does not give the other party the right to terminate the agreement or, otherwise, oppose a change of control.</p> <p>A personal contract will usually be terminated automatically if the identity of the personal counterparty changes.</p>	<p>It would be typical for contracts to make express provision toward permitting assignment and change of control.</p>
<p>Hardship clause (impresvion), i.e., unforeseeable circumstances and renegotiation</p>	<p>Hardship clauses are used in long-term contracts or volatile markets. They are a matter of negotiation between the parties.</p> <p>Hardship clauses deal with unforeseen events arising since the formation of a contract that render the performance more onerous than originally contemplated.</p> <p>Hardship clauses should be drafted such that they define the circumstances in which a hardship will exist and the procedure to be adopted in this event.</p>	<p>Hardship clauses are designed to enable the parties to continue the contract on different terms. So, while force majeure clauses deal with performance that is no longer possible, at least temporarily, hardship clauses deal with performance that has become more burdensome than anticipated.</p>
<p>Force majeure</p>	<p>Force majeure clauses have no established meaning or consequences under English law. But, they are generally accepted as excusing parties from their obligations when an event that is beyond their reasonable control occurs and impedes or delays performance of the contract.</p> <p>Force majeure clauses can be drafted to cover any extraordinary event, such as war, natural disasters, riots or strikes.</p> <p>A force majeure clause is usually inserted into contracts to prevent the English law doctrine of frustration being invoked. Unlike frustration, which automatically terminates the contract, these clauses provide flexibility to the parties, allowing them to adjust the contract in the event that renders performance impossible.</p>	<p>Well-drafted force majeure clauses will usually consist of three parts:</p> <ol style="list-style-type: none"> 1. A description of the events that will trigger the operation of the clause; events that are commonly beyond the control of the parties 2. The obligations of the parties in reporting the occurrence of a force majeure event 3. The remedies available following the occurrence of a force majeure event, including the right to extend or to cancel the contract <p>The clause may also provide for the suspension or variation of the contract.</p> <p>There is greater remedial flexibility provided by a force majeure clause than by the doctrine of frustration.</p>

Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>There is no specific regime for latent defects, but there is a statutory regime governing satisfactory quality, fitness for purpose, correspondence with description, freedom from encumbrances, and title and quiet possession – i.e., the terms implied in the Sale of Goods Act 1979 (as amended).</p> <p>These implied terms apply unless the parties address the issues in their contract: in terms of latent defects, the implied term of satisfactory quality can be excluded by the contracting parties and replaced with a more limited warranty.</p>
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>The Unfair Contract Terms Act 1977 (UCTA) imposes limits on the extent to which liability for breach of contract, negligence or other breaches of duty can be avoided using contractual provisions. UCTA makes certain terms wholly ineffective, for instance, excluding or limiting liability for death or personal injury caused by negligence, or for fraud or fraudulent misrepresentation. It also states that other terms will only be enforceable to the extent that they are reasonable.</p> <p>A limitation provision must not be so wide as to deprive the contract of its purpose; for instance, to relieve a party of any liability for nonperformance.</p>	<p>In a B2B contract made on one party's standard terms of business, it is likely that a total exclusion of liability will be held to be unreasonable. As such, clauses limiting (rather than excluding) liability for breach of standard terms are more likely to be valid, but only if they pass the UCTA reasonableness test. Therefore, any cap on liability must be reasonable between the parties. In standard terms, it is common practice in the UK to limit liability to the value of the respective order or a multiple thereof. But, under the English law, the test of reasonableness is applied to individual transactions; so, what may be reasonable for one customer may be regarded as unreasonable for another customer. It is permissible and common practice to limit or exclude a supplier's liability for consequential damage and loss of profit; however, careful drafting is required.</p> <p>The UCTA reasonableness test is to check whether it was fair and reasonable to include the term, considering everything the parties knew or should have reasonably contemplated at the time the contract was made.</p>

Competent jurisdiction,
execution of foreign
decisions and exequatur

Parties are free to choose courts or arbitration, except in certain matters.

When parties choose arbitration with its seat in the UK, there is a specific statutory regime that will apply, unless the parties exclude it by agreement, which would be typical. Arbitration awards are enforced under the New York Convention.

The UK is currently a party to treaty-based schemes for the enforcement of judgments as a member of the EU and the European Economic Area (EEA), such as the Recast Brussels I Regulation.

The recognition and enforcement of judgments from outside the EU and EEA is carried out under relevant international treaties or conventions, UK statute and the common law.

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	A non-written agreement is binding. However, this is subject to a number of exceptions. In Finland, agreements are not subject to formal requirements unless specifically regulated.	In accordance with legal literature and case law, the party invoking the contract has the burden of proof of the non-written contract.
Pre-contractual obligation: good faith and information obligation	<p>Contracts should be negotiated in good faith. Under Section 33 of the Contracts Act (228/2009, as amended), a transaction, which would otherwise be binding, shall not be enforceable if:</p> <ul style="list-style-type: none"> ▶ It was entered into under circumstances that would make it incompatible with honor and good faith for anyone knowing of those circumstances to invoke the transaction. ▶ The person to whom the transaction was directed toward must be presumed to have known of the circumstances. <p>As a general rule, a party has a duty to disclose any information that is relevant and material to the other party's consent to enter the transaction. Breach of this duty may cause obligation to pay damages.</p>	<p>Freedom to break the negotiations is recognized under the Finnish law, but, in some cases, a party may be liable for damages for acting in bad faith or misconduct.</p> <p>The grounds for invalidity under the contracts act are:</p> <ul style="list-style-type: none"> ▶ Coercion (Sections 28 and 29) ▶ Fraudulent inducement (Section 30) ▶ Undue influence (Section 31) ▶ Error in declaration (Section 32, paragraph 1) ▶ Error in transmission (Section 32, paragraph 2) ▶ Dishonorable and unworthy act (Section 33) ▶ False document (Section 34)
Signature by counterparts	<p>Non-written agreements are binding and, thus, signature is not obligatory in most contracts. However, some contracts have formal requirements, including the requirement of original signature.</p> <p>Electronic signatures are permitted in accordance with the Act on Strong Electronic Identification and Electronic Signatures (617/2009, as amended).</p> <p>Signatures can also be made validly on separate counterparts of the documents.</p>	<p>The lack of signature in a document can create confusion as to whether the agreement has been actually made. The signature is one way to fulfill the burden of proof.</p> <p>In certain cases, witnesses are required to authenticate a signature.</p>

Language of the agreement	In principle, the language of the agreement may be agreed upon freely between the parties.	As a term may mean one thing in one jurisdiction but something else in another, it is advisable to define the terms in the contract, especially if the contract is concluded between parties from different jurisdictions.
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2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>Unless the T&C have been agreed upon without discussion, a battle of form situation will be handled on a case-by-case basis. The relevant outcome can be, inter alia:</p> <ol style="list-style-type: none"> 1. First shot 2. Last shot 3. Knockout 4. Midpoint solution 5. Buyer, who does not make a complaint, bound to the terms <p>Further, the other party's consent and knowledge is usually a higher requirement when the T&C contain conditions that can be deemed to be harsh or unusual. Also, in case the T&C can be deemed to be unclear, they can, in some cases, be interpreted to the detriment of the party that has drafted them.</p>	<p>It is recommend to ensure a clear agreement on the T&C by both parties.</p> <p>The solutions for solving battle of forms situation are presented in legal literature, such as <i>Hemmo: Sopimusoikeus I</i>, 2007. They are as follows:</p> <ol style="list-style-type: none"> 1. The T&C attached to the first expression of intent will be applicable. 2. The business that sent the last document is held to have issued the final offer and the buyer is deemed to have accepted the offer by signing the delivery note or simply accepting and using the delivered goods. 3. The terms the forms do not agree upon cancel each other out and are dropped from the contract. The relevant Sale of Goods Act then supplies any missing terms. 4. A midpoint solution from the differing terms is determined and applied for by the Finnish courts. 5. The buyer or other recipient of the payment in kind, who does not make a complaint, will be bound.
Essential obligations	Breaching the essential contractual obligations usually cause obligation to pay damages to the other party and a right to terminate the contract prematurely.	
Consideration	Consideration is one criteria by which a promise can be regarded as a binding contract under the Finnish law. One-sided deeds (i.e., gratuitous undertakings) are stipulated in the Finnish Gift Promises Act.	

Price: determination, revision, indexing and payment terms	<p>The price and the adjustment method can be agreed upon quite flexibly between the parties.</p> <p>If the price has not been specifically agreed, it can, sometimes, be deemed to have been agreed on the basis of the circumstances.</p> <p>Adjustment of an unreasonable condition can be directed to the price of the agreement in the court; although, this is very rare.</p> <p>If the payment time has not been agreed upon, then Section 49 or the Finnish Sale of Goods Act will be applied: the buyer must pay the price on the seller's demand.</p> <p>Also, the principle of simultaneous performance (Zug-um-Zug) applies in accordance with Section 10 of the Finnish Sale of Goods Act. According to this principle, considerations from both parties shall be made at the same time.</p> <p>Advance payments by the buyer must be agreed on specifically.</p>	<p>If the party does not accept the price indicated on the invoice, it must make a claim. If the claim is not made, the price is binding, except if the price can be deemed unreasonable. However, the invoice cannot be used to alter what has been agreed on in the contract.</p>
Exclusivity provisions	<p>The grant of exclusivity to sell or to buy is permitted, provided that it does not constitute prohibited restraints to competition.</p>	<p>Prohibited restraints on competition are stipulated under the Competition Act of Finland.</p>
Noncompete obligation	<p>A noncompete clause is permitted, provided that it does not constitute prohibited restraints to competition.</p>	
Governing law (implied content and public order)	<p>Parties are free to choose their governing law for international contracts that may apply to the whole or part of contract. This is in accordance with the principle enshrined in Article 3(1) of EU Regulation EC no. 593/2008, Rome I Regulation; but other conventions or treaties may apply depending on the matter or type of contract.</p> <p>There are exceptions to freedom of choice, such as:</p> <ul style="list-style-type: none"> ▶ The mandatory local law of a country will apply despite the choice (Article 9 Rome I). ▶ The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). ▶ It is an exception on grounds of public policy (Article 21 Rome I). <p>If the parties have not agreed on the applicable law, the principle is that the law of the country that is the closest to the contract shall be applicable.</p>	

3. Duration/termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>There are three types of durations:</p> <ul style="list-style-type: none"> ▶ One-time contracts: The contract is terminated when the required performance is completed. ▶ Fixed-term contracts: These must be enforced until the expiry of the initial or renewed term. ▶ Indefinite-term contracts: In such contracts, it is recommendable to include clauses regarding the right to terminate, stipulating matters related to this, in order to avoid disputes. 	
Prior notice of termination	<p>Termination is an informal measure, unless nothing else is provided.</p> <p>If the notice of termination is defective, it is ineffective, unless the other party is deemed to have received adequate information of the termination.</p>	<p>The period of notice starts running from the notice of termination, unless nothing else is provided. In order to avoid challenges related to proof, a written notice of termination is usually recommendable.</p>
Termination for cause	<p>The contract may provide grounds for termination; in that case, groundless termination may lead to obligation to pay damages to the other party.</p>	

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Contracts must be negotiated, formed and performed in good faith, in accordance with public policy.</p> <p>A party may be liable for damages in case of breach of this obligation.</p>	
Intuitu personae clause, or change of control or assignment clause	<p>A party cannot assign its obligations to a third party unless approved by the contracting party.</p> <p>A party may transfer its rights to a third party without consent of the contracting party.</p>	

<p>Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation</p>	<p>In accordance with the Finnish Sale of Goods Act (355/1987, as amended), the buyer is entitled to hold to the contract and to require its performance. The seller is, nevertheless, not obliged to perform the contract in either of the following cases:</p> <ul style="list-style-type: none"> ▶ If there is an impediment that he cannot overcome <p>Or</p> <ul style="list-style-type: none"> ▶ If the performance would require sacrifices that are disproportionate to the buyer's interest in performance by the seller <p>Ultimately, the court can deem the contract terminated or make the contract equitable.</p>	<p>Hardships are cases in which unforeseen events occur and fundamentally alter the equilibrium of a contract, resulting in an excessive burden being placed on one of the parties.</p>
<p>Force majeure</p>	<p>This clause excuses one or both parties from performance of the contract in some way, following the occurrence of unforeseeable circumstances or events that are outside the party's control. That party is excused from or entitled to suspend performance of all or part of its obligations. In this event, the party that is unable to perform its contractual obligations is not liable for damages.</p> <p>The following criteria must be met in order for an event to be considered as force majeure:</p> <ul style="list-style-type: none"> ▶ Unavoidable, making the performance of the agreement impossible ▶ Unpredictable and could not have been foreseen when the agreement was entered into ▶ Beyond the control of the parties 	<p>Often, force majeure circumstances are listed and some circumstances may be excluded.</p>
<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>Under Section 21 of the Sale of Goods Act, whether the goods are defective shall be determined with regard to their properties at the time when the risk passes to the buyer. The seller is liable for any defect that existed at that time, even if it did not appear until later. The parties may, however, deviate from this contractually.</p>	<p>Warranty clauses may contain express limitations (see section "Clauses and obligations" below).</p>

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>The limitation of liability clauses are permitted under the Finnish law.</p> <p>The limitation can be expressed by:</p> <ul style="list-style-type: none">▶ Agreeing on the maximum amount of liability (capping clause)▶ By excluding certain damages▶ By limiting the time under which claims are allowed to be made	
Competent jurisdiction, execution of foreign decisions and exequatur	<p>Parties are free to choose arbitration or courts, except in certain matters or situations. This is in accordance with the public policy doctrine (ordre public) and mandatory rules as stipulated in Rome Convention Articles 3.3 and 7.</p> <p>Recognition and enforcement of international arbitration awards are ensured, regardless of the nationality or place of residence of the parties, through the New York Convention. It is ensured taking into account certain exceptions presented in the convention and provided that the country in question has entered into the convention.</p>	<p>International treaties, such as the Rome I Regulation or CISG, or local law may determine the court when reference to competent jurisdiction is lacking.</p> <p>It is advisable to consider whether to choose civil law or the common law jurisdiction as the applicable law or competent court.</p>

France (civil law)

Contacts: Roland Montfort, Caroline Mercier-Havsteen, Marie-Pierre Bonnet-Desplan

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	An agreement does not have to be in writing to be binding under the French law. However, this is subject to a number of exceptions in the areas of assignment of receivables, transaction, finance and labor relations.	The scanned copy of a signed contract should be considered as a reliable copy of the contract and be used as a proof of the contract, according to Article 1379 of the French Civil Code. However, in the event of dispute, a judge could require that the original version of the contract be produced.
Pre-contractual obligation: good faith and information obligation	<p>Contracts must be negotiated, formed and performed in good faith, according to Article 1104 of the French Civil Code. This provision is public policy. A person acts in good faith if that person believes acting in accordance with the law and is not harming the rights of others.</p> <p>A party has a duty at the pre-contractual stage to disclose any information that is relevant and material to the other party's consent to enter into the transaction, according to Article 1112-1 of the French Civil Code.</p> <p>This provision is public policy and it cannot be excluded or limited.</p>	<p>The French law recognizes the freedom to break the negotiations, but a party may be liable for damages for acting in bad faith or misconduct (tort action). This is a long-established case law.</p> <p>It may be advisable to secure information that the other party deems relevant and material contractually.</p>
Signature by counterparts	The French law does not provide for signing separate counterparts of a contract. At least one copy of the contract must be signed by the authorized representatives of all the parties to the contract. The process of signing a contract is a matter of evidence.	According to a recent amendment of Article 1158 of the French Civil Code, a party is allowed to formally request for confirmation from the other party's signing authority.
Language of the agreement	<p>In principle, the language of the contract may be agreed on freely between the parties, except for specific matters.</p> <p>The language has to be understood by all the parties to the contract; otherwise, the party that has insufficient knowledge of the language is deemed not to have validly contracted.</p> <p>A translation into French will be required for the registration of agreements before authorities and administration. French courts usually require an official translation of the contracts into French.</p>	<p>There is an obligation to use the French language for agreements for contracting out public services with the French administrative authorities.</p> <p>If more than one language is used, it is important to specify the one that will prevail, especially for performance and dispute.</p> <p>Since a term may mean one thing in one jurisdiction but something else in another, it is highly recommended to define as many terms as possible in the contract and to state the term in the original language for the avoidance of doubt.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>T&C are at the basis of commercial relationships. There might be discrepancies between the seller's T&C and those of the buyer.</p> <p>If the buyer accepts the T&C of the seller, these are enforceable at the formation of the contract at the latest.</p> <p>In case of a contradiction between the T&C of the buyer and those of the seller, both the T&C are void; the general law of sales, embodied in the French Civil and Commercial Code as well as the related case law, will apply.</p> <p>The "knock-out rule" applies as long as the parties have agreed on the core obligations (i.e., price and object), and the contract will basically be upheld. Conflicting provisions will be replaced by the statutory regulations and solutions provided by the Civil Code or the Commercial Code.</p>	
Essential obligations and imbalance	<p>Article 1171 of the French Civil Code and Article L.442-6 of the Commercial Code prohibit the significant imbalance clause in a contract, such as a clause that results in a one party being at an unfair disadvantage or disproportionately burdened as compared to the other party.</p> <p>Action can be launched by parties or by the competent French administrative authority.</p> <p>Penalties in case of imbalanced provisions inserted in a commercial agreement would be:</p> <ul style="list-style-type: none"> ▶ Cancellation of the provision ▶ Payment of damages ▶ Civil fine of up to €5 million or 5% of the turnover <p>However, the above is to adherence agreements (contrats d'adhésion)</p>	<p>Standard agreements are subject to more control by the administration.</p> <p>The limitation of liability clauses are particularly scrutinized in that respect.</p>

Consideration	<p>Prior to the reform of the French Civil Code on contract law, the French Law did not strictly recognize the common law concept of consideration. Instead, it used the notion of cause, i.e., the rationale for the validity of the agreement. However, since the reform entered into force on 1 October 2016, the notion of cause is no longer a condition of validity of the agreement.</p>	
Price: determination, revision, indexing and payment terms	<p>Pursuant to Article 1163, paragraph 2 of the French Civil Code, the price must be fixed or at least determinable. Otherwise, the contract will be held as void. However, pursuant to Article 1164 of the French Civil Code, framework agreements, such as distribution agreements, are valid even if they do not provide a price. In case of abuse in the determination of the price unilaterally by one party, the judge may terminate the agreement and consider awarding damages to the other party.</p> <p>The adjustment method and additional price (such as an earn-out clause) may validly be provided for. However, the method of calculation must be specified in detail – illustrated with an example, if appropriate – to avoid a situation with an undeterminable price.</p> <p>The transfer of ownership is not linked to the payment of the price.</p> <p>The price may be stipulated in a foreign currency.</p> <p>Payment terms are regulated. They must not exceed 60 days from the date of the invoice or 45 days from the end of the month that the invoice was issued. A civil fine of €2 million is liable in case of a breach, pursuant to Article L.441-6, I of the French Commercial Code.</p>	<p>If the price is not fixed or determinable in the contract, the judge cannot set the contract price.</p> <p>It is possible to appoint an expert to determine the price. Either the contract may provide for an expert determination or the parties may request the court to appoint an expert to determine the price, according to Article 1592 of the French Civil Code for sales agreement.</p> <p>Compliance with payment terms is increasingly enforced, even for cross-border contracts. This is done by the French Government agency responsible for competition, consumer matters and fraud (Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF)). Frequent investigations are conducted, which has led to fines; for instance, in 2016, 228 procedures were fined for an amount of €10.9 million.</p>
Exclusivity provisions	<p>The grant of exclusivity, whether on the sale or buy side, is permitted.</p>	<p>In the distribution sector, the validity of the clause requires it to be limited in time and territory.</p> <p>An exclusivity provision may not exceed 5-10 years. Moreover, exclusivity must not constitute or result in an anticompetitive practice, i.e., an abuse of dominant position or an anticompetitive agreement.</p>
Noncompete obligation	<p>A noncompete clause is permitted during the performance of the contract and after termination of a contract under conditions laid down by the French courts.</p> <p>A financial penalty can be provided for in case of infringement by the obligated party, pursuant to a noncompete clause. Financial compensation is mandatory in French employment contracts.</p>	<p>Noncompete clauses are subject to scrutiny from a competition law perspective. Moreover, the existence of such a clause could come into play in the assessment of whether certain contractual provisions may be deemed as unbalanced.</p>

<p>Governing law (implied content and public order)</p>	<p>Parties are free to choose their governing law for international contracts that may apply to the whole or part of contract. This is in accordance with the principle enshrined in Article 3(1) of EU Regulation EC no. 593/2008, Rome I Regulation; but other conventions or treaties may apply depending on the matter or type of the contract.</p> <p>If the parties do not choose a governing law, it will be determined by the French courts.</p> <p>There are exceptions to the freedom of choice, such as:</p> <ul style="list-style-type: none"> ▶ The mandatory local law of a country will apply despite the choice (Article 9 Rome I). ▶ The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). ▶ It is an exception on grounds of public policy (Article 21 Rome I). 	<p>The Rome I Regulation sets out EU-wide rules for determining the national law that should apply to contractual obligations in civil and commercial matters involving more than one country.</p>
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
<p>Term and tacit renewal</p>	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term: It must be enforced until the expiry of its term or renewed term. ▶ An indefinite term: Each party may terminate the contract at any time without any justification, subject to the notice of termination requirement (see the section "Prior notice of termination" below). 	

Prior notice of termination	<p>A party must give reasonable prior notice of termination of a contract, even if this is not provided for in the contract.</p> <p>This applies to both fixed-term (if renewed) and indeterminate contracts; and also in case of an absence of contract, if there is an established business relationship.</p> <p>Pursuant to Article L. 442-6, I, 5, of the French Commercial Code, reasonable notice is on the basis of the term of the contract, which is mandatory.</p>	<p>In case the contract does not provide for such notice, the reasonable notice shall be determined by reference to the duration of the commercial relationship and the commercial habits, and pursuant to the inter-branch agreements.</p> <p>However, even though a prior notice of termination has been agreed upon between the parties, the judge shall examine whether the prior notice conforms to the duration of the commercial relationship and other circumstances, according to the French Supreme Court's decision (Commercial Chamber of the French Cour de cassation, 22 October 2013, n° 12-19.500).</p> <p>In case of failure to give reasonable prior notice of termination, damages and civil fine may be awarded (high level of risk of litigation, long-established French case laws).</p>
Termination for cause	<p>Events that could trigger a termination for cause must be clearly specified in the contract.</p> <p>If the contract is silent on early termination for cause, the non-breaching party may apply to the judge to terminate the contract in case a serious breach has been committed by the defaulting party. This is applicable if the non-breaching party has given the defaulting party prior notification to rectify the breach.</p>	

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Contracts must be negotiated, formed and performed in good faith. This provision is public policy, according to Article 1104 of the French Civil Code.</p> <p>A party may be liable for damages in case of breach of this obligation.</p>	

<p>Intuitu personae clause, or change of control or assignment clause</p>	<p>The assignment of a contract requires an agreement between the assignor and the assignee, and requires the agreement of the other original party, unless otherwise stipulated in the contract (Article 1216 of the French Civil Code).</p> <p>Pursuant to Article 1321 of the French Civil Code, the consent of the debtor is not required, unless the receivable is nontransferable.</p> <p>Pursuant to Article 1322 of the same code as amended by the reform on contract law, the assignment of receivables shall be in writing; otherwise, the assignment is void.</p> <p>The above-mentioned reform introduced the assignment of debt (Article 1327 and following of the French Civil Code), which requires the approval of the creditor that could intervene either before or after the completion of the assignment between the initial debtor and the substituted debtor. If not otherwise provided by the creditor, the initial debtor is jointly and severally liable, along with the substituted debtor (Article 1327-2 of the French Civil Code).</p> <p>In the absence of a specific clause to that effect, a party may not oppose the other party's change of control. Specific change of control protection is valid under the French law.</p>	
<p>Hardship clause (impresion), i.e., unforeseeable circumstances and renegotiation</p>	<p>The parties are free to decide the conditions under which the renegotiation of the contract will take place, in order to amend the contract to address the unforeseen events that fundamentally alter the equilibrium of a contract, resulting in an excessive burden being placed on one of the parties.</p> <p>Pursuant to Article 1195 of the French Civil Code, if circumstances that were unforeseeable at the time of the contract make the performance of the contract excessively onerous for a party, it can ask for a renegotiation. In the meantime, it has to continue to perform the contract. In case of refusal or failure of negotiations, the parties can agree on the avoidance of the contract or ask the judge to adapt it. If the parties still disagree, then the judge may revise or terminate the contract at the request of that party.</p> <p>The above-mentioned protection is not mandatory; the parties can agree to exclude it expressly in their contracts.</p>	<p>The court will determine whether the conditions of unforeseeability, as defined by the parties, are met.</p> <p>It is recommended to provide for the notification of the circumstances that trigger the clause and the conditions of renegotiation.</p> <p>It is also recommended to properly articulate the force majeure (see the section "Force majeure" below) and hardship clauses in the contract.</p>

Force majeure	<p>According to Article 1218 of the French Civil Code, the following cumulative criteria must be met in order for an event to be considered as force majeure:</p> <ul style="list-style-type: none"> ▶ It is unavoidable, making the performance of the agreement impossible. ▶ It is unpredictable and could not have been foreseen when the agreement was entered into. ▶ It is beyond the control of the parties. <p>Force majeure usually excuses one or both the parties from the performance of the contract in some way following the occurrence of these unforeseeable circumstances or events. That party is excused from or entitled to suspend performance of all or part of its obligations without incurring any liability for damages.</p>	<p>The French courts will determine whether the conditions of force majeure are met.</p> <p>It is recommended to specify the events and circumstances that may qualify as force majeure in the contract, since the legal definition may be extended contractually. Along with this, the implementation provisions resulting therefrom, including, possibly, the termination of the contract or its renegotiation, can be specified.</p> <p>Prior notification of the force majeure event is required.</p>
Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>There is a specific regime regarding unconformity in the French Consumer Code and another regarding latent defects in Article 1641 of the French Civil Code.</p> <p>Warning: an action must be brought within two years from the discovery of the defect.</p> <p>Limited warranty clauses are possible under certain conditions.</p> <p>Indeed, in a B2B relationship, limitation warranty clauses are valid if the professionals have the same specialty. However, the criteria of same specialty is very narrowly construed by the judge.</p>	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>A breach of contract leads to compensation only for the direct foreseeable loss or damage, according to Article 1231-4 of the French Civil Code.</p> <p>The limitation of liability clauses are valid under the following conditions:</p>	<p>The French courts are reluctant to grant consequential or indirect damages, loss of profit, or punitive damages.</p> <p>It is also possible to extend a party's liability, such as by excluding the right to claim force majeure.</p>

1. A limitation of liability clause must not deprive the contract of its purpose or of the main undertaking of one party, or create a significant imbalance between the parties. This is subject to the following penalty: the clause will be held as void, and damages and civil fine up to €2 million may apply.
2. Exclusion and limitation clauses are inapplicable in cases of willful misrepresentation and gross negligence.
3. In some specific areas, such as personal injury, limitation clauses are not valid.

<p>Competent jurisdiction, execution of foreign decisions and exequatur</p>	<p>Parties are free to choose arbitration or courts, except in certain matters.</p> <p>In France, an exequatur (the judicial process that leads to the recognition and enforcement of a foreign judgment) is necessary for the enforcement of foreign judgment in France. Enforcement is carried out under the relevant international treaty or convention in the country of enforcement and the country where the award was rendered. Under the French law, recognition and enforcement of international awards are ensured, regardless of the nationality or place of residence of the parties, in accordance with the New York Convention.</p> <p>Recognition of judgments pronounced in other EU Member States is automatic, pursuant to Article 39 of the European Regulation (EU) n. 1215/2012 dated 12 December 2012.</p> <p>Parties are entitled to agree that they would submit the litigation to a mediator usually before the submission of the case to a jurisdiction, such as ordinary courts or arbitration courts.</p>	<p>In international commercial matters, parties are usually entitled to choose any court to settle the dispute.</p> <p>Arbitration will be more flexible (as there is a right to choose the arbitrators) and faster, but it can also be much more expensive. Arbitration allows for confidentiality of hearings.</p> <p>If the seat of arbitration is Paris (for instance, the International Chamber of Commerce), then the relevant provisions of the French Code of Civil Procedure will apply.</p> <p>In respect of the choice of jurisdiction, we recommend thinking about the cost and what is the typical duration to get an enforceable judgment in the chosen jurisdiction. In France, it takes at least two years for a first judgment and a further two years for an appeal.</p>
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6. Recent legislation and trends

In addition to the reform of the contract (ordinance dated 10 February 2016), the former minister of justice announced a draft reform of the tort law in March 2017. To date, following the election of a new president in May 2017 and a new majority at the house of representative in June, any bill has been filed at the Parliament.

The purpose of this reform is to “modernize, clarify and enrich the Civil Code by the numerous case laws.”

In March, the draft (subject to adjustment) structured the essential rules of the tort law. These rules included distinction between civil and contractual liability, and maintenance of liability for defective products and ecological harm. Unlike other foreign jurisdictions, the law of tort is on the basis of a fault and not of the nature of the damage.

Germany (civil law)

Contacts: Frank Schäfer

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	<p>Generally, an agreement does not have to be documented in writing to be legally binding under the German law.</p> <p>However, there are certain exceptions, such as:</p> <ul style="list-style-type: none">▶ The sale of real estate or contracts on plots of land must be recorded before a notary, according to Section 311b, paragraph 1 of the German Civil Code (Bürgerliches Gesetzbuch (BGB)).▶ Transfer of shares in a Gesellschaft mit beschränkter Haftung (type of legal entity equivalent to a limited liability company and commonly abbreviated GmbH) must be recorded before a notary, according to Section 15, paragraph 3 of the Limited Liability Companies Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)).▶ The declaration of suretyship must be issued in writing, according to Section 766, sentence 1 of the German Civil Code. <p>A breach of form occurs when an existing form requirement is not met.</p>	<p>A scanned copy of the signed agreement may be used as a proof of contract. However, a judge could require that the original version of the agreement be produced, in event of dispute.</p> <p>In certain cases, the German law provides the opportunity for a cure of such breach of form. For instance, according to Section 311b, paragraph 1, sentence 2 of the German Civil Code, when the transfer or acquisition of ownership of a plot of land was not recorded by a notary, but the declaration of conveyance and registration in the land register has been effected.</p> <p>Otherwise, if a legal transaction lacks the form prescribed by the statute and the preconditions for a cure of such a breach of form are not fulfilled, the transaction is void, according to Section 125 of the German Civil Code.</p>
Pre-contractual obligation: good faith and information obligations	<p>Contracts must be negotiated, formed and performed in good faith. This is according to the so-called principle of good faith and fair dealing (Treu und Glauben), under Section 242 of the German Civil Code.</p> <p>Each party has the pre-contractual duty to disclose any information relevant and material to the other party's consent to enter into the transaction.</p>	<p>The German law recognizes the freedom for the parties to discontinue the negotiations, but the party may be liable for damages for acting in bad faith or misconduct.</p> <p>In case of breach of pre-contractual duties, the liability based on Section 311 of the German Civil Code is possible (culpa in contrahendo, a common contract law concept meaning fault in conclusion of a contract).</p>

Signature by counterparts	<p>The process of signing a contract is a matter of evidence.</p> <p>In case the written form is prescribed by law or agreed upon by the parties, the contract must be signed by both parties. The signatures must be on the same document. However, if more than one counterpart of the contract is drawn up, it suffices if each party signs the document intended for the other party, according to Section 126, paragraph 2, sentence 2 of the German Civil Code.</p>	<p>Basically, the written form may be replaced by the electronic form, according to Section 126a of the German Civil Code. The parties then must add their names to the declaration (or contract) and provide the electronic document with a qualified electronic signature, in accordance with the German Electronic Signature Act (Signaturgesetz (SiG)).</p>
Language of the agreement	<p>In B2B contracts, the language of the agreement may, in principle, be agreed on freely between the parties, except for specific matters.</p> <p>A translation into German will usually be required for the registration of matters or agreements before the authorities and the administration (such as commercial register, land register and other authorities). This is in case the agreement needs to be submitted to prove specific facts.</p>	<p>If more than one language is used, it is important to specify the one that shall prevail, especially for performance and dispute.</p> <p>In the course of legal disputes, the German courts may require an official translation of records or documents (such as contracts) into German.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Essential obligations, and T&C (standard terms)	<p>Parties may agree on any content of a contract, but certain mandatory legal principles or statutory provisions (zwingende Regelungen) aimed at ensuring the protection of the typically weaker party must not be violated.</p> <p>In B2B relationships, the courts will review contractual terms for their compliance with the principle of:</p> <ol style="list-style-type: none"> 1. Good faith (Section 242 of the German Civil Code) 2. Public policy (Section 138 of the German Civil Code) 3. The observance of the statutory prohibitions and form requirements (Section 134 and Section 125 of the German Civil Code) <p>When it comes to public policy, it:</p> <ul style="list-style-type: none"> ▶ Must be understood as a basic value judgment actually observed by society at the relevant time and is pursuant to the German case law, primarily defined by the "legal and moral instincts of all just and reasonable citizens" 	<p>The German Civil Code is based on the principle of freedom of contract.</p> <p>In case these requirements are not met, the contract in question will be considered void. The disadvantaged party may claim damages caused by the use of provisions violating the principle of good faith or public policy, or by the use of unfair T&C clauses or standard terms.</p> <p>The statutory regulation on T&C also applies to B2B contracts. The clauses of a B2B contract are subject to a test of reasonableness. These are reviewed by the courts for compliance with statutory lists of prohibited terms, according to Sections 308 and 309 of the German Civil Code. This is true even if, technically, Sections 308 and 309 of the German Civil Code are directly only applicable to B2C contracts.</p> <p>Furthermore, T&C that are considered unfair or an unreasonable disadvantage to the contracting party are legally impermissible, according to Section 307 of the German Civil Code. This includes the standard terms that:</p> <ul style="list-style-type: none"> ▶ Are not compatible with essential principles of the statutory provision from which it deviates

- ▶ Particularly focuses on the prohibition of transactions that involve undue exploitation of the inequality of bargaining power, such as usury (Wucher), undue influence and economic duress

In addition, the German statutory regulations on T&C, pursuant to Section 305 and the following of the German Civil Code and corresponding case law, have to be observed. These specific regulations apply to contract terms (according to Section 305 of the German Civil Code), which are (cumulatively):

1. Pre-formulated
2. Intended for repeated use
3. Imposed by one party to the contract (the user of the T&C) on the other party upon entering into the contract

Each contract term must be individually negotiated in order to not be regarded as imposing standard business terms. According to the German case law, such negotiation requires the willingness of the proposing party to seriously present each individual contractual term (high standards in practice) for discussion (ernsthaft zur Disposition stellen).

- ▶ Limit essential rights or duties inherent in the nature of the contract to such an extent that fulfilment of the purpose of the contract is jeopardized

Impermissible T&C are deemed legally void and replaced by statutory law, according to Section 306, paragraph 2 of the German Civil Code. The remainder of the contract will basically continue to be valid, as per Section 306, paragraph 1 of the German Civil Code.

T&C – battle of forms situation	T&C are commonly the basis of commercial relationships. T&C are enforceable if the other party accepts them at the formation of the contract at the latest. In case of conflict between the different T&C of the contract parties, the knock-out rule applies, as long as the parties have agreed on the core obligations (i.e., the price and object).	As a result, the contract will basically be upheld and the conflicting provisions will be replaced by the statutory regulations or solutions provided by the German Civil Code.
Consideration	German law does not recognize the common law concept of consideration, but, at best, uses the notion of cause, i.e., the rationale for the validity of the contract.	

