EY Global Legal Commercial Terms Handbook 2020-

Second Edition

A publication from the EY Consumer Products and Retail Sector Legal Team across the globe

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Contents

Preface

We are pleased to present the second edition (2020) of the **EY Global 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. We trust that it will provide valuable first tool kit support to common law specialists about civil law legal systems and vice & versa.

The first edition, issued in 2017, has been praised by clients and colleagues in the industry. We have received lots of comments and encouragements, as well as suggestions to expand the content and the geographic coverage.

Some urgent questions raised by the COVID-19 pandemic have shed some light on vital provisions, such as *force majeure*, specific performance or early termination contractual damages. This second version appears timely from this unfortunate perspective but certainly for other reasons as well.

The EY Global Commercial Terms Handbook's purpose is to assist in house counsels to understand the possible risks associated with a deviation from their national law as the applicable law to a given contract as early as possible in the negotiation timeline. This knowledge may be very helpful to secure the corporate strategy in contractual negotiations with minimum concessions to the other contracting party in order to win the business.

This guide summarizes certain familiar terms and conditions ("T&C") in commercial contracts, categorized under six main parts: formation of the agreement, essential obligations, duration and termination, performance and nonperformance, dispute and recent legislation and trends, including highlights on the temporary measures adopted in relation to the COVID-19 pandemic. It also contains a tracker dedicated to *force majeure* in light of recent circumstances which has already been published separately on certain EY marketing supports by the EY Law Corporate and Commercial group.

We hope that this second issuance of the handbook will prove again its usefulness for your cross-border contractual negotiations and its reliability as source of truth for your internal teams.

Let me thank the EY law teams across the globe, in particular the EY local law teams of 27 jurisdictions (18 in EMEIA, 7 in Asia and 2 in North and South America) which have to contribute to this project. To all of them, we extend our profound thanks for their time, care and experience, with a particular attention to the associates of the Paris office hub of the coordination team: Marie-Pierre Bonnet-Desplan, Céline Chevillon and Louis Bataille.

We welcome your comments so that we can reflect upon and keep improving our work, as we hope the *EY Global Commercial Terms Handbook* will keep on being updated on an annual basis and become a quick reference tool for EY member firm' clients.

Roland Montfort, Partner, EY Global Law Leader for Consumer Products & Retail

Donahue & Partners LLP, an independent law firm allied with EY Tax and part of the global EY network

Chicago, USA

Roland.Montfort@dp.ey.com / Roland.Montfort@ey-avocats.com

Dear clients, colleagues and friends,

I am pleased to support the latest edition of the EY Global Commercial Terms Handbook, created and edited by Roland Montfort and prepared by our Law colleagues around the globe, the purpose of which is to bring information on contract formation and recommendation in 27 jurisdictions.

It is a broad, precious and pragmatic guide, a reference to which you might find helpful whenever you have doubts on the actual regime applicable to contracts in the covered jurisdictions.

The content is based on information current as of the date mentioned on the cover page of each jurisdiction chapter. Indeed, regulations across the globe are constantly evolving. New laws, new decrees and new case law are game changers in many jurisdictions from time to time. It is crucial for companies to be always informed of what's new and what the consequence for their business can be. Still, staying on top of what's new and useful in multinationals is a continued challenge. Companies must make the clear distinction between what's nice to do and what's required in this complex regulatory environment.

This guide reflects the global reach and diversity of EY Law commercial law services. Across the global network of EY member firms today, there are more than 3,500 qualified professionals providing legal services within 86 jurisdictions.

Apart from offering specific tailor-made legal advice for a number of business needs, we also cover a wide range of sectors: automotive and transportation, banking and capital markets, consumer products and retail, government and public sector, health, insurance, life sciences, media and entertainment, oil and gas, power and utilities, private equity, real estate and hospitality, technology and telecommunications.

EY lawyers work closely alongside professionals in Assurance, Tax, Strategy and Transaction and Consulting services. Working across borders, the sector-focused, multidisciplinary approach means EY member firms offer highly integrated and broad pertinent advice across the globe.

Kind regards,

Stephen d'Errico

EY Global Corporate & Commercial Law Leader

stephen.derrico@lu.ey.com

+352 42 124 7188

Introduction

The following tables summarize — at high level — the main strategic clauses and obligations in business-to-business contracts (B2B) and their identification in 27 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, insurance, and administrative law
- Commercial 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 of this report is to summarize in a user-friendly manner knowledge and information on commercial clauses that are typical 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, professional technical legal advice should be obtained having regard to the particular facts and circumstances of each case. Law teams across the global EY network can support different aspects of your project through local legal professionals. This is also true for out-of-scope matters listed above.

The guide is the collective work of a number of law teams of member firms throughout the global EY network and has been prepared in light of 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 and we assume no obligation to update the readers about them.

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

The tables have been divided into the following sections:

1. Formation
2. Content
3. Duration and termination
4. Performance and non-performance
5. Dispute
6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic, as well as tracker on Force Majeure already published separately on certain EY marketing supports by the EY Corporate and Commercial group

High-level takeaway

As already indicated in the first version of the Handbook, the gap between common law and civil law jurisdictions still 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 non-compete or exclusivity undertakings is general, subject however to limitations resulting from local competition laws
- The criterion of reasonableness appears as one of the key recognized legal principles that come to play for different items, such as limitation of liability and prior notice
- The rise and/or the confirmation of alternative dispute resolutions methods, especially in civil law jurisdictions where they were generally less advanced than in common law jurisdictions
- Generally, force majeure is perceived in a rather similar way across common law and civil jurisdictions, although its definition may have different sources (statute or case-law) and some common law jurisdictions make force majeure only available if the contract expressly provides for it.

The same clear differences remain, however, such as:

- The 'good faith' concept is characteristic of civil law jurisdictions, and the 'consideration' concept is inherent to common law jurisdictions. 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 jurisdictions focusing on pre-contractual obligations are not shared by common law jurisdictions
- The battle of forms outcome has different resolutions (such as knock-out or last shot), although these differences exist also amongst the civil law jurisdictions
- The judicial powers related to compliance with the contract are generally larger in common law jurisdictions, where judges may award punitive damages
- Not surprisingly, an important level of harmonization is noticeable in EU jurisdictions as a result of EU directives and 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) will likely have its toll on the desired foreseeability of contractual relationships in dealings with the UK whether between the EU or third-party jurisdictions.

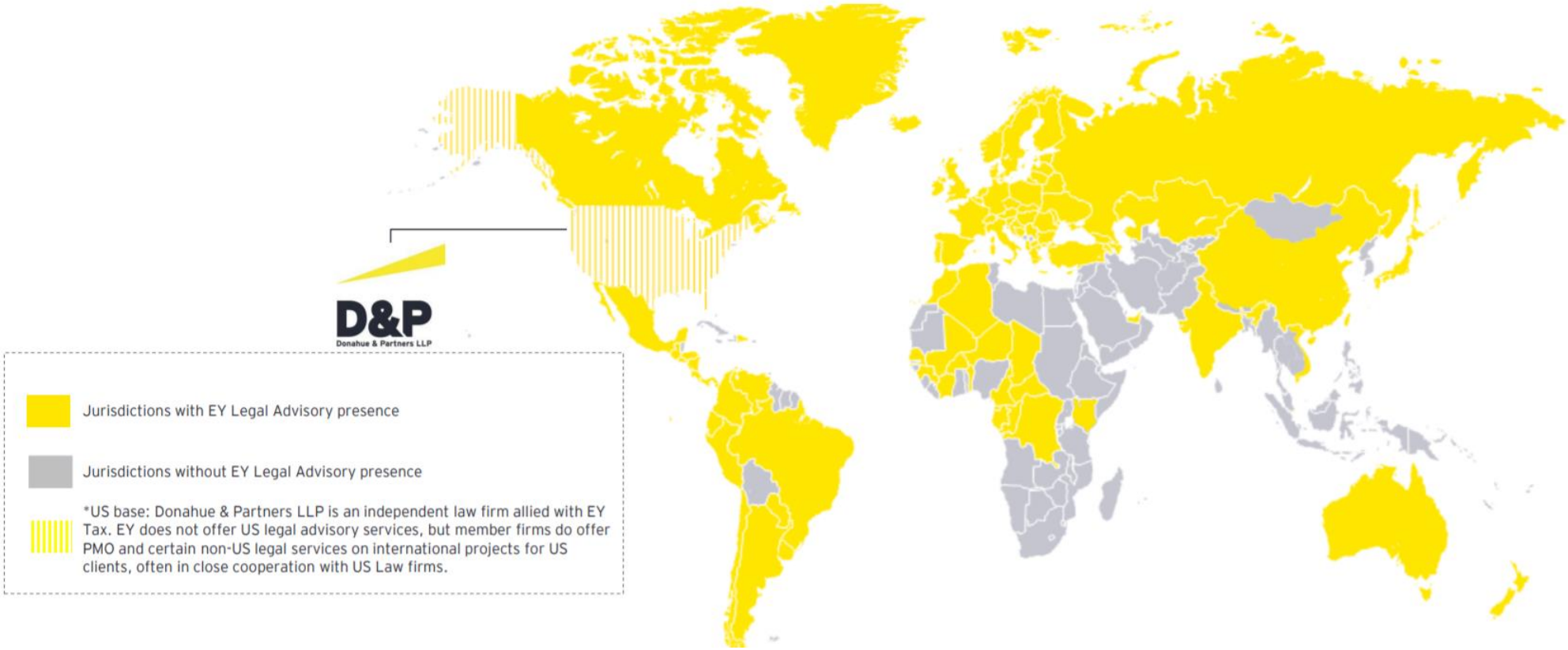
Eventually, it appears that the COVID-19 pandemic resulted in many specific and temporary measures being adopted in the various jurisdictions. These measures are tailored to respond to the COVID-19 pandemic only and should not be treated as permanent regulation. Since their effect is temporary, the articulation between temporary and permanent provisions should be carefully reviewed with a particular focus on the entry into effect of the new temporary measures.

As a general point, among other things, it is recommended to:

- Always ensure clarity (i.e., written contract, example of price calculation, attaching Terms and Conditions to the contract, clear any ambiguity in the negotiation or at the time of performance)
- Avoid excessive (unbalanced) request to the other party (which could expose more easily to future claim for renegotiation)
- Define and articulate appropriately certain clauses with each other, for example, hardship with *force majeure*, to avoid overlap or ambiguity, especially given the importance of those provisions highlighted during the COVID-19 pandemic
- Understand where the contracting party's request is coming from (business rationale, cultural gap, lost in translation?) since there might likely be contractual ways to meet it — at least halfway — without downgrading its own bargaining position
- Please also consider the applicability of foreign law (subject to taking the time to understand it, hopefully this report may facilitate this understanding)
- Finally, from a (pre)litigation perspective, it is important to keep in writing all agreements and important business discussions, meetings and follow-up agreements between the parties; this would allow a strong bargaining position (consistency, reliability) as well as save costs and efforts at the time the business climate will get tense; this is even more true when the persons in charge of the relationship have changed over time which is very often the case for multi-year contracts.

Roland Montfort

EY Law teams across the globe



EMEIA

Algeria (civil law - Islamic law)

Contact(s):

Bruno Messerschmitt

Last updated: 7 September 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	The Algerian Civil Code provides that the agreement must be formed and performed pursuant to its content, and in good faith. There is no general information obligation as such at the pre-contractual stage under the Algerian law (please refer to Section 2: Content- 'Significant imbalance (unfair contract terms)' mentioned below).	Any party may be liable for damages for acting in bad faith or misconduct. 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.
Non-written agreement	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). 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).	In practice, Algerian authorities require a signed written agreement. 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.
Signature: counterparts, representation and electronic signature	▸ Counterparts: The Algerian law does not provide for signing a contract in separate counterparts 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.	
Language of the agreement	In principle, the language of the agreement may be agreed on freely between the parties. An official translation into French or Arabic will be required for registration purposes with the Algerian authorities and administration.	If more than one language is used, the one that prevails has to be specified, especially for performance and dispute.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	The T&C of sales are the basis of commercial relationships. 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. 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.	The default of communication of the T&C of sale is sanctioned by a fine of 10,000 دج to 100,000 دج (i.e., approximatively €82 to € 822).
Significant imbalance (unfair contract terms)	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. Any clause or condition that creates an imbalance between the rights and obligations of the contracting parties is prohibited (according to the unfair clause).	
Consideration	There is no provision about the concept of consideration in the Algerian law. The Algerian Civil Code refers to the concept of cause of the contract, instead of that of consideration.	
Price: determination, revision and indexing	The price must be fixed or at least determinable. 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. The transfer of ownership is not necessarily linked to the payment of the price.	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). The default of information about the prices and tariffs is sanctioned by a penalty of 5,000 دج to 100,000دج (i.e., approximatively €41 to €822).
Exclusivity Provisions	Exclusivity provisions are generally permitted under the Algerian law, for e.g., 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.
Non-compete obligations	A non-compete 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 the case of the non-compliance of the obligation (i.e., a financial compensation).	There is no specific provision in the Algerian law relating to non-compete 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 labour 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: ▸ 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 (please refer to Section 3: Duration and Termination - 'Prior notice of termination' mentioned 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 the case of failure to give reasonable prior notice of termination in the absence of contractual provision specifying a minimum notice duration.	

Termination Clause	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 non-fulfilment 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 non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	The contract must be performed according to its content and in good faith.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	The assignment of receivables and debts is authorized under the Algerian law. Assignment by creditor ▸ 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 Assignment by debtor ▸ 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, 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* (please refer to Section 4: Performance and Non-performance - '*force majeure*' mentioned 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*.	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*. Therefore, it is recommended to specify such a definition and the implementation of the clause in detail in the contract. Prior notification of the *force majeure* event is generally provided for in the contract.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	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 will result in forfeiting the right to do so. The warranty claim must be initiated within six months after the sending that notice. The warranty claim would be barred or considered void if the purchaser was aware of the defect at the time of purchase, except in the case of fraudulent behaviour from the seller.	Warranty claims are not applicable in the case of judicial sales and auctions.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	In principle, contractual limitations of liability are valid under the Algerian law. 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 the case of fraud and gross negligence committed by the people under their control or subordination and involved in the performance of its obligations. Exclusion clauses for tort liability are null and void.	It is possible to extend a party's liability, for e.g., by excluding the right for that party to claim exemption resulting from *force majeure* (please refer to Section 4: Performance and Non-performance - '*force majeure*' mentioned above). 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. The parties may include a repair clause or a penalty clause in the contract, but certain limitation applies.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Not applicable.	Not applicable

Belgium (civil law)

Contact(s):

Herman De Wilde; Margaux Van Opdenbosch

Last updated: 10 September 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Contracts must be negotiated and formed in good faith (general principle of law). Each party has a duty at the pre-contractual stage to negotiate a contract carefully and loyally. 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. Fraud, coercion or abuse of right are prohibited.	Pre-contractual liability (*Culpa in contrahendo*) is of an extra-contractual nature and 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: ▸ 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
Non-written agreement	In principle, contracts do not have to be written to be binding under Belgian law. A contract is formed by the sole consent of the parties.	A written contract may be preferred for evidentiary reasons. 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).
Signature: counterparts, representation and electronic signature	▸ Counterparts: A contract signed in counterparts will, in principle, be valid.	▸ Counterparts: Signature in counterparts is more a matter of evidence. Pursuant to Article 1325 Civil code, in order to be considered as a private deed (*Acte sous seing privé*) and to have the probative force thereof, a document formalizing a contract which places at least one obligation on each of the parties (Synallagmatic contract) must be drawn up in as many copies as there are parties with a distinct interest. Each copy must be an original. In commercial matters, this rule does not apply (because the evidence is free). And for mixed contracts, only the non-commercial party may invoke the application of this rule.

	▸ Representation: If the party is a person, the contract will be signed by the party itself in order to be valid. If the party is a legal entity, the contract will be signed by the authorized representatives of the parties (i.e., directors of the legal entity) in order to be validly signed. Article 1984 of the Civil Code also provides for the possibility for one person (the principal) to give a mandate or power of attorney to another (the agent) to sign a contract for and on behalf of the principal. ▸ Electronic signature: There exist three types of electronic signatures. Although each type is valid from a legal perspective, the difference lies in the security level attached to it: ▸ The simple or standard electronic signature (SES) (e.g., a scan of a handwritten signature, an e-mail signature, signing via a pin code, etc.) offers the lowest level of security ▸ The advanced electronic signature (AES) (e.g., DocuSign, Adobe Sign, etc.) offers a higher level of security as more safeguards are put in place to ensure identification of the signatory and the immutability of the document signed ▸ The qualified electronic signature (QES) (e.g., signing via e-ID, signing via qualified certificates, etc.) is the most secure e-signing method and has the same legal effect as a handwritten signature	▸ Representation: Belgian law recognizes, however, the "theory of appearance". This is a jurisprudential creation, which finds application when a person has all the appearances of the holder of certain rights, so that third parties have dealt with them on the basis of this appearance. The consequence of this theory is that a person can be bound by the signature of a non-authorized person. The case law sets out the conditions for the application of the theory of appearance, i.e., the case law requires that this appearance was strong enough to mislead third parties. ▸ Electronic signature: Which e-signature is most fit for the purpose will thus depend on the type of document that has to be signed and the (existing) relationship between the parties' signatories. It is important to keep in mind that the signing method should reassure: ▸ The identity of the intended signatory ▸ The authenticity of the content of the document Article 1317 of the Civil Code stipulates however that for authentic instruments (*Acte authentique*) drawn up, received or served in dematerialized form by a public official, only a qualified electronic signature, (referred to in Article 3.12. of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trusted services for electronic transactions in the internal market and repealing Directive 1999/93/EC), satisfies the conditions for a valid signature. Moreover, Article 1322 of the Civil Code specifies that a private deed (*Acte sous seing privé*) will be validly signed if the signature responds to a set of electronic data that can be attributed to a specific person and establishes the maintenance of the integrity of the content of the deed.
Contracts concluded electronically	In principle, an agreement does not have to be written to be binding and thus contracts may be concluded contractually/digitally.	However, the support of the agreements agreed between the parties is more a matter of evidence.

	Uncertainties remained, however, regarding the conclusion of certain specific categories of contracts by electronic means, especially the contract of sale of real estate. The Law of 20 September 2018 'aimed at harmonizing the concepts of electronic signature and durable support and removing obstacles to the conclusion of contracts by electronic means' changed this by amending the Belgian Code of Economic Law in such a way that the sale of real estate can now also be carried out electronically, as long as the courts and tribunals cannot identify any obstacles to the conclusion of the sale. The mere fact that the sale of a property has been closed by e-mail is no longer a ground for invalidity.	
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 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, Terms and Conditions (T&C)	The general T&C of a party are enforceable subject to the three following conditions: ▸ 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) 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.	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. 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.
Significant imbalance (unfair contract terms)	Whether in B2C or B2B relations and without containing a general provision on this subject, the Belgian Code of Economic Law sanctions the significant imbalance existing between the parties to the contract. The Belgian Code of Economic Law defines an "abusive clause" as "any term or condition in a contract between a company and a consumer which, either alone or in combination with one or more other terms or conditions, creates a manifest imbalance between the rights and obligations of the parties to the detriment of the consumer". Article VI.84 (B2C) and Article 91/6 (B2B) of the Belgian Code of Economic Law	Article 91/6 of the Belgian Code of Economic Law will enter into force on 1 December 2020 for future contracts or modifications or renewals of existing contracts. The preliminary draft reform of the law of obligations (Book 5 of the new Civil Code) (Infra) provides the possibility for a judge to amend the contract to make it more balanced. These rules will allow the judges to tweak contractual imbalances,

	stipulates in this respect that any abusive clause is prohibited and is null and void. The contract remains binding for the parties if it can subsist without the unfair terms.	e.g., when the economy of the contract is disrupted by unforeseeable circumstances (theory of 'imprevision') or when the reciprocal benefits were, from the beginning, manifestly disproportionate as a result of an abuse by one party of the inferior position of its co-contracting party.
Consideration	Belgian law does not strictly recognize the common law concept of "consideration." 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).	
Price: determination, revision and indexing	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. Adjustment methods and additional price (such as earn-out clauses) may validly be provided for. A price adjustment clause will be considered null and void if the price is not determinable. The calculation method must be precise.	
Payment Terms	Payment terms may be freely decided upon between the parties.	
Exclusivity Provisions	Exclusivity clauses are not explicitly regulated by the Belgian legislation, nevertheless, they are permitted.	In practice, different types of exclusivity clauses are used in commercial contracts: ▸ 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 use of the client base of the other party 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 envisaged in the contract. Furthermore, a distributor may be entitled to receive a compensation for the loss of goodwill.

Non-compete obligations	Non-compete 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:
	▸ According to the majority of the judges and legal scholars, a non-compete clause should stipulate clear limitations with regard to:
	  ▸ The activity
	  ▸ The location (territory where the company is active)
	  ▸ The duration
	▸ The clause shall derive from a legitimate interest and shall be proportionate to the pursued protection purpose
	▸ The clause may provide for a financial penalty in the case of infringement
	▸ If a judge considers the consequences of a non-compete clause to be excessive, they can declare the clause null and void	

Governing law (implied content and public order)	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. 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. There are exceptions to the freedom of choice, which includes: ▸ 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	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. The clause, which stipulates the judge or court that is competent in the case of a dispute, does not necessarily imply the law that will govern the dispute. It is recommended to choose the applicable law according to the key aspects of the contract, such as maturity of the jurisdiction, flexibility of the law and commercial orientation.
Judicial powers related to the contract	The judge is bound by the writings signed by the parties. However, the judge will interpret the parties' intention when analyzing a contract whose provisions are ambiguous or unclear. The judge may supplement the contract by referring to	The preliminary draft reform of the law of obligations (Book 5 of the new Civil Code) (Infra) provides new rules in order for the judges to protect

	usages and will refer to the clauses that are customary in the matter that is the subject of the agreements. In doing so, the judge cannot modify what the parties have agreed.	the weaker parties and the general interest rules. The provisions of the new Belgian Civil code will allow the judges to tweak contractual imbalances.

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: 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)	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. 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.
Prior notice of termination	Termination with prior notice (without cause) is, in principle, not possible for (un-renewed) contracts with a fixed term. 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 sudden manner. 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.	The exemption to give prior notice of termination cannot be a consequence of a liquidated damages clause or an explicit termination clause.
Termination Clause	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. The specific grounds for the termination of a contract may not result in conditions that are purely discretionary (*potestative*). An obligation is null and	Under Belgian law, the fact that one party has entered into a judicial reorganization procedure can never be a valid ground for the early termination of a contract.

	void if its realization is solely dependent on the will of one of the contracting parties. A contract may be considered null and void if it would contain provisions that go against rules of public order. The termination for cause may apply with immediate effect. If a party is not performing its obligations under the contract, the non-breaching party can do either of the following, according to an explicit termination clause: ▸ Alert the breaching party that the contract will be terminated, in the case, a motivation is required ▸ Petition the judge to order the termination of the contract	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be performed in good faith. This is enshrined in the Belgian Civil Code. A party may be liable for damages in the case of breach of this obligation. Abuse of right is prohibited. Whoever exercises their right in a manner manifestly exceeding the limits of the normal exercise of that right, by a prudent and reasonable person placed in the same circumstances, abuses that right.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	The *Intuitu* personae character can be unilateral or reciprocal. 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. The stronger the *Intuitu personae* character, the stronger the consequences. 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.	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 prejudice incurred by the other party is not in proportion with the expected benefit of the delinquent party.
Hardship clause, i.e., unforeseeable circumstances and renegotiation	This type of clause would be valid under Belgian law. 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 arises. 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	Traditionally, Belgian case law is rather reluctant toward the theory of 'imprevision' following the *adagium "pacta sunt servanda"* reflected in Article 1134 of the Belgian Civil Code. Parties can stipulate hardship clauses in order to protect themselves against this reluctance.

	be obliged to continue to perform the contract.	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. The preliminary draft reform of the law of obligations (Book 5 of the new Civil Code) recognizes the theory of non-foreseeability/imprevision. It authorizes the debtor to request renegotiation of the contract in the event of unforeseen circumstances. If the renegotiations are not successful, the judge will be able to adapt the contract.
Force majeure	*Force majeure* is generally admitted under Belgian law. For this to be effective, the alleged event or circumstance must meet the following cumulative criteria: ▸ 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 Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	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). If the *force majeure* becomes permanent, it will, in principle, lead to the termination of the contract without retroactive effect.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	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. The legal obligation of the seller to indemnify the purchaser can intentionally be extended or limited by the parties. in the case of limitation of the warranty, the following criteria should be taken into account to give effect to the limitation: ▸ 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	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	In principle, limitation of liability clauses is permissible. However, they are subject to certain conditions: ▸ 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	A clause that excludes the seller's liability for latent defects shall only be valid if the following conditions are met: ▸ The seller was unaware of the defect ▸ The seller has expressly or implicitly informed the buyer of the possible existence of such a defect Consequently, the professional seller can only invoke an exemption clause if they can demonstrate that: ▸ They really could not have knowledge of the defect (in the case of a professional seller) ▸ It was impossible to detect the defect (in the case of a manufacturer)
Alternative dispute resolution procedures (mediation/conciliation)	The alternative dispute resolution procedures existing in Belgian law are the following: ▸ Negotiation: Implemented directly by the parties in dispute or through their respective lawyers. Negotiation can also involve a third party chosen by the parties. Negotiation, unlike mediation and collaborative law, is not subject to any specific rules or framework. Negotiation can take place at any time and the points agreed upon by the parties can be formalized in an agreement or endorsed by a judgment. ▸ Conciliation (Article 731 and following of the Belgian Judicial code): Conciliation is a voluntary process between the parties to a dispute, who decide to call upon a neutral third party (possibly specialized in a particular area of expertise), called a conciliator, to help them settle their dispute in a confidential setting. The conciliator plays an active role in hearing the parties' points of view and giving their opinion. The conciliator proactively proposes settlement options/resolutions that the parties are free to accept or not.	