<p>Price: determination, revision, indexing and payment terms</p>	<p>The price must be fixed or at least determinable; otherwise, the contract is void.</p> <p>The parties may agree on a:</p> <ol style="list-style-type: none"> 1. Price renegotiation clause, pursuant to which an adjustment of prices would require the consent of both parties 2. Price adjustment clause, which would allow the unilateral adjustment of prices by only the party entitled to such adjustment, but only subject to certain criteria <p>For certain business sectors (e.g., financial services, tenancies, energy and gas), further or different specific requirements need to be taken into account.</p> <p>Generally, the transfer of ownership is not linked to the payment of the purchase price, unless in case of reservation of title.</p>	<p>Please note: framework agreements may be valid even if they do not specify a price (such as a distribution agreement), as the respective prices will commonly be determined and agreed upon in accordance with the latest price list or catalogue price applicable at the date of the subsequent single order.</p> <p>Price adjustment clauses are typically provided in the seller's T&C. However, in order to be legally valid, these should, in particular, meet the following legal requirements cumulatively:</p> <ol style="list-style-type: none"> 1. Describe the calculation method for the price adjustment in significant detail 2. Allow for price adjustment in either direction (increase and decrease) 3. Provide the right for the other party to terminate the contract if the price adjustment may constitute an unacceptable hardship <p>Under the German law, the parties in a business relationship may agree on extended forms of reservation of title (erweiterter Eigentumsvorbehalt). Pursuant to these, the respective property remains with the seller until the satisfaction of all claims that the seller may have against the buyer, arising from the existing business relationship between the parties.</p>
<p>Exclusivity</p>	<p>The grant of exclusivity, whether on the sale or buy side, shall ensure the exclusive right of one contractual party to certain actions, while the other party is prohibited from contracting with third parties for the performance of the same services or purchase of the same goods.</p> <p>In practice, several types of exclusivity provisions are known and used depending on the specific contractual situation, such as:</p> <ol style="list-style-type: none"> 1. An exclusive purchase obligation (Alleinbezugsverpflichtung) 2. An exclusive supply obligation (Alleinbelieferungsverpflichtung) 3. An exclusive distribution right (Alleinvertriebsrecht) 	<p>The general permissibility or permitted scope of exclusivity provisions will depend on the type of contractual relationship in question, such as a distributorship agreement or commercial agency agreement. This issue will often be subject to specific legal requirements resulting from German and EU antitrust law (confer Article 101 of the Treaty on the Functioning of the European Union (TEUF) as well as the Block Exemption Regulation (EU) No. 330/2010).</p>

Noncompete obligation	<p>The legal permissibility and consequences of noncompete obligations are usually dependent on the time of applicability, i.e., during the term of the contract or after termination of a contract.</p> <p>Generally, the legal permissibility of post-contractual noncompete obligations is more limited. Often, it comes with the consequence that the party that has to obey the noncompete obligation receives some kind of financial compensation, as further specified by applicable laws.</p>	<p>Noncompete obligations, depending on the type of contractual relationship in question, may be subject to the specific legal requirements resulting from German and EU antitrust law (confer Article 101 TEUF as well as the Block Exemption Regulation (EU) No. 330/2010).</p> <p>Noncompete obligations often come with contractually agreed specific penalty in case of infringement, in addition to the general liability for damages, in case of breach of noncompete obligation.</p>
Governing law (implied content and public order)	<p>Generally, parties are free to choose the governing law for international contracts (confer Article 3, paragraph 1 of the EU Regulation EC n°593/2008, Rome I; other conventions or treaties may apply depending on the matter or type of contract).</p> <p>However, freedom of choice may be limited:</p> <ul style="list-style-type: none"> ▶ By mandatory local law (Article 9 Rome I) ▶ By public policy grounds (Article 21 Rome I) ▶ By mandatory applicable law for specific types of contract, such as consumer contracts (Article 6 Rome I) and employment contracts (Article 8 Rome I) 	<p>The Rome I Regulation sets out EU-wide rules for determining the national law that should apply to contractual obligations in civil and commercial matters involving more than one country.</p> <p>In case the parties do not choose any specific governing law, it will be determined pursuant to the fallback provisions provided for the respective type of contract in question in Article 4 Rome I.</p>

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>In general, any contract that – based on the rights and obligations of the parties covered therein – is not considered as a one-off contract, but rather a long-term relationship (Dauerschuldverhältnis), may be freely negotiated and entered into by the parties for either a fixed term or an indefinite term.</p> <p>Both fixed terms and indefinite terms are common in commercial relationships.</p> <p>The fixed-term agreement will typically bind the parties until the expiry of the respective term, unless advance termination rights have been expressly agreed to.</p> <p>If the agreement provides for an indefinite term, each party may terminate the contract at any time without any justification (see the section on notice of termination below).</p>	<p>In case the respective contract provisions must be regarded as standard terms or are included in T&C, a fixed contract term as well as its tacit extension by more than one year may be considered by German jurisprudence as an unreasonable disadvantage to the other party (i.e., in case the respective period may be considered as too long in individual case), according to Section 307 of the German Civil Code.</p> <p>Unless the contract provides for tacit renewal at the end of the agreed fixed term or one of the parties exercises a contractual option to extend the term, the contract will not continue beyond the fixed contract term.</p> <p>However, a certain explicit notice period will typically have to be observed in case of an indefinite contract term (see the section “Prior notice of termination” below).</p>
Prior notice of termination and types of termination	<p>In case of an ordinary notice of termination (ordentliche Kündigung), the preconditions are commonly spelled out in detail by the parties in the contract – in particular, where the contract runs for an indefinite period of time.</p> <p>When the law does not set forth specific fallback rules, the courts have developed an unwritten right to terminate the agreement extraordinarily with an adequate notice period, where the following requirements are met cumulatively:</p> <ol style="list-style-type: none"> 1. The parties have concluded an indefinite ongoing obligation. 2. No contractual right to terminate the contractual relationship applies. 3. The parties did not exclude the right to terminate the ongoing obligation ordinarily. 	<p>In some cases, the German law also sets forth mandatory fallback rules on the termination for cause and ordinary notice of termination. For instance, according to Section 89 of the German Commercial Code (Handelsgesetzbuch (HGB)), the terms of ordinary termination notice in commercial agency contracts must not be reduced to the detriment of the agent.</p> <p>The actual application of the case law regarding extraordinary termination with a certain notice period is subject to individual determination by weighing interests of both parties on a case-by-case basis.</p> <p>In general, the method of transmission of the notice of termination may be freely determined by the parties. Accordingly, the parties may agree that the notice of termination must be transmitted in writing, by ordinary or registered letter, or by email.</p>

Termination for cause

The extraordinary notice of termination without notice period (außerordentliche sofortige Kündigung) may be based on good cause within the meaning of Section 314 of the German Civil Code, where the terminating party cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period, taking into account all circumstances of the specific case and weighing the interests of both parties.

The possibility of extraordinary termination for good cause must not be excluded by agreement between the parties.

However, as the language of Section 314 of the German Civil Code is quite undefined and general, parties will often further agree on specific matters that shall constitute good cause. Moreover, specifics of the respective field of law in question must be taken into account when deciding whether good cause actually exists.

Obviously, it is advisable that the termination clause identifies the issues or events considered as causes for termination as precisely as possible.

In case the termination for good cause is based on the breach of a duty under the contract (which is not necessarily required for termination under Section 314 of the German Civil Code), the contract may not be terminated until the terminating party has sent a warning notice to the other party and such warning has remained without result.

When the courts assess whether it is unacceptable for a party to continue the contractual relationship, they take into account the following particular factors:

1. The runtime of the ongoing continuing obligation, including the right to terminate it with notice
2. The consequences of termination for the other party
3. The severity of a contractual violation (if any)
4. The behavior of the parties

In German legal practice, there are certain typical cases that entitle one party to immediately terminate a contract for good cause and are, therefore, often implemented in contracts. These include:

1. When the contractual partner is in not only insignificant default of payment of the contractually agreed remuneration (consideration), and, even after the expiration of a reasonable grace period, the contractual partner still fails to pay the agreed amount
2. When the other party has committed a material breach of an obligation under the contract, and even after a grace period accompanied by a warning of termination has been set, the other party does not cure the breach of contract
3. When the affected party becomes aware of certain circumstances that have negative influence on the creditworthiness of the other party

Termination clauses that expressly refer to the insolvency of the other party have not been upheld by the German courts in the recent past. The specifics of the individual case have to be taken into account.

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Contracts must be negotiated, formed and performed in good faith.</p> <p>The principle of good faith and fair dealing (Treu und Glauben) is statutorily addressed in Section 242 of the German Civil Code. Details are not spelled out in the statute, but are subject to interpretation of this general principle by the courts.</p>	<p>In case of breach of this obligation, there may be liability for damages on the basis of the concept of culpa in contrahendo, according to Section 311 of the German Civil Code (see section "Pre-contractual obligation" above).</p>
Intuitu personae clause, or change of control or assignment clause	<p>The assignment of a contract as a whole requires an agreement between the assignor and the assignee, as well as the consent of other original party.</p> <p>In the event the contract provides for specific consequences in case of change of control of the other party, this most often will be an extraordinary termination right for the other party. Such clauses are valid under the German law.</p> <p>In the absence of a respective clause, a party may not oppose the other party's change of control and generally may not invoke specific contractual rights on the basis thereof.</p>	

<p>Hardship clauses, i.e., unforeseeable circumstances and renegotiation or withdrawal</p>	<p>Section 313 of the German Civil Code is the statutory regulation to address cases where the circumstances of a contract have significantly changed in relation to the time when the contract was entered into (called frustration of purpose – Wegfall der Geschäftsgrundlage). This is mainly in cases of severe inflation, massive devaluation or massive increase of the value of the performance due to legislative amendments and unforeseeable governmental intervention in economic policies affecting the contractual obligations.</p> <p>Pursuant to Section 313, each party may demand the amendment of an already validly concluded contract, if it cannot reasonably be expected to uphold the contract without alteration because of the following reasons (which must be considered cumulatively):</p> <ol style="list-style-type: none"> 1. The circumstances forming the basis of the contract at its conclusion have significantly changed or been found to be incorrect. 2. The parties would not have entered into the contract or only concluded the contract with different contents if they had foreseen this change or incorrectness. <p>If adaption is not possible or reasonable, Section 313, paragraph 3 provides the disadvantaged party with a right to withdraw from the contract.</p>	<p>The standards applying Section 313 of the German Civil Code are rather strict, since receipt of adequate performance and proper negotiation of the contract basically fall within the responsibility of both parties.</p> <p>Sometimes, in order to avoid the need for the parties to rely on Section 313 and the specific requirements that must be shown in order to exercise this statutory clause, parties may include a renegotiation clause in order to cover unforeseen events that may fundamentally alter the equilibrium of the contract, resulting in an excessive burden being placed on one of the parties.</p> <p>The parties are basically free to decide the conditions for such renegotiation or adjustment of the contract. If agreed, the renegotiation or adjustment clause should spell out, in detail, the circumstances or events that trigger legal consequences as a right to renegotiate or even to withdraw.</p>
<p>Force majeure</p>	<p>The force majeure clause typically excuses one or both parties from the performance of the contract in some way following the occurrence of unforeseeable circumstances or events outside the party's or both parties' control. Such party is excused from or entitled to suspend performance of all or part of its obligations. In this event, the party that is unable to perform its contractual obligations is not liable for damages.</p> <p>Please note in this context that in cases where the factual or legal circumstances – or, in some cases, both factual and legal circumstances – which became the basis of the contract, have unpredictably and significantly changed, the parties are protected to a certain degree by the statutory provisions of Section 313 of the German Civil Code (see "Hardship clauses" above). However, as force majeure events are not specifically covered by Section 313 of the German Civil Code, the additional implementation of force majeure clauses is common in commercial contracts governed by the German laws in order to precisely define such events with a view to the specific characteristics of the contract.</p>	<p>It is highly recommended to provide for a precise definition of the events and circumstances to be considered as force majeure. It is also important to detail the rules for the implementation (e.g., specific details regarding notification of the other party) and effects on the contract.</p> <p>The clause may also provide for the conditions for the termination of the contract or its renegotiation.</p> <p>Usually, prior notification of the other party about the force majeure event is required. The legal definition of force majeure may be individually extended by the parties. Courts will essentially determine whether the conditions of the force majeure clause are met.</p>

Warranty of apparent and latent defects (specific to sales between corporate parties, not consumers)

In B2B sales, the buyer has to:

1. Examine the delivered goods promptly for defects following their delivery or handover
2. Object and immediately notify the seller accordingly in the event of the discovery of a defect, according to Section 377 of the German Commercial Code

The scope of examination must be appropriate in light of the individual case; commercial customs must be taken into account.

An apparent defect must be notified as soon as the examination was or should have been completed.

In case of a latent (hidden) defect, notice must be given promptly, i.e., within one to two days following the later discovery of the defect.

If the buyer fails to notify the seller of a discovered defect, the delivered goods are deemed approved and conforming to the contract. As a result, the buyer will lose his warranty claims. Otherwise, in case a defect is reported in time, the buyer will benefit from his statutory warranty rights under the German sales law pursuant to Section 437 and following of the German Civil Code.

These warranty rights may be customized or, in particular, limited by the parties in the contract or in the respective T&C of the seller and buyer. But, at the same time, these must observe the partially strict legal framework set by the German law and jurisprudence, and should, therefore, include:

1. Cure of the defect by means of repair or replacement (Section 439 of the German Civil Code)
2. Rescission of the contract or withdrawal (Sections 440 and 323 of the German Civil Code)
3. Reduction of the purchase price (Sec. 441 of the German Civil Code)
4. Compensation of damages or reimbursement of expenditure, provided that culpable act or omission is given (Sections 440 and 280 and following of the German Civil Code)

The buyer's obligation to examine the delivered products applies only to movable goods, such as the supply of manufactured parts, food, medical products and commodities. But, this is not required in a corporate acquisition, the sale of real estate or in contracts to produce a work according to Section 631 of the German Civil Code.

What is considered to be "promptly" within the meaning of Section 377 of the German Commercial Code depends on the special features of each individual case, such as the industrial sector, the size of the organization and the type of the product.

Please note that the buyer must describe the discovered defects as precisely as possible.

Parties may alter or even exclude the obligations set out in Section 377 of the German Commercial Code only if certain legal restrictions will be observed.

In case the buyer's obligations set out in Section 377 of the German Commercial Code are met, the buyer may initially demand repair (Nachbesserung) or replacement (Nachlieferung) of the goods handed over by the seller in defective state.

Pursuant to Section 439 (3) of the German Civil Code, the seller may refuse to provide the kind of rectification (cure) chosen by the buyer, if this cure is possible only at disproportionate expense.

The German sales law does not provide for the buyer's right to repair the defect by himself and to claim the corresponding costs from the seller. Rather, it is the seller's right to have a second chance and to rectify defective goods.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>Generally, under statutory German law, damage claims shall cover all direct and indirect damages, including lost profits, without limitation.</p> <p>In light thereof, contracts often include specific provisions to limit the quite broad statutory liability for damages.</p> <p>In case limitations of liability are introduced in the context of T&C (usually interpreted very extensively), and not subject to individual and specific negotiation between the parties, the German law and jurisprudence provides for a number of restrictions in relation to the legal permissibility of such clauses. Namely, there must not be any exclusion of:</p> <ol style="list-style-type: none"> 1. Liability for death or injury to body and health caused by the other party 2. Liability for willful intent and gross negligence 3. The strict mandatory liability in accordance with the German Product Liability Act <p>Furthermore, according to the German case law, liability for the negligent infringement of material contractual obligations may only be limited to characteristic and typically foreseeable damages. Characteristic and typically foreseeable damages must basically not be excluded.</p>	<p>In any case, it is strongly advisable to review the current German law and jurisprudence on the limitations of liability in the T&C in detail before the conclusion of contract. In case the contract includes an impermissible provision, then such a clause would be void and not be upheld, but would be replaced by the statutory regulations. This would mean unlimited liability for all direct and indirect damages of the other party, including lost profits.</p> <p>In particular, it is not legally permissible to limit liability for consequential damages and lost profit to the order value or to a multiplier thereof, or exclude it completely. The exception is for individual and specific negotiation between the parties on this specific point, and detailed documentation thereof.</p>

Competent jurisdiction, execution of foreign decisions and exequatur

In international commercial B2B relationships, the parties are entitled to choose between arbitration and litigation before state courts, with limited exceptions.

The jurisdiction clause should be agreed upon in writing to meet the formal requirements of either the applicable EU Regulation (Article 25 of the Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Ia Regulation)) or Section 38 German Code of Civil Procedure (Zivilprozessordnung (ZPO)).

According to the German case law, a jurisdiction clause specified in the T&C may be invalid pursuant to Section 307 of the German Civil Code, where:

1. Both parties have a common jurisdiction and the user of the T&C chooses a jurisdiction elsewhere.
2. The parties choose a jurisdiction that has no connection to the content of the contract or to the seat of the user.
3. The jurisdiction clause establishes the competence of a foreign court in a case that has no foreign dimension.

The parties can either mutually agree on arbitration after a dispute has arisen or, more commonly, at the time of entering into the contract with regard to all future disputes arising out of or in connection with that contract.

In Germany, enforcement of a foreign court judgment requires an exequatur to the German jurisdiction, according to Section 722 of the German Code of Civil Procedure.

Judgments rendered by courts of the EU Member States are enforced in a more simplified procedure, according to Article 39 Brussels Ia Regulation or Section 1112 of the German Code of Civil Procedure.

The German law provides for recognition and enforcement of all foreign arbitration awards according to the UN Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention), regardless of the nationality or place of residence of the parties.

Generally, when making the choice, the estimated costs and the typical duration to get an enforceable judgment in the chosen jurisdiction should be taken into account.

Sometimes, arbitration may become more expensive than court proceedings. The procedure will be conducted on the basis of the procedural rules of the arbitration organization agreed to between the parties and, as fallback, by the relevant provisions of the German Code of Civil Procedure, in case the seat of the arbitration is in Germany.

For merely domestic commercial (not corporate) disputes, it could be cheaper to agree on litigation before the ordinary courts instead of arbitration, unless the parties have a specific interest in confidentiality.

Contact: Apostolos Vorras

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	An agreement does not have to be in writing in order to be binding, according to the principle of conventional freedom, Article 361 of the Greek Civil Code (Greek CC) and the principle of the informality of legal acts. However, this is subject to a number of exceptions.	A scanned signed agreement should be considered as a reliable copy of the contract and be used as a proof of contract. However, a judge could require that the original version of the agreement be produced, in the event of dispute.
Pre-contractual obligation: good faith and information obligation	<p>The contracts should be negotiated, formed and performed in good faith and fair dealing. This provision is public policy provided by Articles 197, 198 and 200 of the Greek CC. A person acts in "good faith" and "fair dealing" it is in accordance with the law with honest practices in commercial matters and without harming the rights of others.</p> <p>A party has a duty at the pre-contractual stage to disclose any information that is relevant and material to the other party's consent to enter the transaction.</p>	The parties have the freedom to break the negotiations. However, a party may be liable for damages for acting in bad faith or misconduct, according to Articles 197 and 198 of the Greek CC.
Signature by counterparts	The contract shall be signed by the legal representatives or the authorized representatives of all parties to the contract. The process of signing a contract is a matter of evidence.	
Language of the agreement	<p>The language of the agreement may, in principle, be agreed upon freely between the parties.</p> <p>The language has to be understood by all parties to the contract. Otherwise, the party that has insufficient knowledge of the language is deemed not to have validly contracted.</p> <p>A translation into Greek will be required for the registration of agreements before authorities and the administration. Greek courts usually require an official translation of contracts into Greek.</p>	<p>If more than one language is used, the one that prevails shall be specified, especially for performance and dispute.</p> <p>Since a term might mean one thing in one jurisdiction, but something else in another, it is highly recommended to define as many terms as possible and even to state the term in its original language for the avoidance of doubt.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>The T&C are agreed on by the parties and are incorporated to the commercial agreement. The T&C are enforceable between the parties, according to the principle of conventional freedom (Article 361 of the Greek CC), with the exception that there are no contradictions to the mandatory law. Conflicting provisions will be replaced by the statutory regulations and solutions provided by the Greek CC.</p> <p>As long as the core obligations (i.e., price and object) have been agreed by the parties, the agreement will be valid, even if there are invalid terms.</p>	
Essential obligations and imbalance	<p>The Greek Civil and Commercial Code does not allow the excessive imbalance of provisions in a contract, such as a clause that results in one party being at an unfair disadvantage or disproportionately burdened as compared to the other party. This should be considered as an abuse of the contractual terms as an abuse of terms of the contract.</p> <p>Action can be launched by parties, such as an out-of-court settlement of the dispute or a judicial settlement.</p> <p>The possible sanctions of imbalanced provisions include the cancellation of the provision and compensation due for damages.</p>	The limited liability clauses and terms are usually included into contracts and deemed essential obligations.
Consideration	<p>The Greek law has the notion of "cause," i.e., the rationale for the validity of the contract. However, the parties would usually expressly identify the cause, i.e., the scope of the contract in order to limit the risk of significant imbalance (see "Essential obligations" above)</p>	

<p>Price: determination, revision, indexing and payment terms</p>	<p>The price should be fixed or at least determinable. Otherwise, the contract is void. However, framework agreements are valid, even if they do not provide a price (e.g., distribution agreement). In case of abuse in the determination of the price unilaterally by one party, the Greek court may terminate the agreement and compensate the other party.</p> <p>Adjustment method and additional price could be provided for in the contract. However, according to the necessity of a determined price, the method of calculation should be specified in the contract (i.e., illustrated with an example).</p> <p>The change of owners has no influence on the payment of the price.</p> <p>The price may be stipulated in a foreign currency.</p> <p>According to the directive 2011/7/EU on combating late payment in commercial transactions as implemented by the Law 4152/2013 (paragraph f), the payment terms are regulated and they should not exceed 60 days from the date of invoice.</p>	<p>The court cannot set the price of the contract when the price is not fixed or determinable in the contract.</p> <p>It is possible to appoint an expert to determine the price (either the contract may provide for expert determination or the parties may request the court to appoint an expert to determine the price).</p>
<p>Exclusivity provisions</p>	<p>The exclusivity clauses, whether on the sale or buy side, are valid.</p> <p>The goal of the exclusivity provision is to prohibit the other party from contracting with third parties for the performance of the same services or purchase of the same goods.</p>	<p>Especially in the area of distribution law, exclusivity provision must be limited in time and territory.</p> <p>An exclusivity provision should not constitute or result in an anticompetitive practice, such as abuse of dominant position or an anticompetitive agreement.</p>
<p>Noncompete obligation</p>	<p>A noncompete clause is allowed during the execution of the agreement and beyond the termination of a contract. Nevertheless, the noncompete clauses might be found abusive by the courts and must be carefully specified in the contract.</p> <p>A financial compensation could be provided in case of infringement. Financial compensation is mandatory for employment contracts.</p>	<p>The noncompete clause should be reviewed from a competition law perspective as well as from the perspective of prohibition of significant imbalance.</p>

<p>Governing law (implied content and public order)</p>	<p>Parties are free to choose their governing law for the international agreements contracts that may apply to the whole or part of contract. This is according to the principle enshrined in Article 3, paragraph 1 of the EU Regulation EC no. 593/2008, Rome I Regulation; but, other conventions or treaties may apply depending on the matter or type of contract.</p> <p>The courts will determine the governing law if the parties do not choose it.</p> <p>An exception to the freedom of choice is that the dispositions of public order and the mandatory local law of a country will apply despite the choice, according to Articles 9 and 21 Rome I.</p>	<p>The Rome I Regulation sets out EU-wide rules for determining the national law that should apply to contractual obligations in civil and commercial matters involving more than one country.</p> <p>The implied legal principles and customs that are applied under the Greek law shall be taken into account.</p>
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
<p>Term and tacit renewal</p>	<p>An agreement may be entered into for:</p> <ol style="list-style-type: none"> 1. A fixed term: In such a case, the contract has to be enforced until the expiry of its term or renewed term. 2. An indefinite term: Each party may terminate the contract at any time without any justification. However, it is subject to possible compensation. 	
<p>Prior notice of termination</p>	<p>The parties should give a reasonable prior notice of termination of a contract, even if this is not provided for in the contract, since the obligation to give prior notice is considered as a dealing of good faith.</p> <p>This applies to fixed-term (if renewed) or indeterminate contracts, or in case of absence of contract, if there is an established business relationship.</p> <p>Reasonable notice is on the basis of the term of the contract, which is mandatory.</p> <p>In case of failure to give reasonable prior notice of termination, damages and compensation are likely to be awarded by the Greek courts (high level of risk of litigation).</p>	

Termination for cause	<p>If the contract provides for specific causes for termination, the clause must be precisely drafted.</p> <p>If the contract does not provide for specific causes for termination, early termination will be subject to the following conditions:</p> <ol style="list-style-type: none"> 1. A serious breach is required. 2. A prior notice should be given by the non-defaulting party to the defaulting party in order to repair the breach. 3. The non-breaching party may apply to the court to terminate the contract.
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	The agreements should be negotiated, formed and performed in good faith and fair dealing (see "Pre-contractual obligations" above). Breach thereof will result in damages.	
Intuitu personae clause, or change of control or assignment clause	<p>The assignment of a contract requires an agreement between the assignor and the assignee. It also requires the consent of the other original party, unless otherwise stipulated in the contract.</p> <p>In the absence of a clause, a party may not oppose the other party's change of control. Change of control restrictions are valid under the Greek law.</p>	

<p>Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation</p>	<p>There are events that may occur and fundamentally alter the equilibrium of a contract, which results in an excessive burden being placed on one of the parties.</p> <p>The parties are free to decide the conditions pursuant to which the renegotiation of the contract will take place in order to amend the contract to address the unforeseen event.</p> <p>Article 388 of the Greek CC provides that if the unforeseeable circumstances at the time of the contract make the performance of the contract “excessively onerous” for a party, it can ask for a renegotiation (during the execution of the agreement). In case of refusal or failure of negotiations, the parties could agree on the avoidance of the agreement or apply to the court to adapt it. If the parties still disagree, then the court may revise or terminate the contract at the request of that party.</p>	<p>The court will determine whether the conditions of unforeseeability, as defined by the parties, are met.</p> <p>It is recommended to provide for the notification of the circumstances that trigger the clause and the conditions of renegotiation, as well as to articulate the force majeure (see “Force majeure” below) and hardship clauses in the contract properly.</p>
<p>Force majeure</p>	<p>To be considered a force majeure event, it must meet the following criteria:</p> <ul style="list-style-type: none"> ▶ It is unavoidable and makes the performance of the agreement impossible. ▶ It is unpredictable and could not have been foreseen when the agreement was entered into. ▶ It is over and beyond the control of the parties. <p>Upon occurrence, a force majeure event will excuse one or both parties from the performance of the contract or entitle them to suspend performance of all or part of the obligations without exposure to damages.</p>	<p>The legal definition of force majeure can be extended by the parties (i.e., to include strikes).</p> <p>Greek courts will determine whether the conditions of force majeure are met.</p> <p>It is recommended to provide in the contract a specific definition of the events or circumstances. It is also important to detail the rules for implementation and effects on the contract up to its termination or its renegotiation.</p> <p>A prior notice of the force majeure event is required.</p>
<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>In the Greek CC, there is a specific regime regarding unconformity and latent defects. The Greek CC regulates the legal and real defect – indicatively, Articles 499, 514, 515, 499, 534, 688 and 689.</p> <p>Limited liability provisions are valid under certain conditions.</p>	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>A breach of contract leads to compensation only for direct and foreseeable loss or damage.</p> <p>Limitation of liability clauses are valid under the following conditions:</p> <ol style="list-style-type: none"> 1. The clause should not lead to depriving the contract of its purpose or of the main undertaking, or to a significant imbalance called as an abusive term. The penalty for this is void, damages and compensation by the civil court. 2. The exclusion and limitation clauses are inapplicable in cases of willful misrepresentation and gross negligence. 3. The clause will be null and void in some specific areas, such as personal injury. 	There is a possibility to extend a party's liability, such as by excluding the right to claim force majeure, subject to the parties' agreement.
Competent jurisdiction, execution of foreign decisions and exequatur	<p>Parties are free to submit their dispute to either arbitration or Greek courts with several exceptions.</p> <p>The cost and the duration to get an enforceable judgment in Greece is at least two to three years for the first instance and a further two to three years for an appeal judgment.</p> <p>Enforcement is carried out under the relevant international treaty or convention country of enforcement and the country where the award was rendered. Under the Greek law, recognition and enforcement of international awards are ensured, regardless of the nationality or place of residence of the parties (according to the New York Convention).</p> <p>In Greece, an exequatur is required to enforce a foreign judgment (the judicial process that leads to the recognition and enforcement of a foreign judgment) to a Greek jurisdiction. But, this is not necessary for judgments rendered in the EU, according to the Regulation 44/2001/EC, called "Brussels I."</p>	<p>Parties are usually entitled to choose any court to settle the dispute in international commercial matters.</p> <p>Arbitration is more flexible – with the right to choose the arbitrators, the language and the seat of arbitration – and faster, but also more expensive. Arbitration allows for the confidentiality of hearings.</p> <p>In case Athens is selected as the seat, the relevant provisions of the Greek code of Civil Procedure will apply.</p>

Italy (civil law)

Contact: Sara Chenchene

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	<p>An agreement does not have to be in writing to be binding, according to the freedom of form principle.</p> <p>According to the general provisions on contracts provided by the Italian Civil Code, the contract is reached when the acceptance of the counterpart is received by the offering party, according to Article 1326 of the Italian Civil Code.</p> <p>Pursuant to Article 1327 of the Italian Civil Code, when, upon request of the offering party, or by the nature of the transaction or according to usage, the performance of the contract should take place without a prior formal reply, the contract is deemed executed at the moment and in the place where the performance started.</p> <p>Other exceptions to the freedom of form principle are provided by Article 1350 of the Italian Civil Code, which requires the written form for several agreements (such as contracts to transfer the ownership of immovable and lease contracts) upon penalty of nullity.</p> <p>Other exceptions are provided also by specific contractual schemes, such as subcontracting agreements, which, pursuant to Italian law number 192/1998 – Regulation of subcontracting in the production activities (Disciplina della subfornitura nelle attività produttive) shall be executed in writing or be considered null and void.</p>	

Pre-contractual obligation: good faith and information obligation	The negotiation of B2B agreements are subject to the general norms on good faith and pre-contractual liability provided for in Article 1337. This article requires that parties, in the conduct of negotiations and the formation of the contract, shall behave in good faith.	According to joint sections of the supreme court no. 4628/2015 and no. 4118/2016, the Italian Supreme Court has recently qualified the pre-contractual liability as a form of contractual liability, as opposed to tort liability. Therefore, parties in breach of the good faith norms in the pre-contractual phase are subject to a regime of liability that, in particular, shifts the burden of proof on the violating party and is subject to time bar (i.e., the loss of the right caused by the elapsing of time without enforcing same right) in 10 years instead of 5. Time bar consists in the term within which the non-breaching party can claim her rights. In particular, the time bar starts from the moment the non-breaching party may exercise its rights.
Signature by counterparts	The Italian law does not provide for signing separate counterparts of a contract.	
Language of the agreement	<p>No specific language requirements are provided for the execution of contracts under the Italian law.</p> <p>Please consider that the language of the agreements produced in the frame of a judicial proceeding does not necessarily need to be Italian. Indeed, pursuant to Article 123 of the Italian Code of Civil Procedure, the judge has the faculty, but not the duty, to request the related Italian translation. On the contrary, the deeds of the process – such as summons – have to be drafted in Italian.</p> <p>However, according to Legislative Decree no. 163/2006 (The code for public contracts for works, services and supplies in implementation of Directives 2004/17/CE and 2004/18/CE), the offers and other documents with Italian public authorities shall be drafted in Italian, provided there is the possibility of bilingualism in the Italian Autonomous province of Bolzano.</p>	The English language is very usually used in B2B contracts in Italy.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>Under the Italian law, a contract is executed when the proposal and the acceptance are identical. A counterproposal (e.g., by referring to one party's T&C excluding the other party's T&C) would be considered as a new proposal. The prevailing conclusion, according to scholars, is that the "last shot rule" applies. No case law has apparently been published on the matter.</p> <p>The United Nations Convention On Contracts For The International Sale Of Goods 1980 (CISG) is applicable under the Italian law.</p>	
Essential obligations and imbalance	<p>Significant imbalanced provisions in a contract, such as a clause that results in one party being at an unfair disadvantage or disproportionately burdened as compared to the other party, can lead to the invalidity of that clause.</p>	
Consideration	<p>Consideration is considered under the Italian law as the "cause" of a contract. It might either correspond to a cash consideration or to other forms of considerations.</p>	

Price: determination, revision, indexing and payment terms	<p>The price must be fixed or at least determinable; otherwise, the contract is null.</p> <p>However, framework agreements are valid, even if they do not provide for a price. This is because they provide for certain rules to be applicable in case the price is determined otherwise, i.e., by separate agreement by the parties or by decision of the third party. In this case, the price is not determined but determinable and, therefore, the validity of framework agreement is guaranteed. In case of abuse in the determination of the price by one party, the Italian judge may terminate the agreement and award damages to the other party.</p> <p>Parties can agree on adjustment methods and additional price (such as an earn-out clause). However, a precise and clear method of calculation has to be provided, for instance, by illustrating it with an example. The adjustment methods and the additional deferred prices usually serve the function of guarantee for the purchaser.</p> <p>The price may be stipulated in a foreign currency.</p> <p>The terms of payment exceeding 60 days shall be expressly agreed, but they might be considered unfair and the related clauses may be challenged as invalid by the judge. This is according to Legislative Decree no. 231/2002, which gives implementation to the Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions.</p>
Exclusivity provisions	<p>Exclusivity clauses are usually provided in long-term contracts. The clauses are to ensure the exclusive right of a contractor and to prohibit the other party from contracting with third parties for the performance of the same services or purchase of the same goods.</p>
Noncompete obligation	<p>A noncompete clause is allowed during the performance of the contract and after termination of a contract, for a specific term.</p> <p>The noncompete clause cannot be undefined and general: it shall contain a specific reference to the term, the territory and the objects that it applies to.</p> <p>The clause can provide a financial penalty in case of infringement by the obligor.</p>

Governing law (implied content and public order)	<p>Parties are free to choose their governing law for international contracts that may apply to the whole or part of contract. This is according to the principle enshrined in Article 3(1) of EU Regulation EC no. 593/2008, Rome I Regulation; but, other conventions or treaties may apply, depending on the matter or type of contract.</p> <p>If the parties do not choose a governing law, it will be determined by the courts.</p> <p>The exceptions to the freedom of choice include:</p> <ol style="list-style-type: none"> 1. The mandatory local laws of a country will apply despite the choice (Article 9 Rome I). 2. The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). 3. It is an exception on grounds of public policy (Article 21 Rome I).
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A limited duration: It must be enforced until the end of the term or renewed term. ▶ An unlimited duration: Each party may withdraw from the contract at any time without any justification by giving a prior notice. 	
Prior notice of termination	<p>A party must give reasonable prior notice of termination of a contract, even if this is not provided for in the contract.</p> <p>This also applies to fixed-term (if renewed and not excluded) or indeterminate contracts, or in case of absence of contract if there is an established business relationship.</p> <p>The reasonable notice is on the basis of the term of the contract.</p> <p>Failure to give reasonable prior notice will expose the terminating party to termination damages.</p>	

Termination for cause	<p>A termination for cause clause under the Italian law should refer to specific obligations of the contained in the agreement clearly identified. On the other hand, the case law considers that a termination clause, making reference to the breaches of all obligations of the agreement or in general to the obligations of the agreement, is null and void.</p> <p>If the contract does not provide for specific grounds for termination, the non-breaching party may apply to the judge to terminate the contract.</p> <p>Besides the intervention of the judge, it is possible to terminate the agreement in the following two cases:</p> <ol style="list-style-type: none"> 1. Pursuant to Article 1454 of the Italian Civil Code, the non-breaching party can notify to the breaching party, in writing, to fulfill obligations within a reasonable term. This should include an express declaration that, in case such term expires without performance of the obligation, the contract shall automatically terminate. The reasonable term cannot be shorter than 15 days, unless otherwise agreed between the parties, or unless otherwise required by the kind of contract at hand or by usage. 2. In case a contract provides for a term for its performance and such term is considered essential to one of the contracting parties, the contract automatically terminates if the performance has not occurred within such term. This holds true unless the non-breaching party notifies the other party within three days from the expiry of the term that they still intend to receive performance of the contract notwithstanding the expiry of the term (Article 1457 of the Italian Civil Code). 	An arbitrary interruption of the contractual relationships – for instance, in subcontracting agreements – where there can be an economic dependence between the principal and the subcontractor, may lead the subcontracting party to challenge as invalid the provisions in the contract allowing for such interruption.
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, formed and performed in good faith, which is a mandatory obligation of contract law (Article 1375 of the Italian Civil Code). Breach of this obligation will expose the breaching party to contractual liability.	