	Conciliation can take place at any stage of the dispute and the parties can decide to formalize it in an agreement. ▸ Arbitration (Article 1676 and following of the Belgian Judicial code): The purpose of arbitration is to have a conflict settled not by a judicial court, but by one or more third party arbitrators, chosen and paid by the parties. The arbitral tribunal renders an arbitral award after hearing the parties and examining the files and documents communicated. The award rendered is binding on the parties and, if necessary, may be enforced, like a judgment. ▸ Mediation (Article 1724 and following of the Belgian Judicial code): In the case of mediation, the parties, helped by a mediator, are supposed to find themselves a solution to their difficulties. The mediator does not settle the dispute. The mediator is neutral, independent and impartial and does not impose any decision. Mediation can be used in all disputes that can be settled by transaction. Mediation is voluntary (the mediator is appointed by mutual agreement of the parties) or judicial (the mediator is appointed by a judge). At the end of the mediation, and as long as the mediator is accredited, the parties can have their agreement approved by the court, which means that the judge takes note of the mediation agreement and includes it in a judgment. ▸ Collaborative law (Article 1738 and following of the Belgian Judicial code): Collaborative law is a voluntary and confidential process of conflict resolution through negotiation. This process brings together the parties in conflict and their respective lawyers (who is specifically trained in this process) who advise and assist them, until the agreement is reached. Unlike mediation, collaborative law does not involve a mediator. Parties following the collaborative law route will explicitly refrain from resorting to the courts, except to have the agreements ratified by said courts.	
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.	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

	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.	provide limitations concerning the choice of certain jurisdiction.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Law of 4 April 2019 amending the Code of Economic Law as regards abuse of economic dependence, unfair terms and unfair market practices between companies.	By the Law of 4 April 2019, the Belgian legislator has regulated three series of new practices: ▸ The prohibition of abuse of economic dependence (entering into force on 1 June 2020). ▸ The Code of Economic Law defines the position of economic dependence as "the position of subjection of an enterprise with respect to one or more other enterprises characterized by the absence of a reasonably equivalent alternative available within a reasonable period of time, under reasonable conditions and at reasonable cost, allowing the enterprise or each of them to impose benefits or conditions that could not be obtained under normal market circumstances". ▸ The Code does not prohibit the position of economic dependence as such, but rather the abuse of this position (Art. IV. 2/1). ▸ The prohibition of abusive clauses in B2B relationships (entering into force on 1 December 2020 for future contracts or modifications or renewals of existing contracts)): ▸ First, the legislator introduced a blacklist of four clauses that are, in any case, prohibited. ▸ Secondly, the legislator has provided a grey list of eight clauses which are presumed to be unfair unless proven otherwise. ▸ Finally, the legislator inserts a third general category, "any term of a contract concluded

		between undertakings is unfair where, either alone or in combination with one or more other terms, it creates a manifest imbalance between the rights and obligations of the parties". • The prohibition of unfair market practices (entering into force on 1 September 2019). • With regard to unfair market practices, the legislator has introduced a general prohibition of deceptive market practices as well as a prohibition of aggressive practices.
Temporary measures adopted in relation to the COVID-19 pandemic	Royal Decree No. 15 of 24 April 2020 on the temporary suspension of implementation and other measures in favor of enterprises.	A pragmatic arrangement was implemented whereby, under certain conditions, all companies subject to insolvency law have automatically and temporarily obtained a legal suspension. A company in difficulty would be protected against seizures, could not be declared bankrupt and could not be required to file for bankruptcy. Furthermore, the ongoing agreements could not be terminated unilaterally or in court due to default. Moreover, payment terms could be extended for ongoing judicial reorganization procedures. The exceptional measures were only intended for companies that were still in a good financial situation prior to the COVID-19 pandemic. It could only apply to companies that did not face any problems before 18 March 2020, but that were in difficulties due to the lockdown. These exceptional measures were extended until 17 June 2020.
The reform of Belgian civil law	The Act of 13 April 2019 introducing a Civil Code and inserting Book 8 "Proof" into that Code was published in the Belgian Official Gazette on 14 May 2019 and will enter into force on 1 November 2020. Book 5 "Obligations" has already been submitted as a bill to the House of Representatives but has not yet been approved.	Belgium is about to welcome a new Civil code. The new Civil Code consists of nine books, the fifth of which is devoted to the "Obligations" and will include the legal provisions relating to contract law. The provisions of the current Civil code are outdated, cluttered and incomplete. The main axes of the reform are as follows: • Restoring legal certainty and modernising the law of obligations.

		▸ Increasing the accessibility of the law by strengthening the coherence and transparency of the provisions of the current Civil code. ▸ Ensuring a balance between the autonomy of will of the parties, on the one hand, and the role of the judge as guardian of the weaker contracting party and of the public interest, on the other hand.

Czech Republic (civil law)

Contact(s):

Ondřej Havránek; Jan Turek

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1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	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 they are acting in accordance with the law and that they are not harming the rights of others. Fairness and acting in good faith are presumed by the Czech law. Any person may conduct negotiations of a contract freely and is not liable for the failure to conclude it, unless they commence or continue the negotiations of a contract without the intention to conclude it. A party has a general duty during the pre-contractual stage to disclose any information (factual and legal circumstances of which they know or must know) that is relevant and material to the other party's intention to enter into the contract. These provisions cannot be excluded or limited by the parties.	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. If parties, when negotiating a contract, provide each other with information and communications, each party has the right to keep records thereof, even if the contract is not concluded. If, during negotiations of a contract, a party obtains confidential information or communication about the other party, it shall take care that such information or communication is not unlawfully misused or disclosed. If a party breaches this duty resulting in its enrichment, it shall surrender to the other party what constitutes such enrichment.
Non-written agreement	A contract does not have to be in writing to be binding, subject to a number of exceptions.	A scanned and signed contract should be considered as a reliable copy 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.
Signature: counterparts, representation and electronic signature	▸ Counterparts: 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 very same copy. 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 counterparties do not have to be on the same executed copy, i.e., each counterpart might be signed by one contracting party.	▸ Counterparts: 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 contents stipulated earlier in the contract.

	▸ Representation: Contracts must be signed by the parties themselves or by the authorized representatives of the parties. If a representative exceeds their authority to represent, the party represented is bound by the legal act to approve such excess authority without undue delay. The same applies in the event that a person acts on behalf of the party without being authorized to do so. ▸ Electronic signature: The electronic signature of a contract by the parties is generally allowed by the Czech Civil Code.	However, this only applies if the variations indicated in the confirmation do not substantially vary from the contents actually stipulated earlier in the contract and are of such a nature that a reasonable entrepreneur (i.e., a business person or an entity carrying on business) would still have approved them, and if the other party does not reject these variations. Furthermore, it is usual that in the event the contract is signed by both parties electronically, a single electronic counterpart exists. ▸ Representation: As per the statutory rule, a representative can be authorized to act on behalf of a legal entity. Also, the legal entity can be represented by a proxy holder or an employee depending on their position or title (the decisive aspect being how they are perceived by the public) or any third person duly authorized to represent the legal entity on the basis of a Power of Attorney. ▸ Electronic signature: Under a specific Act on Trust Services for Electronic Transactions, the parties may use a qualified electronic signature, an advanced electronic signature, or any other type of an electronic signature (including the specific Czech type of a recognized electronic signature, i.e., an advanced electronic signature based on a qualified certificate for an electronic signature).
Contracts concluded electronically	Under the Czech Civil Code, the contracts can be concluded electronically. For written form, the contract must be signed with an electronic signature (please refer to Section 1: Formation - 'Signature: counterparts, representation and electronic signature' mentioned above).	
Language of the agreement	The language of the contract may be agreed upon freely between the parties. 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.	If more than one language is used, it shall be specified which language prevails (especially for performance and dispute purposes). 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 define the term in the original language for the avoidance of doubt.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	According to the Czech Civil Code, an expression of will (for example the response to an '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 the initial 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). If the terms and conditions (T&C) of the seller and the buyer differ, the contract is concluded under the terms that are not contradictory (common terms). If the T&C are contradictory to the wording of the contract itself, the wording contained in the contract shall prevail. The T&C of one party are enforceable towards 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).	The parties may also refer to the rules of interpretation that are generally used with regards to the nature of the contract (e.g., Incoterms, which are the trade terms published by the International Chamber of Commerce).
Significant imbalance (unfair contract terms)	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'. Sanctions may be: ▸ Unenforceability of the respective provision ▸ 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 and indexing	The price must be determined or at least be determinable. Else, the purchase contract is disregarded (does not exist). However, when it is clear that 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. Also, framework contracts are valid even if they do not provide the price (e.g.,	If the price is not stipulated in or determinable from the contract, the court cannot itself set the contract price. 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

	framework purchase contract, distribution contract). An adjustment method and additional price (such as an earn-out or indexation clause) may be validly provided for in the contract. The price may be stipulated in a foreign currency.	appoint an expert to determine the price).
Payment Terms	Payment terms are regulated by the Czech Civil Code. In the 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 clearly unfair to the creditor.	
Exclusivity Provisions	The granting of exclusivity (whether on the sale or buy side) is generally permitted under the Czech law.	Specific to distribution law, the clause must be limited in time or the territorial scope to be valid. In the case of commercial agency contracts, if a contract does not indicate that commercial agency is exclusive, it is considered as non-exclusive. Exclusivity must not constitute or result in an anti-competition practice (i.e., an abuse of dominant position or an anti-competition contract).
Non-compete obligations	A non-compete clause shall determine at least a territory, range of activities or a group of persons subject to such a prohibition, else, it shall be disregarded. A non-compete clause may be stipulated validly for the duration of the contract and up to five years after termination of the relevant contract. Should a non-compete 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. A specific regulation applicable to non-compete clause concerns commercial agents. The post-termination, non-compete duration is limited to two years. Non-compete clause may stipulate the payment of a contractual penalty in the case of breach.	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.
Governing law (implied content and public order)	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. If the parties do not choose the governing law, it will be determined by the courts based on the relevant conflict of law's rules.	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.

	There are exceptions to freedom of the choice of law in contracts, such as: ▸ 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)	
Judicial powers related to the contract	Under the Czech Civil Code, there are multiple situations where the court can interfere in the contractual relationship between the parties. For example, in section 577 of the Code, if the reason for invalidity only consists in an unlawful determining of quantitative, temporal, spatial or other scope, a court shall change the scope so that it is consistent with an equitable arrangement of rights and duties of the parties; in doing so, the court is not bound by the parties' motions, but shall consider whether a party would have made the juridical act had the party ascertained its invalidity in time. In an exceptional case (as defined in the provision above), a court is allowed to interfere in such arrangements in order to set the rights and obligations of the parties. Also, if a legal act of a debtor prejudices the satisfaction of an enforceable claim of a creditor, the creditor is entitled to claim that a court declare such legal act of the debtor legally ineffective towards the creditor.	

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	A contract may be concluded for a fixed or indefinite term. 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). 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).	

Prior notice of termination	In case it is possible to terminate the contract based on 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. The notice period should better be stipulated in the contract, else the Czech Civil Code will impose a three-months' notice period in connection with indefinite term contracts.	
Termination Clause	If the contract provides for specific grounds of termination of the contract, such grounds must be identified precisely in the contract. If the contract does not provide for specific grounds of termination, the party may, under specific circumstances, withdraw from the contract.	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	This is a general principle imposed by the Czech law. A party may be liable for damages in the case of breach of this obligation of good faith.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	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. A party may not oppose the other party's change of control in the case of silence of the contract. The change of the control protection clause may be validly provided for in contracts under the Czech law.	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.

Hardship clause, i.e., unforeseeable circumstances and renegotiation	Generally, a party may claim the renegotiation of a contract if:
	▸ 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:
	  ▸ Disproportionately increasing the costs of the performance
	  ▸ Disproportionately reducing the value of the subject of the performance
	▸ 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
		If included in the contract, the *force majeure* provisions and hardship clauses must be carefully drafted.

	In the 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, the claiming party has to continue to perform the contract). 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. 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.	
Force majeure	*Force Majeure* is generally recognized under the Czech law. The following criteria are required to result in the parties' exemption to perform its obligations under the contract on the basis of the f*orce majeure*. The event or circumstance (unless defined otherwise in the contract) must be: ▸ 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	The court will determine whether the conditions of *force majeure* have been met. It is recommended that a precise definition of the events and circumstances that would qualify as *force majeure* is provided in the contract, and the rules for the implementation and effect of such a clause are detailed. The legal definition of *force majeure* can be extended by the parties, for instance, to include strikes. The clause may also provide for the conditions for the termination of the contract or its renegotiation upon occurrence of a *force majeure*. A prior notification of the *force majeure* event to the other party is required.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	Latent defects shall be notified by the claiming party to the other party without undue delay and at the latest within: ▸ Two years from the date of delivery (purchase contract or contract for work), in the case of movable assets ▸ Five years from registration in the cadastral register in the case of purchase contract or from the handover in the case of a contract for work, or in the case of construction (i.e., immovable assets) Nevertheless, the terms may be set differently by the parties in the contract. A specific set of warranties may be agreed between the parties in the contract.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	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. The contractual limitations of liability are valid. However, certain exclusion or limitation clauses are inapplicable, for instance: ▸ 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.
Alternative dispute resolution procedures (mediation/conciliation)	Parties may agree that they submit their dispute to a mediator before submission of the case to a court/arbitration court. Mediation is regulated by a specific Act on mediation. Mediation is held by a qualified mediator (although it is not excluded that any third person can serve as a mediator in the event of a dispute between the parties). In the event of a litigation (judicial proceedings), the court is allowed to order a first meeting with the qualified mediator and interrupt the judicial proceedings for maximum of three months. The parties are obliged to take part in such first meeting, but they are not obliged to use the mediation as their dispute resolution procedure. If the first meeting with the mediator does not result in the mediation, the court will continue with the judicial proceedings.	
Competent jurisdiction, execution of foreign decisions and exequatur	The jurisdiction may be agreed upon freely by the parties in accordance with the Rome I Regulation. When it comes to commercial contracts, the parties are free to choose arbitration or courts. 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. Under Czech law, recognition and enforcement of international arbitration awards are recognized, regardless of the nationality or place of residence of the parties, through the New York Convention. Recognition of judgments issued in other EU Member States is automatic under	In connection with international commercial matters, parties are usually entitled to choose a court or arbitration court to settle the dispute.

	the Brussels I bis Regulation. Enforcement is generally carried out under the relevant legal regulations of the state where the award is to be enforced.	

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Not applicable.	Not applicable.
Temporary measures adopted in relation to the COVID-19 pandemic	Act No. 210/2020 Coll., on certain measures to mitigate the effects of the COVID-19 pandemic 'COVID – Rent' subsidy program	The Act provides for temporary measures for persons participating in judicial proceedings, injured persons and victims of criminal offences, legal entities and has amended certain provisions of the Insolvency Act and Civil Procedure Code. On 19 June 2020, the Czech Ministry of Industry and Trade published a call for the 'COVID – Rent' subsidy program. The purpose of the program was to provide state aid to tenants who had to close their retail outlets or establishments for a certain period of time due to the COVID-19 pandemic. In order to apply for the subsidy, a tenant must, among other conditions, get from the landlord a 30% discount from the rent. The state will then pay 50% of the rent as a subsidy. After receiving the subsidy, the tenant will actually only pay the remaining 20% of the rent. The aid would cover rents for the period from April to June 2020 and is subject to the satisfaction of several other conditions.
Civil law re-codification in 2014	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 or constant case-law exists in connection to those provisions.

Denmark (civil law)

Contact(s):

Frederik Ploug Sarp; Philip Kisbye

Last updated: 23 September 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Under Danish law, there is a pre-contractual duty of good faith and fair dealing. The pre-contractual duty of good faith and fair dealing is a mutual duty, obligating the parties to provide correct and honest information that may be relevant for the other party's decision.	A party may be held liable for damages for acting in bad faith and misconduct (tort action). Further, breach of the pre-contractual duty of good faith and fair dealing may trigger remedial action or termination if the breach is material. The degree of the information obligation is depending on the role of the contracting parties (e.g.; B2B or B2C) and will in all cases be balanced against the other party's obligation to adequately investigate.
Non-written agreement	Under Danish law, an agreement does not – as a general rule – have to be in writing to be binding, i.e.; oral agreements are binding under Danish law. However, there are some exceptions to this general rule following from specific legislation. The process of signing an agreement is a matter of evidence and proof for the terms of the agreement.	
Signature: counterparts, representation and electronic signature	▸ Counterparts: As an agreement does not have be in writing, signatures are not required in order for an agreement to be binding under Danish law, unless specific legislation apply. Danish law does not contain general rules regarding signing of counterparts of a contract. ▸ Representation: A party will in general be bound by contracts signed by such party's authorized representatives unless a counterparty knew or should have known that the representative was not authorized to sign the contract (and therefore acted in bad faith).	▸ Counterparts: For the purpose of evidence, a contract signed by both parties and shared digitally with the other party is preferable. ▸ Representation: A company's signature rule ("tegningsregel") states which members of a Danish company's executive board and/or board of directors that are authorized to represent and bind a Danish company. In addition to a company's signature rule, the rules on general authority (*'stillingsfuldmagt'*) apply in Denmark. This means that an employee may bind a Danish company with respect to contracts which an employee at the relevant level of an organization would ordinarily be expected to be able to sign on behalf of the Danish company they

	▸ Electronic signature: Electronic signatures are generally accepted under Danish law and are regarded equivalent to written signatures. With reference to the above, agreements between parties do not – as a general rule – require signing in order to be binding. A party to an agreement must (only) be able to prove that the other contracting party has expressed its willingness/intent to be bound by such agreement. A digital signature indicates such intent and will accordingly act as evidence in terms of a contracting party's willingness/intent to be bound by an agreement.	are employed by. This entails that especially the management team and senior staff will often have a wide authorization to enter into even material contracts on behalf of the Danish company in the ordinary course of business. ▸ Electronic signature: Agreements that are entered electronically or by using an electronic signature (Penneo, DocuSign or similar), are in general recognized by Danish courts. Some authorities may require that the electronic signature program used applies login through the Danish national identification system NemID, as the electronic signature will in such case be comparable with personally signed documents. Certain specific types of agreements must observe certain formal requirements when using electronic signature.
Contracts concluded electronically	Contracts concluded electronically are binding under Danish law.	
Language of the agreement	In principle, the language of the contract may be agreed freely by the parties.	If more than one language is used, the contract should specify which version will prevail. Danish authorities, administrations and courts may require an official translation into Danish of documents, including contracts, drafted in a language other than Danish, when documents are brought before or filed with such Danish authorities, administrations and courts.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	Terms and conditions are only binding, if such terms and conditions are considered agreed between the parties. In the case of uncertainty as to which set of terms and conditions that has been agreed between the parties and in the case of contradiction between the terms and conditions of the buyer and those of the seller, Danish case law is limited. According to Danish legal literature, a Danish court will determine the terms and conditions that apply based on an assessment of *inter alia* whether ▸ One of the parties have acted passively/have not objected to be bound by the T&C of the other party, ▸ The terms and conditions differ significantly ▸ Statutory provisions are sufficiently clear on the relevant matters in question	It is advisable to ensure a clear agreement on the terms and conditions that are to apply.
Significant imbalance (unfair contract terms)	Article 36 of the Danish Contracts Act deals with agreements that would be unreasonable or contrary to practices of fair conduct to uphold and states that an agreement may be amended or set aside, in whole or in part, if its enforcement would be unreasonable or contrary to practices of fair conduct. Article 36 apply in B2B relationships as confirmed by Danish courts.	In addition to article 36 of the Danish Contracts Act, Danish courts have applied the so-called 'doctrine of assumptions/doctrine of fundamental breach (''*forudsætningslæren*'')' to set aside agreements. According to the doctrine of assumptions, a promisor is not bound by his promise if there is a failure of basic assumptions. A failure of basic assumptions require that the following three conditions are (all) fulfilled: the assumption must be ▸ Material ▸ Known ▸ Relevant, i.e. the assumption must have been material to the promisor, it must have been known to the promisee that the assumption was material to the promisor and when considering the relevant circumstances, it is reasonable to let the other party bear the risk for the failure of basic assumptions. The doctrine of assumptions does not form part of statutory Danish law. Article 36 of the Danish Contracts Act and the ''doctrine of assumptions'' are rarely applied by Danish courts.

Consideration	Danish law does not contain the common law principle of consideration. Consideration is not a requirement under Danish law in order for an agreement to be enforceable.	
Price: determination, revision and indexing	If no price has been agreed, the price would generally be determined by provisions of the Danish Sale of Goods Act (if applicable) or by general Danish contractual principles (if the Danish Sale of Goods Act does not apply). According to both the Danish Sale of Goods Act and general Danish contractual principles, a buyer must pay the price determined by the seller (unless such price is deemed unreasonable) if no price has been agreed. A fixed price is not required, and parties may agree that the price is subject to adjustments, revisions and indexing.	
Payment Terms	In B2B relationships, the term of payment may not be more than 30 days from the creditor's payment request unless the creditor has explicitly agreed to a longer term of payment and the term of payment is not unreasonable towards the creditor. If a term of payment of more than 30 days is contained in a standard contract drafted unilaterally by the debtor, and the debtor has done nothing further in terms of informing the creditor about the term of payment, there is a presumption against the creditor having explicitly agreed to the payment term of more than 30 days.	If no due date for payment has been agreed, interest can be claimed 30 days after the creditor has requested payment.
Exclusivity Provisions	The grant of exclusivity (whether on the sale or buy side) is generally permitted under Danish law.	Exclusivity provisions must, however, be compliant with e.g.; competition law and labor laws.
Non-compete obligations	Noncompete clauses are generally permitted under Danish law.	Noncompete clauses are subject to specific considerations from a labor and competition law perspective. E.g.; a noncompete clause between a Danish company and an employee hereof may not exceed a duration of 12 months after termination of employment and financial compensation for the duration is mandatory.
Governing law (implied content and public order)	The parties to a contract are free to choose the governing law that will apply to all or part of a contract. Mandatory local law of a country will apply despite the choice of law. If the parties have not agreed on the governing law, the Danish courts will	The international rules of private law applied by Denmark -are the Haque Conference on private international law from 1955 or the Rome Convention from 1980 as Denmark is not part of the 'Rome I and

	determine the governing law by applying international rules of private law. As a starting point, international rules of private law will result in application of the law of the country of the seller. There are certain exceptions to this starting point.	II regulations' due to its judicial reservations.
Judicial powers related to the contract	Parties may agree to submit a dispute to a mediator/conciliator before submitting a dispute to ordinary courts or arbitration tribunals. If there are no provisions in a contract governing dispute resolution, disputes are resolved by ordinary courts.	A decision from an arbitration tribunal is binding and may not be appealed.

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	A contract may be entered into force for: ▸ A fixed term: The contract is enforceable until the expiry of its fixed term and will not be renewed automatically unless otherwise agreed. ▸ An indefinite term: If no termination period is stated, the contract may generally be terminated by any of the parties upon reasonable notice.	
Prior notice of termination	A reasonable prior notice is required for indefinite-term contracts unless otherwise regulated in the contract itself. Fixed term contracts may not be terminated until expiry unless otherwise regulated in the contract itself.	The period for a reasonable prior notice of termination depends on the length and significance of the contract to be terminated. A contract over several years can typically be terminated with a notice period of six months, whereas a contract with a duration of a week can be terminated within the same day.
Termination Clause	A contract can either be silent regarding the cause for termination or list some specific events that will trigger termination for cause. If a contract is silent regarding the cause for termination, the Danish Sale of Goods Act (if applicable) and general Danish contractual principles will apply. According the Danish Sale of Goods Act, a breach must be material in order to trigger termination.	Termination provisions of the Danish Sale of Goods Act and general Danish contractual principles can be excluded by agreement.

4. Performance and non-performance

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 the case of breach of the obligation to act in good faith.
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	The assignment of a contract generally requires an agreement between the assignor and the assignee, and the approval of the respective counterparty of the contract to be assigned, unless otherwise set out in the contract itself. Pursuant to Danish law, the consent of a debtor is not required, unless the receivable is nontransferable. *Intuitu personae* clauses are recognized under Danish law. In the absence of a specific clause to that effect, a party's change of control will have no relevance for the contract.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	Parties are free to decide under which conditions renegotiation of a contract will take place in order to amend a contract to address unforeseen events.	
Force majeure	In the absence of *force majeure* provisions in a contract, Danish law contains general principles of *force majeure*. However, the definition and conditions of *force majeure* events under Danish law only comprise rather radical events such as outbreaks of war, riots, natural disasters and acts of God. Parties are free to agree on/define *force majeure* events in contracts. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	It is recommended to clearly specify the events and circumstances that will qualify as *force majeure* between the parties, as well as to specify the effects of a *force majeure* event, including possible termination of the contract or its renegotiation.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	A claim for a (latent) defect must be notified to the seller no later than two years from delivery unless a longer period has been agreed between the parties.	If the seller has acted fraudulently the two-year period may not apply. According to the Danish Sale of Goods Act (if applicable) and Danish contractual principles, a buyer has a duty to adequately investigate (*undersøgelsespligt*) purchased goods or services, which entails that a buyer cannot – as a general rule – raise notice of a defect, if a buyer would have discovered such defect during adequate investigations. If a buyer discovers a defect, then the buyer must

		notify the seller hereof immediately from discovery of the defect.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	Limitation of liability clauses are recognized in contracts under Danish law. A limitation of liability clause must be specific and will only apply to the part of the agreement covered by the clause.	As a general principle, a limitation of liability clause does not apply to the extent a party has acted with gross negligence or willful misconduct. In some areas, such as product liability, limitation clauses are not valid.
Alternative dispute resolution procedures (mediation/conciliation)	Parties may agree to submit a dispute to a mediator/conciliator before submitting a dispute to ordinary courts or arbitration tribunals.	It is important to clearly state in the contract whether this preliminary step (mediator/conciliator) is mandatory or optional.
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are in general free to agree on arbitration or courts to settle disputes. If there are no provisions in the contract, disputes are resolved in competent courts.	In commercial matters, parties are generally free to agree on any court to settle disputes. Arbitration is usually more flexible than courts (as there is a right to choose the arbitrators, the language and the seat) and also faster, but arbitration is usually more expensive. Arbitration allows for confidentiality of hearings.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Temporary measures adopted in relation to the COVID-19 pandemic	No temporary measures adopted in relation to the COVID-19 pandemic and commercial contracts.	No temporary measures adopted in relation to the COVID-19 pandemic and commercial contracts.

England (common law)

Contact(s):

Colette Withey; Alex Razak

Last updated: 2 September 2020

Content

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	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.	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. Parties to a contract may include express duties of good faith.
Non-written agreement	An agreement does not have to be in writing to be binding, subject to certain exceptions, such as: ▸ 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	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 in writing.
Signature: counterparts, representation and electronic signature	▸ Counterparts: 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. ▸ Representation: A person who has actual (express or implied) authority can enter into a binding contract on behalf of another entity. In certain circumstances, a binding contract can also be made without actual authority but where, objectively, an agent appears to be authorized (apparent authority).	▸ Counterparts: Contracts typically contain a clause expressly allowing the document to be executed in counterparts. ▸ Representation: Various statutory rules modify common law principles. For example, where a third party is dealing with a company in good faith, the power of the directors to bind the company is deemed free of any limitation under the company's constitution and the person dealing with a company is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorize others to do so (Section 40 of Companies Act 2006). However, if a person dealing with a company is aware of some limitations on the directors' powers, that person must make enquiries as to authority to sign/bind the company and failure to do so may make the agreement invalid.

	▸ Electronic signature: An electronic signature can be legally used to execute a document (including a deed).	▸ Electronic signature: To be effective, an electronic signature must demonstrate an authenticating intention i.e., that the signatory intended to be bound by the terms they have signed to. Any formalities relating to execution of the document should also be satisfied. The requirement under current law that a deed must be signed "in the presence of a witness" requires the physical presence of that witness. This is the case even where both the person executing the deed and the witness are executing or attesting the document are using an electronic signature.
Contracts concluded electronically	Contracts may be concluded electronically and through various forms of electronic communication including email and website order and acceptance procedures.	Under English contract law, contracts can be concluded electronically provided that the elements of offer, acceptance, consideration, intention to create legal relations and certainty are present in the process.
Language of the agreement	The language of the agreement may, in principle, be agreed upon freely between the parties. The language of the agreement is the principal tool used by the courts to determine what the parties have agreed and, therefore, must be understood by all parties to the agreement.	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. 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 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. If more than one language is used, the contract should include a clause expressly specifying which language should take precedence.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	In cases of the battle of the forms, English law uses the "last shot rule." Pursuant to this rule, the last shot of T&C put forward before unequivocal acceptance or performance will prevail (acceptance is usually inferred by conduct). 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.	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. Businesses should manage their procurement processes to ensure that the battle of forms does not operate to their detriment.
Significant imbalance (unfair contract terms)	English law does not, in general, prohibit significant imbalance provisions in a B2B contract. However, under the Unfair Contract Terms Act, 1977 (UCTA) and common law, certain exclusion clauses are expressly deemed "unfair", and therefore invalid, while other exclusion or limitation clauses, or clauses imposing requirements or conditions of an onerous nature, may only be enforceable if they satisfy the reasonableness test under UCTA. One element of the reasonableness test is the relative strengths of the parties' bargaining positions (please refer to Section 5: Dispute: Limitation of liability (between corporate parties, not consumers) mentioned below).	UCTA applies to domestic B2B contracts and does not apply to international supply of goods or consumer contracts. Consumer contracts and unfair terms are more heavily regulated under the Consumer Rights Act, 2015.
Consideration	Consideration is an essential part of any contract under English law. Contracts must contain mutual promises, or a promise made in consideration of obligations or actual performance, between the parties to the agreement. Consideration must be sufficient but need not be adequate. Providing that consideration has some economic value, the courts will not investigate its adequacy. Consideration is not required where the contract is executed as a deed.	A promise by a contracting party to perform its existing contractual duties is not a good consideration. Contract variations must be supported by fresh consideration. 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. Parties may choose to enter into a contract as a deed where there is doubt about the existence of consideration. The formalities for a deed must be satisfied for the deed to be valid.