Intuitu personae clause, or change of control or assignment clause	<p>The assignment of a contract requires an agreement between the assignor and the assignee, and requires the agreement of the other original party, unless otherwise stipulated in the contract.</p> <p>A change of control clause is valid when aimed at guaranteeing the identity of the counterpart. It may be provided for in contracts in instances when there is an interest of the parties in having the identity of the counterpart always the same. This is so that any kind of change would eliminate the interest in maintaining the contractual relationship.</p> <p>Change of control clauses are usually inserted in bank contracts, loans and credit facilities, as well as whenever the identity of one of the contracting parties is essential to the agreement itself.</p>
Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation	<p>If circumstances that were unforeseeable at the time of the contract make the performance of the contract “excessively onerous” for a party, it can ask for a renegotiation. In the meantime, it has to continue to perform the contract. In case of refusal or failure of negotiations, the parties can agree on the avoidance of the contract or ask the judge to adapt it. If the parties still disagree, then the judge may revise or terminate the contract at the request of that party.</p> <p>Since such a mechanism is not mandatory, parties can, therefore, agree to exclude it expressly in their contracts.</p>
Force majeure	<p>This clause excuses one or both parties from performance of the contract in some way following the occurrence of unforeseeable circumstances or events that are outside the party’s control. That party is excused from or entitled to suspend performance of all or part of its obligations. In this event, the party that is unable to perform its contractual obligations is not liable for damages.</p>

Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>General rules on the sale purchase contract applies to the sale and purchase of a defected object. The general rules on sale purchase contracts provide that, in particular, the seller shall guarantee that the sold good is free from defects that would make it unsuitable for its designed use or that would considerably reduce its value. If the purchaser fails to notify the seller of the defects of the good within eight days from their discovery – or within the other time agreed on by parties or established by law – and, in any case, later than one year from the delivery of the good, the guarantee is no longer applicable.</p> <p>Limited warranty clauses are possible under certain conditions: in particular, parties can limit or exclude the warranty for the defects only in case the seller has not hidden the defects of the good in bad faith. In this case, the limitation or exclusion of the warranty is not effective. Moreover, the warranty is not mandatory if, at the moment of purchase of the good, the purchaser was aware of the defects, or the defects were evident or easily recognizable.</p>
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>In principle, the breach of contract leads to compensation. According to Article 1223 of the Italian Civil Code, the damage to be compensated includes both the arising damage (danno emergente), such as the physical damages and damages to the properties of the creditor; and the profit loss (lucro cessante), including, as an example, the loss of profit for lack of execution of specific contractual agreements.</p> <p>The compensation is, in any case, limited to the damage that is a direct and foreseeable consequence of the breach of the party.</p> <p>The limitations of the liability clause are generally valid under the Italian law. However, no exclusion or limitation will be valid in cases of willful misrepresentation, gross negligence or personal injury.</p>	

Competent jurisdiction,
execution of foreign
decisions and exequatur

Parties are free to choose either arbitration or courts for the settlement of their disputes.

The execution of court decisions from other EU Member States became automatic after the adoption of the European Regulation (EU) no. 1215/2012.

The execution of foreign arbitration awards is automatic for court decisions rendered in countries that have signed the New York Convention of 1958.

For the other decisions and awards, an exequatur will be required with the competent Italian appeal court.

Poland (civil law)

Contact: Zbigniew Grzegorz Pindel

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	<p>As a rule, a contract does not have to be in writing to be binding under the Polish law. However, numerous exceptions are provided by the law, such as leasing agreements and transfer or lease of an enterprise.</p>	<p>A scanned signed copy is not considered as a reliable copy of the contract, unless its conformity with the original agreements is confirmed by a public notary or an attorney representing the party at the court. Nevertheless, the court could require that the original version of the agreement is communicated in the event of dispute.</p>
Pre-contractual obligation: good faith and information obligation	<p>The Polish law recognizes the concept of good faith, which is considered as a justified conviction that a person is legitimate to undertake a given action. The concept of good faith has similar features to the concept of acting in accordance with good customs.</p> <p>In practice, carrying on negotiations in bad faith would be considered an infringement of good customs. Contracts should be negotiated in accordance with good customs. Infringing good customs may consist of carrying on negotiations without an intention to conclude a contract, intentionally prolonging negotiations and misleading the other party.</p> <p>The parties must not disclose or convey the confidential information that they learnt during the negotiations to other persons or use it for their own purposes.</p>	<p>The party that started or carried on negotiations while infringing good customs shall be obligated to redress the damage that the other party suffered as a result of counting on conclusion of the contract.</p> <p>The party that disclosed or conveyed confidential information shall be obliged to redress the damage of the other party or release the obtained benefits.</p>
Signature by counterparts	<p>The Polish law recognizes signature by counterparts. As a rule, for the conclusion of the contract, it shall suffice to exchange the documents containing declarations of intent, each of them being signed in original by one of the parties. Alternatively, documents containing a declaration of intent of one party and signed in original by such party shall suffice.</p>	

Language of the agreement	As a rule, the language of the agreement may be agreed on freely by the parties. However, several exceptions are provided by the law, such as contracts with entities performing public tasks within the territory of the Republic of Poland and contracts with consumers.	In case a contract is to be presented in the Polish court (or to other public authority), it should be translated into Polish. Usually, a sworn translation is required. For contracts prepared in more than one language versions, it is advised to specify the language version that is prevailing, in case of discrepancies between the versions.
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2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>As a rule, a model form of a contract set up by one of the parties (in particular general conditions of contracts, standard forms of contracts and T&C) are binding to another party if it has been delivered to such party before concluding the contract.</p> <p>In the case of any discrepancies between the contents of a contract and the T&C, the parties are bound by the contract.</p> <p>In case when both parties use T&C and there is a contradiction between these T&C, the mutually contradictory provisions are not valid and the provisions of the Polish Civil Code apply in this regard (as per the knock-out rule).</p>	
Essential obligations	<p>As a rule, the parties to a contract may arrange the legal relationship as they deem proper (the freedom of contract rule). However, the contents or the purpose of that contract must not be contrary to the nature of the relationship, statutory law and the principles of community life. For instance, the courts consider a contract to be contrary to the principles of community life if it provides for the possibility to change the contract's content arbitrarily by one party only or excessive security of one party.</p> <p>The parties are also obliged to execute the contract in accordance with its contents and in a manner complying with its socioeconomic purpose and the principles of community life. If there are established customs in that respect, the contract should also be executed in a manner complying with those customs.</p>	The Polish Civil Code does not provide for any specific sanction referring to abuse of the freedom of contract rule. However, if the contract is inconsistent with statutory law or with the principles of community life, it may be deemed null and void.

Consideration	<p>The Polish law does not recognize the concept of consideration.</p> <p>The similar concept of causa is, however, recognized and plays an important role in contracts concerning, in particular, the transfer of real estate. Their validity depends on the existence of valid causa, which has to be expressly stated in the contract.</p>	
Price: determination, revision, indexing and payment terms	<p>The remuneration may be determined in a foreign currency. However, as a rule, the debtor has the right to pay in Polish zlotys when the object of the obligation is to be fulfilled within the territory of Poland.</p> <p>If the parties agreed that the purpose of its obligation is the payment of a sum of money, then the debtor should pay the nominal sum, unless special provisions state otherwise. However, the parties may stipulate in the contract that the amount of a monetary performance is fixed in alternative value than money.</p> <p>As a rule, the payment term specified in a contract shall not exceed 60 days; however, the parties to a contract may agree on a longer payment term if it is not grossly unfair to the creditor. If, however, the parties to a contract specify that the payment term is longer than 30 days or they did not provide for the payment term at all, then after the expiry of the 30 days deadline, the creditor may demand statutory interests, counted from the date when the creditor fulfilled its obligation and delivered a respective invoice to the debtor. This results from the implementation of a European Parliament and Council decree 2011/7/UE of 16 February 2011.</p>	
Exclusivity provisions	Express exclusivity provisions are valid under the Polish law.	Exclusivity provisions must not violate anticompetitive regulations; in particular, prohibiting to conclude a contract that seeks to or results in eliminating, restricting or otherwise distorting competition on the proper market by dividing sale or purchase markets.
Noncompete obligation	<p>Noncompete obligation can be imposed for the period of the contract's performance and after its termination.</p> <p>The contractual penalty is usually introduced in case of breach of noncompete undertakings.</p>	The noncompete provisions must not violate anticompetitive regulations; in particular, prohibiting to conclude a contract that seeks to or results in eliminating, restricting or otherwise distorting competition on the proper market by dividing sale or purchase markets.

Governing law (implied content and public order)	<p>For international contracts, parties may choose the law governing their contract, in accordance with Article 3(1) of EU Regulation EC no. 593/2008, Rome I Regulation; other international contract or convention may apply depending on the matter or type of contract.</p> <p>If the parties do not choose a governing law, it will be determined by the Polish courts on the basis of the provisions of the EU Rome I Regulation (or other respective international contracts).</p>	<p>The EU Rome I Regulation provides for several exceptions as regards the freedom of choice of the governing law. These include:</p> <ol style="list-style-type: none"> 1. Mandatory provisions cannot be overridden (Article 9 of EU Rome I Regulation). 2. All elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen (Article 3(3) of EU Rome I Regulation). 3. It is manifestly incompatible with the public policy (ordre public) of the forum (Article 21 of EU Rome I Regulation).
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A contract can be entered into for either:</p> <ul style="list-style-type: none"> ▶ A fixed period of time and, as the case may be, renewed Or ▶ An indefinite period of time <p>As a rule, a contract concluded for a fixed period of time may be terminated with an appropriate prior notice period, if expressly provided for by the parties. The contract may also include a possibility to renew it under certain conditions.</p> <p>A prior notice period is required for termination of an indefinite time contract.</p>	The Polish law provides for specific rules of termination (e.g. the requirement to send a prior notice) of some types of contracts, such as lease contracts and agency contracts.
Prior notice of termination	As a rule, termination of contracts must be preceded by a prior notice. However, it may provide for specific reasons (in particular, breaching of a contract's provisions of one of the parties), entitling another party to terminate a contract without prior notice (i.e. with an immediate effect).	

Termination for cause	<p>There is no general requirement for the justification of contract termination. The parties may stipulate specific reasons justifying termination of a contract for cause. However, it is also possible to provide for the possibility to terminate a contract with no reason whether for fixed-term or indefinite term contracts.</p>	<p>It is advisable to precisely list the reasons for the contract termination in order to avoid doubts.</p> <p>The right to terminate a contract without reasons granted to one party only may be considered as inconsistent with the principles of social coexistence (or good customs) and, therefore, be held invalid.</p> <p>These principles are intentionally not defined by the Polish legislator. They serve as a general clause and are defined by the Polish courts on a case-by-case basis. They are understood as the basic rules of honest and ethical dealings with other entities.</p> <p>In practice, the principles of social coexistence provided by the Polish civil law may be the equivalent of good practices provided by the Polish commercial law.</p>
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>The notion of good faith is introduced in a number of provisions. Very often, the Polish law subjects the outcome of the legal action on the existence of good faith.</p> <p>Where the law makes legal consequences contingent on good or bad faith, the existence of good faith shall be presumed.</p> <p>The good faith is not literally required in negotiation, conclusion or performance of contracts. However, the concept of acting in accordance with good customs or in line with the principles of social coexistence have been provided by the Polish law. These concepts are of similar character as good faith. There is also a general clause that stipulates that one cannot use any right that one may benefit from (e.g., the right to conclude contracts, the right of freedom of expression and the right of ownership), in a manner contrary to its social and economic purpose or to the principles of community coexistence. It might result in the invalidity of that person’s legal acts.</p>	

<p>Intuitu personae clause, or change of control or assignment clause</p>	<p>As a rule, the assignment of contract requires an agreement between the assignor and the assignee. It should take place with the consent of the other original party to the contract.</p> <p>A contract may provide for limitations as regards its assignment; e.g. the obligation to obtain another party's consent in a specific form or the possibility to make an assignment within the group companies only.</p> <p>For the change of control clause, in the absence of the clause, a party may not oppose the other party's change of control. The change of control limitation may be validly contained in contracts under the Polish law.</p>	
<p>Hardship clause (impresvion), i.e. unforeseeable circumstances and renegotiation</p>	<p>The parties are free to decide the conditions under which the renegotiation of the contract will take place in order to amend the contract to address unforeseen events.</p> <p>Following an extraordinary change of circumstances, if the performance faces excessive difficulties or threatens one of the parties with substantial loss that was unforeseen by the parties when concluding the contract, the court may define the mode of performing the obligations and the degree of the performance. The court can even decide upon termination of the contract, in accordance with the principles of community life. All of this is done keeping the interests of the parties in consideration. When terminating the contract, the court may, as far as necessary, decide upon a settlement of accounts, being guided by the principles specified in the preceding sentence.</p>	
<p>Force majeure</p>	<p>The definition of force majeure has not been stipulated by the Polish law. In practice, it is considered that it refers to an external event, impossible (or hardly possible) to predict and the effects of which cannot be prevented.</p> <p>A force majeure clause under the Polish law excuses one or both parties from the performance of the contract in some way following the occurrence of unforeseeable circumstances or events that are outside the party's control. That party is excused from or entitled to suspend performance of all or part of its obligations. In this event, the party that is unable to perform its contractual obligations is not liable for damages.</p>	<p>It is recommended to specify the definition of the force majeure in the contract and to detail rules for its implementation and effects on the contract, including possibly termination and contract renegotiation.</p> <p>Prior notification of the force majeure event may be also required under the Polish law.</p>

Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>The seller is generally liable toward the buyer when the product or service sold has some material or legal defect.</p> <p>In case the defects are discovered, the buyer may file a declaration aimed at reducing the price or renouncing the contract. This is unless the seller immediately and with no excessive inconveniences, exchanges the defective product or service for one that is free from defects or immediately removes the defects.</p> <p>The parties may extend, limit or exclude liability under a written contractual warranty clause. The exclusion or limitation of the liability under such warranty clause shall be ineffective if the seller insidiously concealed the defect to the buyer.</p>
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>As a rule, the person obliged to pay an indemnity shall be liable only for the normal effects of the act or omission that resulted in the damage. The extent of the indemnification shall cover the losses incurred by the injured person, as well as the benefits that the person could have obtained had the person not suffered from the damage – unless it is specified differently by the law or the clause of the contract.</p> <p>The debtor may assume by contract the liability for the nonperformance or improper performance of the obligation due to specified circumstances that he is not liable for by virtue of statutory law. However, the stipulation that the debtor is not liable for a damage that he might do to the creditor intentionally shall be null and void.</p>	

Competent jurisdiction, execution of foreign decisions and exequatur

The choice of forum and arbitration clauses are both allowed. However, some exceptions are provided by the law: such as cases concerning a real estate, which can only be decided by a court in the area of jurisdiction where the given real estate is located.

Rulings of foreign state courts issued in civil matters are recognized by virtue of law, unless specific obstacles exist (for instance, recognition of the ruling would be contrary to the basic principles of the legal order of Poland).

Judgments of foreign state courts in civil matters that may be enforced become enforceable in Poland through the exequatur procedure. Enforceability shall be declared if a judgment is enforceable in the state of origin and there are no specific obstacles. The exequatur does not need to enforce judgments rendered by the courts of other EU Member States.

It is recommended to consider the costs and duration of court proceedings when deciding on the competent jurisdiction. Arbitration will be more flexible (as there is a right to choose the arbitrators), can be faster and the hearings will be confidential. However, in some cases, it can be much more expensive.

Russia (civil law)

Contact: Anastasia Kaveshnikova

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	Contracts under the Russian law do not have to be in writing to be binding. However, this is subject to a number of exceptions. In case of a dispute, the parties will not be able to refer to the testimony to confirm the agreement and its terms. To that extent, a written contract is highly advisable.	The agreement in a written form can be concluded by the exchange of electronic documents, provided, however, that it is possible to confirm that the party to the agreement provided it.
Pre-contractual obligation: good faith and information obligation	<p>The parties must act in good faith and they are deemed to act in good faith, unless otherwise proven. This is the general and mandatory provision of the Russian law. This principle applies at the pre-contractual stage.</p> <p>At the stage of negotiations, formation and performance of an agreement, the party is not allowed to disclose or use the confidential information provided by the other party for non-intended purposes. Otherwise, it can be liable for damages.</p>	<p>The party not acting in good faith may be liable for damages.</p> <p>The parties may agree in their contract on good faith requirements, costs allocation, and other rights and obligations. Such provisions may provide for penalty in case of breach.</p> <p>The provisions related to the right of the parties to enter into such contractual clauses have been adopted in 2015 and are thus quite recent.</p>
Signature by counterparts	<p>At least one original copy of the contract shall be signed by the representatives of all the parties.</p> <p>Nevertheless, the Russian law allows the signature by counterparts, which can be completed by exchanging documents.</p>	In the case of a dispute, the single document signed by the parties will be accepted as an undisputable fact.
Language of the agreement	<p>Under the Russian law, the agreement should be made in the Russian language. The parties may agree on any other language of the agreement in addition to the Russian one.</p> <p>The language has to be understood by all parties; otherwise, the validity of the agreement may be challenged.</p>	<p>In case of bilingual contracts, it is highly recommended to specify the prevailing language.</p> <p>In case the prevailing language is not Russian, the notarized translation of the agreement will be required for state authorities, such as courts and tax authorities.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>The agreement is deemed concluded when the parties agree on the essential T&C. These are understood as such when they are named as essential by law or by any of the parties. In case of failure to reach an agreement on such essential T&C, the agreement is treated as non-concluded.</p> <p>Therefore, in case of divergence of essential T&C, the agreement is treated as non-concluded. In case of divergence of T&C other than the essential ones, the provisions of the Russian law apply.</p>	<p>The name and quantity of the goods are essential T&C of a supply agreement by virtue of law. Because of established court practice, the supply agreement should also provide for the term of delivery.</p>
Essential obligations	<p>The Russian law provides for essential obligations in relation to each type of contract. The party that failed to perform its obligation under the agreement may be liable for damages or penalty, if provided by the contract.</p>	<p>Under supply agreement, the supplier shall supply the goods of proper quality to the purchaser, and the purchaser shall accept and pay for them.</p>
Consideration	<p>Under the Russian law, each party to a contract is treated as a debtor of the other party, by what it is obliged to do in its favor and, simultaneously, as its creditor, by what it has the right to claim from it.</p> <p>The parties are free to agree on any consideration. At the same time, a contract cannot be valid without any consideration. If so, it may be challenged in court, but it is not void by operation of the law.</p>	
Price: determination, revision, indexing and payment terms	<p>The price must be fixed or at least determinable. Otherwise, the performance or delivery must be compensated for at the price that is usually charged for similar goods, works or services under comparable circumstances.</p> <p>In cases when the price is an essential T&C, failure to agree on it leads to non-conclusion of the contract.</p> <p>Once the price is agreed upon, the parties may revise it only if provided by the contract or by law.</p> <p>The parties are free to provide for any payment deadlines.</p> <p>The price may be stipulated in a foreign currency provided that the law on currency control is observed.</p>	<p>Price is not an essential T&C for a supply contract. Therefore, in case of failure to agree on it, the general provisions of the Russian law shall apply for its determination. The performance of the contract should be paid at the price that is usually charged for similar goods under comparable circumstances.</p> <p>If the goods are paid after the supply, the supplier has a pledge over such goods by virtue of law, unless otherwise provided for in the contract.</p>

Exclusivity provisions	The Russian civil law does not prohibit express exclusivity provisions.	However, such exclusivity provision must take into account restrictions of the Russian antitrust law. If the antimonopoly authority finds that such provision adversely triggers competitive requirements, the parties can be brought to substantial administrative fine.
Noncompete obligation	The Russian civil law does not expressly provides for noncompete construction. The Russian antitrust law considers such obligation included into contracts as contrary to the law.	If the anti-monopoly authority finds that such provision adversely triggers competitive requirements, the parties can face substantial administrative fine.
Governing law (implied content and public order)	<p>The parties are free to choose non-Russian law to govern their relations under their contract, provided that a foreign element exists; e.g., one of the party is a foreign legal entity. However, if the agreement is mostly connected with another law, the mandatory provisions of such law shall be observed.</p> <p>If the parties fail to agree on the applicable law, the Russian conflict of laws rules should apply. Under such rules, the law of a supplier should be a governing law for the supply agreement and the law of a service provider for the service agreement.</p> <p>The provisions of the contract may not contradict the Russian public order. The latter has no definition and, therefore, it may be interpreted quite broadly by court.</p>	<p>The governing law shall be expressly provided for in the contract or evinced from its T&C.</p> <p>The agreement on the governing law after the conclusion of a contract has a retroactive effect.</p>

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>The contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term – defined by the reference to calendar date or period of time ▶ An indefinite term <p>A contract may provide for tacit renewal for a particular period, if no party claims otherwise in the manner provided for in the contract.</p>	

Prior notice of termination	<p>It is highly recommended to give prior notice of termination of a contract, even if it is not expressly required under the contract.</p> <p>If the contract provides for such notice, the defaulting party may be liable for damages or penalty if provided for in the contract.</p>	<p>As a rule, parties agree on the termination procedure in a contract (it is highly recommended). Such contractual procedure becomes mandatory for the parties.</p>
Termination for cause	<p>A contract may be terminated by mutual agreement of the parties. Unilateral termination is allowed, as it is provided by law. But, it can also be provided for in the contract.</p> <p>A contract may be unilaterally terminated on the basis of the court ruling, if such termination is caused by substantial breach by one of the parties thereto.</p>	<p>Any of the parties to the service contract may unilaterally terminate it by virtue of law, provided that the service provider compensated the damages incurred by the client or the client paid the services rendered.</p>

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>The parties must act in good faith at all times. They are deemed to have acted in good faith, unless proven otherwise. This is a general and mandatory provision of the Russian law.</p> <p>Under the Russian civil law, neither party is entitled to gain an advantage from its unlawful or unfair conduct.</p> <p>The party not acting in good faith may be liable for damages.</p>	
Intuitu personae clause, or change of control or assignment clause	<p>In the absence of a change of control provision, a party may not oppose the other party's change of control, unless the contract provides for it.</p> <p>The assignment of a contract requires the consent of the other party, unless the contract provides for its preliminary consent. In the latter case, the assigning party should notify the other party of such assignment.</p>	

<p>Hardship clause (impresvion), i.e., unforeseeable circumstances and renegotiation</p>	<p>Under the Russian civil law, a material change of circumstances is a ground for the renegotiation or termination of the contract, unless otherwise is provided for in the contract or follows from the substance of the contract.</p> <p>If the parties did not reach an agreement on the renegotiation or termination of a contract due to material change of circumstances, the party may claim its alteration or termination in court.</p> <p>The parties are free to agree on any other conditions when they undertake renegotiation of the contract or its particular provisions. The contract should unambiguously provide for such conditions.</p>	<p>The change of the circumstances is treated as material when they have changed to such an extent that if the parties could have reasonably foreseen it, they would not have entered the contract or would have entered the contract under other T&C.</p>
<p>Force majeure</p>	<p>The party cannot be held liable for nonperformance or undue performance of its obligations if it is the result of an event of force majeure, unless otherwise is provided for in the contract.</p> <p>Force majeure events are understood as unavoidable and unpredictable events that are beyond the parties' control, such as flood, earthquake, fire and other nature disasters, and acts of war. The Russian law provides that business risks (such as lack of the goods to be supplied or lack of the funds to be paid) cannot be treated as force majeure events.</p>	<p>If the parties intend to extend the meaning of force majeure to cover acts of state authorities, changes in law or any other events that make it impossible to perform the contract, it should be clearly and unambiguously stated in the contract.</p>
<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>In case of defects in the supplied goods, the party may claim from the other party a decrease in the price, elimination of the defects or reimbursement of its expenses for elimination of defects, unless the party replaces the defected goods.</p> <p>In case of material defects, the party may terminate the contract.</p>	<p>The party that sells the acquired goods through the retail channel has the right to claim to replace the defected goods returned by consumers, unless otherwise is provided for in a contract between the supplier and the purchaser.</p>

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>The party is liable for damages in case of failure to perform the obligations set out by the contract or its undue performance, only if caused by intent or negligent actions (such as omissions), unless other grounds for liability are provided for in the contract.</p>	

Exclusion or limitation of liability for intentional breach is null and void.

The party may be held as not guilty if, taking into account the extent of its care and caution, it took all the necessary measures for proper discharge of its obligations.

Competent jurisdiction, execution of foreign decisions and exequatur

Parties are free to choose any place of jurisdiction and court. This is subject to certain restrictions, depending on the substance of the dispute.

By virtue of international treaties, the Russian state courts shall recognize and enforce the foreign awards, for which an exequatur is required. This is done unless, among others, the court determines that, under the Russian law, the particular case should have been considered by the Russian state court or its recognition and enforcement contradict to the Russian public order.

The latter has no definition and, therefore, it may be interpreted quite broadly.

6. Recent legislation and trends

Owing to the amendments in the Russian civil law in 2015, commercial agreements (such as supply, service and distribution agreements) may provide for specific warranties and indemnities of the parties.

Warranties

A party to a contract may provide warranties to another party at the date of the contract, prior or after thereof. Such warranties shall be relevant to the conclusion, performance or termination of the contract. They may relate to various aspects of a party's activity, its right to enter into the contract, its financial standing or that of any third party.

In case of breach of all or some of the warranties provided, the other party may claim recovery of damages or penalty in the amount provided for in the contract. Such rights are granted only if the party that breached the warranties provided reasonably understood that other party would rely on them.

Indemnities

The contract may provide for circumstances upon occurrence of which a party to the contract is obliged to compensate incurred losses to the other party. The contract should provide for the amount of such compensation or the procedure of its verification; the court cannot change the amount of compensation stipulated in the contract. Such mechanism is very similar to the mechanism known in English law as "indemnities."

Spain (civil law)

Contacts: Laura Fox and Phil McDonnell

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	A contract does not have to be in writing to be binding under the Spanish law. However, this is subject to a number of exceptions.	Several types of contracts must be executed into public deed. For these contracts, a certified copy of the public deed may be used to prove its existence. For private contracts, an original copy or a certified copy is required in order to prove their existence.
Pre-contractual obligation: good faith and information obligation	<p>Contracts must be negotiated, formed and performed in good faith. This provision is public policy and enshrined in the Spanish Civil Code. A party acts in good faith if that party believes it is acting in accordance with the law and that it is not harming the rights of others.</p> <p>The Spanish Civil Code does not include any specific provision regarding information obligations. However, a party has a duty at the pre-contractual stage to disclose any information that may be relevant and material to the other party's consent to enter into the agreement. Otherwise, lack of information or misleading information may invalidate consent and, as a result, a judge could declare the contract as void. The Spanish law recognizes consent as one of the three essential elements of contracts.</p>	<p>The Spanish law recognizes the freedom to break the negotiations, but a party may be liable for damages for acting in bad faith or misconduct.</p> <p>Spanish courts may force the party that has breached the negotiations to comply with the agreement at the other party's request, if the parties had agreed on the price and the object or purpose.</p>
Signature by counterparts	The Spanish law does not regulate this aspect. However, it is possible to sign in counterparts and it is a common practice.	
Language of the agreement	<p>In principle, the language of the agreement may be agreed on freely between the parties.</p> <p>The language has to be understood by all parties to the contract; otherwise, the party that has insufficient knowledge of the language is deemed not to have validly contracted.</p> <p>For agreements drafted in languages other than Spanish, sworn translations into Spanish will be required for the registration of such agreements before the Spanish authorities and administration. Spanish courts usually also require sworn translations of contracts into Spanish.</p>	<p>There is an obligation to use the Spanish language for agreements for contracting out public services with Spanish administrative authorities.</p> <p>If the contract does not define certain terms of a contract governed by the Spanish law, then provisions regarding interpretation of contracts in the Spanish Civil Code will apply.</p> <p>If more than one language is used, it is recommended to specify the one that will prevail, especially for performance and dispute.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>The T&C of the seller are enforceable against the buyer, if the latter accepts them at the formation of the contract at the latest.</p> <p>In case of a contradiction between the T&C of the buyer and those of the seller, both T&C are ineffective and the general Spanish law of sales apply.</p> <p>This knock-out rule applies as long as the parties have agreed on the core obligations (i.e., price, and goods and services) and the contract will basically be upheld. Conflicting provisions will be replaced by the statutory regulations and solutions provided by the Spanish Civil Code.</p>	
Essential obligations and imbalance	<p>The autonomy of the parties is the basic principle of the Spanish contractual law. Contracts will be binding as soon as parties have consented.</p> <p>The Spanish law is based on the good faith of the parties and does not forbid significant imbalance provisions for commercial contracts. However, on the basis of the bad faith of the parties, Spanish judges may declare void those clauses of the contract that result in a party being at an unfair disadvantage or disproportionately burdened, as compared to the other party.</p> <p>In general terms, the legal concept of abuse cannot be alleged by companies and professionals.</p>	
Consideration	<p>The Spanish law does not strictly recognize the common law concept of consideration. Instead, it uses the notion of cause – the rationale for the validity of the contract. This is considered as one of the three essential elements of contracts to be valid – i.e., consent of the parties, cause of the obligation and true object and good.</p> <p>Even when the cause is not expressed in the contract, it is assumed to exist and is lawful as long as the debtor does not demonstrate otherwise.</p> <p>The parties would usually expressly identify the cause of the contract in order to limit the risk of significant imbalance (see our comments above in “Essential obligations”).</p>	

Price: determination, revision, indexing and payment terms	<p>The price must be fixed or at least shall be determinable. Otherwise, the contract is void under the Spanish law.</p> <p>On the basis of bad faith, in case of abuse in the determination of the price by one party, the judge may terminate the agreement and award damages to the other party.</p> <p>The adjustment method and additional price (such as an earn-out clause) can be provided for. However, the method of calculation must be precise.</p> <p>The transfer of ownership is not linked to the payment of the price but to the transfer of the object that is going to be sold.</p> <p>The price may be stipulated in a foreign currency.</p> <p>The Spanish law considers the price as an essential obligation of the buyer. Thus, the seller shall not be compelled to deliver the purchased object if the buyer has not paid (unless the parties have agreed the deferral of the payment). Lack of payment may lead to termination of the contract under the Spanish law.</p>	<p>It is possible to appoint a third party to determine the price. The third party does not necessarily need to be an expert.</p> <p>The price cannot be fixed by one of the parties. The contract may be void if the price has been determined by the sole discretion of one party.</p>
Exclusivity provisions	<p>The grant of exclusivity (whether on the sale or buy side) is permitted. However, exclusivity clauses must determine the territory, the purpose and the duration in order to be valid under the Spanish law.</p>	<p>Exclusivity must not constitute or result in an anticompetitive practices, such as abuse of dominant position or an anticompetitive agreement.</p>
Noncompete obligation	<ul style="list-style-type: none"> ▶ Noncompete covenants are permitted during the performance of the contract and after its termination. ▶ The clause can provide a financial penalty in case of infringement by the defaulting party. 	<p>Noncompete clauses are subject to specific consideration from a competition law perspective. Moreover, the existence of such clause can be taken into account in the assessment of the existence of possible significant imbalance provisions.</p>

<p>Governing law (implied content and public order)</p>	<p>Parties are free to choose their governing law for international contracts, which may apply to the whole or part of contract. This is according to the principle enshrined in Article 3(1) of EU Regulation EC no. 593/2008, Rome I Regulation; but other conventions or treaties may apply, depending on the matter or type of contract.</p> <p>For certain subjects, to the extent that the law applicable to the contract has not been chosen by the parties, the law governing the contract shall be determined according to Articles 4 to 8 of the Rome I Regulation. Otherwise, it will be determined by the courts according to the provisions set forth in the Spanish Civil Code.</p> <p>There are exceptions to the freedom of choice, including the following:</p> <ul style="list-style-type: none"> ▶ The mandatory local law of a country will apply despite the choice (Article 9 Rome I). ▶ The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). ▶ It is an exception on grounds of public policy (Article 21 Rome I). 	<p>The Rome I Regulation sets out EU-wide rules for determining the national law that should apply to contractual obligations in civil and commercial matters involving more than one country.</p> <p>The form and solemnities of the agreements shall be governed by the laws of the country where they are granted.</p>
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
<p>Term and tacit renewal</p>	<p>Under the Spanish law, a contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term: It must be enforced until the expiry of its term or renewed term. ▶ An indefinite term: Each party may terminate the contract at any time without any justification (see "Prior notice of termination" below). 	<p>Not all contracts can be entered into for an indefinite term under the Spanish law – for instance, lease agreements.</p> <p>The judge may establish the term if the parties have not defined it in their contract in instances where the judge can deduce the intention of the parties to fix a term.</p>
<p>Prior notice of termination</p>	<p>A party must give reasonable prior notice of termination of a contract, even if this is not provided for in the contract. This will apply to indefinite contracts or, in case of absence of contract, if there is an established business relationship.</p>	

Termination for cause	<p>If the contract provides for grounds for termination, the clause should identify precisely the breaches that may result in termination for cause.</p> <p>In case of termination for breach, the non-breaching party may force the other party to comply with its obligations or ask for the termination of the contract.</p> <p>In both cases, the non-breaching party shall be empowered to claim damages and late interests against the breaching party.</p>	<p>Grounds for early termination based on the initiation of insolvency proceedings of any of the parties shall be declared as void under the Spanish law.</p>
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Contracts must be negotiated, formed and performed in good faith. This provision is public policy under the Spanish law.</p> <p>A party may be liable for damages in case of breach of this obligation.</p>	
Intuitu personae clause, or change of control or assignment clause	<p>The assignment of a contract requires an agreement between the assignor and the assignee, and requires the agreement of the other original party, unless otherwise stipulated in the contract.</p> <p>In the absence of a clause, a party may neither oppose the other party's change of control nor terminate the agreement as a result of the change of control. Express protection against change of control in the agreements is valid under the Spanish law.</p>	

<p>Hardship clause (imprevision), i.e., unforeseeable circumstances (renegotiation)</p>	<p>The Spanish Civil Code does not provide for specific provisions regarding unforeseen events that would fundamentally alter the balance of a contract, resulting in an excessive burden being placed on one of the parties. Thus, the parties are free to decide the conditions under which the renegotiation of the contract will take place in order to address the unforeseen event.</p> <p>If circumstances that were unforeseeable at the time of the contract make performance of the contract “excessively onerous” for a party, parties can ask for a renegotiation. In the meantime, it has to continue to perform the contract. In case of refusal or failure of negotiations, the parties have the right to terminate the agreement.</p> <p>For long-term contracts, the Spanish legal doctrine “being the circumstances as they are” (Rebus sic stantibus) shall be alleged by the parties in order to equilibrate the position of the parties where there has been a fundamental change in the circumstances.</p>	<p>Rebus sic stantibus is a Spanish legal doctrine that authorizes the renegotiation of the agreement conditions when circumstances at its point of origin have changed in ways fundamental to the object and the purpose of the agreement.</p> <p>In accordance with the Spanish case law, it may be alleged when the following conditions are met:</p> <ol style="list-style-type: none"> 1. The existence of a long-term contract 2. The occurrence of an extraordinary change on the circumstances or an unforeseeable event 3. One party being on a clear disadvantage in comparison with the other party
<p>Force majeure</p>	<p>The following criteria must be met in order for an event to be considered as force majeure under the Spanish law:</p> <ul style="list-style-type: none"> ▶ It is unavoidable and makes the performance of the agreement impossible. ▶ It is unpredictable and could not have been foreseen when the agreement was entered into. ▶ It is beyond the control of the parties. 	<p>The court will determine whether the conditions of force majeure are met.</p> <p>The legal definition of force majeure can be extended by the parties, for instance, to include strikes.</p> <p>It is recommended to specify in the contract the definition of the events or circumstances, and to detail rules for the implementation and effects on the contract, including its termination or renegotiation.</p> <p>Prior notification of the force majeure event is required.</p> <p>The Spanish case law and doctrine occasionally differentiates between force majeure and fortuitous event, for which it would be allowed to agree the liability for damages in the contract. Fortuitous event has been defined as an event that could not be foreseen but that, if foreseen, could have been avoided.</p>
<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>The seller shall be obliged to repair latent defects when those defects make the object useless, or if the defect reduces its value in such a way that the buyer would not have entered into the transaction with the other party or would have paid less for it. This obligation applies even if the seller ignored those defects. However, parties may deviate contractually from this obligation, which is not mandatory under the Spanish law.</p>	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>Under the Spanish law, the general principle is that breach of contract leads to compensation for damages for the actual loss and loss of profits.</p> <p>Limitation of liability provisions are valid. However, the Spanish Civil Code prohibits:</p> <ol style="list-style-type: none"> 1. Exclusion of liability clauses when the party has intentionally not committed with its obligations 2. Total exclusion of liability <p>In some specific areas, such as personal injury, limitation clauses are not valid.</p>	
<p>Competent jurisdiction, execution of foreign decisions and exequatur</p>	<p>Parties are free to choose arbitration or courts, except in certain matters.</p> <p>Arbitration clauses should be expressed as clear as possible in order to avoid interpretation disputes in the future. Particular attention should be given to the seat of arbitration and type of arbitration (ad hoc or institutional).</p> <p>Enforcement is carried out under the relevant international treaty or convention between the country of enforcement and the country where the award was rendered. Under the Spanish law, recognition and enforcement of international awards are ensured, regardless of the nationality or place of residence of the parties (according to the New York Convention).</p> <p>In Spain, to enforce foreign judgments, an exequatur is required before the Spanish jurisdiction, except for judgments rendered in other EU Member States.</p>	<p>Arbitration will be more flexible – as there is the right to choose the arbitrators – and can be faster, but can be much more expensive. Arbitration allows for confidentiality of hearings.</p>

Sweden (civil law)

Contact: Tuula Tallavaara

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	A contract does not need to be in writing under Swedish law, unless specific legislation apply, such as in the case of real estate transactions.	A scanned signed agreement is generally considered as a reliable copy of the contract, which can be used as a proof of contract.
Pre-contractual obligation: good faith and information obligation	There are no specific regulations requiring future contracting parties to act in good faith under Swedish law and there are no general obligations to inform or disclose information to the counterparty before an agreement is made. However, there is an obligation not to act disloyally.	<p>The freedom to break the negotiations is recognized under Swedish law, but a party may be liable for damages for acting in bad faith or misconduct.</p> <p>Under general contractual legal principles, including the doctrine of <i>culpa in contrahendo</i>, negligence or acting disloyally during negotiations may incur liability for damages, in accordance with tort law – for instance, if a party negotiates without an intention to enter into a contract or, following a negotiation process, neglects to inform the other party that it does not intend to enter into a contract.</p>
Signature by counterparts	Since a contract does not have to be in writing, signatures are not required either to have a contract held as binding under Swedish law, unless specific legislation apply, for instance, in the case of real estate transactions.	Whether a contract has been entered into is a matter of evidence for the contracting parties. Although a signed contract is generally preferred, signed counterparts or even acceptance via email could be considered sufficient.
Language of the agreement	In principle, the language of a contract may be agreed on freely between the parties, as long as the parties understand the provisions and have the intention to enter into the agreement.	If more than one language is used, it is necessary to specify the one that prevails, especially for performance and dispute.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>In case of contradiction between the T&C of the seller and of the buyer, an interpretation is made with a view to establish the parties' intentions with regard to the specific provision.</p> <p>The interpretation may result in T&C being amended or disregarded, so as to reflect the parties' intentions. Where a joint intention cannot be established, the conflicting provisions may be replaced by provisions in the applicable Swedish law, legal principles or similar regulations, unless significant adjustments are required, which could lead to a contract being declared void.</p>	<p>In case of conflict, specifically negotiated terms have priority over standard terms that have not been negotiated specifically.</p> <p>The outcome of an interpretation and construction may be difficult to foresee. It depends on numerous factors to be taken into account, such as the intentions of the parties, prior agreements and practices between the parties and the practice within the trade etc.</p>
Essential obligations	<p>Generally, there are no essential obligations or provisions that need to be inserted in a contract in order for it to be binding, unless otherwise prescribed by law (such as in the case of real estate transactions).</p>	
Consideration	<p>Swedish law does not apply the common law concept of consideration.</p>	<p>In certain circumstances, a contracting party may take action on provisions that are unreasonably burdensome. Unreasonably burdensome provisions may be adjusted or disregarded from and may even result in the contract being declared void.</p>
Price: determination, revision, indexing and payment terms	<p>The price is primarily determined by the contract.</p> <p>If there are no provisions in the contract, the price would generally be determined using general contractual principles and the Swedish Sale of Goods Act (if applicable), which provides for a <i>fair price</i> to be paid if the parties have not agreed on a price. Certain types of agreements, such as real estate transaction agreements, require the price to be determined in the contract in order to be valid.</p> <p>Adjustments, revisions and indexing of price are generally not accepted during the term of the contract, unless regulated in the contract itself.</p> <p>In commercial contracts, payment should be made latest 30 days from the invoice date, unless otherwise agreed with the creditor.</p>	

Exclusivity provisions	The grant of exclusivity (whether on the sale or buy side) is generally permitted under Swedish law.	Exclusivity provisions are permitted subject to compliance with, for instance, labor laws and competition laws. In addition, such clauses could, depending on the circumstances, be considered unreasonably burdensome and may thus be disregarded.
Noncompete obligation	<p>Noncompete clauses are generally permitted under Swedish law during the term of a contract and during a <i>reasonable</i> time after.</p> <p>The clauses may include <i>reasonable</i> financial penalties in case of breach by the obligor.</p>	<p>Noncompete clauses are subject to specific consideration from a labor and competition law perspective.</p> <p>Moreover, such a clause could be considered unreasonably burdensome and may thus be disregarded.</p>
Governing law (implied content and public order)	<p>Commercial parties are free to choose their governing law for international contracts, which may apply to the whole or part of the contract. This is according to the principle enshrined in Article 3(1) of EU Regulation EC no. 593/2008, Rome I Regulation; but other conventions or treaties may apply depending on the matter or type of contract.</p> <p>If the parties do not choose a governing law, it will be determined by the Swedish courts.</p> <p>There are exceptions to freedom of choice, such as the following:</p> <ul style="list-style-type: none"> ▶ The mandatory local law of a country will apply despite the choice (Article 9 Rome I). ▶ The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). ▶ It is an exception on grounds of public policy (Article 21 Rome I). 	The Rome I Regulation sets out EU-wide rules for determining the national law that should apply to contractual obligations in civil and commercial matters involving more than one country.

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A fixed-term contract will not be renewed automatically unless otherwise agreed. However, it is possible that the parties continue to perform in accordance with the contract following the expiration of such fixed term, upon which the contract may be deemed to be extended for an indefinite term.</p> <p>If the contract is made for an indefinite term, until further notice or with no specific term, and no notice period is stated, the contract may generally be terminated by any of the parties upon <i>reasonable</i> notice.</p>	
Prior notice of termination	<p>A reasonable prior notice is required for indefinite-term contract when not provided for in the contract.</p>	
Termination for cause	<p>Contracts can be terminated in accordance with their provisions.</p> <p>A non-breaching party must generally give the breaching party opportunity to remedy, compensate or otherwise rectify the breach prior to terminating the contract for cause, unless this is not reasonably possible.</p> <p>If the breach is material, the non-breaching party generally has the right to terminate the contract immediately.</p>	

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Prior to entering into contracts, parties are generally not obligated to act in good faith; instead, they negotiate on their own risk under Swedish law.</p> <p>Once a contract has been entered into, contracting parties need to act in good faith.</p>	<p>If a party acts in bad faith during a contract, he may be held liable for damages (<i>culpa in contractu</i>).</p>

<p><i>Intuitu personae</i> clause, or change of control or assignment clause</p>	<p>The assignment of a contract generally requires consent from both parties, unless otherwise agreed.</p> <p>A party may not oppose the other party's change of control, unless the contract provides for it.</p>	
<p>Hardship clause (<i>imprevisio</i>), i.e., unforeseeable circumstances and renegotiation</p>	<p>The parties are free to decide the conditions under which the renegotiation of the contract will take place in order to amend the contract to address the unforeseen event.</p> <p>In the silence of the contract, if circumstances that were unforeseeable at the time of the contract make performance of the contract "excessively onerous" for a party, it can ask for a renegotiation. In the meantime, it has to continue to perform the contract. In case of refusal or failure of negotiations, the contract may be revised or terminated by the court at the request of that party.</p>	<p>The Swedish Contract Act provides a possibility to adjust the contract if it becomes unreasonably burdensome for one party.</p> <p>As the parties may not succeed in renegotiating the contract, it is recommended to include other remedies, such as the possibility to deliver a similar product or service and the termination of the contract or damages.</p>
<p>Force majeure</p>	<p>Force majeure clauses are allowed under Swedish law, and it is possible to agree to include and specify certain force majeure events.</p> <p>Force majeure refers to abnormal and unforeseeable circumstances or events that were outside the party's control and that could not have been avoided even with exercise of due care. That party is excused from or entitled to suspend performance of all or part of its obligations. In this event, the party that is unable to perform its contractual obligations is not liable for damages.</p> <p>Force majeure is only applicable when performance is not possible.</p>	<p>It is likely, albeit not certain, that in the absence of force majeure provisions in the contract, Swedish law contains general legal principles to the same effect.</p> <p>It is recommended to clearly define the events and circumstances, and to specify the circumstances that will qualify as force majeure between the parties, as well as to specify the details for its implementation, including possible termination of the contract or its renegotiation.</p> <p>Prior notification of the force majeure event is generally required.</p>
<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>Unless otherwise agreed, under the Swedish Sale of Goods Act (if applicable), the seller is responsible for the goods to be fit for purpose and that the goods have normal characteristics.</p> <p>The buyer may not rely on defects that it ought to have known if the goods had been duly examined.</p> <p>It is possible to sell goods "as is"; however, the buyer may still allege that the goods are defective if the seller acted in bad faith, if the seller explicitly assured a certain quality or capacity, or if the defects are material.</p>	<p>The Swedish Sale of Goods Act is applicable in case of sale and purchase of movables or chattels, albeit not in case of consumer transactions, in which case the Swedish Consumer Sales Act applies.</p>

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>Limitation of liability clauses are generally allowed under Swedish law. However, extensive limitations of liability may be rendered unenforceable if and to the extent they are deemed unreasonable.</p> <p>A limitation of liability when a party has acted intentionally or grossly negligent would generally be considered as unreasonable and could be declared void.</p> <p>In some specific areas, such as personal injury, limitation clauses are not valid.</p>	<p>The Swedish Contract Act may be used to adjust provisions deemed unreasonable as indicated under the "Hardship clause" section.</p>
<p>Competent jurisdiction, execution of foreign decisions and exequatur</p>	<p>Parties are free to choose arbitration or courts, except in certain specific matters.</p> <p>Regarding jurisdiction, recognition and enforcement within the EU Regulation No. 1215/2012 applies.</p> <p>If there are no provisions in the contract, disputes are resolved in competent courts. However, parties may choose to have disputes resolved by arbitration tribunals.</p>	<p>In international commercial matters, parties are usually entitled to choose any court to settle the dispute.</p> <p>Arbitration will be more flexible, as there is a right to choose the arbitrators, the language and the seat. It can also be faster, but can be much more expensive. Arbitration allows for confidentiality of hearings.</p>

Switzerland (civil law)

Contact: Maja Krapf

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Conclusion of a contract	The conclusion of a contract requires a mutual expression of intent by both parties under Swiss law.	Where the parties have agreed on all essential terms, it is presumed that the contract will be binding, notwithstanding any reservation on secondary terms.
Non-written agreement	<p>The validity of a contract is not subject to compliance with any particular form, unless a particular form is prescribed by law.</p> <p>In the absence of any provision to the contrary on the significance and effect of formal requirements prescribed by law, the contract is valid only if such requirements are satisfied. Where the law requires that a contract has to be concluded in writing, that provision also applies to any amendment to the contract.</p>	<p>A contract required by law to be in writing must be signed by all persons on whom it imposes obligations.</p> <p>Signatures must be appended by hand by the parties to the contract.</p> <p>It is advisable to enter into a contract in written form for evidence purposes.</p>
Pre-contractual obligation: good faith and information obligation	<p>Every person must act in good faith in the exercise of rights and in the performance of obligations (Article 2, paragraph 1 of the Swiss Civil Code). Therefore, contracts must be negotiated, formed and performed in good faith.</p> <p>Any party has the duty at the pre-contractual stage to disclose any information that is relevant and material to the other party's consent to enter into the contract. The parties are obliged to negotiate genuinely. They also have to comply with the duty of truthfulness and the confidentiality obligations. The knowledge of planned investments by the counterparty has also to be taken into account.</p>	In case of a breach of pre-contractual duties, the liability arising from pre-contractual liability (<i>culpa in contrahendo</i>) may apply. Therefore, a party acting in bad faith may be liable for damages.
Signature by counterparts	<p>The Swiss law does not provide for signing separate counterparts of a contract. Thus, in principle, at least one copy of the contract must be signed by the authorized representatives of all parties to the contract.</p> <p>However, the parties may contractually agree on signature by counterparts.</p>	

Language of the agreement	<p>In general, the language of a contract may be agreed on freely between the parties, except for specific matters. However, the language has to be understood by all parties to the contract; otherwise, the party that has insufficient knowledge of the language is deemed not to have validly contracted.</p> <p>A translation into the respective official language (such as German, French, Italian and Rhaeto-Romanic) is required for the registration of agreements before authorities and administration bodies (e.g., land registry and Commercial Register). Swiss courts usually require a translation of contracts into the official language of the competent canton. In case of various official languages, the cantons regulate the use of the language.</p>	<p>If more than one language is used, the language that prevails should be specified.</p> <p>A term may mean one thing in one jurisdiction, but something else in another one. Thus, it is highly recommended to define important terms, to refer to the applicable legal provision or to state the term in its original language.</p>
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2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>T&C become part of a contract if the parties accepted them and if each party had access to the T&C. It is highly recommended that each party signs the T&C in order to confirm their application. In case of contradictions between the T&C of the buyer and those of the seller, both T&C are void (partial disagreement), and the Swiss law applies instead. This rule applies as long as the parties have agreed on the essential elements of the contract, such as price and object.</p>	

<p>Essential obligations</p>	<p>In general, the content of a contract may be freely determined within the limits of the Swiss law. Thus, a contract is void if its terms are impossible, unlawful or immoral. However, where the defect pertains only to certain terms of a contract, those terms alone are void, unless there is cause to assume that the contract would not have been concluded without them.</p> <p>Furthermore, where there is a clear discrepancy between performance and consideration under a contract – as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness – the injured party may declare within one year that it will not honor the contract and demand restitution of any performance already made.</p>	<p>A party laboring under a fundamental error when entering into a contract is not bound by that contract. However, a person may not invoke error in a manner contrary to good faith. In particular, the party acting in error remains bound by the contract it intended to conclude, if the other party accepts that contract. A party acting in error and invoking that error to repudiate a contract is liable for any loss or damage arising from the nullity of the agreement, where the error is attributable to its own negligence, unless the other party was aware or should have been aware of the error.</p> <p>A party induced to enter into a contract by fraudulent acts or omissions of the other party is not bound by such a contract, even if its error is not fundamental.</p> <p>If a party has entered into a contract under duress from the other party or a third party, it is not bound by that contract.</p> <p>If the party acting under error, fraud or duress neither declares to the other party that it intends not to honor the contract nor seeks restitution for the performance made within one year, the contract is deemed to have been ratified. The one-year period starts on the day the error or the fraud was discovered or on the day the duress ends.</p>
<p>Consideration</p>	<p>The Swiss contract law does not require any consideration and the contract is valid although no consideration has been agreed upon. However, whether a consideration is paid or not and what type of consideration has been agreed upon are relevant for the qualification of the respective contract. In case the consideration consists of money, the contract is qualified as a purchase contract. If assets are exchanged, it is qualified as a contract of exchange. If assets are transferred to another person without an adequate consideration, the contract qualifies as a gift.</p>	

Representation	<p>Under the Swiss Code of Obligations (CO), different types of representation exist, such as:</p> <ul style="list-style-type: none"> ▶ Contractual representation: Rights and obligations arising out of or in connection with a contract signed by an agent in the name of another person accrue to the person represented (principal), provided the agent is authorized to sign the respective contract. If a person enters into a contract on behalf of a third party without being authorized to do so, rights and obligations do not accrue to the latter, unless it ratifies the contract. ▶ Apparent authority: If, by conduct, a person creates the appearance that authority was conferred to an agent or if that person does not object to the created appearance, a third party can rely on such authority. ▶ Agency without authority: If a person conducts business on behalf of another person without authorization, that person is obliged to do so in accordance with the principal's best interests and presumed intention. 	<p>Where the represented party has expressly or de facto announced the authority conferred, it may not invoke the total or partial revocation of such authority against a third party acting in good faith, unless it has likewise announced such revocation.</p>
Price: determination, revision, indexing and payment terms	<p>The purchase price to be paid under a purchase contract can be freely determined by the contract parties. The price can be fixed, but needs to be determinable at least. If no price is indicated in the contract, the price is presumed to be the average current market price at the place of performance. Where the price is based on the weight of the goods, the weight of the packaging (tare) is deducted.</p> <p>The purchase price can be stipulated either in a local or in a foreign currency.</p>	<p>A purchase contract may provide for price adjustment mechanisms.</p> <p>If no payment terms have been agreed upon in the purchase contract, the price is due as soon as the object of purchase passes into the buyer's possession.</p> <p>A debtor in default on payment of a pecuniary debt must pay default interests of 5% per annum, even where a lower rate of interest was stipulated in the contract. Where the contract envisages a rate of interest higher than 5%, whether directly or by an agreement of a periodic bank commission, such higher rate of interest may also be applied while the debtor remains in default. In business dealings, where the normal bank discount rate at the place of payment is higher than 5%, default interest may be calculated at the higher rate.</p>
Exclusivity provisions	<p>Exclusivity provisions, which are permissible, are subject to the applicable antitrust laws and need to be drafted very carefully in order not to violate that law.</p>	

Non-competition obligation	<p>Non-competition clauses are permitted under the Swiss law, during the performance of the contract and after termination of a contract. However, such clauses must be limited in time, territory and scope. The prohibition to compete shall not exceed three years. An exceedance of the three years is only permitted under special circumstances.</p> <p>Furthermore, non-competition clauses can provide for a financial penalty in case of infringement. Financial compensation is mandatory for an agency contract in case of a post-termination non-competition clause (according to Article 418d, paragraph 2 of the Swiss CO).</p> <p>Non-competition clauses in employment contracts must be made in writing and contain at least the employee's signature in order to be valid.</p>	Swiss courts may, at their discretion, impose restrictions on excessive prohibitions of competition, taking due account of all relevant circumstances. They will, in particular, have due regard to any consideration paid by the counterparty.
Governing law (implied content and public order)	<p>Contracts where both parties are domiciled in Switzerland are governed by the Swiss law. In international contracts – i.e., if at least one party is domiciled abroad – the parties are free to choose the governing law. The choice of law must be express or clearly evident from the terms of the contract or the circumstances.</p> <p>In the absence of a choice of law in international contracts, Article 117 of the Swiss Code on Private International Law (CPIL) and the following apply.</p>	<p>Special provisions regarding the governing law apply, among others, to the following international contracts:</p> <ul style="list-style-type: none"> ▶ Sale of movable property ▶ Real property ▶ Consumer contracts ▶ Employment contracts ▶ Contracts concerning intellectual property rights <p>Treaties or international conventions may also define the applicable law in an international context.</p>

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term: The contract must be fulfilled until expiry of the term. ▶ An indefinite term: Each party may terminate the contract in accordance with the respective termination provisions. <p>If a contract with a fixed term is tacitly continued, its duration becomes indefinite.</p>	

Prior notice of termination	A fixed-term contractual relationship ends without notice. A contractual relationship for an unlimited period may be terminated by either party by giving notice of termination according to the respective contract.	The parties may, in general, freely agree on the termination provisions in the contract, such as the notice period and termination dates, unless minimum notice periods or termination dates are set forth by mandatory legal provisions. If a contract does not contain any termination provisions, the statutorily prescribed notice periods and termination dates apply. Mandatory legal provisions apply to the termination of certain contract types, such as employment contracts, lease agreements and agency agreements.
Termination for cause	Each party may terminate a contract with immediate effect at any time for good cause, if the respective contract or the statutory provisions provide for grounds for such termination.	

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, formed and performed in good faith. A party may be liable for damages in case of a breach of this obligation.	
Intuitu personae clause, or change of control or assignment clause	The assignment of a contract requires an agreement between the assignor and the assignee, and the approval of the respective counterparty of the contract to be assigned. A change of control does not affect a contract, unless provided otherwise in the respective contract.	

Hardship clause (impresvion), i.e., unforeseeable circumstances and renegotiation

Basically, contracts have to be fulfilled by the parties. However:

- ▶ The parties are free to define the conditions under which the renegotiation of the contract will take place, in order to amend the contract to unforeseen events.
- ▶ The parties may also agree on indexation and renegotiation clauses at the time of the conclusion of the agreement.
- ▶ There are statutory provisions that enable an adjustment of an agreement.
- ▶ If circumstances that were unforeseeable and not avoidable at the time the contract was signed make the performance of the contract "excessively onerous" for a party (clausula rebus sic stantibus), then the respective party may ask for a renegotiation. In the meantime, the party has to continue to perform the contract. In case of a failure of negotiations regarding the amendment, the parties can agree on the avoidance of the contract or ask the judge to adapt it. If the parties still disagree, the Swiss judge may revise or terminate the contract at the request of a party.

Statutory provisions that enable an adjustment include and are not limited to the following:

- ▶ Article 266g, paragraph 1 of the CO: In case of a rental contract, both parties can terminate the contract with the legal periods, if there are circumstances that make the performance of the contract unacceptable.
- ▶ Article 337a of the CO: In case of an employment contract, the employee can terminate the contract without notice, if the employer got illiquid and can't secure the employees claims.
- ▶ Article 373, paragraph 2 of the CO: In case of a contract of work, the judge can allow a resolution of the contract or raise the price, if there are extraordinary and unforeseeable circumstances, which cause a delay or complicate the finalization excessively.

The following conditions need to be fulfilled for an adjustment by the court on the basis of clausula rebus sic stantibus:

- ▶ Alteration of the circumstances after conclusion of the contract
- ▶ Serious disturbance of the equivalence (i.e., events that fundamentally alter the equilibrium of a contract resulting in an excessive burden being placed on one of the parties)
- ▶ Lack of foreseeability and avoidability
- ▶ No contradictory behavior of the party claiming clausula rebus sic stantibus

For instance, the judge would deny an amendment in case of a loan agreement, where the deterioration of the borrower's economic circumstances doesn't justify an amendment of the contract.

Force majeure	<p>There is no detailed legal provision under the Swiss law regarding force majeure. Thus, it is highly recommended to contractually provide for a general definition of force majeure events. A force majeure event is any event that is beyond the affected party's reasonable control, which could not have been foreseen when the agreement was entered into and could not have been prevented or avoided by the exercise of all due diligence. Such an event makes the performance of the contract impossible, as the contract should also provide for a list of events that shall qualify as an event of force majeure, such as acts of god, natural disasters, strike, embargo and epidemics. It should also provide for the consequences of an event of force majeure; i.e., that the affected party's obligations are postponed and that no damages or penalties need to be paid because of such postponement.</p>
Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>There are special provisions regarding unconformity and latent defects, such as Article 201, paragraphs 2 and 3 of the Swiss CO. According to this, the buyer must inspect the condition of the purchased object as soon as feasible in the normal course of business. If the buyer discovers defects that the seller is liable to under warranty, then the seller must be notified without delay.</p> <p>In the event of failing to do so, the purchased object is deemed accepted, except in the case of latent defects that could not have been revealed by the customary inspection. Such latent defects have to be notified immediately to the seller after their subsequent detection, otherwise the object will be deemed accepted even in respect of such defects.</p>

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>Generally, a party is liable for any fault attributable to it and for any damage caused, i.e., for direct damages and indirect damages. Such liability may be judged more leniently if the party in default does not aim to achieve any advantages or benefits from the respective contract.</p> <p>Limitations of liability are permitted under the Swiss law. However, any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void. At the discretion of the court, an advance exclusion of liability for slight negligence may also be deemed void in the following cases:</p> <ul style="list-style-type: none"> ▶ If the party accepting an exclusion of the other party's liability was in the other party's service at the time the waiver was made ▶ If the liability arises in connection with commercial activities conducted under official license <p>No exclusion or limitation of liability is permitted with respect to product liability.</p>	
<p>Competent jurisdiction, execution of foreign decisions and exequatur</p>	<p>The parties are generally free to choose whether disputes shall be solved by arbitration or by ordinary courts. In international commercial disputes, parties are usually also entitled to choose the place of jurisdiction.</p> <p>The execution of foreign decisions is carried out pursuant to the relevant international treaty or convention. For instance, the Lugano Convention prevails on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters; and the New York Convention on the recognition and enforcement of foreign arbitral awards. If no treaty or convention exists between the countries concerned, enforcement is carried out under the CPIL and the Civil Procedure Code (CPC).</p>	<p>The conditions that need to be fulfilled for a foreign award to be generally recognized according to the Swiss CPIL include the following:</p> <ul style="list-style-type: none"> ▶ The award was made by a foreign locally competent authority. ▶ The award is a definitive award (i.e., it is legally binding). ▶ There are no grounds for refusal – for instance, infringement of the public policy or if there is already a legally binding court decision concerning the relevant matter (res iudicata).

Contacts: Antoinette van Beest-de Mul

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	A contract does not have to be in writing to be binding under the Dutch law for the contractual parties. However, this is subject to a number of exceptions, such as an agreement regarding the purchase and sale of real estate.	<p>A scanned copy of the signed contract should be considered as a reliable copy of the contract and may be used as a proof of contract. However, each party or a judge could require that, in the event of dispute, the original version of the contract is presented.</p> <p>Although verbal contracts are valid, it not always easy to (judicially) enforce the verbal agreement. The burden of proof lies with the party that alleges something, which means that the party that invokes the verbal agreement needs to prove that such contract exists.</p>
Pre-contractual obligation: good faith and information obligation	<p>The pre-contractual phase has three stages and is governed by reasonableness and fairness. In the first stage, parties can negotiate without obligations to be bound to each other. If parties reach the second stage, (unjustified) termination of the negotiations can lead to damage incurred by one of the parties; these damages may need to be compensated by the other party. If parties reach the third stage, termination of the negotiations may be considered a breach of good faith dependent of the legitimate expectations of the other party that an agreement will be formed.</p> <p>Certain parties (such as financial service providers) have a duty at the pre-contractual stage to disclose any information that is relevant and material to the other party's consent to enter into the transaction.</p>	<p>It is advisable to be clear in the expectations that you create once negotiating a contract.</p> <p>In practice, damages arising from termination of pre-contractual negotiations are rarely granted by the court.</p>
Signature by counterparts	Under the Dutch law, agreements are form-free and can be signed in counterparts.	A contract may be entered into in any number of counterparts and by the parties to it on separate counterparts, each of which, when so executed and delivered, shall be an original, but all the counterparts shall together constitute one and the same instrument.

Language of the agreement	<p>The language of the agreement may be agreed on freely between the contractual parties.</p> <p>The language of articles of association of a Dutch entity must be Dutch. An unofficial translation can be provided to the parties involved.</p>	If more than one language is used, the one that prevails must be specified, especially for performance and dispute.
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2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>T&C are often used between commercial parties.</p> <p>Under the Dutch law, a reference to a party's T&C only may not be sufficient to make them applicable. The T&C need to be handed to the counterparty.</p> <p>In the event of battle of forms, the Dutch law determines that the T&C of the party with the second referral are not applicable (the first-shot rule), unless such party explicitly rejects those T&C by means of a written confirmation, and states that its own T&C are applicable.</p> <p>It is possible, but not compulsory, for a party to file its T&C with the Dutch Chamber of Commerce as well as with a clerk of the court's office.</p> <p>A stipulation in T&C may be nullified:</p> <ul style="list-style-type: none"> ▶ If it is unreasonably onerous to the other party, taking into consideration the nature and the further content of the contract, the manner in which the T&C were established, the mutually apparent interests of the parties, and the other circumstances ▶ If the user has not given the other party a reasonable opportunity to take note of the T&C 	In international contracts, it is possible that the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) applies to the determination of the applicable T&C.
Essential obligations and imbalance	<p>A juridical act that infringes a mandatory statutory provision (e.g., non-competition provisions) or public decency is null and void.</p> <p>In the event the content of the agreement is not sufficiently clear, the agreement can be null and void.</p>	There is no specific provision that prohibits significant imbalance. However, pursuant to the Dutch law, this is derived from the general provisions regarding reasonableness and fairness.
Consideration	The Dutch law does not recognize the common law concept of consideration.	Agreements without any consideration are valid agreements. However, the legal basis of the agreement will be different; for instance, an agreement without consideration is considered a gift.

Price: determination, revision, indexing and payment terms	<p>The price must be at least determinable; otherwise, the contract can be annulled. However, framework agreements are valid even if they do not provide a price, but a mechanism to determine the price for subsequent contracts under the framework agreement needs to be provided.</p> <p>Adjustment method and additional price, such as an earn-out clause, can be provided for.</p> <p>The transfer of ownership is not linked to the payment of the price.</p> <p>The price may be stipulated in a foreign currency.</p> <p>Invoices sent between companies (i.e., B2B) must be paid within 60 days, unless a longer period has been agreed upon on reasonable grounds. If no contractual arrangements have been made, the invoice must be paid within 30 days. Governmental authorities must pay an invoice received within 30 days.</p>	<p>It is possible to appoint an expert to determine the price if parties do not reach an agreement. Either the contract may provide for expert determination or the parties may request the Dutch court to appoint an expert to determine the price.</p> <p>The party that claims the annulment of a contract must appeal to the other party that the contract is annulable. If the other party objects, the claiming party must appeal to a judge.</p>
Exclusivity provisions	The grant of exclusivity (whether on the sale or buy side) is permitted.	The exclusivity is subject to the competition law and must be assessed in each individual case.
Noncompete obligation	<p>A noncompete clause is permitted during the performance of the contract and after the termination of a contract. The conditions, term and scope of the noncompete obligation are laid down in the law, and further subject to reasonableness and fairness.</p> <p>It is common practice that the clause provides a financial penalty in case of infringement of the noncompete obligation.</p>	<p>Such a clause is subject to specific consideration from a competition law perspective.</p> <p>If the term and scope of the noncompete obligation are too extensive, it is possible that the judge will annul the clause or mitigate the term and scope of the noncompete obligation.</p>

<p>Governing law (implied content and public order)</p>	<p>Parties are free to choose their governing law for international contracts, which may apply to the whole or part of contract. This is according to the principle enshrined in Article 3(1) of EU Regulation EC no. 593/2008, Rome I Regulation; but, other conventions or treaties may apply depending on the matter and type of contract.</p> <p>If the parties do not choose a governing law, it will be determined by the courts.</p> <p>There are exceptions to the freedom of choice, which include the following:</p> <ul style="list-style-type: none"> ▶ The mandatory local law of a country will apply despite the choice (Article 9 Rome I). ▶ The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). ▶ It is an exception on grounds of public policy (Article 21 Rome I). 	<p>The Rome I Regulation sets out EU-wide rules for determining the national law that should apply to contractual obligations in civil and commercial matters involving more than one country.</p>
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
<p>Term and tacit renewal</p>	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term: The agreement shall end by operation of law after the fixed term, if the agreement does not provide for a (tacit) renewal and such renewal has not taken place. However, if parties continue their legal relationship, it can be argued that the agreement is automatically renewed. ▶ An indefinite term: It is recommended to include provisions regarding the reasons and manners of termination of the agreement. If such provisions are not included, general rules of the Dutch law apply regarding termination, such as reasonableness and fairness, nonfulfillment, and vitiated consents. 	