Price: determination, revision and indexing	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. Revisions to and indexation of the price can be provided for. Again, the method of their determination must be certain. Transfer of ownership (i.e., the title) is not linked to the payment of the price, unless specified by the parties in the contract. The price may be stipulated in a foreign currency.	The contract price is a material term. The requirement that contract terms be certain, i.e., clear. This is a general requirement under English contract law.
Payment Terms	There is no regulation of payment terms under English law. Parties should provide clear terms regarding payment terms, including payment obligations.	While there is no regulation of payment terms under English law, there are statutory rules on late payment that may apply i.e., in relation to payment after the due date under the contract, if the contract does not specify a rate of interest on late payment. These rules are set out in the Late Payment of Commercial Debts (Interest) Act, 1998 (as amended). There is also the requirement for certain companies to report publicly on their contractual payment practices and policies and their performance against those policies (Reporting on Payment Practices and Performance Regulations 2017 (SI 2017/395)).
Exclusivity Provisions	A grant of exclusivity (whether on the sale side or buy side) is permitted under English law, provided certain conditions are satisfied.	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. Reasonableness will be assessed in relation to: ▸ The length of time of the exclusivity provision ▸ The geographical area of the exclusivity provision ▸ The scope of the exclusivity provision (i.e., the range of activities covered) Exclusive dealing agreements that are valid under EU competition law cannot be invalidated under the restraint of trade law. In practice, most exclusive dealing provisions are

		drafted in accordance with the EU block exemption regulation, if applicable.
Non-compete obligations	A non-compete 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.	Non-compete 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. Post-termination, noncompete obligations must be carefully drafted in order to be enforceable. In practice, most noncompete obligations are drafted in accordance with the EU block exemption regulation.
Governing law (implied content and public order)	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 nº593/2008, Rome I. But other conventions or treaties may apply depending on the matter or type of the contract. If the parties do not choose a governing law, it will be determined by the courts. There are exceptions to freedom of choice, such as: ▸ 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)	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" because the contract laws of Scotland are in some ways different from those of England and Wales. In preparation of its withdrawal from the EU, the UK has legislated to incorporate Rome I into English law, under the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019/834 (which will come into force at the end of the transition period) and so English courts will apply the same rules as currently to determine applicable law.
Judicial powers related to the contract	There is a presumption that, where the parties record their agreement in writing, the parties intend the written agreement to be the complete contract between them and extrinsic evidence is inadmissible to add, vary, or contradict its terms. The presumption can be rebutted, and the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties.	The inclusion of an "entire agreement" clause would point towards the conclusion that the document represents the whole agreement. Ideally, the clause should be clear as to whether the agreement includes documents or representations that are not referred or set out in the contract.

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 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, the contract will continue until it is terminated (Please refer to the additional remarks).	Where contracts are for an indefinite term, the parties must either follow the contract rights and terms for termination, which is, typically, the giving of notice on breach of contract, insolvency or, possibly, without cause but with notice. If there are no provisions for termination in the contract, a right to terminate without cause by giving reasonable notice may be implied, e.g., in a contract that would otherwise be perpetual and unworkable (please refer to Section 3: 'Duration and termination – 'Termination for cause' mentioned below).
Prior notice of termination	Termination should take place in accordance with the terms of the contract, such as a specified notice period or expiry of a fixed term. 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. If the contract does not provide for a termination notice period, a party must give reasonable prior notice of the termination of a contract. The reasonable notice is based on the duration of the contract prior to the termination notice. Unlawful termination of a contract may give rise to damages and, in appropriate cases, injunctive relief, to prevent early termination causing irreparable harm.	Notice periods in commercial agency contracts must comply with the provisions of the EU Commercial Agents Directive, as implemented in the UK through the Commercial Agents (Council Directive) Regulations, 1993.
Termination Clause	If the contract provides for grounds of termination, the clauses should identify the breaches that are grounds for termination precisely. 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. There is no requirement for the non-defaulting party to give the defaulting party a notice to cure the repudiatory breach. There is no requirement to apply to a judge to terminate the contract.	A repudiatory breach is a serious breach of the contract. 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. 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. 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.

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	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.	Parties to a contract may include express duties of good faith. Such a provision would be enforced by the English courts. Certain types of contractual relationships do contain duties of good faith, such as agency and partnership. Case law has shown that the courts may be willing to imply a term of good faith into the performance of a specific class of contracts referred to as "relational" contracts. These are characterized as long-term contracts, with the mutual intention of the parties being that there will be a long-term relationship. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty. The courts have provided a non-exhaustive list of characteristics to determine whether a contract is "relational". Subsequent judicial comments have stated that this should not be seen as establishing a principle of general application to imply a term of good faith to all commercial contracts.
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	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 unless assignment is expressly excluded or made subject to consent in the contract. To transfer obligations under a contract (i.e., 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. All existing and new parties need to agree to the transfer. In commercial contracts, a change of control of one party does not give the other party the automatic right to terminate the agreement or, otherwise,	It would be typical for contracts to make express provision toward permitting (or not) assignment and change of control.

	oppose a change of control unless specifically provided for in the contract. A personal contract will usually be terminated automatically if the identity of the personal counterparty changes.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	Hardship clauses are used in long-term contracts or volatile markets. They are a matter of negotiation between the parties. Hardship clauses deal with unforeseen events arising since the formation of a contract that render the performance more onerous than originally contemplated. 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.	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.
Force majeure	The term *force majeure* has no established meaning or consequence under English law. However, *force majeure* clauses are generally included in agreements and are 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. *Force majeure* clauses can be drafted to cover any extraordinary event, such as war, natural disasters, riots or strikes. The spread of the COVID-19 pandemic in December 2019 highlights the importance of considering how an "epidemic" and "pandemic" will be dealt with and whether it should be included in the definition of *force majeure*. 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, a *force majeure* clause provides flexibility to the parties, allowing them to adjust the contract in the event that renders performance impossible. English law does not imply a *force majeure* clause into a contract. The clause must be present in a contract in order for it to take effect. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	The effect of a *force majeure* clause will depend on how it is drafted. Well-drafted *force majeure* clauses will usually consist of three parts: ▸ A description of the events that will trigger the operation of the clause. Events that are commonly beyond the control of the parties ▸ The obligations of the parties in reporting the occurrence of a force majeure event ▸ The remedies available following the occurrence of a force majeure event, including the right to extend or to cancel the contract if a force majeure event continues for a specified period The clause may also provide for the suspension of obligations to perform whilst the *force majeure* continues or variation of the contract. There is greater remedial flexibility provided by a *force majeure* clause than by the doctrine of frustration.
Warranty of latent defects (Specific to sales between corporate parties, not consumers)	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). 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.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	The UCTA and common law impose 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, and limitations for fraud or fraudulent misrepresentation are prohibited on grounds of public policy. UCTA also states that other terms will only be enforceable to the extent that they are reasonable. 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 non-performance.	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. Hence, 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. 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.
Alternative dispute resolution procedures (mediation/conciliation)	The parties to a commercial contract can expressly agree the dispute methods available such as litigation, arbitration or other forms of alternative dispute resolution such as mediation or conciliation. Mediation is the process whereby parties, with the assistance of a neutral third party (the mediator), identify the issues in dispute, explore the options for resolution and attempt to reach agreement. Conciliation is similar to mediation except that, usually, the third party will actively assist the parties to settle the dispute (for e.g., by making suggestions regarding settlement options). For construction contracts, there is a statutory procedure of "adjudication" which can be used to resolve certain types of disputes.	Occasionally, mediators may be asked to evaluate the claim or issue or identify the strengths and weaknesses of a particular case. This is called evaluative mediation.

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.	The European Union (Withdrawal Agreement) Act 2020 contains various transitional provisions relating to civil cooperation. ▸ The current rules on jurisdiction under the Recast Brussels I Regulation will continue to apply where proceedings are commenced before the end of the transition period (the transition period runs until 31 December 2020) ▸ Recognition and enforcement of judgments from the remaining Member States of the EU will also continue to be governed by the Recast Brussels I Regulation in respect of judgments handed down in proceedings started before the end of the transition period In respect of proceedings commenced or judgments handed down after the end of the transition period, the position has not yet been finalized.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition on enforcement of rights in commercial relationships	Subject to a number of exceptions, in the event a contracting counterpart goes into an insolvency process, the Corporate Insolvency and Governance Act, 2020 renders unenforceable any clauses in contracts for the supply of goods or services that would allow termination by the supplier on the grounds that the customer has entered formal insolvency.	The prohibition on the enforcement of contractual termination rights which arise solely because a party has entered into an insolvency procedure may have significant consequences for some suppliers of goods and services, although its impact will be lessened by the long list of exceptions to this prohibition. The prohibition does not apply to certain companies and services. These are predominantly financial services companies. Suppliers which are small entities were temporarily excluded from the effect of the prohibition as a COVID-19 pandemic related measure until 30 September 2020, with a power to reduce or extend this period. The expectation is that earlier triggers for termination will be included in contracts as a result to allow suppliers to terminate if a company shows

		warning signs of financial difficulties but has not yet entered an insolvency process.
Temporary measures adopted in relation to the COVID-19 pandemic	The Corporate Insolvency and Governance Act 2020 introduces a number of temporary measures in response to the COVID-19 pandemic, as well as new permanent reforms of the UK insolvency regime noted above. Temporary measures include: ▸ Suspension of winding-up proceedings which were commenced on the basis of statutory demands made between 1 March 2020 and 30 September 2020 ▸ Suspension of winding-up petitions triggered by cash flow insolvency, where the pandemic has caused the relevant financial difficulties In each case this applied to winding up petitions presented from 27 April 2020 to (as at the date of writing but subject to a right to extend) 30 September 2020.	
Government Guidance	The Government has issued published guidance on responsible contractual behavior in the performance and enforcement of contracts impacted by the COVID-19 pandemic. The guidance is non-statutory.	The Government encourages parties to contracts to follow its guidance. A non-exhaustive list of matters in relation to which responsible and fair behavior is encouraged is set out below: ▸ Making, and responding to, force majeure, frustration, change in law, relief event, delay event, compensation event and excusing cause claims ▸ Making, and responding to, claims for damages, including claims under liquidated damages provisions ▸ Claiming breach of contract and enforcing events of default and termination provisions (including termination rights arising by reason of the insolvency or potential insolvency of a party) ▸ Making, and responding to, requests for contract changes and variations ▸ Parties to commercial contracts should consider carefully, and reasonably, what reliefs may be available, including whether an extension of time for performance should be granted, how additional costs should be dealt with and whether terms should be renegotiated to preserve the viability of

		the contract to accommodate the impact of the COVID-19 pandemic ▸ An equitable adjustment or accommodation in contractual arrangements impacted by the COVID-19 pandemic should be considered in preference to a formal dispute ▸ Parties should seek to resolve any emerging contractual issues responsibly, through negotiation, an early neutral evaluation or mediation, before these escalate into formal intractable disputes ▸ Many fast-track dispute resolution procedures have been developed in response to the COVID-19 pandemic and other fast-track dispute resolution services are available

Finland (civil law)

Contact(s):

Taina Pellonmaa

Last updated: 14 August 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Contracts should be negotiated and concluded in good faith. In accordance with Section 33 of the Contracts Act (228/1929, as amended), a transaction, which would otherwise be binding, shall not be considered enforceable if: ▸ It was concluded 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 As a general rule, before entering into the transaction, a party has a duty to disclose any information that is relevant and material to the other party's consent to enter the transaction. If this duty is breached, the breaching party may have an obligation to pay damages. It should be noticed, however, that the threshold for amending a contract based on a breach of a general rule is usually quite high	Under the Finnish law, freedom to break the negotiations is recognized. However, in some cases, a party may be liable for damages for not acting in good faith or performing misconduct. The grounds for invalidity under Chapter 3 of the Contracts Act are: ▸ 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) ▸ Dishonourable and unworthy act (Section 33) ▸ False document (Section 34) Furthermore, according to the Contracts Act, if a term of transaction is unreasonable or its application would lead to unreasonable conditions, the term may either be ultimately conciliated or disregarded by a decision of a court. It should be noticed, however, that the threshold for successfully invoking the grounds for invalidity are quite high.
Non-written agreement	A non-written agreement is binding. However, this is subject to a number of exceptions. A written agreement must be concluded, for e.g., in a purchase of a real estate. Agreements are not subject to formal requirements unless specifically regulated.	Legal literature and case laws provides that the party invoking the contract has usually the burden of proof of the non-written contract.
Signature: counterparts, representation and electronic signature	▸ Counterparts: Non-written agreements are binding and, thus, signature is not mandatory in most contracts. However, some contracts have formal requirements, including the requirement of original signature. Signatures can also be made validly on separate counterparts of the documents.	▸ Counterparts: It should be noted that a lack of signature in a document can create confusion as to whether the agreement has been entered into. The signature is one way to fulfil the burden of proof. In