Prior notice of termination	<p>It is common practice to include in the contract that a party must give a reasonable prior notice (in writing) of termination of a contract.</p> <p>However, in some cases, although an obligation to provide a prior notice is not included in the contract, a party can be obligated to give a prior notice to the other party, pursuant to reasonableness and fairness. For instance, this is applicable for long-term contracts or when the termination of the contract has a material impact on the business of the other party.</p>
Termination for cause	<p>If the contract provides for the causes of termination, the clause should identify precisely the breaches that are grounds for termination.</p> <p>The mandatory law stipulates that the non-breaching party can terminate the contract in the event that:</p> <ul style="list-style-type: none"> ▶ The defaulting party fails to fulfill its obligations under the contract. ▶ The defaulting party is given a reasonable time to fulfill its obligations under the contract. <p>If fulfillment of the defaulting party is not possible, the non-breaching party can terminate the agreement without prior notice of default.</p>

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Contracts must be negotiated, formed and performed in good faith under the Dutch law. This provision is public policy.</p> <p>A party may be liable for damages in case of breach of this obligation.</p>	
Intuitu personae clause, or change of control or assignment clause	<p>The assignment of a contract requires an agreement between the assignor and the assignee, and requires the agreement of the assignor, unless otherwise stipulated in the contract.</p> <p>In the absence of a clause, a party may not oppose the other party's change of control, unless the contract provides for it.</p>	

Hardship clause (impresvion), i.e., unforeseeable circumstances and renegotiation	Under Dutch law, the court may, upon the request of one of the parties, modify the effects of a contract. Alternatively, it may set the effects aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.	
Force majeure	<p>This clause excuses one or both parties from performance of the contract in some way following the occurrence of unforeseeable circumstances or events that are outside the party's control. That party is excused from or entitled to suspend the performance of all or part of its obligations. In this event, the party that is unable to perform its contractual obligations is not liable for damages.</p> <p>An event can be considered as force majeure under the Dutch law if the following criteria are met:</p> <ul style="list-style-type: none"> ▶ It is unavoidable and makes the performance of the agreement impossible. ▶ It is unpredictable and could not have been foreseen when the agreement was entered into. ▶ It is beyond the control of the parties. 	<p>It is recommended to provide for the definition of the events and circumstances, and to detail rules for the implementation and the effects on the contract. The clause may also provide for the conditions for the termination of the contract or its renegotiation. The legal definition of force majeure can be extended by the parties, for instance, to include strikes.</p> <p>Prior notification of the force majeure event is required.</p>
Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>Under the Dutch law, there is a specific regime regarding unconformity and latent defects. In commercial contracts between legal entities, the applicability of this regime is often excluded.</p> <p>Limited warranty clauses are possible under certain conditions.</p>	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>The general principle under the Dutch law is that a breach of contract leads to compensation only for direct foreseeable loss or damage.</p> <p>Limitations are possible under the following conditions:</p> <ul style="list-style-type: none"> ▶ To be valid, the compensation for breach must be brought to the parties' attention and accepted by them. ▶ Exclusion or limitation clauses may be inapplicable in cases of willful misrepresentation and gross negligence. ▶ In some specific areas – for example, personal injury – limitation clauses are not valid. 	<p>It is also possible to extend a party's liability, such as by excluding the right to claim force majeure.</p>
<p>Competent jurisdiction, execution of foreign decisions and exequatur</p>	<p>Parties are free to choose arbitration or courts.</p> <p>Enforcement is carried out under the relevant international treaty or convention in the country of enforcement and the country where the award was rendered. Under the Dutch law, recognition and enforcement of international awards are ensured, regardless of the nationality or place of residence of the parties (according to the New York Convention).</p> <p>In the Netherlands, an exequatur is required before a Dutch jurisdiction to enforce a foreign judgment, except for judgments rendered in other EU Member States.</p>	<p>In international commercial matters, parties are usually entitled to choose any court to settle the dispute.</p> <p>Arbitration will be more flexible, as there is the right to choose the arbitrators, the language and the seat of the arbitration. It can be faster, but can be much more expensive. Arbitration allows for confidentiality of hearings.</p>

Turkey (civil law)

Contact: Can Gecim

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	<p>The validity of the contracts is not subject to any restriction regarding its form, unless otherwise provided in the relevant Turkish legislation. For example, it is obligatory to conduct factoring contracts in written format. In order to transfer a claim, the parties are obliged to conduct a written agreement as well.</p> <p>A contract is concluded by the declaration of intents of parties, which are mutual and consistent to each other. In principle, non-written contracts are binding as per to the “freedom of form” principle, which applies to contracts. However, this is subject to a number of exceptions.</p>	<p>If the amount of a contract is above TRY2,500, its existence shall be proved only in written form before the judicial authorities.</p> <p>Some agreements are required to be in written form in order to be valid and provable.</p> <p>Moreover, some agreements, such as sale of real property agreements, are required to be conducted before the public bodies in order to be valid and provable.</p>
Signature by counterparts	<p>At least one copy of the contract must be signed by the authorized representatives of all parties to the contract.</p> <p>Parties may decide to sign the contract by counterpart.</p>	<p>It is obligatory to sign the contract through the handwriting of the debtor.</p> <p>However, a secure electronic signature has the same legal effect as a handwriting signature under the Turkish law.</p> <p>In practice, each page of the document is signed for evidencing purposes.</p>
Language of the agreement	<p>Under Article 1 of the Law on Obligation to Use Turkish Language in the Economic Enterprises numbered 805, any type of companies or enterprises that are of Turkish nationality shall use Turkish language in all kinds of transactions, agreements, correspondences, accounts and books within Turkey.</p> <p>This obligation applies to foreign companies and enterprises only in their communications, transactions and relations with governmental offices and government officers.</p>	<p>A contract to be executed between two or more Turkish companies (including the local companies that are affiliated by foreign parent companies) should be prepared and signed in Turkish language. If it is chosen to be executed in a foreign language, it has to be accompanied with a Turkish version, which shall prevail in the event of dispute.</p> <p>It is not mandatory for a foreign company to execute all the contracts with the Turkish companies in the Turkish language.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>T&C are on the basis of commercial relationships; there might be discrepancies between the T&C of the seller and the buyer.</p> <p>T&C are regulated by Articles 20 through 25 of the Turkish Code of Obligations (TCO). Accordingly, general T&C are provisions drafted in advance by the draftsman of the contract, previously single-handed, to be used in different contracts further and that are offered to the counter side of the contract.</p> <p>It is further regulated within the TCO that, for the determination of the general T&C, it is not important whether the elements are regulated in the contract or its annexes, nor the scope of the elements, type or forms of writing. In case the texts of contracts that have the same content are not identical, this will also not be taken into consideration during evaluation processes. The provisions regarding the general T&C negotiated and agreed in the contracts does not solely disqualify them from being considered as general T&C.</p> <p>A standard term that is unfavorable to one party is only deemed valid if the latter has been informed on the existence and context of such term by the other party, and has accepted the relevant term. Otherwise, such term is deemed as unwritten. In addition to this, standard terms that are unsuitable to the contract in question or the nature of the transaction are also deemed unwritten.</p>	<p>Article 2 of the TCO is considered by the doctrine as regulating the knock-out rule. According to this, in case parties have agreed upon all the primary terms of a contract, the contract is deemed to have been concluded, even if the secondary terms have not been negotiated. The court determines the secondary terms with due regard to the features of the transaction, if the parties fail to reach an agreement thereof. The provisions regarding the form of the contracts are reserved.</p>

Essential obligations and imbalance	<p>It is obligatory and also sufficient to agree upon essential obligations of a legal relationship to perform a valid contract.</p> <p>Essential obligations may vary depending on the type of contract. But, in general, price and consideration, scope, and time of the contract are essential obligations of a contract. For example, for a valid sales contract, object and its price are required to be determined.</p> <p>An equilibrium between the performances of parties is an accepted concept under the Turkish law.</p> <p>In case the balance between performances of parties in an agreement may be disrupted intolerably – to the detriment of one party because of some unforeseeable events – such party may request from the court the adaptation of the contract to new circumstances. Alternatively, it may request to rescind the contract where such adaptation is not possible with respect to concept of equilibrium. This is explained in more detail in the “hardship clause” section below.</p>	<p>It is adequate to conduct a tacit declaration of the mutual intention to form a valid contract under the Turkish law.</p> <p>The price of the contract can be determined later as well (see the section “Price: determination, revision, indexing and payment terms” below).</p> <p>As an example, under Article 480 of the TCO numbered 6098, it has been regulated that the determined fixed fee of a contract of construction may be amended because of unforeseeable and changing circumstances, in order to maintain the balance of interests between parties. However, in practice, to get an adaptation verdict from the court is quite difficult and requires evidencing of real unforeseeable and extraordinary events, i.e., significant economic developments at the court, such as devaluation.</p>
Consideration	<p>As stated in “Essential obligations,” for necessary elements to embody a valid contract, consideration must be communicated and agreed upon by the contracting parties.</p>	
Price: determination, revision, indexing and payment terms	<p>The price is an essential term of the contract and it has to be either determined or determinable.</p> <p>The price may be stipulated in a foreign currency.</p> <p>Although it is quite exceptional in practice, in some cases, such as situations of hardship, the price can be revised in accordance with the relevant procedures of adaptation of the contract. Price indexing may affect the price of contract.</p> <p>In the event of default in payment of price, the other party can claim damages for such default or delay (in case there is a delay), or withdraw from the contract.</p>	<p>In case the contract price is negotiable in accordance with the facts and circumstances of the case, it is considered as determined price. It is important to concisely set out the price and payment terms.</p>
Exclusivity provisions	<p>Exclusivity may be agreed on between parties, but there is no such obligation arising out of the law.</p> <p>In case of a breach of the exclusivity clause, either the penalty clause will be effective, if it is agreed so, or the party may seek for compensation, as per to general rules under the TCO.</p>	

<p>Noncompete obligation</p>	<p>A noncompete clause can be provided for in a contract as per the mutual consent of parties. It will cover the term of contract and after the termination of the contract, if not otherwise agreed upon by the parties.</p> <p>The clause can provide a financial penalty in case of infringement.</p>	<p>With a noncompete clause, in general, parties are obliged to preserve the following, within the country or out of the country:</p> <ul style="list-style-type: none"> ▶ The intellectual, industrial and commercial rights ▶ The product, quality and competition advantages <p>Noncompete clauses may also be included in employment contracts as restrictive covenants. The noncompete clause should be in writing and be applicable for the employees who are in contact with customers and have access to customers' trade secrets. Such noncompete clause for employees should be reasonably limited in terms of territory, time and scope. The period and scope for noncompete obligations should be limited in a way that does not prevent the employee from earning a living.</p>
<p>Governing law (implied content and public order)</p>	<p>Parties are free to choose their governing law for contracts containing any foreign element, which may apply to the whole or part of contract. In case the governing law is not chosen by the parties in the contract, the applicable law will apply.</p> <p>The Turkish law will govern in limited cases, even if there is a choice of governing law. Such cases include:</p> <ul style="list-style-type: none"> ▶ If the provision of the foreign law to be applied in a certain case is openly contrary to the public order of Turkey ▶ If the applicable foreign law provisions cannot be ascertained despite all efforts <p>There are certain exceptions to such freedom of choice of the governing law, as mentioned below:</p> <ul style="list-style-type: none"> ▶ The parties cannot choose the governing law of another country in order to prevent the application and enforcement of the provisions of the contract. ▶ The Turkish law applies in some specific contracts, such as the sale of immovable property located in Turkey. 	<p>Determination of the governing law differs, depending on whether the foreign element is present in the contract – i.e., if one of the contracting parties is a foreign company.</p> <p>In case both contracting parties are Turkish, in principle, the parties may choose a foreign governing law, unless there are specific legal or contractual obstacles.</p>

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>Basically, the term is agreed upon by the parties, depending on their wills and intentions.</p> <p>The parties may agree on the automatic renewal of the contracts, unless either party wants to terminate it.</p>	<p>In case of conflict, the court will decide whether an act of any party can be considered as a will of tacit renewal offer or an acceptance.</p> <p>Generally, the term of contracts need to be defined in the contract.</p>
Prior notice of termination	In principle, both parties may terminate the contract with a prior notice.	<p>The terms and the period in which the prior notice shall take place, and the consequences vary depending on the type of the contract.</p> <p>Generally, it is advised to make notices in writing and send them to the other party via certified mail or through a Turkish notary public in order to avoid any dispute on the timing or delivery of the termination notice.</p>
Termination for cause	<p>In principle, termination for cause can be freely agreed on between the parties with or without a prior notice. However, the consequences and compensation may vary depending on the type of contracts. For example, as per Article 121 of Turkish Commercial Code (TCC) numbered 6102, agency agreement can be terminated at any time, if there is valid reason for it, even it is a fixed-term agency agreement.</p> <p>If no term is provided in the contract, the termination may be justified on the basis of substantiated reasons, such as a breach of contract and significant changes of the contract conditions.</p>	<p>The content or terms of fair cause may be different for each type of contract and special conditions of the subjected contract. In some cases, the termination is regulated by law, in which case the termination for fair cause can be applied (for e.g., the labor law).</p> <p>If the definite term contract is terminated before its expiration without any justified reasons, then the other party may raise some compensation claims because of early unjust termination.</p>

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	According to Article 2 of the Turkish Civil Code, every person should act in good faith while using their rights and performing their obligations.	Good faith is a significant tool to fulfill loopholes within the contracts, conversion of contracts and interpretations of parties' wills regarding contracts.

Intuitu personae clause, or change of control or assignment clause	<p>In order to assign a contract, a valid and transferable contractual relationship should exist. In addition to the consentaneous declaration of intents of the assignor and the assignee, prior permission or later approval of the other party shall be given.</p> <p>In case a clause that forbids the change of control exists, a party may oppose the other party's change of control. Otherwise, the change of control cannot be opposed by the counterparty.</p>	<p>Validity of the assignment of contract is subject to the form of contract. In the event that there is no specific contract prohibiting the assignment of the contract and its rights, this is generally deemed that the contract allows the parties.</p>
Hardship clause (imprevision), i.e., unforeseeable circumstances renegotiation	<p>The hardship clause covers the following situations:</p> <ul style="list-style-type: none"> ▶ An unexpected event (not foreseen and not expected to be foreseen by the parties during the conclusion of the contract) can result in excessive difficulty to perform obligations, provided that it does not result from the negligence of the debtor. ▶ Certain conditions present during the conclusion of the contract may be modified to the detriment of one party, to such an extent that the performance of the contract would violate the principle of good faith. ▶ The obligor has not yet discharged their debt or has discharged their debt by reserving the right of hardship. <p>In such cases, the obligor may demand the following from the court:</p> <ul style="list-style-type: none"> ▶ Adapting the contract to the new circumstances ▶ Rescinding the contract wherever adaptation is not possible 	
Force majeure	<p>There is no statutory definition of force majeure under the Turkish legislation. In the meantime, scholars claim that the hardship clause (see "Hardship clause" above) will apply to force majeure as well, as long as it is appropriate.</p>	<p>In general, the force majeure clause is included in contracts by the mutual consent of parties. In such a clause, parties usually include the definition of force majeure events.</p> <p>Acts of god, fires, natural disasters, accidents and acts of terror are the most common examples of force majeure events covered under such clauses.</p>
Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>The statutory period of limitation envisaged for defect liability is two years as from the date of discovery of the latent defect, unless the seller undertakes a longer liability period.</p> <p>The term of warranty is usually agreed upon between the contracting parties.</p>	

Transfer of claims	Transfer of claim is defined as changing the creditor of an existing claim. As per the TCO, the creditor can transfer the claim without obtaining the consent of the debtor when there is no obstacle arising from law, agreement or the nature of the business. Therefore, the debtor does not have to be informed on such transfer or approve it.	In accordance with the TCO, the transfer of claim agreement shall be in written form and this requirement is the condition for validity. The transfer of claim is made through a transfer agreement executed between the transferee and the transferor, which transfers the claim directly to the transferee.
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>In principle, it is possible to include a clause of limitation of liability in a contract. However, in some contracts where the craftsmanship is required, in case there is a fault or gross negligence of the debtor, the limitation of liability is deemed null and void.</p> <p>The TCO provides that the following clauses shall be null and void:</p> <ul style="list-style-type: none"> ▶ Contracts signed in advance stating that the debtor's liability is limited within the scope of its heavy defect ▶ All kinds of agreements made previously indicating that the debtor shall not be responsible for any debts that extend from the service contract signed between the debtor and creditor ▶ If a service, profession or craft requiring expertise can only be provided with the concession by the laws or authorized departments, previous agreements indicating that the debtor shall not be responsible for slight negligence 	

Competent jurisdiction, execution of foreign decisions and exequatur

In general, parties are free to choose the competent jurisdiction regarding the disputes arising from contracts.

Arbitration is also possible if the parties agree on the arbitration. Such provisions are subjected to written form, and should include the competent jurisdiction and the seat of arbitration.

The enforcement of court judgments rendered by foreign courts in the course of civil lawsuits in Turkey, which are final, pursuant to the law of that foreign state, shall be subject to the enforcement decision of the competent Turkish courts of first instance. This is as per the Act on Private International and Procedural Law numbered 5718.

A foreign court judgment may serve as a definitive evidence or final judgment, provided that the court decides that the foreign court judgment fulfills the conditions of enforcement through the exequatur process.

In some certain disputes, the arbitration clauses are not applicable – for instance, in disputes regarding the real rights of the immovable property, which do not include a foreign element.

A foreign court decree serves as a definitive evidence or final judgment from the time the foreign court judgment becomes definitive.

6. Recent legislation and trends

There have been certain amendments to the Stamp Tax Law numbered 488 within the last year. In this regard, some provisions of this law regulating the stamp duty for the signature of the contracts have been changed, such as:

- ▶ Papers for share transfers of joint-stock companies, limited liability companies and partnerships limited by shares will be exempted from stamp tax.
- ▶ Stamp tax exemption will be applied for sale and purchase agreements made by real estate investment trusts and real estate funds for their real estate portfolio and preliminary sale agreement for real estate.
- ▶ With the amendment concerning the insurance agreements and papers for payment of insurance premiums, insurance commitment clauses written in the same papers are also included within the scope of stamp tax exemption and thus it is intended to collect the stamp tax over the main agreement value.

AFRICA

Algeria (civil law – Islamic law)

Contacts: Sabah Boughida and Vincent Lunel

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	<p>In principle, an agreement does not have to be written to be binding. However, this is subject to a number of exceptions. The Algerian Civil Code specifies that an agreement is formed once parties exchange their mutual willingness without prejudice to the legal provisions. The willingness can notably be expressed verbally, in writing or by signs generally used (Articles 59 and 60 of the Algerian Civil Code).</p> <p>However, commercial agreements must be recorded in writing, i.e., by notary act, private act, an accepted invoice or through correspondence (Article 30 of the Algerian Commercial Code).</p>	<p>In practice, Algerian authorities require a signed written agreement.</p> <p>A commercial contract may take the form of a purchase order, an invoice, a delivery order or any document under any form or any medium, including specifications or references relating to the general T&C of sales. Article 3, Law no 4-2 lays down the rules applicable to the commercial practices.</p>
Pre-contractual obligation: good faith and information obligation	<p>The Algerian Civil Code provides that the agreement must be formed and performed pursuant to its content, and in good faith.</p> <p>There is no general information obligation as such at the pre-contractual stage under the Algerian law (see “Essential obligations” section).</p>	<p>Any party may be liable for damages for acting in bad faith or misconduct.</p> <p>In practice, a party generally discloses any information that is relevant and material to the other party’s consent to enter into a given transaction.</p>
Signature by counterparts	<p>The Algerian law does not provide for signing a contract in separate counterparts.</p> <p>Any agreement must be signed by the legal representatives or the authorized representatives of all parties to the contract. The process of signing a contract is a matter of evidence.</p>	
Language of the agreement	<p>In principle, the language of the agreement may be agreed on freely between the parties.</p> <p>An official translation into French or Arabic will be required for registration purposes with the Algerian authorities and administration.</p>	<p>If more than one language is used, the one that prevails has to be specified, especially for performance and dispute.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>The T&C of sales are the basis of commercial relationships.</p> <p>In the frame of commercial transactions, the seller or the provider of services must inform the client notably about the T&C of sale applicable to the transaction. The information may be communicated by any appropriate means. It should be apparent and clear.</p> <p>In the relationships between economic agents, the T&C of sale must include the terms of payments, and, as the case may be, the rebates and discounts.</p>	<p>The default of communication of the T&C of sale is sanctioned by a fine of DZD10,000 to DZD100,000 (i.e., approximately €82 to € 822).</p>
Essential obligations and imbalance	<p>In the commercial relationships, the seller or provider of services must provide the client with loyal and sincere information before the conclusion of a given transaction. This information must relate to the characteristics of the product or the service to be provided, conditions of the transaction and the limitation of responsibility of each party.</p> <p>Any clause or condition that creates an imbalance between the rights and obligations of the contracting parties is prohibited (according to the unfair clause).</p>	
Consideration	<p>There is no provision about the concept of consideration in the Algerian law.</p> <p>The Algerian Civil Code refers to the concept of cause of the contract, instead of that of consideration.</p>	
Price: determination, revision, indexing and payment terms	<p>The price must be fixed or at least determinable.</p> <p>If the parties do not mention the price in the contract, the sale is not likely to be declared null and void if the circumstances demonstrate that the parties intended to refer to the prices generally charged in the market or in prior dealings between them.</p> <p>The transfer of ownership is not necessary linked to the payment of the price.</p>	<p>For sales or services agreements, it is necessary that the seller informs the purchaser about the prices. It can be ensured through marking, labelling, posting or any appropriate written means. The stated prices must be visible and readable, and correspond to the amount that the purchaser has to pay. The sale conditions must also include payment T&C of rebate, and discount (if any).</p> <p>The default of information about the prices and tariffs is sanctioned by a penalty of DZD5,000 to DZD100,000 (i.e., approximately €41 to €822).</p>

Exclusivity provisions	Exclusivity provisions are generally permitted under the Algerian law – for example, a clause of a distribution contract providing for territorial exclusivity.	However, any exclusive purchasing contract leading to a distribution monopoly on the market is considered a restrictive-competition practice. This type of contract is likely to be declared null and void.
Noncompete obligation	A noncompete clause is generally permitted under the conditions indicated in the contract or agreement concluded between the parties. Such a clause can provide a contractual financial penalty in case of the noncompliance of the obligation (i.e., a financial compensation).	There is no specific provision in the Algerian law relating to noncompete clause for commercial contracts. The parties are free to include such a clause in the contract. This clause is rather usual in commercial and employment contracts. The Algerian labor law specifies only that the employee should not compete with the employer in the sector during the term of employment.
Governing law (implied content and public order)	In principle, parties are free to choose the law that will govern the contract (according to Article 18 of the Algerian Civil Code). The Algerian law will apply if the foreign law is deemed contrary to the public order or to morality in Algeria (according to Article 24 of the Algerian Civil Code).	

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	An agreement may be concluded for: <ul style="list-style-type: none"> ▶ A fixed term: It is in force until the expiry of the term or a possibility to renew. ▶ An indefinite term: Each party may terminate the contract at any time, but a prior notice should be issued (see “Prior notice of termination” below). 	Generally, commercial agreements are concluded for a fixed term, with a possibility to renew them contractually.

Prior notice of termination A party must give reasonable prior notice of termination of an indefinite term contract, even if this is not specified in the contract.

The Algerian law does not set forth a precise timeframe for the issuance of such prior notice. Such timeframe is usually set forth in the contract. If not, the criteria will be that of reasonableness as interpreted by Algerian courts.

There would be a high risk of litigation in case of failure to give reasonable prior notice of termination in the absence of contractual provision specifying a minimum notice duration.

Termination for cause The Algerian Civil Code provides that if one party does not perform its obligations according to the contract, the other party may, after having issued a formal notice, claim before Algerian courts for the performance of the contract or ask for its termination subject to financial sanction against the breaching party. The judge may grant the latter some additional time to perform its obligations, depending on the circumstances. The judge may also reject the request for contract termination if the alleged nonfulfillment of the obligation is insignificant in light of the whole set of obligations set forth in the contract.

If the contract specifies certain grounds for termination, the clause should identify precisely the breaches that would constitute acceptable grounds for termination. The parties may also exclude in the contract any latitude of interpretation by the judge on this issue.

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	The contract has to be performed according to its content and in good faith.	
Intuitu personae clause, or change of control or assignment clause	<p>The assignment of receivables and debts is authorized under the Algerian law.</p> <p>Assignment by creditor</p> <ul style="list-style-type: none"> ▶ The creditor may assign its rights without requesting the prior approval from the debtor. Such assignment becomes effective against third parties and the debtor, if it is accepted by the latter or if it has been notified to it by an extrajudicial act. <p>Assignment by debtor</p> <ul style="list-style-type: none"> ▶ The debtor may also transfer its debt to a third party. Such assignment becomes effective against the creditor only once the latter ratifies it. ▶ The old debtor is usually guarantor of the solvability of the new debtor toward the creditor, unless the contrary has been specified in the contract. 	An assignment clause is usually set forth in the contract.
Hardship clause (impresion), i.e., unforeseeable circumstances and renegotiation	Unforeseen events can occur and fundamentally alter the equilibrium of a contract, resulting in an excessive burden being placed on one of the parties. In such cases, Algerian judges may reduce the excessive obligation in a reasonable manner. This is done in light of the circumstances and after having taken into consideration the respective interests of the parties. This provision is a matter of public policy.	It is recommended to properly address force majeure (see “Force majeure” below) and hardship clauses in the contract in advance.
Force majeure	The force majeure concept is well known under the Algerian law. It can shield the debtor from performing an obligation and from contractual responsibility. Parties may agree that the debtor takes the risks of force majeure.	<p>The Algerian law does not provide for any list of cases or events that are considered force majeure, nor for criteria to be met in order for an event to be considered force majeure. Thus, there is no legal definition of force majeure.</p> <p>Therefore, it is recommended to specify such a definition and the implementation of the clause in detail in the contract.</p> <p>Prior notification of the force majeure event is generally provided for in the contract.</p>

Warranty of latent defects	<p>Except as otherwise agreed, if the seller has guaranteed the quality of an item that has been sold for a fixed period, the purchaser should notify the seller within one month of finding any fault. Failure to do so will result in forfeiting the right to do so. The warranty claim has to be initiated within six months after the sending that notice.</p> <p>The warranty claim would be bared if the purchaser was aware of the defect at the time of purchase, except in case of fraudulent behavior from the seller.</p>	Warranty claims are not applicable in case of judicial sales and auctions.
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability	<p>In principle, contractual limitations of liability are valid under the Algerian law.</p> <p>Exclusion and limitation clauses are inapplicable in cases of fraud or gross negligence. However, the debtor may stipulate that they will be exonerated from their liability in case of fraud and gross negligence committed by the people under their control or subordination and involved in the performance of its obligations.</p> <p>Exclusion clauses for tort liability are null and void.</p>	<p>It is possible to extend a party's liability, for example, by excluding the right for that party to claim exemption resulting from force majeure (see "Force majeure" above).</p> <p>The debtor who has not committed a fraud or a gross negligence is, in principle, only liable for the foreseeable loss or damage to be assessed at the time when the contract was concluded.</p> <p>The parties may include a repair clause or a penalty clause in the contract, but certain limitation applies.</p>

Ivory Coast (civil law – customary law)

Contacts: Eric Nguessan and Ghislain Angoran

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written contract	A contract does not have to be in writing to be enforceable under the Ivorian law.	A scanned signed contract should be considered as a reliable copy of the contract and be used as a matter of evidence. However, a judge may require that the original version of the contract be produced in the event of dispute between the parties.
Pre-contractual obligation: good faith and information obligation	<p>Contracts must be negotiated, formed and performed in good faith. This is a matter of public policy, which is also reproduced in the Ivory Coast Civil Code.</p> <p>All parties have a duty at the pre-contractual stage to disclose any information that is relevant and material to the other party's consent to enter the transaction.</p>	For example, a party may be held liable for damages for acting in bad faith or for misconduct upon terminating pre-contractual negotiations.
Signature by counterparts	The Ivorian law does not address the signature of contracts by counterparts. At least one copy of the contract must be signed by the authorized representatives of all parties to the contract.	<p>In Ivory Coast, it is recommended that at least two copies of the contract be signed by the parties or their authorized representatives.</p> <p>The process of signing a contract is a matter of evidence.</p>
Language of the contract	<p>In principle, the language of the contract may be agreed on freely between the parties, except for specific matters.</p> <p>The language has to be understood by all parties to the contract.</p> <p>A translation into French will be required for registration of contracts before authorities and the administration. Ivorian courts usually require an official translation of contracts into French.</p>	<p>The French language is mandatory in dealing with French-speaking public services and administrative authorities.</p> <p>If more than one language is used, it is necessary to specify the one that will prevail, especially for performance and dispute.</p> <p>Since a given term may have different meanings depending on the jurisdiction it is used in, it is highly recommended to define as many terms as possible in the contract and even to state the term in its original language for the avoidance of doubt.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>T&C form the basis of commercial relationships.</p> <p>T&C of the seller are enforceable against the buyer if the latter accepts them at the formation of the contract at the latest.</p> <p>There might be discrepancies between the seller's T&C and those of the buyer. In case of contradiction between them, both T&C will be deemed as void, and the general law of sales of Ivory Coast will apply.</p> <p>The knock-out rule applies as long as the parties have agreed on the core obligations (i.e., price and object), and the contract will basically be upheld. Conflicting provisions will be replaced by the statutory regulations and solutions set forth in the Ivory Coast Civil Code.</p>	
Essential obligations and imbalance	<p>The Ivorian law does not generally recognize the concept of essential obligations. In the contract, the obligations of each party must be specified clearly. The parties have to execute their contractual obligations. A breach thereof is usually sanctioned by payment of damages.</p>	<p>The obligations of the parties depend on the nature of the contract.</p> <p>For example, in a sale contract, the seller must transfer or deliver the good to the buyer, make sure of the conformity of the goods with the order specifications and grant seller's guarantee to the buyer. In return, the buyer must pay the price and receive the goods. In services contracts, the provider must execute their obligations freely, determined by the parties in the contract. In return, the beneficiary must pay the price of the service and facilitate the job of the provider.</p>
Consideration	<p>The Ivorian law does not generally recognize the common law concept of consideration and, instead, uses the notion of cause (i.e., the rationale for the validity of the contract). However, the parties will usually expressly identify the cause of the contract in writing in order to limit the risk of significant imbalance (see "Hardship clauses" below).</p>	

Price: determination, revision, indexing and payment terms	<p>The price must be determined or at least be determinable. Otherwise, the contract will be deemed as void. However, framework contracts, such as a distribution contract, are valid, even if they do not provide a price. In case of abuse in the determination of the price by one party, the judge may terminate the contract and award damages to the other party.</p> <p>The price may be stipulated in a fixed currency according to the parties.</p> <p>Payment terms are regulated and need to be specified in writing.</p>	<p>The judge is not entitled to modify a price fixed by the parties in a contract. However, in case the price is deemed to be undetermined by the parties, the judge is likely to conduct its own analysis and fix a price at the demand of one party, in consideration of the services or goods sold through the contract.</p> <p>Adjustment method and additional price, such as an earn-out clause, are valid under the Ivorian law; however, the method of calculation must be precise, illustrated with an example.</p>
Exclusivity provisions	<p>Exclusivity rights (whether sale or buy side) are generally recognized under the Ivorian law. The purpose of these clauses is to grant exclusive right to a contractor, the other party being prohibited from contracting with third parties for the performance of the same services or purchase of the same goods.</p>	<p>In the area of distribution, the exclusivity clause must be limited in time or in its geographical coverage.</p>
Noncompete obligation	<p>A noncompete clause is permitted during the performance of the contract and after termination of a contract, under conditions laid down by the courts.</p> <p>The clause may validly provide for financial penalties in case of infringement by the obligated party.</p>	<p>Noncompete clauses will be under scrutiny from a competition law perspective.</p> <p>In addition, such clauses can also be upheld in the assessment of possible significant imbalance between the parties' respective obligations.</p> <p>Financial compensation is mandatory for noncompete undertakings in employment relationships.</p>

Governing law (implied content and public order)	<p>Parties are free to choose their governing law for international contracts, which may apply to whole or part of the contract. This is according to the principle enshrined in Article 3(1) of EU Regulation EC no. 593/2008, Rome I Regulation; but, other conventions or treaties may apply, depending on the matter or type of contract.</p> <p>If the parties do not choose a governing law, it will be determined by courts.</p> <p>There are exceptions to freedom of choice, such as the following:</p> <ul style="list-style-type: none"> ▶ The mandatory local law of a country will apply despite the choice (Article 9 Rome I). ▶ The parties cannot artificially choose the governing law of another country (Article 3(3) Rome I). ▶ It is an exception on grounds of public policy (Article 21 Rome I).
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term: It must be enforced until expiry of the said term or the possibility to renew. ▶ An indefinite term: Each party may terminate the contract at any time without any justification, but it is subject to prior notice (see "Prior notice of termination" below). 	
Prior notice of termination	<p>A party must give a reasonable prior notice of termination of a contract, even if this is not provided for in the contract.</p> <p>Prior advance notice is required for fixed (if renewed) or indefinite term contracts, or in case of absence of a written contract, if courts recognize an established business relationship between the parties.</p> <p>Timing for prior notice must be reasonable. The reasonableness criteria is assessed on the basis of various criteria.</p> <p>Failure to give a reasonable prior notice of termination will result in damages and civil fine (i.e., a high level of risk of litigation).</p>	It is recommended to specify the duration of the reasonable prior notice in the contract.

Termination for cause	<p>If the contract provides for grounds for termination, the relevant clause should identify precisely the breaches that would serve as valid ground for such termination for cause.</p> <p>If the contract does not provide for specific grounds of termination, termination for cause will be subject to the following conditions:</p> <ol style="list-style-type: none"> 1. The non-breaching party may apply to the judge to terminate the contract. 2. Serious breach is required. 3. The non-defaulting party must have given the defaulting party a prior notification to remedy the breach.
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy under the Ivorian law.</p> <p>A party may be liable for damages in case of breach of this obligation.</p>	
Intuitu personae clause, or change of control or assignment clause	<p>The assignment of a contract requires a contract between the assignor and the assignee, as well as the consent of the other contracting party, unless said consent is already stipulated in the original contract.</p> <p>In the absence of any specific contract clause, a party may not oppose the other party's change of control, unless the contract provides for it.</p>	

<p>Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation</p>	<p>The parties are free to decide the conditions under which the renegotiation of the contract will take place, in order to amend its terms to address unforeseen events. This includes the extent to which they fundamentally alter the equilibrium of a contract, resulting in an excessive burden being placed on one of the parties.</p> <p>Since imprevision is not mandatory, the parties can therefore agree to exclude such mechanism in the contract.</p> <p>In case the contract is silent on this issue, a party may still ask for a renegotiation. In the meantime, it has to continue to perform the contract. In case of refusal by the other party, the demanding party may ask the judge to revise the contract or terminate it.</p>	<p>The court will determine whether the conditions of unforeseeable circumstances, as defined by the parties, are met.</p> <p>It is recommended to provide for the notification of the circumstances that trigger the clause and the conditions of renegotiation.</p> <p>It is also recommend to properly articulate force majeure (see “Force majeure” below) and hardship clauses in the contract.</p>
<p>Force majeure</p>	<p>Force majeure would result in validly excusing one or both parties from the nonperformance of their contractual obligations, following the occurrence of unforeseeable circumstances or events that are outside of the parties’ control. That party is excused from or entitled to suspend performance of all or part of its obligations without facing any liability.</p> <p>The following criteria must be met in order for an event to be considered as force majeure under the Ivorian law:</p> <ul style="list-style-type: none"> ▶ It is unavoidable and makes the performance of the contract impossible. ▶ It is unpredictable and could not have been foreseen when the contract is entered into. ▶ It is beyond the control of the parties. 	<p>The court will determine whether the conditions of force majeure are met.</p> <p>It is recommended to provide for the definition of the events or circumstances qualifying as force majeure, since the legal definition may be extended by the parties, for instance, by including strikes. It must also detail rules for the implementation and effects on the contract.</p> <p>The clause may also provide for the conditions for the termination of the contract or its renegotiation.</p> <p>Prior notification of the force majeure event is required.</p>
<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>The Ivorian law provides for a specific regime dealing with nonconformity and latent defects.</p> <p>Limited warranty clauses are valid under certain conditions.</p>	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>In principle, a breach of contract leads to compensation for direct foreseeable loss or damages, exclusively.</p> <p>Contractual exclusions and limitations clauses are valid under the following conditions:</p> <ul style="list-style-type: none">▶ They must not lead to depriving the contract of its purpose or of the main undertaking, or to a significant imbalance. The penalty for this includes damages and declaring the contract void.▶ They are inapplicable in cases of willful misrepresentation and gross negligence.▶ In some specific areas, such as personal injury, they are invalid.	It is also possible to extend a party's liability, such as by excluding the right to claim force majeure protection.
Competent jurisdiction, execution of foreign decisions and exequatur	<p>Parties are free to choose between arbitration and the court system, except in certain matters.</p> <p>Enforcement is carried out under the relevant international treaty or convention in the country where the award has been rendered.</p> <p>In Ivory Coast, enforcement of a foreign judgment is subject to the classical exequatur process by an Ivorian court (i.e., the judicial process that leads to the recognition and enforcement of a foreign judgment on the Ivory Coast territory).</p>	In international commercial matters, parties are usually entitled to choose any court to settle the dispute.

Americas Region

Brazil (civil law)

Contact: Aline Fachinetti

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	An agreement does not have to be in writing to be binding between the parties. However, this is subject to a number of exceptions.	<p>It is highly recommended to have a written contract.</p> <p>A judge may require written proof, such as invoices, emails or other documents, attesting the existence of a non-written agreement.</p> <p>Testimonial proof can be accepted, except in small amount court cases – that, according to Article 401 of the Brazilian Civil Code, is 10 times the minimum wage, which is BRL937.00 in 2017.</p>
Pre-contractual obligation: good faith and information obligation	<p>Contracts must be negotiated, formed, performed and concluded in good faith. This provision is enshrined in the Brazilian Federal Constitution and the Brazilian Civil Code. A person acts in good faith if that person does not frustrate the reasonable expectations of the other party, on the basis of morality, loyalty and respect.</p> <p>A party has a duty at the pre-contractual stage to disclose any information and details around the agreement that may have an impact on it.</p> <p>A party has also the duty to behave with honor and keep its loyalty to the contracted obligations.</p>	<p>The Brazilian Civil Code establishes that the negotiation of a contract should be construed in accordance with probity and good faith between the contractors. It also states that if a party acts against this principle, it will be deemed an unlawful act. The parties shall behave in good faith during the execution until its termination, according to Articles 113, 187 and 422 of the Civil Code.</p> <p>Parties are free to break the negotiations but they may be liable for damages for acting in bad faith or misconduct.</p>
Signature by counterparts	The Brazilian law does not provide for signing separate counterparts of a contract. At least one copy of the contract must be signed by the authorized representatives of all parties to the contract. The process of signing a contract is a matter of evidence.	Contracts should be signed with the full names of the parties clearly indicated on the signatory page.

Language of the agreement	<p>There is no legal restriction on the language of a contract that may be agreed on freely between the parties. The only exception is that the Brazilian Civil Code determines that documents written in another language shall be translated into Brazilian Portuguese in order to produce legal effect in Brazil.</p> <p>The language has to be understood by all parties to the contract. Otherwise, the party that has insufficient knowledge of the language is deemed not to have contracted validly.</p> <p>There is also an obligation to use Brazilian Portuguese for contracts involving the Brazilian administrative authorities. Indeed, the Brazilian Civil Procedure Code requires that all documents written in foreign languages must be accompanied by a sworn translation. Only then will it be valid for federal, state or municipal authorities; for courts; or for entities maintained, supervised, or directed by the public powers.</p>	<p>In practice, this means that dual language or translation is required, if Brazilian Portuguese is not the sole language of the contract.</p> <p>Indeed, a translation into Brazilian Portuguese will be required for the registration of agreements before authorities and the administration.</p> <p>Brazilian courts usually require an official translation of contracts into Brazilian Portuguese.</p> <p>Since a given term may have different meanings depending on the jurisdiction in which it is used, it is highly recommended to define as many terms as possible in the contract and even to state the term in its original language for the avoidance of doubt.</p>
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2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>T&C form the basis of commercial relationships.</p> <p>There might be discrepancies between the T&C of the seller and the buyer. In case of contradiction between the T&C of the buyer and the seller, the parties (or courts) must seek the real intention of both parties at the time they decided to enter into the contractual relationship, always considering the solutions provided by the Brazilian Civil Code.</p> <p>The knock-out rule may be given effect under certain circumstances.</p>	
Essential obligations and imbalance	<p>The Brazilian Civil Code prohibits the significant imbalance provision in a contract, such as the inclusion of any clause that might result in one party being at an unfair disadvantage or disproportionately burdened as compared to the other party. Some examples include the transfer of responsibility to third parties, obligations deemed unfair or abusive, compulsory use of arbitration and reduction of liability.</p> <p>Such a clause will be deemed null and will be canceled (only the clause and not necessarily the entire contract). Payment of damages may also be awarded by courts.</p>	

Consideration	<p>The Brazilian law does not recognize the common law concept of consideration and it is not a legal requirement to include the consideration. However, parties can usually expressly identify the consideration of the contract in order to facilitate the identification of the risk of significant imbalance (see “Essential obligations” above).</p>	
Price: determination, revision, indexing and payment terms	<p>The price must be fixed or at least determinable; otherwise, the contract may be deemed as void. It should be determinable according to market indexes or any commodities or future exchange indexes, or according to other parameters agreed by the parties, provided that these parameters are capable of objective determination, as per Articles 486 and 487 of the Brazilian Civil Code.</p> <p>Adjustment method and additional price, such as an earn-out clause, may be valid; but, the method of calculation must be precisely stated in the contract.</p> <p>The transfer of ownership is not linked to the payment of the price.</p> <p>The price may be stipulated in a foreign currency for international contracts. Local contracts must be in Brazilian Reals.</p> <p>According to Article 406 of the Brazilian Civil Code, the seller can charge interest on late payment of up to 12% per year, pro rata per day.</p>	<p>According to Article 485 of the Brazilian Civil Code, the price may be fixed by a third party chosen by agreement between the parties.</p> <p>According to Article 489 of the Brazilian Civil Code, in case any of the parties set prices according to its sole discretion, the contract may be deemed as void.</p>
Exclusivity provisions	<p>The grant of exclusivity (whether buy or sell side) is generally permitted, provided that the clause reasonably stipulates limits of time, geography and purpose, as well as financial compensation for the exclusivity.</p>	<p>Exclusivity provisions may constitute a violation of the Brazilian Competition Law if they lead to the exclusion of a party from market access.</p>
Noncompete obligation	<p>A noncompete clause is permitted during the performance of the contract and after termination of a contract, under conditions laid down by courts. The clause may also provide for a financial penalty in case of infringement. Financial compensation is mandatory for an employment contract.</p>	<p>Such a clause will be under specific scrutiny from a competition law perspective. Moreover, such a clause could also come into play at the time of assessing possible significant imbalance.</p> <p>The Brazilian Antitrust Authority usually accepts noncompete provisions with a maximum of five years.</p> <p>It is recommended to specify the amount of penalties in the contract to avoid difficulties for the court to make a fair assessment of the damages incurred.</p>

Governing law (implied content and public order)	<p>Parties are free to choose their governing law for international contracts, provided the law chosen has some connections with the transaction. This is according to the principle enshrined in Article 25 of the Brazilian Civil Procedure Code.</p> <p>The governing law chosen by the parties must comply with Brazilian public order and the good morals.</p> <p>Foreign judgment enforceability should also not interfere with Brazilian national sovereignty.</p>
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term: In such a case, it has to be enforced until the expiry of its term or renewed term. ▶ An indefinite term: In such a case, each party may terminate the contract at any time without any justification, but subject to prior notice (see "Prior notice of termination" below). 	
Prior notice of termination	<p>A party must give reasonable prior notice of termination of a contract, even if this is not provided for in the contract.</p> <p>Timing for prior notice must be reasonable. The reasonableness criteria is assessed on the basis of various criteria.</p> <p>Failure to give reasonable prior notice of termination will result in damages and civil fine (i.e., a high level of risk of litigation).</p>	Certain contracts usually provide for the possibility to terminate the agreement. Such contracts include service contract executed with undetermined term, deposit contract and rental contract of urban real estate.
Termination for cause	<p>If the contract provides for grounds for termination, the relevant clause should identify precisely the breaches that would serve as valid ground for such termination for cause.</p> <p>If the contract does not provide for grounds for termination, the non-breaching party may apply to the judge to terminate the contract.</p>	In court, the non-breaching party may request to terminate the contract or ask the other party to fulfill its obligations. In any case, the non-breaching party may be entitled to receive damages.

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Contracts must be negotiated, formed and performed in good faith. This provision is a constitutional right.</p> <p>A party may be liable for damages in case of breach of this obligation.</p>	
Intuitu personae clause, or change of control or assignment clause	<p>There might be certain contracts that may not be assigned because of its strictly personal nature.</p> <p>In general, the assignment of a contract requires an agreement between the assignor and the assignee, and requires the agreement of the other contracting party, unless otherwise stipulated in the contract.</p>	
Hardship clause (impresion), i.e., unforeseeable circumstances renegotiation	<p>The parties are free to specify in the contract the conditions under which the renegotiation of the contract will take place. This is to address the unforeseen event to the extent it consists in extraordinary and unpredictable occurrence, and makes the contract excessively burdensome for one of the parties and excessively advantageous for the other.</p> <p>Since impresion is not mandatory, the parties can therefore agree to exclude such mechanism in the contract.</p> <p>In case the contract is silent on this issue, a party may still ask for a renegotiation. In the meantime, it has to continue to perform the contract. In case of refusal by the other party, the demanding party may ask the judge to revise the contract or terminate it.</p>	<p>The court will determine whether the conditions of unforeseeable circumstances, as defined by the parties, are met. If the event is objectively included among the risks already specified and accepted in the agreement, it will not be considered as unforeseeable.</p> <p>It is recommended to specify in the contract the notification of the circumstances that might trigger the clause and the conditions of renegotiation.</p> <p>In case of silence of the contract, courts will usually only accept to revise the contract if the event renders the performance of the contract either impossible or commercially impractical because of excessive expense, to the point of altering the essence of the transaction.</p> <p>We recommend to properly articulate force majeure (see "Force majeure" below) and hardship clauses in the contract.</p>

Force majeure	<p>The effect of force majeure is to excuse one or both parties from performance of the contract in some way following the occurrence of unforeseeable circumstances or events falling outside of the parties' control. Upon occurrence of an event qualifying as force majeure, the party that is unable to perform its contractual obligations is excused from or entitled to suspend performance of all or part of its obligations. It will not be liable for damages, unless such responsibility has been expressly stated in the contract.</p> <p>The following criteria must be met in order for an event to be considered as force majeure under the Brazilian law: the event must be unforeseeable or difficult to foresee and its effects must be impossible to avoid. This includes events originated by the nature, such as earthquake and flood, or by act of man, such as strikes and wars.</p>	<p>The court will determine whether the conditions of force majeure are met.</p> <p>It is recommended to specify in the contract the definition of the events and circumstances qualifying as force majeure, and to detail rules for the implementation and effects on the contract.</p> <p>The clause may also specify the conditions for the termination of the contract or its renegotiation.</p> <p>Prior notification of the force majeure event is required.</p> <p>We recommend to properly articulate the force majeure and hardship clauses (see "Hardship clause" above) in the contract. Also, keep in mind that the party that is unable to perform its contractual obligations might still be liable for damages if its responsibility is expressly maintained in the contract despite the occurrence of a force majeure or hardship event.</p>
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Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>Under the Brazilian Civil Code, warranty for latent defects will last for a 30-day period (in case of movable assets) and for a one-year period (in case of immovable assets), counted as of the time of delivery.</p> <p>If the defect occurs later than that, then the term starts once the party is first aware of the defect (within the limit of 180 days for movable assets and one year for immovable assets).</p> <p>In case of specific contractual warranty provision, the affected party must notify the other party about the defect no later than 30 days after first becoming aware of it.</p>	
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>In principle, a breach of contract leads to compensation and the need to fully repair the damages caused.</p> <p>Contractual limitations are valid subject to the following cumulative conditions:</p> <ul style="list-style-type: none"> ▶ The object of the agreement must be a disposable patrimonial right (e.g., not governmental or environmental). 	It is also possible to extend a party's liability, such as by excluding the right to claim force majeure exemption, if expressly stated in the contract.

- ▶ The parties voluntarily and freely agreed to such a condition.
- ▶ The parties must have had the opportunity to negotiate the T&C of the contract.
- ▶ A limitation clause must not lead to depriving the contract of its purpose or of the main undertaking, or to a significant imbalance. The penalty for this includes damages and contract being declared void.
- ▶ Exclusion and limitation clauses are inapplicable in cases of willful misrepresentation and gross negligence.
- ▶ In some specific areas, limitation clauses are not valid; for example, environmental damages.

Competent jurisdiction, execution of foreign decisions and exequatur

Parties are free to choose arbitration or courts.

In order to be enforceable in Brazil, the clause for arbitration must:

- ▶ Clearly establish that the controversy is to be resolved through arbitration
- ▶ Identify the arbitral institution that will administer the arbitral proceedings
- ▶ Select the applicable law and place of arbitration
- ▶ Provide a procedure for the selection of the arbitrators

In case of choice of non-Brazilian courts, the costs and typical duration to obtain the enforcement of a foreign judgment in Brazil need to be considered. In Brazil, at least 0.5 to 2.5 years are required to recognize a foreign judgment, followed by a subsequent process for enforcement that may take two to three years.

In addition, foreign decisions must not violate Brazil's public policy, national sovereignty or the dignity of the human person. There must be no conflict between the foreign decision to be enforced in Brazil and previous decisions on the same matter, and involving the same parties in Brazil, if any.

In international commercial matters, parties are usually entitled to choose any court to settle the dispute.

The parties may decide to limit the appeal or may choose the language and the seat of the arbitration

A choice of Brazil as the seat will entail the applicability of the relevant provisions of the Brazilian Code of Civil Procedure and the Brazilian Arbitration Act.

6. Recent legislation and trends

In Brazil, there is a bill under discussion (Projeto de Lei PL5276/2016) related to data privacy, which can impact agreements executed through electronic means.

Canada (mixed: civil law and common law)

Contact: Marcus Hinkley

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	Although written contracts are strongly recommended, a verbal contract is generally enforceable by law. A contract does not necessarily have to be in writing to be binding, but there are certain exceptions, such as real estate property contracts.	
Pre-contractual obligation: good faith and information obligations	Courts have largely refused to recognize the duty to negotiate in good faith in the absence of a special relationship, such as the tendering or labor and employment contexts.	In the province of Quebec, there is a general obligation to act in good faith that applies during the pre-contractual and negotiation periods.
Signature by counterparts	Canadian corporate law permits signature by counterparts. A counterpart's clause ensures that the agreement will be held to constitute one original document, regardless of how or in what form the counterparts are actually delivered to the other parties.	
Language of the agreement	The language of the contract may generally be agreed upon by the parties to the contract.	Under the Quebec Charter, Quebec contracts containing printed standard clauses or those that are predetermined by one party must be in French, unless the parties expressly request that they be in another language. Parties wishing to contract in English may do so by including a clause expressly stating their consent to do so. Contracts with the Government of Quebec or its agencies must be in French if the contract is concluded in Quebec.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>It is always hard to predict who will win a battle of forms, because the courts follow no clear rules when deciding the terms that apply. Instead, the facts of each case determine the outcome. Fortunately, some general guidelines exist.</p> <p>Courts first examine the buyer's and seller's conducts in order to assess the T&C that each believed were applicable to the transaction. Courts may also consider the parties' previous dealings for evidence that one party knew and accepted the other's T&C.</p> <p>Next, courts will look at when the contract was formed, keeping in mind two basic contract law principles:</p> <ol style="list-style-type: none">1. An offer and acceptance must occur to create a contract.2. A fully formed contract's terms generally cannot be modified without all parties' consent.	
	<p>In light of these principles, courts hearing battle of forms cases often hold that the contract's terms are those the parties had agreed on at the time the offer was accepted.</p>	
Essential obligations and imbalance	Essential obligations under the Canadian law are not generally recognized as a category of obligations.	

Consideration	Under common law, consideration is one of the three criteria that have to be met before a contract is binding. It refers to money or payment of money; some right, interest, profit or benefit accruing to one party; or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.	A deed, which is a contract under seal or a specialty contract, is one exception to the requirement of consideration. Deeds are used mostly in contracts that involve real estate. If a contract is a deed, then no consideration is required.
Price: determination, revision, indexing and payment terms	<p>Generally, whatever the parties have agreed to in terms of pricing should prevail. It is recommended that the price be fixed or at least determinable. If not, it is arguably questionable whether adequate consideration has been provided, which may result in the contract being void. In addition, payment terms cannot be built into a contract if these terms are contrary to legislation – such as usury interest rates.</p> <p>An adjustment clause and additional price may be provided for in the contract.</p> <p>The price may also be stipulated in a foreign currency.</p>	
Exclusivity provisions	Exclusivity provisions are generally permitted.	
Noncompete obligation	<p>Non-competition obligations are generally permitted in commercial agreements, but are more difficult to enforce for individuals. The rationale is that stopping someone from competing interferes with individual liberty and restricts open competition. Consequently, non-competition clauses are difficult to enforce.</p> <p>From a commercial perspective, non-competition clauses that are included in employment contracts made in the context of the sale of a business will presumably be enforceable.</p>	Whether it is a non-competition clause or a non-solicitation clause, one of the key questions a court will try to answer before determining if it is enforceable is: “How reasonable is the restriction?”

Governing law (implied content and public order)	<p>The Canadian law, with respect to choice of law and choice of forum, favors party autonomy, particularly in international B2B contracting. In Canada, parties to a contract can choose the law that they want to govern their contract, subject to certain limits, such as:</p> <ul style="list-style-type: none"> ▶ The contract must be legal. ▶ The choice of law must be bona fide. ▶ There must be no reason for avoiding the choice of law on the grounds of public policy.
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	Some contracts, such as definite-term contracts, will expressly come to an end after a fixed period of time. Others, such as indefinite-term contracts, will require some positive step to be taken by one or both parties to bring about termination.	
Prior notice of termination	It is recommended that there should be express provisions in contracts dealing with notice of termination. If these exist, then they should be followed. If not, then reasonable notice should be provided, which is generally on the basis of the expectation of the parties.	

Termination for cause

Contracts usually make express provision for termination in certain specified circumstances and the steps that should be followed in order to effect termination. The circumstances specified may include, for example:

- ▶ Certain types of breach (usually material breaches that would justify termination at common law)
- ▶ Change of control of a party to the contract
- ▶ Actual or threatened insolvency of a party to the contract

Contracts also often provide that a right of termination will only arise after the defaulting party has failed to remedy its breach within a given period. In such circumstances, the demanding party must give the defaulting party the opportunity to remedy its breach before proceeding to terminate.

If the contract contains no express provision on termination, a term allowing termination on reasonable notice may sometimes be implied. The reasonable notice in the circumstances has to be determined at the time of the termination. However, the courts have considered the following matters relevant:

- ▶ The formality of the relationship between the parties is a factor. The more formal relationships are likely to require greater notice of termination.
 - ▶ It depends on the length of the commercial relationship and how much the parties have invested in it. Longstanding relationships involving substantial investment are likely to require greater notice.
 - ▶ The duration and scope of the obligations of the parties under the contract also matters. Again, the longer the term of the contract and the broader its scope, the greater the notice period that is likely to be required.
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>The principle of good faith has a place in the Canadian common law. Parties must perform their contractual obligations honestly. The Supreme Court of Canada, in its decision <i>Bhasin v. Hrynew</i>, released on 13 November 2014, confirms that the Canadian contract law is guided by an organizing principle of good faith in contractual performance. It also stated that parties have a duty to perform contractual obligations honestly.</p>	
Intuitu personae clause, or change of control or assignment clause	<p>Generally, without an assignment provision, a party is free to assign the rights and benefits of a contract. The exceptions to this include contracts that are personal services contracts or where an assignment would increase the other party's obligations under the contract. Further, it should be noted that while rights and benefits may be assigned, contractual obligations and liabilities cannot be assigned. There are a number of reasons why one party would wish to control another party's rights to assign, the most obvious being that the other party may not want to engage in commercial arrangements with a proposed assignee.</p>	
Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation	<p>Hardships clauses generally overlap force majeure clauses. Hardship clauses may be considered for situations such as insolvency.</p>	
Force majeure	<p>A force majeure provision generally provides that a party to an agreement is not responsible for the delay or failure to perform any of its obligations, if that delay or failure is the result of an unforeseen event beyond the reasonable control of that party.</p> <p>As described by the Supreme Court of Canada in <i>Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.</i>, a "force majeure provision ... generally operates to discharge a contracting party when a supervening event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill."</p>	

Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>The Civil Code of Quebec uses the expression “latent defect” within the subsection dealing with the obligation of the seller to warranty the quality of the property that is being sold.</p> <p>The essence of the legal warranty against latent defects is found in Article 1726 of the Civil Code of Quebec, which states:</p> <p>“The seller is bound, however, to warrant against any latent defect known to the buyer or any apparent defect.”</p>
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>Canadian courts have allowed parties to limit liability for claims arising in either contract or tort through appropriately drafted exclusion or limitation of liability clauses. This was established in the case, <i>Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.</i></p> <p>Limitation of liability clauses often also impose a time limit as to when claims shall cease to exist. This is commonly stated as six years, from the earliest of certain events specified in the contract.</p>	
Competent jurisdiction, execution of foreign decisions and exequatur	<p>Parties are generally free to choose the forum for resolving disputes. Depending on the wording of the clause, the parties may give exclusive, nonexclusive or concurrent jurisdiction to a particular forum.</p> <p>Exclusive jurisdiction: The best way to indicate that the parties would like to resolve disputes in one and only one jurisdiction is to indicate that they choose to give exclusive jurisdiction to a particular forum.</p> <p>Non-exclusive jurisdiction: Parties may also want to agree to one forum but not to the exclusion of others.</p> <p>Concurrent jurisdiction: As a subset of a nonexclusive jurisdiction clause, parties may want to allow disputes to be heard in more than one forum.</p>	

Contacts: Paola Bruzzone Goldsmith and Ignacia Castro

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	<p>The Chilean commercial law privileges the use of consensual contracts, without ignoring the solemn character of certain commercial conventions. In consensual (i.e., private) contracts, the contract will be deemed valid and effective by the acceptance of the offer made by the recipient of it. This acceptance may be express or verbal, which is implied.</p> <p>The offer may be withdrawn, but this withdrawal must be timely – as long as the recipient of the offer has not accepted it and, like the formulation of it, must be done in formal and explicit terms. Retraction shall not be presumed.</p> <p>The foregoing is without prejudice to solemn contracts. Certain contracts under the Chilean law must comply with certain solemnities to be deemed valid and effective, being, in some cases, the obligation to memorialize the contract in writing. For example, it must be recorded in writing or contracts that contain the obligation to deliver or the promise to deliver a product worth more than US\$0.50, which thus applies to most private sale or service contracts.</p>	In matters of evidence, proof by witnesses will not be admitted with respect to an obligation that must have been recorded in writing.
Pre-contractual obligation: good faith and information obligation	<p>The Chilean law recognizes the following pre-contractual obligations:</p> <ul style="list-style-type: none"> ▶ Duty of communication or information: Good faith imposes on the parties the obligation to communicate in order to lead the negotiations to a state of equality between the parties. ▶ Duty of loyalty: This obligation looks at the direct relationship that future contractors should create, maintain and strengthen. ▶ Duty to act with seriousness and reserve: Parties must exchange information, and this information must be the truth and kept confidential. ▶ Duty of preservation: This includes custody of the purpose of the proposed contract. 	Failure to comply with any of these pre-contractual obligations may result in extra contractual liability.

Signature by counterparts	<p>The Chilean commercial law privileges consensual contracts, so the manifestation of the parties' will does not need to be in writing.</p> <p>Nevertheless, the common practice is to duly write and sign a contract, so as to have obligations of the parties well established, in case of controversy. The Chilean law does not generally recognize signature by counterparts.</p>	In contracts that must be written in accordance with the Chilean law, the signature is obviously required.
Language of the agreement	<p>Contractors are free to agree on a contract in Spanish or another language.</p> <p>If the contract is drafted in more than one language (i.e., double column), parties must identify the prevailing language.</p>	A translation into Spanish will be required for contracts that are subject to registration with public registries, or those that will be presented before governmental agencies or a Chilean court.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>T&C are at the basis of commercial relationships. There might be discrepancies between the seller's T&C and those of the buyer.</p> <p>The T&C of the seller are enforceable against the buyer if the seller accepts them at the formation of the contract at the latest.</p> <p>In case of contradiction between the T&C of the buyer and those of the seller, the parties (or courts) must seek the real intention of both parties at the time they decided to enter into the contractual relationship. The general law of sales (embodied in the Chilean Civil and Commercial Code) will apply.</p>	
Essential obligations and imbalance	<p>According to the Chilean legislation, contracts are formed by clauses that belong to such contracts by essence, as opposed to optional clauses that are not required for the validity of the contract. Obligations that are of its essence cannot be omitted or breached, since they are constitutive requirements of the contract and necessary elements for the existence or perfection of the contract.</p> <p>Parties are not allowed to modify these essential obligations of a contract; if they do, the contract will transform into a different legal act.</p>	

Consideration	The Chilean law does not strictly recognize the common law concept of consideration and, instead, uses the notion of cause (i.e., the rationale for the validity of the contract).	The cause is one of the elements of the essence in any contract. It is important for interpreting the scope of the parties' respective obligations. Contracts usually expressly identify the cause of the contract.
Price: determination, revision, indexing and payment terms	<p>Parties may agree on the price freely. For those contracts with the price specified in foreign currency, payment must be converted to Chilean Pesos (CLP) at time of payment, according to the exchange rate in force at that day. The Central Bank of Chile publishes the exchange rate every day for the most important currencies, such as Euros, US dollars and Yen.</p> <p>The price has to be determined in the contract or be determinable, following a calculation formula specified in the same contract. Failure to do so will result in the contract being deemed void.</p> <p>The price may be set by the parties or by a third party appointed by the parties.</p> <p>Payment terms are subject to parties' will.</p> <p>Factoring is allowed and electronic bill is the most common way to invoice in Chile.</p>	
Exclusivity provisions	Generally, the grant of exclusivity (whether on the buy or sale side) is permissible. These clauses do not necessarily have to be limited to a time or geographical area, as long as they do not result in an unfair competitive practice.	The validity of exclusivity clauses will depend on the dominant position of those who impose them. If they are able to exclude suppliers from the market, they will affect fair competition. Those who impose it have to prove their justification for reasons of efficiency, and that they are reasonable in time and form. These clauses may be challenged before the Chilean court of fair trade. Fines can be imposed if the court finds the clause not reasonable. The court may also start an investigation against the party that imposed the clause and declare its nullity. Fair trade and antitrust contingencies might arise as well.
Noncompete obligation	Noncompete undertakings are allowed, as long as they are limited to a specific field of commerce. The undertaking may apply to the contract duration or to the period after its termination for a given period agreed on by the parties.	The clause may provide for specific penalties in case of infringement.
Governing law (implied content and public order)	A contract executed in Chile and to be performed in Chile will be governed by the Chilean law regarding its interpretation and performance.	

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>The parties may enter into contracts for the following terms:</p> <ul style="list-style-type: none">▶ A fixed term must be enforced until the expiry of the (renewed) term. These contracts can be renewed for consecutive periods, for example, for lease contracts. Normally, these contracts last until the obligations generated by the contract are fully met, through payment or ways to extinguish obligations equivalent to the payment.▶ For an indefinite period, notwithstanding, each party may terminate the contract at any time, without justification, through the notice stipulated generally in the same contract.	
Prior notice of termination	<p>Parties are free to determine the form the notice shall take. Specific regulation can be found for certain type of contracts. But, in general, it is up to parties to determine the length of the prior notice and the notice formalities that must be complied with.</p>	
Termination for cause	<p>The contract may specify termination causes, such as bankruptcy, agreed upon by the parties. The clauses should identify precisely the breaches that could justify an agreed cause of termination.</p> <p>Other examples of termination for cause may be found in the Chilean legislation, such as:</p> <ul style="list-style-type: none">▶ Absolute and relative nullity▶ Resolution▶ Revocation (Pauline action that entitles creditors to annul contracts because of fraud against the creditors)▶ Fortuitous event, when it causes the extinction of the correlative obligation▶ Death of one of the contractors (contracts intuitu personae)	

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Regarding contracts, good faith is a ruling principle, explicitly recognized within the Chilean legislation. All contracts will have to be executed in good faith.	
Intuitu personae clause, or change of control or assignment clause	<p>If the contract is intuitu personae, it cannot be validly transferred, since a transfer will be understood as creating a new contract.</p> <p>Generally, assignment of contracts (understood as bearing on the entire instrument) is not expressly regulated in the Chilean legislation and is a creation of the scholars. It is common to include such a specific assignment provision in contracts requesting counterpart authorization prior to the actual assignment, unless the assignee is a subsidiary of the assignor.</p> <p>The assignment of rights and debts are expressly regulated, in which an assignor assigns its rights and debts to an assignee.</p> <p>The change of control clause is usual in contracts with big conglomerates or groups of companies, or between a corporation and a bank. Free will of the parties may stipulate change of control clause.</p>	
Hardship clause (impresión), i.e., unforeseeable circumstances and renegotiation	<p>Parties may freely stipulate the hardship clause and the conditions applicable thereto, leading the parties to renegotiate in good faith. This is subject to the following conditions:</p> <ul style="list-style-type: none">▶ It must be a continued performance contract or at least a deferred execution contract.▶ The hardship should result from circumstances unrelated to the parties and not foreseen.▶ The hardship must result in a patrimonial imbalance.▶ The facts that produce the alteration must be so extraordinary and serious that if parties had them in sight at the time of the conclusion of the contract, they would not have contracted or would have done it under different conditions.	

Force majeure	Force majeure is expressly recognized in the Chilean legislation, releasing the parties from liability for breach of obligations under circumstances of force majeure. Force majeure event must be cumulatively non-imputable, unpredictable and irresistible.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	The warranty clause is usual in purchase agreements, whereby the seller is granting warranty for a limited period of time agreed on by the parties. If the seller is not the same as the manufacturer, then the seller will grant a warranty to the buyer; but, such warranty will actually be the same as the manufacturer's warranty.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>Contractual limitation of liability is usually recognized under the Chilean law, except to cover fraud, malicious behavior or gross negligence.</p> <p>Parties may freely specify the penalty clause in their contracts.</p>	
Competent jurisdiction, execution of foreign decisions and exequatur	<p>Regarding commercial matters, parties are entitled to choose any court to settle their dispute. Civil law is more restrictive in this matter, especially for cases involving public interest or public law.</p> <p>Chile is signatory of the New York Convention. Enforcement of international decisions will have to be processed through a request to the Chilean Supreme Court.</p>	Dispute in international contracts is usually entrusted to arbitral courts.

Mexico (civil law)

Contact: Tatiana Treviño

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written contracts	Contracts are binding under the Mexican law, even though they are not in writing. However, certain types of agreements require a special formality by law, i.e., in writing and granted before a Mexican notary public.	<p>It is advisable to execute written contracts.</p> <p>Parties are under duty to keep the original version of their contracts for 10 years, including the letters, emails or any other documents, such as the agreements.</p> <p>In the event of a judicial dispute, the original version of the agreement would need to be submitted in court.</p> <p>The Mexican Commercial Code provides for the digitization of written contracts, provided that certain requirements are met.</p>
Good faith and information obligations	<p>The parties have to comply with the obligations expressly stated in their contracts and those implied by statute, depending on the type of contract.</p> <p>Contracts executed with bad faith or willful misconduct may be declared null and void, to the extent that such bad faith or misconduct is duly proven.</p>	
Pre-contractual obligation	Pre-contractual obligations may be included in a promise to contract containing the main T&C of the final contract and a period for the execution of the final contract.	<p>The court may force the execution of the final contract in the event one party refuses to execute it.</p> <p>If the final contract cannot be executed because of negligence of one party, such party may be liable for the payment of damages and losses.</p> <p>Promissory agreements may include penalty clauses in case of breach by the defaulting party.</p>

Signature by counterparts	<p>The Mexican law does not impose any restriction against signing a contract by counterparts.</p> <p>The process of signing a contract is a matter of evidence.</p> <p>Once the acceptance of an offer is received in writing or by any electronic means, the contract is considered valid and binding, to the extent that the corresponding formalities are met.</p>	<p>In the event of a judicial dispute before a Mexican court, the original executed documents or other proof of its existence will be required.</p>
Language of the agreement	<p>Parties are free to select the language of their contract. In the event a contract is signed in a language other than Spanish, it is highly advisable for each party to expressly represent that they understand the language of the contract and, consequently, the content of the same.</p> <p>In the event any action is taken before a Mexican court, an official translation into Spanish by an official translator would have to be prepared to initiate any proceeding.</p>	<p>Mexican governmental authorities request the use of Spanish.</p> <p>In any proceeding taking place in Mexico for the enforcement of a contract, Mexican courts will apply the Mexican procedural law and an official translation into Spanish of the contract would need to be provided.</p> <p>If more than one language is used in the contract, it is advisable to specify the language that will prevail in case of discrepancy, preferably the language of the country of the applicable law and jurisdiction chosen in the contract.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>Under the Mexican law, the applicable T&C shall be the ones set forth in the signed contract. In the event that there is no signed contract, the applicable T&C shall be the ones that are proven to be the uncontested will of the parties before the court.</p> <p>If the T&C of the parties are contradictory, the contract must be interpreted on the basis of:</p> <ol style="list-style-type: none"> 1. The subjective intent of the parties 2. Its legal nature and desired effects 3. The applicable commercial practices <p>If it was impossible to resolve the contradiction between the T&C of each party, the Mexican law stipulates that:</p>	

1. If the contradiction affects a non-substantial provision of the contract, the contract must be interpreted in the less onerous way for all parties.
2. If the contradiction affects a substantial provision of the contract, the contract will be void.

Essential obligations and imbalance

Under the Mexican law, the validity and performance of a contract cannot be left at the sole discretion of any of the parties.

The contract has to clearly specify the intention of the parties and the subject matter; otherwise, the contract may be held void.

As opposed to the Federal Civil Code, the Mexican Commercial Code does not prohibit significant imbalance provisions because of the unfair disadvantage or disproportionate burden on one of the parties.

However, the Mexican Supreme Court (Suprema Corte de Justicia de la Nación) has resolved that a Mexican court may reduce ordinary interest rates agreed on a loan or credit agreement in the event such rate is considered imbalanced and abusive.

A specific category of contracts – adherence to standard formatted agreements (contratos de adhesión) – for the acquisition of products or to render services in the context of consumer protection laws have to comply with the following cumulative requirements:

- ▶ They shall be in Spanish.
- ▶ No imbalance or abusive provisions shall be included.
- ▶ As provided by the Federal Attorney’s Office of Consumer (PROFECO), the form of certain standard agreements need to be registered before such authority.

Consideration

The Mexican law does not recognize the common law concept of consideration or cause. However, under the Mexican law, the agreements may be held void in the event the motive of inducement of the parties is illegal or against laws of public order.