	▸ Representation: The general rule is that parties of agreement must sign the agreement by themselves. Alternatively, a person that has a right to represent certain legal entity or has been authorized to sign on behalf of someone else, can sign the agreement. However, if the authorized representative exceeds the authorization granted to them, and the other party knew or should have known that this person was not duly authorized to the transaction in question, the agreement does not bind the assignor of the authorization. Under the Section 10 of the Contracts Act, in some situations, the authorization may be given in accordance with law or general practice. ▸ Electronic signature: Electronic signatures are permitted in accordance with the Act on Strong Electronic Identification and Electronic Signatures (617/2009, as amended).	certain cases, witnesses are required to authenticate a signature. ▸ Electronic signature: In Finland, several different companies provide tools for electronic signatures, which are regarded valid under Finnish legislation.
Contracts concluded electronically	In Finland, agreements may be concluded by electronic means, and such agreements are as binding as non-electronically concluded agreements. The Act on Strong Electronic Identification and Electronic Signatures provides the detailed conditions for a valid, electronically concluded agreements.	Nowadays, authorities, such as Finnish Patent and Registration Office that holds the Trade Register, accept electronically concluded agreements. This applies also to the agreements that were previously required to be filed with Trade Register as original versions, such as memorandum of associations.
Language of the agreement	In principle, the parties to the agreement may freely agree upon the language of the agreement.	As wording of an agreement and certain terms may mean different things in different jurisdictions, it is advisable to define the terms in the contract, especially if the contract is concluded between parties from different jurisdictions.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	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: ▸ First shot ▸ Last shot ▸ Knockout ▸ Midpoint solution	It is recommended that parties ensure the unambiguousness of the T&C. The solutions for solving battle of forms situation are presented in legal literature, such as *Hemmo: Sopimusoikeus I, 2007*. They are as follows: ▸ The T&C attached to the first expression of intent will be applicable

	• Buyer, who does not make a complaint, bound to the terms Additionally, the consent and knowledge of the other party is usually a higher requirement when the T&C includes conditions that can be considered harsh or unusual. If the T&C is deemed to be unclear, it can be interpreted *in dubio contra stipulatorem*, i.e., to the detriment of the party that has drafted them.	• 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 • The terms that the forms do not agree upon will cancel each other out and are dropped from the contract. The relevant Sale of Goods Act then supplies any missing terms • A midpoint solution from the differing terms is determined and applied for by the Finnish courts • The buyer or other recipient of the payment in kind, who does not make a complaint, will be bound As a main rule, it is recommended that the T&C's are made clearly as a part of the agreement prior to entering into an agreement.
Significant imbalance (unfair contract terms)	If one party of the agreement has significantly better rights than the other one, or the application of the agreement would lead to unreasonable conditions, the agreement may be considered unreasonable and the terms of the agreement may consequently be either conciliated or disregarded. When assessing unreasonable conditions, the full content of the transaction, the position of the parties, the circumstances prevailing the transaction and thereafter, as well as other factors must be taken into account. It should be noted, however, that conciliation and/or disregarding such terms is always an exception to the freedom to enter into contracts and therefore the threshold for such action is quite high.	
Consideration	Under Finnish law, consideration is one criterion by which a promise can be regarded as a binding contract. One-sided deeds (i.e., gratuitous undertakings) are stipulated in the Finnish Gift Promises Act.	
Price: determination, revision and indexing	Parties can flexibly agree upon the price and the adjustment methods of the price. If the parties have not specifically agreed upon the price, it can, sometimes, be deemed to have been agreed based on the circumstances. Adjustment of an unreasonable condition can be directed to the Court for determining the price of the agreement, although, this is very rare.	

Payment Terms	If the parties have not agreed upon the payment time, then Section 49 of the Finnish Sale of Goods Act will be applied. According to Section 49, the buyer must pay the price on the seller's demand. 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. Advance payments by the buyer must be agreed on specifically.	A party must make a claim if they do not accept the price indicated on the invoice. If the claim is not made, the price is binding, except if the price can be deemed unreasonable. Invoice cannot be used to alter what has been agreed on in the contract.
Exclusivity Provisions	Exclusivity to sell or to buy can be granted, provided it does not constitute prohibited restrains to competition.	Prohibited restraints on competition are stipulated under the Competition Act of Finland.
Non-compete obligations	A non-compete clause is permitted, provided it does not constitute prohibited restrains to competition.	
Governing law (implied content and public order)	Governing law that may apply to the whole or part of agreement can be freely chosen by the parties concluding international agreements. 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. However, the following exceptions must be considered when choosing the governing law: ▸ 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) If the parties have not agreed on the applicable law, the principle followed is that the law of the country that is the closest to the contract shall be applicable.	
Judicial powers related to the contract	If the terms of the agreement are ambiguous and the parties cannot jointly agree on the application of the agreement, the court can interpret the terms of the agreement. In the interpretation, court analyzes, in addition to the text of the agreement, what was the actual intention of the parties at the time the agreement was concluded. Ultimately, judges can make the agreement equitable or deem the contract terminated.	According to legal literature, e.g., *Saarnilehto*, the rules for the interpretation of an agreement can be put in the following order: ▸ Mandatory legislation ▸ Agreement and what can be regarded of being agreed ▸ Business practice and other similar practice ▸ Non-mandatory legislation

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	There are three types of durations: ▸ 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. It should be noted, that in some cases an indefinite contract could be deemed unreasonable	
Prior notice of termination	Termination is an informal measure, unless otherwise agreed. If the notice of termination is defective, it is ineffective, unless the other party is deemed to have received adequate information of the termination.	The period of notice starts from receipt of the notice of termination, unless nothing else is provided. A written notice of termination (that has been delivered in a verifiable way) is usually recommended in order to avoid challenges related to proof.
Termination Clause	An agreement should provide grounds for termination. A termination without proper grounds may lead to obligation to pay damages to the other party.	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, formed and performed in good faith, in accordance with public policy. A party may be liable for damages if it breaches the obligation to act in good faith.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	A party cannot assign its obligations to a third party unless approved by the contracting party. A party may transfer its rights to a third party without consent of the contracting party.	For the avoidance of doubt, these rules are recommended to be included in the agreement.

Hardship clause, i.e., unforeseeable circumstances and renegotiation	In accordance with the Finnish Sale of Goods Act (355/1987, as amended), the buyer is entitled to hold to the contract and to carry on its performance. The seller is, nevertheless, not obliged to perform the contract in either of the following cases: ▸ If there is an impediment that they cannot overcome ▸ If the performance would require sacrifices that are disproportionate to the buyer's interest in performance by the seller	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.
Force majeure	According to this clause, one or both parties are not required to perform the agreement or part of it following the occurrence of unforeseeable circumstances or events that are beyond the party's control. If *force majeure* is applied, 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. Usually the following criteria must be met for an event to be considered as *force majeure*: ▸ 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 Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	Often, *force majeure* circumstances are listed in the agreement and some circumstances may be excluded.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	Under Section 21 of the Sale of Goods Act, whether the goods are defective shall be determined with regards 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. Otherwise, Finnish law does not provide rules for time limits of warranty in B2B sales.	Warranty clauses may contain express limitations (please refer to Section 5: Dispute - 'Limitation of Liability' mentioned below).

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not	The limitation of liability clauses is permitted under the Finnish law. The limitation can be expressed by:	

consumers)	▸ 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	
Alternative dispute resolution procedures (mediation/conciliation)	In Finland, mediation is a voluntary, confidential and unbiased service. Any party can withdraw their consent at any stage of the mediation process. The professionals in mediation office decide whether the case can be issued for mediation and whether mediation should be initiated. Mediation enables a constructive and easy approach to conciliate and solve the events that have occurred. Mediation may result in settlement or if necessary, it may be suspended. If the mediation process results in a settlement, a binding written agreement is prepared, which the mediators will also sign.	
Competent jurisdiction, execution of foreign decisions and exequatur	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. 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 considering certain exceptions presented in the convention and provided that the country in question has entered into the convention.	International treaties, such as the Rome I Regulation or CISG, or local law may determine the court when reference to competent jurisdiction is lacking. It is advisable to consider whether to choose civil law or the common law jurisdiction as the applicable law or competent court.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Not applicable.	Not applicable.
Temporary measures adopted in relation to the COVID-19 pandemic	The Debt Collection Act (513/1999) will be amended temporarily. The upper limit will be given to other than consumer debts in order to lighten the economic difficulties of companies. The Ministry of Justice is currently drafting the proposal.	It must be taken into account that the amendments to the legislation are mandatory in this case and prevail over the terms of agreement. The amendments apply to e.g. payment terms.
Force majeure – practice	Recently, the COVID-19 pandemic and other possible pandemic situations have been included to the *force majeure* clauses.	As an example of the circumstances that the COVID-19 pandemic has caused to parties of lease agreements, a lessee is not, as a main rule, eligible for rent reduction due to the COVID-19 pandemic related footfall decline and turnover issues. If premises have to be closed by government order,

		the provisions of a lease agreement (including rent reduction) may be adjusted, pursuant to Section 5 of the Act of Lease of Business Premises. However, there is no rule stating that this section can be applied in every case when the premises have been closed due to government order and it shall be estimated case-by-case.

France (civil law)

Contact(s):

Roland Montfort; Caroline Mercier-Havsteen; Marie-Pierre Bonnet-Desplan

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1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	According to Article 1104 of the French Civil Code, contracts must be negotiated, formed and performed in good faith. This provision is of 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. According to Article 1112-1 of the French Civil Code, a party has a duty at the pre-contractual stage to disclose any information, except on value of the service provided, that is relevant and material to the other party's consent to enter into the transaction. This provision is of public policy and it cannot be excluded or limited.	Article 1112 of the French Civil Code recognizes the freedom to break negotiations, but a party may be liable for damages for acting in bad faith or misconduct (Tort action). It may be advisable to secure information that the other party deems relevant and material to the contract.
Non-written agreement	Under French law, an agreement does not have to be in writing to be binding. However, this is subject to several legal exceptions that will not be addressed in this table. The process of signing a contract is a matter of evidence.	It is generally recommended to have written agreements.

Signature: counterparts, representation and electronic signature	▸ Counterparts: French law does not contain any provision imposing to sign separate counterparts or a single common instrument of a commercial contract in order to ensure its validity, except in exceptional cases. However, in terms of evidence, Article 1375 of the French Civil Code provides that the document formalizing a contract may only be used as evidence if made in a number of counterparts equal to the number of separate interests in the contract.
	
	▸ Representation: Contracts must be signed by the parties themselves or by the authorized representatives of the parties. However, French courts recognize the 'theory of appearance' (as per the French legal concept of '*théorie de l'apparence*'), according to which a party may be bound by a contract signed by a non-authorized representative if the other party legitimately believed that this person was duly authorized to sign the contract. The rule of the 'theory of appearance' is now provided for in Article 1156 of the French Civil Code.
	
	▸ Electronic signature: According to Article 1367 of the French Civil Code, electronic signature is permitted provided that the identification procedure be reliable and ensure the link between the document and the attached electronic signature. The reliability of the identification procedure is presumed when
	  ▸ The electronic signature is created
	  ▸ The identity of the signatory is ensured
		▸ Representation: According to Article 1158 of the French Civil Code, a party may formally request for confirmation of the signing authority of the other party's representative.
		
		▸ Legal requirements governing electronic signatures: The legal requirements related to the recognition of an electronic signature or the circumstances under which a handwritten signature is permissible or required according to an established signature exchange protocol and formal handover of the documents should be carefully reviewed to ensure legal certainty.

	▸ The integrity of the document is guaranteed according to requirements set out by Decree no 2017-1416 of 28 September 2017, which refers to EU Regulation No 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market	
Contracts concluded electronically	According to Article 1125 of the French Civil Code, contracts may be concluded by electronic means. According to Article 1366 of the French Civil Code, an electronic contract which is signed according to the requirements set out by Article 1367 of the French Civil Code (please refer to Section 1: Formation - 'Signature: counterparts, representation and electronic signature' mentioned above) has the same probative force as a written contract, provided that it is drafted and recorded in conditions that guarantee its integrity. If an electronic contract is not signed according to the requirements set out by Article 1367 of the French Civil code (e.g., exchanges of email, scans, etc.), its probative value will be reduced to a commencement of proof in writing (as per the French legal concept of '*commencement de preuve par écrit*', set out at Article 1362 of the French Civil Code).	As regards transmission of pre-contractual information by electronic means, according to Article 1126 of the French Civil Code, pre-contractual information requested by one party in view of entering into the contract or information transmitted to one party during the performance of the contract may be provided by electronic means if the recipient has accepted such communication means. According to Article 1127-1 and following of the French Civil Code, offers proposed by professionals following electronic means must fulfil some specific conditions laid out in the law (e.g., the offer must clearly lay out the path to follow in order for the receiving party to conclude the contract).
Language of the agreement	In principle, the language of the contract may be agreed on freely by the parties, except for specific matters. The language chosen by the parties has to be understandable by all parties to the contract. Otherwise, the party that has insufficient knowledge of the language is deemed not to have validly consented. 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.	There is an obligation to use French for agreements for contracting out public services with the French administrative authorities as well as in other areas (labor relations). If more than one language is used, it is important to specify the one that will prevail, especially for performance and dispute. Since a term may mean one thing in one jurisdiction but a different thing 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.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	T&C are at the basis of commercial relationships. There might be discrepancies between the seller's T&C and those of the buyer. If the buyer accepts the T&C of the seller, these are enforceable at the formation of the contract at the latest. According to Article 1119 of the French Civil Code, in the case of a contradiction between the T&C of the buyer and those of the seller, the incompatible provisions are void. The general law of sales, embodied in the French Civil Code and the French Commercial Code as well as the related case law, will therefore apply to the issues covered by the voided provisions: conflicting provisions will be replaced by the statutory regulations and solutions provided for by the French Civil Code or the French Commercial Code. The above 'knock-out rule' for conflicting provisions applies as long as the parties have agreed on the core obligations (i.e., price and object), and the contract will basically be upheld.	
Significant imbalance (unfair contract terms)	Article 1171 of the French Civil Code (which scope is limited to standard form contracts, as per the French legal concept of '*contrats d'adhésion*') and Article L.442-1 of the French Commercial Code (applicable to commercial contracts) prohibit significant imbalance provisions (as per the French legal concept of '*déséquilibre significatif*') 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. According to Article L. 442-4 of the French Commercial Code, in the case of a commercial contract, action can be launched by the party who suffers damages or by the competent French administrative authority, including the French Ministry of the economy. Violation of the prohibition of significantly imbalanced provisions in commercial contracts is sanctioned by: ▸ Cancellation of the provision ▸ Payment of damages ▸ Civil fine whose amount cannot exceed the highest of the following amounts: €5 mn, triple of the unfair advantages received or 5% of the turnover of the infringing party.	Standard form agreements are subject to higher scrutiny from the French administration. The limitation of liability clauses is particularly scrutinized in that respect.