Price: determination, revision, indexing and payment terms	<p>The price must be fixed or determinable; otherwise, the contract may be held void.</p> <p>The price shall be paid pursuant to the T&C specified in the contract. Otherwise, the price shall be paid up front.</p> <p>The price may be stipulated in a foreign currency.</p> <p>It is advisable to include in the contract a penalty clause in case of late payment of the price. In the absence of such a clause, by statute of law, a penalty of up to 6% may be applied.</p> <p>Adjustment method and additional price may also be agreed on, provided that the calculation method is specified in the contract.</p> <p>The transfer of ownership is not necessarily linked to the payment of the price.</p>	<p>Tax and transfer pricing implications need to be taken into account to determine the price if the contract is executed between related parties.</p> <p>Pursuant to the Mexican Monetary Law, any payment in Mexico due in any currency other than Mexican Peso may be paid in Mexican Pesos, considering the exchange rate published by the central bank (Banco de México) in the Federal Official Gazette on the payment date.</p> <p>Consequently, any provisions purporting to limit the ability to discharge the payment obligations, or purporting to give any party an additional course of action seeking indemnity or compensation for possible deficiencies arising or resulting from variations in the exchange rate, may not be enforceable in Mexico.</p>
Exclusivity provisions	<p>Exclusivity provisions are considered as relative monopolistic practices and are allowed, provided that the following conditions are satisfied:</p> <ol style="list-style-type: none"> 1. The market competition is not affected as provided by the federal competition law (abuse of dominant position or anticompetitive agreement). 2. Parties do not have substantial power in the relevant market. 	
Noncompete obligation	<p>Noncompete clauses are allowed, provided that the undertaking is limited to:</p> <ol style="list-style-type: none"> 1. A certain period of time (usually no more than five years) 2. A given territory 3. A certain scope (clearly identifying competitive activities) 	<p>The Federal Competition Commission may review such clause to verify that the competition law is not violated. However, the Federal Competition Commission considers a three-year term as an acceptable period of time for noncompete obligations.</p> <p>From the labor law perspective, the noncompete clauses are sometimes challenged by arguing that the Mexican Constitution sets forth that any individual should remain free to work in any lawful activities in a freely manner.</p>

<p>Governing law (implied content and public order)</p>	<p>Parties are free to choose the governing law applicable to their contract, provided there is a point of contact with the elected governing law (either in respect to the contract or the parties). However, in the event of silence in the contract as to the governing law, the Mexican law will apply, if the parties are resident or if the contract is executed in Mexico.</p> <p>Notwithstanding the non-Mexican applicable law chosen by the parties, the Mexican law will apply in the following events:</p> <ul style="list-style-type: none"> ▶ If the chosen applicable law is against a mandatory Mexican law ▶ If the court resolves that the chosen applicable law has been artificially chosen to evade the fundamental principles of the Mexican law ▶ If the chosen applicable law or the result of its applications is against any fundamental principle of the Mexican public policy 	<p>The rules set forth in the Federal Civil Code should be applied to determine the law applicable to civil and commercial matters involving more than one country or different states within Mexico.</p> <p>The general principle of law, <i>lex rei sitae</i> (or <i>lex situs</i>) is recognized by the Mexican law.</p>
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
<p>Term and tacit renewal</p>	<p>The term of the contract may be:</p> <ul style="list-style-type: none"> ▶ A fixed term: It would be in force until the expiry of the specific term, unless the parties agree to renew the contract. ▶ An indefinite term: Each party may terminate the contract at any time, provided that a written notice is given in advance. <p>Under the Mexican law, tacit renewal only applies automatically in lease agreements and only if certain circumstances occur. However, the tacit renewal clause may be included in other agreements, provided that it is expressly agreed on by the parties.</p>	<p>In the event the contract does not specify a term for the satisfaction of the obligations (other than delivery of goods contract), such obligations have to be satisfied within 10 days as from the execution of the contract.</p> <p>If the purchase agreement does not specify a term for the delivery of the goods, delivery must take place within 24 hours following the execution of the contract.</p>
<p>Prior notice of termination</p>	<p>As a general rule, the termination without cause of a contract with a specific term is deemed as a breach of contract, unless it is expressly contemplated in the contract.</p> <p>If a contract does not have a specific term or is silent in this respect (indefinite term), the Mexican law admits the termination without cause with prior notice and subject to certain rules that depend on the type of contract (i.e., lease agreements require 15 days prior notice).</p>	

Termination for cause	<p>As a general rule, termination for cause is only available in the event of default by any of the parties.</p> <p>In such a case, the remedies available to the non-defaulting party are:</p> <ol style="list-style-type: none"> 1. The termination of the agreement, and the payment of damages and loss of profits 2. The specific performance of the contract, and the payment of damages and loss of profits 	<p>The contract may include a late penalty in case the obligations are not satisfied on time.</p> <p>In the event the contracts (other than purchase contracts) include a penalty for the breach of the whole contract (penalty clause), then the non-defaulting party may request either the fulfillment of the contract or the payment of such penalty.</p>
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>Contracts must be negotiated, formed and performed in good faith.</p> <p>A contract executed in bad faith may be held void.</p>	<p>Good faith is presumed; thus, bad faith has to be demonstrated.</p> <p>The term of the statute of limitation applicable to claims related to the acquisition of property vary, depending on whether the demanding party alleges the good or bad faith from the defaulting party.</p>
Intuitu personae clause, or change of control or assignment clause	<p>Under the Mexican law, contracts may be assigned as a whole, or the rights and obligations thereunder may be partially or totally assigned, provided the following conditions are satisfied:</p> <ol style="list-style-type: none"> 1. The assignment is expressly contemplated in the contract or, otherwise, the assignment is agreed by all parties. 2. In the event the contract includes obligations payable to a third party, such third party consents to the assignment. 3. In the event the contract includes obligations payable by a third party, such third party receives an assignment notice in writing. <p>Change of control provisions are acceptable under the Mexican law.</p>	<p>The assignment is enforceable against third parties, provided that the requirements set forth in the Federal Civil Code are satisfied.</p>
Hardship clause (impresión), i.e., unforeseeable circumstances and renegotiation	<p>Under the Mexican Commercial Code, a hardship clause is not mandatory, but parties are free to provide for same in their contract.</p> <p>However, the Mexican Supreme Court has resolved that a Mexican court may reduce ordinary interest rates agreed on a loan or credit agreement in the event such rate is considered imbalanced and abusive.</p>	

Force majeure or acts of god	<p>The existence of force majeure or acts of god will relieve the obligor from complying with their obligations upon the occurrence of the following:</p> <ul style="list-style-type: none"> ▶ A natural event unforeseen, predictable or unpredictable, which prevents the performance of the obligation ▶ A third party's act (beyond one's control) that prevents the performance of the obligation <p>Upon such occurrence, the obligor is entitled to suspend the performance of all or part of its obligations. It shall not be liable for the payment of losses and damages to the other party, provided that:</p> <ul style="list-style-type: none"> ▶ The obligor has not itself caused the existence of the force majeure or acts of god. ▶ The obligor does not accept any liability regarding thereof. ▶ The obligor is not liable by applicable law. 	<p>The court will determine whether the conditions of force majeure or acts of god are met.</p> <p>It is recommended to specify in the contract a definition of the events and circumstances that would qualify as force majeure or act of god, and to agree on all applicable T&C upon occurrence of such event.</p> <p>The clause may also provide for the conditions for the termination of the contract or its renegotiation.</p> <p>Prior notification of the force majeure or act of god event by the obligor to the other party is required.</p>
Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>The Mexican Commercial Code provides the following in respect of purchase and distribution contracts:</p> <ol style="list-style-type: none"> 1. In the event the type and quality of the goods to be delivered is not specified, then the obligor may deliver goods that have a standard type and quality. 2. The purchaser may take action against the seller if the following conditions are satisfied: <ul style="list-style-type: none"> ▶ If the purchaser, within five days following the date of delivery, complains in writing regarding the lack of quality or quantity ▶ If the purchaser, within 30 days following the date of delivery, complains about any latent defects 	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>Parties are free to limit their contract liability, except when:</p> <ol style="list-style-type: none"> 1. The breach of contract is a consequence of the willful misconduct of one of the parties. 2. Such limitation violates the public order or the rights of third parties. <p>Also, it is acceptable under the Mexican law for parties to stipulate a pre-liquidated default penalty, in which case, the non-defaulting party will not have the right to additionally demand the payment of damages and loss of profit from the defaulting party.</p> <p>Penalty clauses are valid subject to the following:</p> <ul style="list-style-type: none"> ▶ A penalty may be included in the contract, provided that the amount of such penalty may not exceed the amount of the principal obligation of the contract. ▶ Evidence of the existence of damages and losses does not need to be provided to request the payment of the penalty. ▶ The payment of the penalty excludes the payment of additional damages or losses. ▶ If the obligation is partially satisfied, the penalty may be adjusted. 	<p>The enforceability of obligations and contractual liabilities may be limited or affected by tax, labor, bankruptcy, insolvency or similar laws affecting creditors' rights.</p> <p>The enforcement of contractual indemnity clauses may be limited by the Mexican public policy.</p>

Competent jurisdiction, execution of foreign decisions and exequatur

Parties are free to choose arbitration or courts, except in certain matters, provided that the following conditions are met:

- ▶ There is a point of contact with the elected governing law (either in respect to the contract or the parties).
- ▶ Their choice is clearly specified in writing.
- ▶ The parties waive clearly any right to seek protection under any other jurisdiction that may otherwise have competence on the dispute, by reason of their domicile or the place where the obligation has to be executed.

A judgment rendered by a foreign court or an arbitration resolution would be enforceable in Mexico. This is subject to certain requirements set forth in the Mexican Commercial Code are satisfied. Among these requirements, the first one is that such a judgment must:

1. Comply with the legal requirements of the jurisdiction where the court that has issued the judgment sits
2. Strictly be about payment of money and has been rendered in a personal action (an in personam action), as opposed to a real action (an in rem action)
3. Not be against the Mexican public policy or any international treaty that Mexico is a signatory of, or general principles of international law
4. Be final
5. Be translated into Spanish by an authorized translator

The second requirement is that the service of process must be made in person – service of process by mail is not valid under the Mexican law.

In the event a legal action is brought before a court in Mexico, Mexican courts may apply Mexican law on statute of limitations and expiration (prescripción o caducidad), notwithstanding the fact that the parties may have selected a foreign law to govern their contracts.

Under Mexican law procedural rights may not be legally waived.

Arbitration will be more flexible (right to choose the arbitrators) and quicker. It will also allow confidentiality of hearings (unlike in court cases). However, arbitration can be much more expensive than resolution before Mexican courts.

Asia and Australia

Australia (common law)

Contact: David Paterson

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Matters affecting formation	<p>The contract is formed where there is at least one contractually binding promise. The contract must be sufficiently certain and complete to be enforceable before courts. There are two additional requirements necessary for contract formation at common law, namely:</p> <ul style="list-style-type: none"> ▶ Consideration resulting from the promisee ▶ An intention to create legal relations <p>A party is generally deemed to have consented to entering contractual obligations. However, there are vitiating factors that may render an agreement void under equitable principles. These include:</p> <ul style="list-style-type: none"> ▶ Misrepresentation or mistake ▶ Economic duress ▶ Undue influence ▶ Unconscionable conduct 	<p>It is common in the negotiation of a contract for one party to seek to persuade the other to enter into the contract. Such "influence," without more, does not affect the enforceability of the contract. But, some situations of influence may be regarded as undue and the contract affected liable to be rescinded by the party that was subjected to the influence or liable to be set aside by the court for undue influence. Where a contract is affected by undue influence, the party influenced may approach the court for an order setting aside the contract.</p> <p>Under general principles, a contract may be set aside on the basis of unconscionable conduct if:</p> <ul style="list-style-type: none"> ▶ The party seeking to have the contract set aside suffered from some disability or other circumstances (including poverty or need of any kind, sickness, age and infirmity of body or mind) that served to place that party at a serious disadvantage in the transaction. ▶ That party was unable to make a judgment as to what was in its own interests. ▶ The party against whom relief is sought took unfair advantage of the superior bargaining position in which that party is placed.
Non-written agreement	<p>A contract may be wholly written, wholly oral or partly written and partly oral. It may also be inferred from conduct; however, that conclusion is subject to a number of exceptions.</p>	

Pre-contractual liability	<p>There is no liability in contract in the absence of agreement under Australian law and, thus, no pre-contractual liability per se.</p> <p>However, misrepresentations made prior to entering a contractual agreement may result in the binding agreement being voidable.</p>	<p>Liability may arise, however, in the absence of agreement under a variety of bases under Australian law, including where there is a preliminary or implied contract, under principles of estoppel, in tort, or under statute, among others.</p>
Signature by counterparts	<p>Under Australian law, a contract may be signed in counterparts if the contract expressly states that the parties to the contract agree to it.</p>	<p>A scanned copy of a signed contract is generally acceptable, if the parties agree. Best practice is for originals signed by parties to be retained, in the event of a dispute.</p>
Language of the agreement	<p>The language of the contract may, in principle, be agreed freely between the parties. However, in the event of a dispute, an agreed English translation will be required.</p>	<p>In Australia, contracts are primarily drafted in English.</p> <p>If a contract is drafted in another language, it is best practice for a contract to include a clause stating that all parties agree to the contract being drafted in that language, and that all parties understand and agree to all terms of the contract.</p> <p>Whenever a contract is interpreted, the result must be that a word or clause is given a single meaning. Very few, if any, words of the English language have a single meaning, and issues may arise when a document is required to be translated in the event of dispute.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>Generally, a contract is not formed if an offer is made using standardized form of T&C, and accepted with a differing standardized form of T&C. The issue of the second T&C is perceived as a counteroffer. The contract is formed if the parties commence contractual performance or if the counteroffer results in further negotiation and agreement to the final T&C.</p> <p>It is foreseeable that contractual obligations will be enforceable in circumstances where the contract was last formed. For example, if a counteroffer results in performance of contractual obligations, these may be deemed as accepted and, thus, enforceable.</p>	<p>Each arrangement will be determined on its merits. It is commercially prudent to ensure that contracting parties agree to terms prior to conducting business to avoid uncertainties arising where each party uses their own form of standard T&C.</p>

Essential obligations and imbalance	<p>Standard implied terms may be inferred by common law, statute and the parties' conduct, where it is necessary to give full effect to the intention of the parties. For example, standard terms may include:</p> <ul style="list-style-type: none"> ▶ Goods sold are fit for purpose. ▶ Services are rendered with reasonable care. 	<p>Many of these considerations are addressed in Australian consumer law (B2C).</p>
Consideration	<p>In the Australian common law, consideration is essential in enforcing an agreement as binding.</p> <p>Performance of an existing contractual obligation is not deemed as sufficient consideration, as it confers no additional benefit.</p>	<p>However, it is subject to some qualifications. For example, consideration is not required to be valuable per se. Parties may still execute a deed in seeking to have an agreement without consideration being enforced.</p> <p>Also, there are two exceptions to consideration:</p> <ol style="list-style-type: none"> 1. Execution of a deed 2. Doctrine of promissory estoppel applies
Price: determination, revision, indexing and payment terms	<p>The price of a contract is referred to as consideration in Australian contract law. The concept of consideration refers to the monetary or non-monetary value of the promise in a contract.</p> <p>The revision of consideration may be possible if the contract adequately provides for such changes, for example, a clearly defined hardship clause with respect to price review.</p>	
Exclusivity provisions	<p>The grant of exclusivity (whether on the sale or buy side) is permissible under Australian law.</p>	<p>Depending on several factors, exclusivity provisions should be drafted carefully to ensure they are enforceable.</p>
Noncompete obligation	<p>A noncompete clause is permitted during the performance of a contract, as well as after the termination of a contract.</p>	<p>Noncomplete clauses may be dismissed by Australian courts, if not drafted in accordance with the current law (which may include statute, case law and employment law).</p>
Governing law (implied content and public order)	<p>Parties may choose their own governing law, which should be expressly included as a clause in a contract.</p>	<p>Parties should elect the governing law according to the key aspects of the contract: maturity of the jurisdiction, flexibility of the law and commercial orientation.</p> <p>Choice of law clauses may not be upheld in the following circumstances:</p> <ul style="list-style-type: none"> ▶ Where it is overridden by statute ▶ Where the provision is contrary to public policy ▶ Where the provision selects law that is not bona fide

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	A contract may be entered into for a fixed term, with or without the possibility to renew.	Parties must consider whether renewal needs to conform to certain procedural or timing requirements, or if acquiescence is acceptable to renew a term.
Prior notice of termination	A termination clause within the contract should describe the events that trigger the clause, the procedure for termination (such as form of notice and notice periods), and specify the consequences of termination.	Depending on the drafting of a contract, prior to termination, the obligor may have an opportunity to remedy the breach or show cause as to why the contract should not be terminated. This may not be available if the breach is described as a material breach that gives right to a termination right for cause (see "Termination for cause" below).
Termination for cause	Termination for cause may generally occur in the following three circumstances: <ul style="list-style-type: none">▶ Discharge by agreement▶ Discharge by exercise of an express or implied right of termination▶ Automatic discharge by frustration	

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	There is no authoritative obligation to act in good faith in Australian contract law. There is a duty of mutual trust and confidence; however, according to the High Court of Australia, this is distinct from good faith.	Many underlying contract principles promote the ideal of good faith in contract negotiation and performance.
Intuitu personae clause, or change of control or assignment clause	While a party can assign its rights under a contract, a party is generally unable to assign its obligations. If a party wants to assign its rights and obligations under a contract, unless expressly prohibited from doing so, it may seek to novate its rights and obligations to a third party. To legally effect a novation of a party's rights and obligations under a contract, it must enter a tripartite agreement with existing counterparties and the proposed third party. This requires the full consent of the existing counterparty.	Depending on several factors, assignment provisions should be drafted carefully to ensure they are enforceable. Novation is typically effected by way of a tripartite novation deed between existing parties to an agreement and the incoming third party. A novation deed should be carefully drafted to ensure that the intentions of the parties are legally effected as a novation.

<p>Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation</p>	<p>A hardship clause may be included as an express contract provision that provides for deviation of the original contract terms because of changes in particular circumstances.</p> <p>Hardship clauses need to be clearly defined and sufficiently certain to be enforceable. The clause should also include consequences, if an agreement on the revision cannot be reached between the parties.</p>	<p>Depending on several factors, hardship clauses should be drafted carefully to ensure they are enforceable.</p>
<p>Force majeure</p>	<p>Force majeure clauses generally operate to suspend contractual rights and obligations if a force majeure event occurs. A force majeure event is one that is unforeseeable and not reasonably within the control of the parties. For instance, force majeure events may be acts of god, general strike, war (declared or undeclared), blockade and disturbance. It also includes governmental or quasi-governmental restraint, expropriation, prohibition, intervention, direction or embargo; unavailability or delay in availability of materials, equipment or transport; inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licenses, authorities or allocations; or drought, flood or fire.</p>	
<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>Warranty provisions generally provide the right for parties to claim damages against parties in breach. However, warranty clauses do not generally provide the right for parties to rescind or terminate the performance of the contract.</p>	<p>In practice, each obligation will be assessed individually by Australian courts with respect to its contractual nature.</p>

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>Liability between contracting parties may be validly limited in respect of monetary value, non-monetary value and consequences of breach.</p>	<p>Depending on several factors, limitation of liability clauses should be drafted carefully to ensure they are sufficiently certain, enforceable and not subject to dispute.</p>

Competent jurisdiction, execution of foreign decisions and exequatur

Parties may agree to the jurisdiction that their agreement applies. Such clauses should be clear and properly reflect the parties' intention about the law and jurisdictions they wish to apply to in case of a dispute arising under their contract. Through these clauses, parties can designate specific jurisdictions or laws that apply to the construction and interpretation of the contract.

Whether a foreign judgment can be enforced in Australia generally depends on:

- ▶ The jurisdiction in which the foreign judgment was made
- ▶ The court in that jurisdiction in which the judgment was made
- ▶ The type of judgment that was issued

If a money judgment (being a judgment under which money is payable) is made in a superior court of certain countries, substantial reciprocity of treatment applies in relation to enforcement of that money judgment in an Australian superior court. The accepted jurisdictions and superior courts are prescribed under Australian law, under Foreign Judgments Act 1991 (Commonwealth) and Foreign Judgments Regulation 1992 (Commonwealth).

Foreign money judgments made in inferior courts of certain countries (limited to the UK, Canada, Switzerland and the Republic of Poland), may also receive reciprocity of treatment in relation to enforcement in an Australian inferior court.

The availability of this Australian enforcement mechanism is subject to certain Australian procedural conditions and the specific nature of the relevant foreign judgment. Although Australian statute does not currently permit enforcement of foreign non-money judgments, there may be limited circumstances in which a party could seek to have a foreign judgment enforced under common law.

The distinction between superior and inferior courts will inform which Australian court will seek to enforce a foreign judgment. In turn, the type of Australian court may apply certain procedural differences and related costs.

6. Recent legislation and trends

Unfair contracts

Recent amendments to the Australian Securities and Investments Commission Act 2010 (Commonwealth) and the Competition and Consumer Law Act (Commonwealth) have expanded the application of the unfair contracts regime, to include small business contracts. The unfair contracts regime generally applies to unfair terms in standard contracts. The amendments seek to reduce imbalances between contracting parties' rights and obligations, while prevent financial detriment to parties relying on unfair terms in standard contracts. Unfair terms may include those that limit or avoid performance of contractual obligations, or limitations on the right to take action.

China mainland (civil law – customary law)

Contact: Daisy Wang

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	<p>Parties may conclude contracts in writing, orally or in some other form.</p> <p>However, a contract shall be concluded in writing where laws or administrative regulations stipulate, or where the parties agree to use the written form.</p> <p>The following contracts have to be concluded in a written form:</p> <ul style="list-style-type: none"> ▶ Loan contracts (unless the loan is between natural persons who have agreed otherwise) ▶ Lease contracts with the term over six months ▶ Financial leasing contracts ▶ Construction project contracts ▶ Contracts for entrustment of supervision of construction project with a supervisor ▶ Technology development contracts and technology transfer contracts 	<p>Contracts would be deemed to have been concluded “in other forms” when the parties fail to conclude a contract either in written or oral form, but it is able to infer from the civil acts of the parties that they have the intention to enter into a contract, unless otherwise stipulated by the Chinese law.</p> <p>If the parties fail to adopt a writing form (while laws, administrative regulations or the parties made the writing form mandatory), whereas one party has already performed the main obligations that have been agreed upon by the parties, the contract is, nevertheless, deemed to be concluded.</p>
Pre-contractual obligation: good faith and information obligations	<p>Pre-contractual obligations are set forth in the Chinese contract law in Article 42 (Good faith) and Article 43 (Business secrets protection).</p> <p>A party shall be held liable for not acting in good faith in the course of concluding a contract, if the party:</p> <ul style="list-style-type: none"> ▶ Negotiates in bad faith under the false pretext of concluding a contract ▶ Deliberately conceals important facts or provides a false account of the situation ▶ Violates the principles of good faith by other means 	<p>The party shall be liable to pay compensatory damages if it violates the pre-contractual obligations of good faith and for disclosing or inappropriately using the business secrets that the parties became aware of in the course of concluding a contract, which resulted in any loss to the other party.</p>

Signature by counterparts	<p>The Chinese contract law does not provide for signing separate counterparts. Basically, the principle of informality is adopted regarding the conclusion of the contracts. However, where a contract is required to be formed in writing by law or administrative regulations, signatures or seals of each parties are necessary on one original copy.</p> <p>In general, a contract shall be signed by the legal representative or other authorized person of an organization from both sides.</p>	
Language of the agreement	<p>Parties may agree on the languages of the contracts. But, when a contract that needs to be submitted to a court, other authorities or administration as documentary evidence is in a foreign language, a Chinese translation must be provided.</p>	<p>Where the contract is in two or more different languages and it is agreed that they are equally effective, it shall be presumed that the words used in each language all have the same meaning.</p> <p>Where the words used in the different languages of the contract are not identical, the contract shall be interpreted in accordance with its purpose.</p> <p>If more than one language is used, it is highly recommended to specify the language that prevails.</p>

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>The State Administration for Industry and Commerce and the local administrations for industry and commerce in China prepare and release some model texts of contracts that the relevant parties may choose to use or amend at their free will.</p> <p>Standard clauses are adopted by certain enterprises for repeated use, provided that the standard clauses are made subject to the principle of fairness in defining the rights and obligations of the parties.</p> <p>The party providing the standard terms shall observe the principle of fairness in defining the rights and obligations of the parties. It shall draw the attention of the other party to the terms that exclude or restrict the other party's liabilities in a reasonable manner and explain the standard terms at the request of the other party.</p> <p>The Chinese contract law stipulates the meaning less favorable to the party, providing it prevails.</p>	<p>A standard clause shall be of no effect if it excludes the liabilities of the party proposing it, increase the liabilities of the other party or remove important rights enjoyed by the other party.</p> <p>It is important to make the standard clauses clear and avoid ambiguities when there are different meanings.</p>

The nonstandard clause will prevail when a standard clause and a nonstandard clause have different effects or conflicts.

Essential obligations and imbalance	<p>Parties shall observe the principles of good faith in exercising their rights and performing their obligations.</p> <p>Parties shall comply with laws and administrative regulations in concluding and performing contracts. They shall respect social morals and they may not disturb the social or economic order, or harm social and public interests.</p> <p>Parties shall observe the principle of fairness in defining their rights and obligations.</p>	<p>A party shall have the right to request a people's court or an arbitration institution to modify or revoke a contract, if it was obviously unfair at the time of conclusion.</p>
Consideration	<p>The Chinese contract law, which applies to commercial contracts, does not strictly recognize the common law concept of consideration. Instead, it stresses on the principle of fair and equal value.</p>	
Price: determination, revision, indexing and payment terms	<p>The Chinese contract law attaches importance to the principle of freedom to contract. Therefore, if the price is not determined in the contract the following occurs:</p> <ul style="list-style-type: none">▶ The parties may reach additional agreement. If the price has not been determined by the parties at the time the contract is executed, but only after the contract comes into effect, the contract is valid and the parties may agree on additional provisions.▶ If no additional agreement could be reached, the price may be determined by referring to the other provisions of the contract or by reference to business practices.▶ If the price still cannot be determined, the market price at the place of performance at the time of conclusion shall apply.▶ However, if there exists a government-fixed price or government-directed price, the relevant provisions regarding that price shall apply.	

Exclusivity provisions	<p>Parties may agree on exclusivity provisions subject to the competition law and anti-monopoly law.</p> <p>Public utilities or other operators having monopolistic status by law shall not require others to purchase the goods of the operator designated to exclude other party from fair competition.</p> <p>A party having dominant market position is prohibited from refusing to trade with relevant trading counterparts without justified reasons.</p>	<p>The anti-monopoly law clarifies that the dominant market position refers to the market position where an operator can control the prices or volume of commodities or other trades in a relevant market, or can obstruct or affect other operators' capability to enter into a relevant market.</p>
Noncompete obligation	<p>Noncompete is a term used under the Labor Contract Law of China.</p> <p>The noncompete obligation restricts an employee (senior management personnel, senior technical personnel and other personnel who are obliged to keep confidentiality) from working in a similar business, within a defined time and defined territory.</p>	<p>The Chinese contract law does not provide for noncompete obligations. However, in practice, parties do agree on certain restriction regarding competing products or competing business, but need to be wary of not infringing on the competition law or anti-monopoly law.</p>
Governing law (implied content and public order)	<p>Parties to a contract with a foreign element may choose the governing law, except otherwise provided for by the Chinese laws.</p> <p>If the parties to a contract with a foreign element fail to choose the governing law, the law of the country with the closest connection to the contract will apply.</p>	<p>General rules on the Civil Law of the People's Republic of China provides for the application of law in civil relations with foreigners.</p> <p>By way of exception, Sino-foreign equity JV contracts, Sino-foreign cooperative enterprise contracts, and Sino-foreign contracts for the cooperative exploitation and development of natural resources that are to be performed within the territory of China shall be governed by the Chinese law.</p>

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>Parties may agree to attach a time limit to the effectiveness of a contract. Otherwise, the contract is deemed to have an unlimited term.</p> <p>It is allowed to provide for tacit renewal of a fixed-term contract.</p>	
Prior notice of termination	<p>The Chinese contract law stipulates that a party shall give advance notice to the other party prior to the termination of the contract.</p> <p>Parties may agree on the notice to be given within a reasonable time period and through reasonable means.</p>	<p>Notification shall be made in in good faith, and shall be made in accordance with the nature and purpose of the contract, as well as with business practices.</p>

Termination for cause	<p>The following causes of termination are generally recognized under the Chinese law :</p> <ul style="list-style-type: none"> ▶ The purpose of the contract cannot be realized because of force majeure. ▶ Prior to the expiry of the contract, one party states clearly or makes it clear from its conduct that it will not perform the main obligation. ▶ One party delays the performance of its main obligation and, after being called on to perform the obligation, fails to do so within a reasonable period of time. ▶ The objectives of the contract cannot be realized because one party delays the performance of an obligation or because of other conduct in breach of contract. ▶ Other circumstances stipulated in the law can also be cause for termination. <p>The parties may agree on certain other conditions pursuant to which one party may terminate the contract.</p>	If the other party objects to the termination of the contract, it may request that the court or an arbitration body determine the validity of the termination of the contract.
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Good faith is one of the principles prescribed in the Chinese contract law, which parties shall observe in exercising their rights and performing their obligations.	

Intuitu personae clause, or change of control or assignment clause	<p>A party may assign its contractual rights to a third party in whole or in part, except when rights may not be assigned because of:</p> <ul style="list-style-type: none"> ▶ The nature of the contract ▶ An agreement between the parties ▶ Laws stipulate that the rights may not be assigned <p>If a party assigns its contractual obligations in whole or in part to a third party, the consent of the original other party must be obtained.</p> <p>A party may, upon gaining the consent of the other party, assign to a third party all its rights and obligations under the contract in their entirety.</p>	<p>Any assignment of its rights shall be properly notified to the original other party, for which no legal form is required.</p> <p>Notification of the assignment of rights may not be revoked, except with the consent of the assignee.</p>
Hardship clause (impresion) unforeseeable circumstances and renegotiation	<p>The people's court (upon request from a party) will have the power to confirm whether a contract shall be varied or dissolved, in accordance with the principle of justice, taking into account the actual circumstances of the case. This is true for the following two circumstances:</p> <ol style="list-style-type: none"> 1. Where any significant change in the objective environment that could not have been foreseen by the parties at the time of entering into the contract has occurred and does not belong to any commercial risk occasioned by force majeure 2. Where continued performance of the contract turns out to be manifestly unfair to the relevant party or to prevent the purpose of the contract to be achieved 	
Force majeure	<p>A party may be partially or wholly excused from liability because of an event of force majeure, except where laws provide otherwise.</p> <p>A force majeure event refers to a situation that is, from an objective point of view, unforeseeable and unavoidable, and the parties are not capable of overcoming it.</p> <p>If force majeure occurs after a party has already delayed the performing its obligation, the said party will not be excused from its liability.</p>	<p>If one of the parties is unable to perform the contract due to force majeure, the said party shall immediately notify the other party. This is in order to reduce the potential losses sustained by the other party. Evidences of the force majeure event shall be provided by the defaulting party within a reasonable time.</p>

<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>The Chinese product quality law imposes responsibilities and obligations regarding product quality on producers and sellers.</p> <p>Producers shall be liable for compensation if the defect of the products caused any injury to a person or damage to property.</p> <p>Sellers shall be liable for compensation if the personal injury or damage to the property is caused because of product defects resulting from the fault of sellers.</p> <p>Sellers shall be liable for compensation if they cannot identify the producers or suppliers of the defective products.</p>	<p>Producers will be relieved from liability if they can prove that the products have not been put on the market, the defects causing the damage did not exist when the products have been put in circulation or that the defects could not be detected at the time of circulation on the basis of the then scientific and technological knowledge.</p>
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>The limitation of liability mutually agreed by the parties in the contract is permissible, subject to reasonable foreseeability and the principle of fairness.</p> <p>If a party to a contract fails to perform the contractual obligations or its performance fails to satisfy the terms of the contract, thereby causing losses to the other party, then the compensation for losses shall be equal to the losses resulting from the breach. This is provided that the compensation shall not exceed the probable losses for breach of contract that could have been foreseen by the breaching party when concluding the contract.</p>	

Competent jurisdiction, execution of foreign decisions and exequatur

The parties may resolve contractual disputes through conciliation or mediation.

The parties may, in accordance with an arbitration agreement, apply to an arbitration body for arbitration. Parties to a foreign-related contract may, in accordance with an arbitration agreement, apply to a Chinese arbitration body or some other arbitration body for arbitration.

If the parties have not concluded an arbitration agreement or their arbitration agreement is invalid, they may file a suit with the Chinese people's court.

If a legally effective judgment or ruling made by a foreign court requires recognition and execution by a people's court of China:

- ▶ The party concerned may directly apply for recognition and execution to the intermediate people's court with jurisdiction of China.
- ▶ The foreign court may, pursuant to the provisions of an international treaty concluded between or acceded to by the foreign state and China, or in accordance with the principle of reciprocity, request the people's court to recognize and execute the judgment or ruling.

The parties shall implement any judgments, arbitral awards or mediation agreements of legal effect. If a party refuses to implement the same, the other party may petition the Chinese people's court to enforce the relevant judgment, award or agreement.

An action instituted for a dispute shall come under the jurisdiction of the people's courts of China. This is so, if the dispute arises from the performance of:

- ▶ A Sino-foreign equity JV contract
- ▶ A Sino-foreign cooperative JV contract
- ▶ A contract for Sino-foreign cooperative exploration and development of natural resources

The request shall be made by the party concerned or the foreign court that made the judgment.

After a people's court receives the application or request, it shall review such judgment or ruling pursuant to international treaties concluded or acceded to by China, or in accordance with the principle of reciprocity, as explained below:

- ▶ If the people's court considers that such judgment or ruling neither contradicts the basic principles of the law of China nor violates state sovereignty, security and the public interest, it shall rule to recognize its effectiveness. If execution is necessary, it shall issue an order of execution, which shall be implemented in accordance with the relevant provisions of the Chinese law.
- ▶ If such judgment or ruling contradicts the basic principles of the law of China or violates state sovereignty, security or the public interest, the people's court shall refuse to recognize and execute the judgment or ruling.



Hong Kong (common law – customary law)

Hong Kong refers to the Hong Kong Special Administrative Region (SAR) of China

Contact: Renee Mark

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	Contracts may be entered into in writing or in oral form.	Oral agreements are rare in Hong Kong.
Pre-contractual obligation: good faith and information obligations	There is no obligation under the Hong Kong law to negotiate contracts in good faith. Pre-contractual information provided must be correct, accurate and not misleading.	
Signature by counterparts	Contracts may be signed by counterparts.	Most cross-border commercial contracts include a clause expressly authorizing signature by counterparts.
Language of the agreement	Parties are free to choose the language of their contracts. However, typically, contracts in Hong Kong are written either in Chinese or in English. The language used must be agreed by parties involved. If the language is not understood by one party, then the contract has to be translated for the benefit of the party concerned.	A typical clause will provide that if versions of the agreement in differing languages are available, then the version with the selected language shall prevail in the event of discrepancies between the versions or in case of dispute before courts.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	If parties would like to include standard ancillary T&C to the main contract, they may do so usually by a separate document incorporated into the main instrument. This technique is designed to permit unilateral modification to said standard ancillary terms, if such a right is reserved in the main contract.	T&C must be incorporated into the contract to be binding on the parties. If T&C are later on amended, such changes must be made known and agreed by both parties, unless the main contract provides for the advance agreement to unilateral amendment by one party.
Essential obligations and imbalance	There are no specific statutory obligations that apply to commercial contracts in general between business parties.	

Consideration	The concept of consideration is important to ensure the contract is enforceable. Consideration is said to be something of value and may be measurable in economic terms. However, consideration need not be measurable in monetary terms.	This is an important element to enforce a contract in Hong Kong. It would be difficult, in practice, to be admitted to claim under a contract that is deprived of consideration.
Price: determination, revision, indexing and payment terms	The price must be determined or be at least determinable under the Hong Kong law. The determination of price is normally set out in details in contract provisions. In a schedule attached at the end of the contract, it provides more space and clarity on how it should be determined.	There are no particular rules in terms of this, so long as the price is at the very least determinable (either through a fixed formula or through market rates).
Exclusivity provisions	Exclusivity provisions are permitted so long as it is not considered as anticompetitive in Hong Kong.	
Noncompete obligation	The enforceability of noncompete clauses will depend on whether it is reasonable to protect the legitimate business interest of the parties and whether the time period of the protection is reasonable.	If the obligation is coupled with a penalty clause, it would likely not be enforceable unless it is a liquidated damages clause based on genuine pre-estimate of loss.
Governing law (implied content and public order)	Parties are free to choose the governing law. The applicable chosen law must be expressed in the contract.	The choice of the governing law, typically, is the one that is most closely connected to the system of law in which the business operates. The Hong Kong law is generally preferred when the business operates in the Hong Kong territory.

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	Parties are free to choose whether the contract has a fixed or indefinite term. Some contracts have fixed terms with clauses that allow parties an option to renew the initial fixed contract term.	
Prior notice of termination	It is common to specify in contracts an advance notice mechanism before termination. Typically, contracts would include a reasonable notice period that is assessed by court on a case-by-case basis.	

Termination for cause	Provisions listing certain clause for automatic termination are valid under the Hong Kong Law. This is for events, such as insolvency, change of control, breach of confidentiality clauses and assignment of agreement to third parties.
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Parties are expected to exercise their contractual powers in good faith in certain contracts, such as insurance, reinsurance and employment contracts.	In general, the obligation is governed by the principle of “let the buyer beware” (caveat emptor).
Intuitu personae clause, or change of control or assignment clause	Generally, commercial contracts would not allow for transfer of obligations, unless an expressly written consent is obtained from the other party. The change of control of a party may trigger an event of default in certain types of commercial contracts.	
Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation	If there are economic circumstances that result in a substantial change, a specific contractual clause may allow a party to renegotiate certain terms, such as pricing.	This type of clause is not commonly used in Hong Kong.
Force majeure	Force majeure is a recognized concept under the Hong Kong law. It is necessary to provide for a specific clause to that effect. This clause serves to ensure that no party to the agreement should be held liable to the performance of its contractual obligations if performance is prevented by unexpected events that occurred outside the parties’ control. For example, civil unrest, terrorism, industrial action, strikes and lockouts could all be included as events of force majeure.	Force majeure would come in addition to possible exemption under the concept of frustration, which is quite narrow under the Hong Kong law.

Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>Warranty for latent defects has to be specified in the contract.</p> <p>The list of warranties in a contract would serve as the basis for the representations on current, factual and true circumstances, which may be important to the parties, made prior to entering into the contract. Breach of these warranties would lead to contractual claim for damages by the non-defaulting party against the breaching party.</p>	In some cases, these warranty provisions would consist of the most important part of the contract as they are dealing with risk allocation between the parties. Depending on certain industries, certain specific legislations may affect the full effectiveness of these contractual provisions.
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5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>Contractual limitations of liability are generally valid under the Hong Kong law. However, certain limits can be found, in accordance with the Control of Exemption Clauses Ordinance (Cap.71 of the laws of Hong Kong), namely:</p> <ul style="list-style-type: none"> ▶ Negligence causing personal injury or death ▶ Fraud ▶ Fraudulent misrepresentation 	
Competent jurisdiction, execution of foreign decisions and exequatur	<p>Depending on the trade and confidential nature of the commercial contract involved, parties generally may opt freely to use either litigation, mediation or arbitration.</p> <p>The jurisdiction clause is normally drafted along with the governing law and the jurisdiction chosen would normally be the same as the governing law. The clause can confer either exclusive or nonexclusive jurisdiction to a given court, mediation or arbitration tribunal.</p> <p>The execution of foreign judgments in Hong Kong can be achieved in two ways:</p> <ol style="list-style-type: none"> 1. Through the legislative process prescribed under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap.319) (FJO) 2. Through common law 	

If the judgment is from a country that Hong Kong has signed a reciprocal enforcement agreement with, such judgments may be enforced by making an ex parte application (otherwise known as an application made by a party alone) to the court pursuant to the FJO. Under this process, certain requirements must be met to register and enforce a foreign judgment, such as: the judgment must not have been wholly satisfied and the judgment will be expressed in Hong Kong dollars at the exchange rate as at the date of registration.

If the judgment is from a country that Hong Kong has not signed a reciprocal enforcement agreement with, fresh proceedings must be initiated at the court to enforce the debt under the foreign judgment. With this method, an action is brought upon the foreign judgment, whereby the foreign judgment itself will become the basis of the cause of action.

6. Recent legislation and trends

As a common law jurisdiction, Hong Kong has traditionally inherited the English legal doctrines that prohibits funding of legal proceedings by third parties. However, following approval of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2017, a new Part 10A (ss.98E-98W) is added to the Arbitration Ordinance and a new s.7A to the Mediation Ordinance. With the new amendment, the common law tort, and offense of champerty and maintenance no longer apply to third-party funding of arbitration and mediation. To summarize the change: this allows a third-party funder to provide funding to a funded party under a funding agreement in return for a financial benefit, only if the arbitration is successful.

The new law includes a code of practice (the code) to monitor funders' compliance.

This amendment of the law is likely to have an impact on a variety of industries that may be cross-border in nature. In particular, the amendment will affect commercial contracts that heavily rely on customs and practices, whereby parties have chosen arbitration, mediation and litigation proceedings under the Arbitration Ordinance as its primary means of dispute resolution.

 **India** (common law – customary law)

Contact: Anirudh Mukherjee

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	A non-written contract (i.e., an oral or implied contract) is valid and enforceable under the Indian law, provided that the intention of the parties to be bound by the terms of such contract is clearly evidenced (usually through words or conduct). However, there are certain legislations (e.g., Arbitration and Conciliation Act, 1996, and Patents Act, 1970) that specifically require contracts dealing with subject matter of such legislations to be in writing.	While non-written contracts are recognized under the Indian law, it is preferable to enter into written contracts as the enforceability is comparatively easier.
Pre-contractual obligation: good faith and information obligations	<p>There are no pre-contractual obligations stated as such under the Indian laws.</p> <p>The prerequisites of a contract are, inter alia:</p> <ol style="list-style-type: none"> 1. Parties agree on the same thing in the same sense (consensus ad idem). 2. Consent of the parties is not obtained by undue influence, fraud or misrepresentation. <p>A party must disclose all information that is relevant in obtaining the other party's consent to the contract.</p>	<p>A contract that is entered into on the basis of any misrepresentation or fraud is voidable at the option of the party that was the victim of such misrepresentation or fraud.</p> <p>The existence of good faith while entering into a contract is a requirement under public policy and not a statutory obligation expressly provided under the Indian Contract Act, 1872 (Contract Act).</p>
Signature by counterparts	<p>The Indian law does not mandatorily require signing of contracts in counterparts; however, the contracting parties may contractually agree for signature by counterparts.</p> <p>In contracts providing for signature by counterparts, each counterpart of the contract is deemed as original, and all of it together is constituted as one and the same instrument.</p>	A contract must be signed by authorized representatives of each party and such authorization can be obtained through board resolution or power of attorney in favor of the authorized representative.

Language of the agreement	<p>The Indian law does not specify any particular language in which the contracts are to be written. Therefore, parties to the contract can mutually decide the language of the contract.</p> <p>It is advisable that not more than one language is used in the contract. However, if more than one language is used, the language that shall prevail must be specified in the contract in case of conflict.</p>	Contracts should specify the language to be used for dispute resolution process so as to avoid ambiguity.
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2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>T&C are material for a commercial transaction. Therefore, all clauses relevant for such transaction must be agreed at the time of formation of the contract to avoid any conflict later.</p> <p>In case of a sale transaction, the terms provided by the seller are relevant, unless otherwise agreed on between the buyer and seller.</p> <p>The Contract Act does not specifically provide the T&C for a commercial transaction. It only provides a broad framework, on the basis of which the contracts must be performed by the parties.</p>	In a sale transaction, the parties enjoy the right to fix the terms of the sale contract. However, in the absence of any specific term, the provisions of the Sale of Goods Act, 1930 or any other applicable statutory provision will prevail.
Essential obligations and imbalance	<p>The essentials of a valid contract are:</p> <ol style="list-style-type: none"> 1. Competency of the contracting parties 2. Free consent of the parties 3. The object and consideration in the contract to be lawful 4. Subject matter of the contract not declared to be void under the Contract Act; e.g., contracts in restraint of trade or legal proceedings. <p>A contract should, ordinarily, contain clauses with respect to indemnity, limitation of liability, termination and confidentiality of information.</p>	

Consideration	<p>Consideration is an essential requirement of a contract. A contract without consideration is treated void, unless:</p> <ul style="list-style-type: none"> ▶ It is expressed in writing, registered, and is made on account of love and affection. ▶ It is a promise to compensate for something voluntarily done for the promisor or the promisor is legally compelled to do. ▶ It is a promise in writing to pay a time-barred debt. 	<p>From a Contract Act perspective, adequacy of consideration is not regulated and may be agreed on purely between the contracting parties.</p>
Price: determination, revision, indexing and payment terms	<p>In commercial contracts, the price is an essential term in a contract. If the price is not specified, the manner that the price is to be determined in should be clearly specified.</p> <p>In a contract for sale of goods, in the absence of a price or price-discovery mechanism, a reasonable price is to be paid by the buyer to the seller. The reasonable price is determined on the basis of the circumstances of each transaction.</p> <p>The parties to the contract are free to determine how the price revision will be done and to set the payment terms.</p>	<p>Contracts entered into with the intent of enabling price fixing so as to deter competition may contravene with the Indian antitrust laws and be held as void.</p>
Exclusivity provisions	<p>Exclusivity provisions are permitted under the Indian law.</p>	<p>The parties should ensure that exclusivity does not cause or become likely to result in an anticompetitive practice, for instance abuse of dominant position and anticompetitive contracts, as such contracts may be seen to contravene Indian antitrust laws and may be held as void.</p>
Noncompete obligation	<p>Noncompete obligations are permitted during the subsistence of a contract.</p> <p>Post-term noncompete obligations are permitted under the Indian law, provided that the territorial applicability and tenure of such obligation is reasonable.</p> <p>The Indian law does not recognize post-employment noncompete obligations.</p>	<p>The Contract Act provides that a contract that restrains a person from exercising a lawful profession, trade or business of any kind is void. Further, the freedom to practice any lawful trade or profession is a fundamental right guaranteed by the Indian Constitution. Accordingly, while noncompete restrictions in commercial contracts are not unlawful, their enforceability is at the discretion of the court, and depends on the facts and circumstance of each case.</p>

Governing law (implied content and public order)	<p>Parties to a contract have the freedom to choose the governing law for the contract.</p> <p>In the absence of a governing law provision, the courts usually determine the governing law on the basis of the jurisdiction with which the transaction contained in the contract has the closest nexus. For instance, if the parties are Indian, the courts are likely to determine the contract to be governed by the Indian law.</p>	<p>The governing law of a contract may be different from the procedural law applicable to dispute resolution mechanism provided in a contract. For instance, a contract governed by the Indian law may provide for the rules of Singapore International Arbitration Centre.</p> <p>Maturity of the legal system, convenience of parties and transactional-territorial nexus must be borne in mind while determining the governing law of a contract entered into with an Indian party or where place of performance is in India.</p>
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3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term Or ▶ An indefinite term <p>In case of a fixed term contract, the parties may, upon or prior to expiry of the said term, decide upon the terms and duration for which the contract will be renewed. Alternatively, the parties may, at the onset, agree under the contract for tacit renewal of the term upon its expiry.</p>	
Prior notice of termination	<p>Parties are free to contractually agree on the duration of the termination notice.</p> <p>A contract may also provide for circumstances wherein the contract may be terminated forthwith by written notice.</p> <p>In the absence of any specific period being prescribed for the termination notice, a reasonable notice period for termination will be required, and is determined on the basis of facts and circumstances of each case.</p> <p>Failure to serve the notice period amounts to breach of contract and may render the termination infructuous.</p>	

Termination for cause	<p>For the termination of a contract for cause, the events constituting cause should be listed in the contract.</p> <p>In the absence of cause in the contract, i.e., grounds for termination, a party may terminate for the other party's breach, which is critical. Further, the non-breaching party must have given the defaulting party prior notification to rectify the breach.</p>
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4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>The parties must enter into and perform their obligations under the contract in good faith.</p> <p>This is a requirement under public policy and not a statutory obligation.</p> <p>In case of breach of this obligation, the breaching party may be liable for damages.</p>	<p>The concept of good faith is a position of public policy and has no existence in statutory law. It is essential that, for a contract to be valid, the parties must not have entered into the contract on the basis of duress, coercion, fraud or misrepresentation. Accordingly, it is a presumption that the parties have acted in good faith while executing the contract.</p>
Intuitu personae clause, or change of control or assignment clause	<p>Assignability of a contract is determined on the basis of its terms. In case a contract permits assignment, it must be effected in accordance with the provisions thereof, e.g., intimation or prior consent.</p> <p>Contracts wherein assignment is not specifically prohibited are deemed to be assignable, except where the contract is for performance by a specific person or entity (i.e., intuitu personae).</p> <p>Assignment of contract must be in writing.</p> <p>Change of control clauses are permitted under the Indian law and must be specifically provided for in the contract. In the absence of such a clause, a party may not oppose the other party's change of control or management.</p>	

<p>Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation</p>	<p>The Contract Act provides that a contract is void if it seeks for an impossible act to be done.</p> <p>Further, a contract that subsequently becomes impossible or unlawful is also treated as void.</p> <p>Grounds of frustration, such as change of law, destruction of subject matter, nonoccurrence of contemplated event and death of party are generally recognized under the Indian law.</p>	
<p>Force majeure</p>	<p>Force majeure is a recognized concept under the Indian law (doctrine of frustration).</p> <p>Under a force majeure clause, a party is not held liable for any delay or default in performance of the contract that occurs on account of unavoidable events that are not foreseeable and are beyond the reasonable control of the relevant party. Such events include government legislations, riots, strike, theft, war, terrorist attack or other acts of god.</p> <p>During occurrence of the force majeure event, the party effected by the force majeure event is excused or is entitled to suspend performance of such obligations under the contract as are impacted by the force majeure event.</p> <p>The contract may also provide termination rights to the other party in case such an event continues to impact performance of the contract beyond a predetermined period.</p>	<p>Notification obligations must be imposed on the party affected by a force majeure event.</p>
<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>The Sale of Good Act, 1930 provides that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except in certain conditions, such as when goods are sold by description.</p> <p>Sale by description means that the goods being sold are of the same condition as described by the seller or as mentioned in the sale catalogue. The buyer agrees to buy the good on the mere description provided by the seller. Further, as per the provisions of Sale of Good Act, 1930, whenever a good is sold by description, there is an implied condition that the goods shall correspond with the description.</p>	<p>For the cases wherein an implied warranty or condition as to the quality and fitness for any particular purpose of relevant goods exists, it applies to individual as well as commercial parties, unless they are specifically disclaimed in the contract.</p> <p>In commercial contracts (other than contract for sale of products), the parties usually disclaim all warranties (including any implied warranty of merchantability or fitness for a particular purpose) with respect to services and goods provided thereunder.</p>

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>The Contract Act provides that in case of a breach of contract, the non-breaching party can claim compensation for the loss or damage caused.</p> <p>Parties cannot claim compensation for any remote or indirect loss or damage caused because of breach of contract.</p> <p>In case of liquidated damages, the party claiming such breach is entitled to receive from the breaching party an amount not exceeding the stipulated amount, whether actual damage or loss is proved to have been caused.</p> <p>A contract may provide for exclusions or limitations of liability.</p> <p>Exclusions or limitations of liability are not acceptable in certain cases, such as fraud, personal injury or death.</p>	
<p>Competent jurisdiction, execution of foreign decisions and exequatur</p>	<p>The parties are free to choose the competent jurisdiction for settlement of their disputes, i.e., arbitration or courts.</p> <p>A foreign judgment or decree is enforceable in India, provided the conditions specified under the Civil Procedure Code, 1908 are satisfied.</p> <p>Other methods of dispute resolution are, inter alia, mediation and conciliation.</p> <p>A foreign arbitral award is enforceable and recognized under the provisions of Part II (Enforcement of Certain Foreign Awards) of the Arbitration and Conciliation Act, 1996.</p>	<p>As compared to court-driven dispute resolution process, arbitration is faster and flexible. The parties can choose the number of arbitrators, language of the proceedings, seat and venue of arbitration.</p> <p>Parties opting for international commercial arbitration may seek recourse from Indian courts for interim measures, even if the seat of arbitration is outside India.</p>

Japan (civil law – customary law)

Contacts: Ichiro Tsumimori and Kotaro Okamoto

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written contract	<p>Contracts are not required to be executed in writing. However, there are some exceptions; many kinds of commercial contracts are required or recommended by the Government to be executed in writing.</p> <p>For example, constructors are required to execute construction contract in writing and contracts of guarantee must be agreed in writing under the Japanese Civil Code.</p>	For sub-contracts, prime parties are required to provide written documents indicating the terms.
Pre-contractual obligation: good faith and information obligations	<p>Under the Japanese Civil Code, a person is required to act in good faith even before entering into a contract. In some transactions (typically, real property transactions, franchise or financial investment), a party is obliged:</p> <ol style="list-style-type: none">1. To negotiate in good faith2. To inform the other party of any material fact <p>The scope of mandatory prior information will vary depending on the on facts and circumstances of each case.</p>	Generally, a party may break the negotiation before entering into contract. However, a party may be held liable for damages for acting in bad faith or misconduct during pre-contractual discussions.
Signature by counterparts	<p>The Japanese law does not specifically provide for any specific conditions of form that a contract needs to comply with. Hence, since signing separate counterparts of a contract is not forbidden by the Japanese law, the contract will be valid, should it be signed by counterparts.</p> <p>At least one copy of the contract is usually signed by the authorized representatives of all parties to the contract. However, signing separate counterparts is also permissible, as long as it shows that the parties accepted the contract. The process of signing a contract is a matter of evidence.</p>	A scanned signed contract is admissible and generally considered as a reliable evidence to prove the existence of the contract under the Japanese law. However, forgery of the contract (whether the contract is truly executed as the scanned signed contract) may be an issue at the court. In such a case, the court will require communication of the original signed contract. For instance, if a party claims that parties do not enter into such contract and that the scanned sign contract was forged by the other party, then the original will be required to determine whether such contract is in fact executed.

Language of the contract	<p>The language of the contract may be agreed on freely between the parties.</p> <p>The chosen language needs to be understood by all parties to the contract; otherwise, the party that has insufficient knowledge of the language might be deemed not to have validly contracted.</p> <p>A translation into Japanese is required when the contracts need to be submitted or shown to governmental authorities. Contracts in foreign language that must be submitted to Japanese courts need to be accompanied by a Japanese translation, under the rules of Japanese civil procedure.</p>	<p>If more than one language is used, it is highly recommended to specify the one that will prevail, especially for performance and dispute.</p> <p>Since a term may mean one thing in one jurisdiction and something else in another one, it is also highly recommended to define as many terms as possible in the contract and even to state the term in the original language for the avoidance of doubt.</p>
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2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>The T&C of the seller are enforceable against the buyer if the buyer accepts them and vice versa.</p> <p>General T&C that are unfairly unfavorable to consumers may be considered void.</p> <p>If there are any discrepancies between the T&C of the seller and those of the buyer, neither T&C will be considered valid. In such cases, the prevailing terms will be determined by court on the basis of general commercial customs.</p>	

<p>Essential obligations and imbalance</p>	<p>In principle, parties can set forth any obligation in the contracts. However, the contracts including significant imbalance provisions – such as one that results in one party being at an unfair disadvantage or disproportionately burdened as compared with the other party – are unenforceable under the Japanese law. Claims in that respect may be initiated by either party or by governmental authorities (when relevant regulation exists).</p> <p>Such a provision will be void, amended or cause a party's liability at the benefit of the other party, or might be amended or interpreted by court differently to diminish unfairness, depending on the cases.</p> <p>The party that sets forth such an unenforceable provision also might be subject to sanction by authorities under, for example, the Japanese Antitrust Law.</p>	<p>Some standard provisions, such as that of transportation contract or electricity supply contract, are required to be certified or approved by relevant authorities.</p>
<p>Consideration</p>	<p>The Japanese law does not recognize the common law concept of consideration or any equivalent concept. Under the Japanese Civil Code or Commercial Code, there are various types of contracts and each type of contract has mandatory components that are a condition of their respective validity.</p> <p>However, as indicated above, there is a possibility that the contract can be considered as void if the terms are significantly imbalanced.</p>	
<p>Price: determination, revision, indexing and payment terms</p>	<p>The price should be determined or determinable (by reference to relevant facts, especially fair market value of the goods or service, if any) when the parties enter into the contract. Framework contracts are valid even if they do not provide for a price.</p> <p>Adjustment method and additional price (such as an earn-out clause) may also be validly provided for.</p> <p>The transfer of ownership is not linked to the payment of the price.</p> <p>The price might be stipulated in a foreign currency.</p> <p>Payment terms must be within 60 days after the performance or delivery, in contracts between large companies and subcontractors, even if they expressly agree upon a longer term. Otherwise, payment terms are not generally regulated.</p>	

Exclusivity provisions	<p>Exclusive provisions are generally permissible under the Japanese law. However, in limited cases, it might be considered void under the Japanese Antitrust Law.</p>	<p>Japan does not have laws specifically protecting distributorship, such as a distribution law.</p> <p>There is no specific maximum duration for exclusivity.</p>
Noncompete obligation	<p>Noncompete provisions are generally permissible under the Japanese law.</p> <p>Such a provision is permitted if the period of the noncompete obligation is limited for a reasonable period of time.</p> <p>Noncompetitive provisions may be considered to be violating the Japanese laws, such as the Japanese Antitrust Law.</p>	<p>If a party breaches the undertaking obliging it, the other party may seek damage or injunction against it.</p>
Governing law (implied content and public order)	<p>Parties are free to choose their governing law for international contracts, which may apply to the whole or part of contract. This is according to the principle enshrined in Article 7 of Act on General Rules for Application of Laws (the act); however, other conventions or treaties may apply depending on the matter or type of contract.</p> <p>Classical exceptions apply, such as mandatory local laws or those provided for in the United Nations Convention on Contracts for the International Sale of Goods.</p> <p>If the parties do not choose a governing law, the governing law will be the law of the place most connected with the contract at the court judgment.</p>	<p>It is expressly specified under the act that the mandatory local laws will apply to consumer contracts and employment contracts.</p>

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term: It must be enforced until the expiry of the initial term or that of the renewed term. ▶ An indefinite term: Each party may terminate the contract at any time without any causes (provided that the court may limit the termination in some cases, as mentioned in "Termination for cause" below). 	

Prior notice of termination	<p>Whether a party must give prior notice is determined by the provision of the contract.</p> <p>A party is not required to give prior notice in case of indefinite term contract in the absence of a written clause to that effect.</p> <p>However, the court may limit such termination (e.g., by requiring justifiable cause and setting a reasonable grace period) when the period of the notice is unreasonably short or the termination without prior notice results in injustice.</p>	
Termination for cause	<p>If the contract provides for grounds of termination, the clause should identify precisely the breaches that would consist valid grounds for termination.</p> <p>If the contract does not provide for specific grounds for termination, the non-breaching party may terminate the contract immediately in case of breach. However, in some cases, the non-breaching party must give the breaching party prior notice to rectify the breach and must wait for a reasonable period of time for the breaching party to rectify.</p>	<p>Non-breaching party must give the notice and wait when the performance is just delayed or when the perfection of the tender is still achievable.</p>

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>The Japanese Civil Code provides that exercise of the rights and performance of the duty must be done in good faith.</p> <p>A party might be held liable for damages if it abuses its right, even if the contract is silent on this issue.</p>	<p>By reference to this general policy, significantly unreasonable provision in the contract (e.g., non-solicitation obligation) might be held as void by Japanese courts.</p>
Intuitu personae clause, or change of control or assignment clause	<p>The assignment of a contract requires an agreement between the assignor and the assignee. In addition, consent of the counterparty to the assignor is also necessary, unless otherwise stipulated in the contract.</p> <p>A party may not have any claim against the change of control of the other party, unless otherwise provided for in the contract.</p>	

<p>Hardship clause (impresvion), i.e., unforeseeable circumstances and renegotiation</p>	<p>The parties are free to decide the conditions under which the renegotiation of the contract will take place. This is in order to amend the contract to address unforeseen events that fundamentally alter the equilibrium of a contract, resulting in an excessive burden being placed on one of the parties.</p> <p>Generally, such provision provides that if circumstances that were unforeseeable at the time of the contract make performance of the contract excessively onerous for a party, then it can ask for a renegotiation. In the meantime, it has to continue to perform the contract. In case of refusal or failure of negotiations, it is likely that the demanding party may validly suspend the performance of its obligations under the original terms.</p>	<p>It is recommended to specify events of force majeure as well as hardship in the contract.</p>
<p>Force majeure</p>	<p>Force majeure is not clearly addressed under the Japanese law.</p> <p>Generally, an event may qualify as force majeure if it is:</p> <ul style="list-style-type: none"> ▶ Unavoidable, making the performance of the contract impossible ▶ Unpredictable ▶ Uncontrollable by the parties <p>The typical force majeure events are war, earthquake and tidal wave.</p>	<p>When force majeure events are not specified in contracts, a party may still be excused from performing its obligations under the general principles of the Japanese Civil Code. However, it is recommended to provide for specific force majeure clause in contracts.</p>
<p>Warranty of latent defects (specific to sales between corporate parties, not consumers)</p>	<p>There is a specific regime regarding unconformity and latent defects.</p>	<p>Non-consumer party may be held liable for consumer's damages under the Japanese Act of Product Liability.</p>

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
<p>Limitation of liability (between corporate parties, not consumers)</p>	<p>Contractual limitation of warranty obligations are valid under certain conditions and subject to certain limitations. For example, liability for damages caused willfully or by gross negligence in the contracts regarding maritime transportation may not be excluded.</p> <p>General mandatory limitations are:</p> <ul style="list-style-type: none"> ▶ A limitation liability clause must not lead to depriving the contract of its purpose or of the main undertaking, or create a significant imbalance. ▶ In some areas, limitation clauses are not valid. For instance, in consumer contracts, certain provisions aimed at limiting liability are void. <p>If there is a breach of contract, the other party may request compensation for foreseeable loss or damage.</p>	<p>Under the Consumer Contract Act, the clause of limitation of liability will be considered invalid, if:</p> <ol style="list-style-type: none"> 1. Such a clause exempts non-consumers from all the liability arising from the contract. 2. It limits the liability of the non-consumer party arising from such parties' willful misconduct or gross negligence. <p>Non-consumer party may be held liable for the consumer's damages under the Japanese Act of Product Liability.</p>
<p>Competent jurisdiction, execution of foreign decisions and exequatur</p>	<p>Parties are free to choose arbitration or courts to settle any issue arising from a contract.</p> <p>The foreign court judgment is enforceable in Japan if the following requirements are met:</p> <ul style="list-style-type: none"> ▶ The relevant foreign court had the jurisdiction over the matter even from the viewpoint of the rules of jurisdiction under the laws of Japan (i.e., Code of Civil Procedure or international treaty). ▶ The defendant duly received service of notice (except constructive service) or appeared without receiving service. ▶ The judgment and the litigation proceedings are not contrary to public policy in Japan. ▶ There is a reciprocity with the place of the court judgment. 	<p>Arbitration will be more flexible, as it provides the right to choose the arbitrators. Also, it will be generally faster, but can turn to be much more expensive. Arbitration allows for confidentiality of hearings.</p> <p>Decisions of punitive damages are not enforceable in Japan, as it is considered to be against public policy.</p>

Contact: Jennifer Chih

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Non-written agreement	A contract does not have to be written to be binding under the Singaporean law, but it is strongly advised that all contracts be in writing, for purposes of evidence.	A scanned signed agreement can be considered as a reliable copy of the contract and may be used as a proof (but not conclusive proof) of contract. However, a Singapore judge could require that the original version of the agreement be produced, in the event of dispute as to authenticity.
Pre-contractual obligation: good faith and information obligations	The Singaporean law recognizes the concept of good faith. However, the concept of good faith as a legal concept is applied very narrowly in commercial contracts. In general, the Singaporean courts are very hesitant to establish that an obligation of good faith exists between commercial parties in a contractual relationship.	
Signature by counterparts	For business contracts, this is a matter of contractual agreement.	For documents, such as board resolutions approving such agreements, this will depend on whether the constitution of the company allows for this. In general, it is typical for the constitutions of most companies to allow for signing on counterparts.
Language of the agreement	The language of the agreement may, in principle, be agreed on freely between the parties. For commercial contracts, it is standard for English to be used. For commercial matters, the local language is considered to be English.	If more than one language is used, it is necessary to specify the one that will prevail, especially for performance and dispute. Since a term may mean one thing in one jurisdiction but something else in another, it is highly recommended to define as many terms as possible in the contract and even to state the term in its original language for the avoidance of doubt.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of form, and T&C	<p>The T&C of a contract are determined by commercial agreement.</p> <p>If the standard T&C of the seller or buyer have been incorporated into the relevant contract or order forms, then they will apply.</p>	<p>In a situation where the terms of the seller and buyer contradict with one another, the document exchanged latest in time will have to be considered in detail to see if it supersedes the terms of earlier documents. There are a number of legal rules around this, evolving from the common law concept of the battle of the forms.</p>
Essential obligations	<p>The obligations in a contract are a matter of contractual agreement. There are no mandatory obligations required by the law.</p>	
Consideration	<p>As a general rule, a promise contained in a contract is not enforceable against the promisor, unless it is supported by consideration.</p> <p>Consideration is something of value (as defined by the law) requested for by the promisor and provided by the promisee in exchange for the promise that the promisee is seeking to enforce against the promisor.</p>	<p>If there is no consideration involved, parties could consider executing the agreement as a deed instead.</p>
Price: determination, revision, indexing and payment terms	<p>The price may be stipulated in a foreign currency.</p> <p>The price and payment terms should be fixed or determinable. However, it is accepted that framework agreements (such as distribution agreements) do not specify contractual prices.</p>	<p>It is admissible to appoint an expert to determine the price. Either the contract may provide for expert determination or the parties may request the court to appoint an expert to determine the price.</p>
Exclusivity provisions	<p>The grant of exclusivity (whether on the sale or buy side) is permissible under the Singaporean law.</p>	<p>There is no statutory limit to the number of years such exclusivity provisions may be applicable for.</p> <p>However, parties should be careful to ensure that the exclusivity does not result in anticompetitive practice that breaches the Competition Act of the Singapore Statutes.</p>

Noncompete obligation	<p>This section will only deal with commercial contracts and not employment contracts.</p> <p>A noncompete clause is permitted during the performance of the contract and after termination of a contract.</p> <p>The clause may provide for liquidated damages in case of breach.</p>	Parties should be careful to ensure that the agreement does not result in anticompetitive practice that breaches the Competition Act of the Singapore Statutes.
Governing law (implied content and public order)	Parties are free to choose their governing law, although it is not possible to contract out of certain statutory laws (e.g., employment law or immigration law).	

3. Duration and termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	<p>A contract may be entered into for:</p> <ul style="list-style-type: none"> ▶ A fixed term: This contract will be valid until the expiry of its initial term or until the expiry of its renewed term. ▶ An indefinite term: Each party may terminate the contract at any time without any justification. <p>The term of the contract is a matter of commercial consideration. There are no statutory rules in this regard.</p>	
Prior notice of termination	This is a matter of commercial consideration. There are no statutory rules in this regard.	If a party fails to provide the requisite notice period – when provided for in the contract – it may be held liable for damages for breach of contract.
Termination for cause	<p>This is a matter of commercial consideration.</p> <p>This section will only deal with commercial contracts and not employment contracts.</p>	If the contract provides for grounds for termination, the clause should identify precisely the breaches that are considered valid grounds for termination.

4. Performance and nonperformance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	<p>The Singaporean law recognizes the concept of good faith.</p> <p>However, the concept of good faith as a legal concept is applied very narrowly in commercial contracts. In general, the Singaporean courts are very hesitant to establish that an obligation of good faith exists between commercial parties in a contractual relationship.</p>	
Intuitu personae clause, or change of control or assignment clause	<p>The assignment of a contract requires an agreement between the assignor and the assignee. It also requires the agreement of the other original party, unless otherwise stipulated in the contract.</p> <p>In the absence of a clause, a party may not oppose the other party's change of control. Contractual clauses providing for a change of control restrictions are valid.</p>	
Hardship clause (imprevision), i.e., unforeseeable circumstances and renegotiation	<p>In Singapore, this is usually treated as conceptually the same as the force majeure clause.</p> <p>There is usually no separate clause for dealing specifically with hardship.</p>	
Force majeure	<p>A force majeure clause would excuse one or both parties from performance of their obligations under the contract, provided that the event is unforeseeable and outside the parties' control. Usually, the party is excused from or entitled to suspend performance of all or part of its obligations and will not be liable for damages.</p>	<p>The court will determine whether the conditions of force majeure are met.</p> <p>It is recommended to specify the definition of the events or circumstances that would qualify as force majeure in the contract, as well as to detail rules for the implementation and effects on the contract upon the occurrence of such event.</p> <p>The clause may also provide for the conditions applicable to contract the termination or renegotiation.</p>
Warranty of latent defects (specific to sales between corporate parties, not consumers)	<p>This is a matter of commercial agreement. There is no statutory rule in this regard.</p>	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	<p>Under the Singaporean law, it is possible to limit liability for breaches of a commercial contract.</p> <p>Exclusion or limitation clauses are inapplicable in certain cases. For example, it is not possible to limit liability for personal injury and death.</p>	
Competent jurisdiction, execution of foreign decisions or exequatur	<p>Parties are free to choose for adjudication of their disputes to court or to arbitration.</p> <p>In principle, a foreign judgment may be recognized in Singapore or enforced by action at common law in Singapore. However, whether the judgment can actually be recognized or enforced in Singapore will depend on various factors.</p> <p>In some cases, foreign judgments from superior courts of law of certain countries have to be registered in Singapore to be enforced. The regimes are set out under the Reciprocal Enforcement of Commonwealth Judgments Act (Chapter 264 of the Singapore Statutes) (RECJA) and Reciprocal Enforcement of Foreign Judgments Act (Chapter 265 of the Singapore Statutes) (REFJA).</p>	<p>Arbitration will be more flexible, as it provides the right to choose the arbitrators, and, in certain jurisdictions, may be faster. However, they can be much more expensive. Nonetheless, they are often chosen by commercial parties as arbitration allows for confidentiality of hearings.</p> <p>The parties can decide to limit the appeal, and can choose the language and the seat of the arbitration.</p> <p>The main difference between the registration and common law methods is that once registered, the foreign judgment may be executed in Singapore as if it were a local judgment. Thus, there is no need for the plaintiff to commence a new enforcement proceedings in Singapore. Kindly note that there are other differences, advantages and disadvantages between the two methods.</p>

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