Consideration	Prior to the reform of the French Civil Code on contract law, 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 commitment of the parties. Since the reform, which entered into force on 1 October 2016, the notion of cause has no longer been a condition of validity of the agreement. Article 1169 of the French Civil Code still provides that a contract for pecuniary interest is void if the consideration is unrealistic or derisory.	
Price: determination, revision and indexing	According 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. According to Articles 1583 and 1591 of the French Civil Code applicable to sales contracts, the price of the sale must be determined by the parties and sales contracts are enforceable as soon as parties agree on the product and the price, irrespective of any condition relating to the delivery or the payment of the price. However, according to Article 1164 of the French Civil Code, in framework agreements, such as distribution agreements, the price may be unilaterally set up by one party, who will have to justify its amount in the event of litigation. In the case of abuse in the determination of the price, the judge may terminate the agreement and consider awarding damages to the other party. Likewise, according to Article 1165 of the French Civil Code, in services agreements, in the absence of agreement between the parties before implementation of the agreement, the price may be unilaterally set up by the creditor, who will have to justify its amount in the event of litigation. In the case of abuse in the determination of the price, the judge may terminate the agreement and consider awarding damages to the other party. 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. The transfer of ownership is not linked to the payment of the price, except otherwise provided in the contract. According to Article 1343-3, paragraph 2, of the French Civil Code, the price may be stipulated in a foreign currency.	If the price is not fixed or determinable in the contract, the judge cannot set the contractual price. It is possible to appoint an expert to determine the price. 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. It is worth noting that price may vary as a result of the hardship clause (please refer to Section 4: Performance and non-performance – Hardship clause mentioned below).

Payment Terms	Payment terms in commercial relationships are strictly regulated. According to Article L.441-11 of the French Commercial Code, they must not exceed 60 days from the date of the invoice, or 45 days from the end of the month in which the invoice was issued. However, there are some sectors subject to specific payment terms provided by law, such as transportation sector where the maximum terms are shorter (30 days). Contractual clauses that provide for longer payment terms will be held as void. In addition, according to Article L.441-16 of the French Commercial Code, legal entities are liable for an administrative fine of €2 mn in the case of a breach (and €4 mn in the case of reiterated breach). The decision imposing the fine may be published at the expenses of the liable entity or individual.	Compliance with payment terms is increasingly enforced, even for cross-border contracts. This is monitored 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 have led to significant fines. For instance, in 2019, 271 fines were imposed, amounting to a total of €34.9 mn. Sanctions in this area have been recently getting more and more significant from the French administration.
Exclusivity Provisions	The grant of exclusivity, whether on the sale or the buy side, is permitted.	According to Article L.330-1 of the French Commercial Code, exclusivity provisions shall not exceed 10 years. Moreover, exclusivity must not constitute or result in an anticompetitive practice, i.e., an abuse of dominant position or an anticompetitive agreement.
Non-compete obligations	A non-compete clause is permitted during the performance of the contract and after termination of a contract under conditions laid down by French courts, notably limitation in time and limitation in geographical scope. Financial compensation is mandatory in French employment contracts. A financial penalty may be provided in the contract to sanction the obligated party in the case of infringement of the non-compete clause.	Non-compete clauses are subject to strict scrutiny from a competition law perspective. Moreover, the existence of such clauses could come into play in the assessment of whether certain contractual provisions may be deemed as unbalanced (please refer to Section 2: Content - 'Significant imbalance' mentioned above).
Governing law (implied content and public order)	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 stated in Article 3(1) of EU Regulation no. 593/2008 (Rome I Regulation). But other conventions or treaties may apply depending on the matter or type of the contract. If parties do not choose a governing law, it will be determined by the French courts. There are exceptions to the freedom of choice, such as: ▸ The mandatory local law of a country will apply despite the choice (Article 9 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.

	▸ Parties cannot artificially choose the governing law of another country (Article 3(3) Rome I) ▸ There is an exception on grounds of public policy (Article 21 Rome I)	
Judicial powers related to the contract	The judge shall interpret the parties' intention when analyzing a contract whose provisions are ambiguous or unclear. However, following the reform on contracts law, which entered into force on 1 October 2016, French contract law has shifted towards a more objective approach: when the mutual intention of the parties cannot be determined, the contract is to be interpreted in the sense that a reasonable person placed in the same situation would give to it, according to Article 1188 of the French Civil Code. In addition, French contract law has recently strengthened the powers of the judge in several aspects, for instance: ▸ The judge may decide to terminate or amend a contract in the event of changed circumstances, according to Article 1195 of the French Civil Code (please refer to Section 4: Performance and non-performance - 'Hardship clause' mentioned below) ▸ The judge may decide to remove a provision if it creates a 'significant imbalance' in a standard form contract, according to Article 1171 of the French Civil Code and Article L.442-1 of the French Commercial Code (please refer to Section 2: Content - 'Significant imbalance' mentioned above)	These judicial powers create uncertainties for the parties since their contractual agreements could be challenged. As a result, they encourage the parties to decide, when negotiating the contract, to define and/or to limit the scope and application of the said mechanisms in the contract in order to limit the residual powers of the judge to the minimum.

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	A contract may be entered into force for: ▸ 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 (please refer to Section 3: Duration and Termination - 'Prior notice of termination' mentioned below)	
Prior notice of termination	A party must give reasonable prior notice of termination of a contract, even if this is not provided for by the contract. This applies to both fixed-term (if renewed) and unlimited-term contracts, and in the case of an absence of contract if there is an established business relationship.	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 according to the inter-branch agreements.

	According to Article L.442-1 of the French Commercial Code, established commercial relationships must not be terminated without grating a sufficient prior notice of termination to the other party (except in the event of breach or *force majeure*), which duration notably depends on the duration of the past relationship. Ordinance no 2019-359 of 24 April 2019 has modified the law in order to include a 'safe' duration of 18 months for the prior notice which means that beyond 18 months, the liability of the terminating party can no longer be at risk. According to Article L. 442-4 of the French Commercial Code, violation of such prohibition of giving a reasonable notice may be sanctioned by: ▸ Payment of damages ▸ Civil fine of up to €5 mn, triple of the unfair advantages received or 5% of the turnover of the infringing party (whichever amount is higher) The question of whether or not this regulation constitutes a mandatory rule in the context of international relationships (as per the French legal concept of '*loi de police*') is uncertain. However, a recent decision from the French Supreme Court tends to indicate that such regulation on reasonable prior notice may be considered as mandatory regulation in the context of international relationships (*Cour de cassation*, 8 July 2020, no 17-31.536).	However, even though a prior notice of termination has been agreed upon between the parties in the contract (which is often the case), the judge shall examine whether this contractual prior notice duration conforms to the duration of the commercial relationship and other circumstances, according to a French Supreme Court decision (*Cour de cassation*, 22 October 2013, no 12-19.500).
Termination Clause	Events triggering the termination of a contract for cause must be clearly specified in the contract. If the contract is silent on early termination for cause, the non-breaching party may: ▸ Resolve the contract after giving a prior notification to rectify the breach to the defaulting party, according to Article 1226 of the French Civil Code ▸ Apply to the judge to perform or terminate the contract in case a serious breach has been committed by the defaulting party, according to Article 1227 and following of the French Civil Code	

4. Performance and non-performance

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

Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	▸ According to Article 1216 of the French Civil Code, 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. The assignment of a contract shall be in writing; otherwise, the assignment is void
	▸ According to Article 1321 and following of the French Civil Code, the assignment of receivables does not require the consent of the debtor, unless the receivable is nontransferable. The assignment of receivables shall be in writing; otherwise, the assignment is void
	▸ The reform on contract law introduced the assignment of debts. According to Article 1327 and following of the French Civil Code, the assignment of debts 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. The assignment of debt shall be in writing; otherwise, the assignment is void. If not otherwise provided by the creditor, the initial debtor is jointly and severally liable, along with the substituted debtor
	▸ Change of control or *intuitu personae* clause:
	  ▸ in the absence of a specific clause to that effect and unless otherwise provided, a party may not oppose the other party's change of control. Specific change of control protection in a contract is valid under French law
	  ▸ French contracts commonly refer to the notion of intuitu personae in order to express that the contract is personal in nature and the parties' rights cannot be assigned, nor can the performance of their duties be delegated without prior consent of the other party	

Hardship clause, i.e., unforeseeable circumstances and renegotiation	The parties are free to agree on 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. Moreover, according to Article 1195 of the French Civil Code, if circumstances that were unforeseeable at the time of the conclusion of the contract make the performance of the contract excessively onerous for a party, this party may ask for a renegotiation. In the meantime, this party has to continue performing the contract. In the case of refusal or failure of the negotiations, the parties may agree on the avoidance of the contract or request the judge to adapt it. If the parties still disagree, then the judge may revise or terminate the contract at the request of one party. The above-mentioned protection is not mandatory; The parties can opt out from it in their contract or to adapt it by providing a tailored hardship clause in their	The court will determine whether the conditions of unforeseeability, as defined by the parties, are met. It is recommended to provide for the notification of the circumstances that trigger the application of the clause and the conditions of renegotiation. It is also recommended to properly articulate the *force majeure* (please refer to Section 4: Performance and Non-performance - '*force majeure*' mentioned below) and hardship clauses in the contract.

	contract.	
Force majeure	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*: ▸ 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 *Force majeure* usually excuses one or both parties from the performance of the contract in some way following the occurrence of these unforeseeable circumstances or events. This party is excused from or entitled to suspend performance of all or part of its obligations without incurring any liability for damages. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	French courts determine whether the conditions of *force majeure* are met. 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, may also be specified in the contract.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	By way of information, there are specific regimes regarding unconformity in the French Consumer Code and regarding latent defects in Article 1641 of the French Civil Code that will not be addressed in this table. Warning: for latent defects, an action must be brought within two years from the discovery of the defects. Limited warranty clauses are possible under certain conditions and are valid only between professionals having the same specialty. However, the criterion of the same specialty is very narrowly construed by the judge.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	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. Limitation of liability clauses are valid under the following conditions: ▸ A limitation of liability clause must not deprive the contract of its purpose or of the main commitment of one party (Article 1170 of the French Civil Code) or create a significant imbalance between the parties (please refer to Section 2: Content mentioned above) ▸ Exclusion and limitation clauses are inapplicable in the case of wilful misrepresentation and gross negligence ▸ In some specific areas, such as personal injury, limitation clauses are not valid Punitive damages are invalid under French law.	According to Article 1231-5 of the French Civil Code, when the contract provides for penalties in the case of breach, the other party cannot claim for higher or lower compensation. Nevertheless, the judge may, on its own decision, reduce or increase the penalty provided in the contract when its amount is grossly excessive or derisory. It is also possible to extend a party's liability, such as by excluding the right to claim *force majeure*.
Alternative dispute resolution procedures (mediation/conciliation)	Parties may agree to submit the dispute to a mediator/conciliator before submitting the case to ordinary courts or arbitration courts. Thus, the mediator/conciliator would help the parties reaching an agreement. Mediation and conciliation rules are set out in the French Civil Procedure Code (principles of confidentiality, independence of the mediators, voluntary basis of the mediation and conciliation). Mediation/conciliation may be less expensive and a good way to maintain the business relationship between the parties. It is important to clearly state in the contract whether this preliminary step is mandatory or optional. Indeed, a court is not entitled to handle the case if the mandatory contractual mediation/conciliation procedure has not been activated by the claimant prior to filing the case before the court (*Cour de cassation*, 6 October 2016, no 15-17.989).	However, this preliminary mediation/conciliation step usually requires between three to six months. The increasing use of mediation/conciliation provisions is in line with the last developments of French law, aiming at promoting the use of alternative dispute resolution methods. Hence, according to law no. 2019-222 of 23 March 2019 and decree no. 2019-1333 of 11 December 2019, parties must use a mediation/conciliation procedure before filing the case before the main civil court (*Tribunal de grande instance*). Also, judges may order the parties to go through a mediation procedure. There are several organizations which provide mediation/conciliation services.
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are free to agree on arbitration or competent courts, except in certain matters.	In international commercial matters, parties are generally free to choose any court to settle the dispute.

	In France, an exequatur (the judicial process that leads to the recognition and enforcement of a foreign judgment) is necessary for the enforcement of a foreign judgment. 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 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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Recognition of judgments pronounced in other EU member States is automatic, according to Article 39 of EU Regulation no 1215/2012 dated 12 December 2012. The development above about mediation / conciliation are also valid before filing a claim with an arbitration court.	Arbitration will be more flexible (as there is a right to choose the arbitrators and the applicable law) and faster, but it may also be much more expensive. Arbitration allows for confidentiality of hearings. If the seat of arbitration is in Paris (for instance, the International Chamber of Commerce), then the relevant provisions of the French Civil Procedure Code will apply. With respect to the choice of jurisdiction, it is recommended to envisage the costs and what the typical duration will be to get an enforceable judgment in the chosen jurisdiction. In France, it takes at least two years for a first judgment to be rendered, and a further two years for an appeal to be ruled on.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Ordinance no 2019-359 of 24 April 2019	Ordinance no 2019-359 of 24 April 2019 has reshuffled the list of practices subject to prohibition in commercial relationships around three main practices: - Obtaining (or trying to obtain) an undue advantage or an advantage grossly unfair compared to the consideration received - Inserting (or trying to insert) a significantly imbalanced provision in the contract - Terminating the established commercial relationship without granting reasonable prior notice (except on the event of breach of the other party or force majeure) (Article L.442-1 of the French Commercial Code) As mentioned above (please refer to Section 2: Content - 'Significant Imbalance' mentioned above), these practices are subject to significant fines and are closely monitored by the French administration. Moreover, court actions related to these practices

		may be introduced not only by the Ministry of the economy but by private parties as well.
Temporary measures adopted in relation to the COVID-19 pandemic	Ordinance no 2020-306 of 25 March 2020 and ordinance no 20206427 of 15 April 2020	In reaction to the COVID-19 pandemic, the French government has adopted ordinance no 2020-306 of 25 March 2020 according to which penalty and termination clauses provided for in contracts cannot be immediately activated against debtors who would fail to fulfil their contractual obligations as a result of the pandemic between 12 March 2020 and 23 June 2020 (called 'legally protected period'). For obligations owed during this legally protected period, parties recover the right to activate such clauses only after a certain period starting from 23 June, which calculation is complex and depends on various factual circumstances. This mechanism essentially aimed at offering debtors more time to fulfil their obligations during the pandemic. However, parties remain free to opt out from this system. Ordinance no 2020-427 of 15 April 2020 has extended this mechanism to obligations owed after the end of the legally protected period, which, from a theoretical standpoint, means that penalty and termination clauses cannot be immediately activated against debtors failing to fulfil obligation due after 23 June. As for obligations owed during the legally protected period, parties will have to wait a certain period before recovering the right to activate such clauses as well. The calculation is complex and depends on various factual circumstances. Nevertheless, the scope of this mechanism is unclear, and it is difficult to anticipate how such rules will be implemented from a practical standpoint. In any event, the legally protected period stopped on 23 June 2020, and no additional temporary measures related to commercial contracts in general has been announced by the French government. In addition to the above, the French government has also adopted specific measures related to a variety of sectors such as labor law and corporate law. These sectorial measures will not be detailed here.

Tort Law	Draft tort law announced in July 2020	In addition to the reform of contract law (Ordinance dated 10 February 2016, applicable to contracts entered into force as of 1 October 2016 and ratified by law no 2018-287 dated 20 April 2018), the French government announced a draft reform of tort law in March 2017. The purpose of this reform was to 'modernize, clarify and enrich the French Civil Code by the numerous case law'. In March 2017, the draft (subject to adjustments) presented by the Ministry of Justice structured the essential rules of tort law. These rules include distinction between civil and contractual liability, maintenance of liability for defective products, and ecological harm. Unlike other foreign jurisdictions, French tort law is based on the concept of fault and not on the nature of the damage. In July 2020, the French Senate finally introduced a bill at the Parliament aiming at reforming French tort law and updating the current versions of the provisions of the French Civil Code in light of the case law. The objective of this bill is to rapidly materialize the reform at least on its most consensual aspects, some of them being already enshrined in case law. Regarding contractual matters, the most significant provisions of the bill are the following: validation of the limitation of liability clauses, except otherwise provided in the law and except in the event of gross fault; confirmation of the possibility to claim for compensation as soon as the debtor is in breach of the contract (even in the case of late performance) and when this breach causes damages; possibility to claim compensation for the loss of opportunity, as per the French legal concept of "*perte de chance*" (subject to conditions however); possibility to claim compensation for a future loss when it is the certain and direct extension of a current situation. The planned date of entry into force of the provisions contained in this bill is 1 January 2022. Nevertheless, it is uncertain as of today whether the bill will ever turn into a law.

Gabon (civil law)

Contact(s):

Nicolas Chevrinais; Fatima Kassory Bangoura

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1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Contracts must be negotiated, formed and performed in good faith. This is a matter of public policy, which is also reproduced in the French civil code of 1804 still applicable in Gabon. 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.	For example, a party may be held liable for damages for acting in bad faith or for misconduct upon terminating pre-contractual negotiations.
Non-written agreement	A contract does not have to be in writing to be enforceable under the Gabon law. However, the process of signing a contract is a matter of evidence.	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.
Signature: counterparts, representation and electronic signature	The Gabon law does not address the signature of contracts by counterparts. The document formalizing a contract may only be used as evidence if made in a number of counterparts equal to the number of separate interests in the contract. Contracts must be signed by the parties themselves or by the authorized representatives of the parties. However, Gabon courts recognize the "theory of appearance" ("*théorie de l'apparence*"), according to which a party may be bound by a contract signed by a non-authorized representative if the other party legitimately believed that this person was duly authorized to sign the contract. ▸ Electronic signature: To date, there is no law or regulation that address the electronic signature in Gabon.	In Gabon, it is recommended that at least two copies of the contract be signed by the parties or their authorized representatives. The process of signing a contract is a matter of evidence.
Contracts concluded electronically	Contracts can be shared electronically by the parties. However, it cannot be concluded electronically as the electronic signature is not yet recognized in Gabon.	
Language of the agreement	In principle, the language of the contract may be agreed on freely between the parties, except for specific matters.	The French language is mandatory in dealing with French-speaking public services and administrative authorities.

	The language must be understood by all parties to the contract; otherwise, the party that has insufficient knowledge of the language is deemed not to have validly consented. A translation into French will be required for registration of contracts before authorities and the administration. Gabonese courts usually require an official translation of contracts into French.	If more than one language is used, it is necessary to specify the one that will prevail, especially for performance and dispute. 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.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	T&C form the basis of commercial relationships. T&C of the seller are enforceable against the buyer if the latter accepts them at the formation of the contract at the latest. There might be discrepancies between the seller's T&C and those of the buyer. In the case of contradiction between them, both T&C will be deemed as void, and the general law of civil code and the Ohada law on commercial will apply. 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 French civil code of 1804 in force in Gabon.	Ohada is the acronym for Organization for the harmonization of Business law in Africa. With that treaty, Business law is common to 17 African jurisdictions. The Uniform acts relate to each specific matter. As such, they are as follow: • General commercial law • Corporations and commercial interest groupings • Guarantees • Debt collection procedures and enforcement measures • Bankruptcy proceedings • Accounting law • Arbitration law
Significant imbalance (unfair contract terms)	The Gabonese law does not generally recognize the concept of essential obligations. In the contract, the obligations of each party must be specified clearly. The parties must execute their contractual obligations. A breach thereof is usually sanctioned by payment of damages.	The obligations of the parties depend on the nature of the contract. 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.
Consideration	The Gabonese 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 (Please refer Section 4: Performance and nonperformance - 'Hardship clauses' mentioned below).	
Price: determination, revision and indexing	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 the 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. The price may be stipulated in a fixed currency according to the parties.	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. Adjustment method and additional price, such as an earn-out clause, are valid under the Gabonese law; however, the method of calculation must be precise, illustrated with an example.
Payment terms	Payment terms are regulated and need to be specified in writing by the parties. It spans from 30 days to 60 days from receipt of the bill.	
Exclusivity Provisions	Exclusivity rights (whether sale or buy side) are generally recognized under the Gabonese 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.	In the area of distribution, the exclusivity clause must be limited in time or in its geographical coverage.
Non-compete obligations	A noncompete clause is permitted during the performance of the contract and after termination of a contract. Parties can determine non-compete obligation but under a limitation in time and limitation in geographical scope -of parties. The clause may validly provide for financial penalties in the case of infringement by the obligated party.	Noncompete clauses will be under scrutiny from a competition law perspective. In addition, such clauses can also be upheld in the assessment of possible significant imbalance between the parties' respective obligations. Financial compensation is mandatory for noncompete undertakings in employment relationships.

Governing law (implied content and public order)	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. If the parties do not choose a governing law, it will be determined by courts. There are exceptions to freedom of choice, such as the following: ▸ 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)	

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	A contract may be entered for: ▸ 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 (please refer Section 3: Duration and termination - 'Prior notice of termination' mentioned below)	
Prior notice of termination	A party must give a reasonable prior notice of termination of a contract, even if this is not provided for in the contract. Prior advance notice is required for fixed (if renewed) or indefinite term contracts, or in the case of absence of a written contract, if courts recognize an established business relationship between the parties. Timing for prior notice must be reasonable. The reasonableness criteria is assessed on the basis of various criteria. 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).	It is recommended to specify the duration of the reasonable prior notice in the contract.

Termination Clause	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. If the contract does not provide for specific grounds of termination, termination for cause will be subject to the following conditions: ▸ The non-breaching party may apply to the judge to terminate the contract ▸ Serious breach is required ▸ The non-defaulting party must have given the defaulting party a prior notification to remedy the breach	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy under the Gabonese law. A party may be liable for damages in the case of breach of this obligation.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	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. 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.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	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. Since unforeseeably or '*imprevision*' is not addressed mandatorily, the parties can therefore agree to exclude such mechanism in the contract. In case the contract is silent on this issue, a party may still ask for a renegotiation. In the meantime, it must continue to perform the contract. In the case of refusal by the other party, the demanding party may ask the judge to revise the contract or terminate it.	The court will determine whether the conditions of unforeseeable circumstances, as defined by the parties, are met. It is recommended to provide for the notification of the circumstances that trigger the clause and the conditions of renegotiation. It is also recommended to properly articulate *force majeure* (Please refer Section 4: Performance and nonperformance – '*force majeure*' mentioned below) and hardship clauses in the contract.

Force majeure	*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. The following criteria must be met for an event to be considered as *force majeure* under the Ivorian law: ▸ 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 ▸ It is beyond the control of the parties	The court will determine whether the conditions of *force majeure* are met. 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. The clause may also provide for the conditions for the termination of the contract or its renegotiation. Prior notification of the *force majeure* event is required.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	The Gabonese law provides for a specific regime dealing with nonconformity and latent defects. Limited warranty clauses are valid under certain conditions.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	In principle, a breach of contract leads to compensation for direct foreseeable loss or damages, exclusively. Contractual exclusions and limitations clauses are valid under the following conditions: ▸ 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.

Alternative dispute resolution procedures (mediation/conciliation)	Parties may agree to submit the dispute to a mediator/conciliator before submitting the case to ordinary courts or arbitration courts. Thus, the mediator/conciliator would help the parties reaching an agreement. Mediation and conciliation rules are set out in the Gabon Civil Procedure Code (principles of confidentiality, independence of the mediators, voluntary basis of the mediation and conciliation). Mediation/conciliation may be less expensive and a good way to maintain the business relationship between the parties. It is important to clearly state in the contract whether this preliminary step is mandatory or optional. The Ohada law on arbitration enforces the binding effect of multi-tiered dispute resolution clauses requiring the parties to undertake negotiation, mediation and/or conciliation prior to commencing arbitration. The Uniform Arbitration Act unifies the arbitration laws in Ohada member states and establishes the rules applicable to arbitral disputes having their seats in an Ohada Member State. The Uniform Arbitration Act aims to enhance transparency, promptness, and efficiency of arbitral proceedings in the member states. Under the Act's framework, member states can choose to arbitrate either under the CCJA Rules of Arbitration or under the Uniform Act on the Law of Arbitration.	
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are free to choose between arbitration and the court system, except in certain matters. Enforcement is carried out under the relevant international treaty or convention in the country where the award has been rendered. In Gabon, enforcement of a foreign judgment is subject to the classical exequatur process by a Gabonese court (i.e., the judicial process that leads to the recognition and enforcement of a foreign judgment on the Gabon territory).	In international commercial matters, parties are usually entitled to choose any court to settle the dispute. Arbitration will be more flexible (as there is a right to choose the arbitrators and the applicable law) and faster, but it may also be much more expensive. Arbitration allows for confidentiality of hearings. If the seat of arbitration is in Paris (for instance, the International Chamber of Commerce), then the relevant provisions of the French Civil Procedure Code will apply.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Not applicable.	Not applicable.
Temporary measures adopted in relation to the COVID-19 pandemic	In relation to the COVID-19 pandemic, the Gabonese government has adopted specific measures related to a variety of sectors such as for Tax and Labor law. Regarding the Commercial law it is under the Ohada competency. However, the Council of Ministers of Ohada have not provided measures in relation with the COVID-19 pandemic.	

Germany (civil law)

Contact(s):

Jörg Leißner

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1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	According to Section 242 German Civil Code (*Bürgerliches Gesetzbuch (BGB)*), the so-called principle of good faith and fair dealing (*Treu und Glauben*), contracts must be negotiated, formed and performed in good faith. 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.	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. In the case of a breach of pre-contractual duties, a liability based on Section 311 of the *BGB* may arise (*culpa in contrahendo*, a common contract law concept meaning fault in conclusion of a contract).
Non-written agreement	Generally, an agreement does not have to be in writing to be legally binding under the German law. However, there are several exceptions, where the written form or even the form of a notarization (*Beurkundung*) is required, such as: ▸ 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 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 BGB A breach of form occurs when an existing form requirement is not met	The process of signing an agreement is a matter of evidence. 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. 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 *BGB*, 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. 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 *BGB*.
Signature: counterparts, representation and electronic signature	▸ Counterparts: 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 original 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 *BGB*.	

	▸ Representation: Contracts must be signed by the parties themselves or by the authorized representatives of the parties. ▸ Electronic signature: Contracts may be signed electronically. However, according to Section 126a of the *BGB*, if the electronic form shall be replaced by the written form prescribed by statute, the issuer of the declaration must add their name to it and provide the electronic document with a qualified electronic signature and the parties of a contract must each electronically sign an identical document in the manner described above.	▸ Representation: According to Section 177 of the *BGB*, a party may approve a contract which has been signed by a person that did not have the authority to act on behalf of the party at the time the agreement was signed by such person. The effect of such approval is the retroactive validity of the contract.
Contracts concluded electronically	In principle, under German Law, contracts may be concluded electronically. To preserve the electronic form determined by the parties, it shall be sufficient, unless another intention is to be assumed, to use an electronic signature other than the electronic signature determined in Section 126a of the *BGB* (please refer to above comments) and, in the case of a contract, to exchange the declaration of offer and declaration of acceptance, each of which is provided with an electronic signature.	Unless a qualified electronic signature is required by law or the agreement of the parties, any kind of electronic signature will be sufficient so that the only requirement is that the issuer of the declaration is identifiable. That means that the fulfilment of the requirements of 'text form' of Section 126b of the *BGB* is sufficient. Text form means a legible declaration stating the person making the declaration must be made on a durable medium. A durable data carrier is any medium that: ▸ Enables the recipient to keep or store a declaration on the data carrier addressed to them personally in such a way that it is accessible to them for a period of time appropriate to its purpose ▸ Is capable of reproducing the declaration unchanged
Language of the agreement	In principle, the language of the contract may be agreed on freely by the parties, except for specific matters. 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.	If more than one language is used, it is important to specify the one that shall prevail, especially for performance and dispute. In the course of legal disputes, the German courts may require an official translation of records or documents (such as contracts) into German.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	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 the case of conflict between the parties in the T&C of the contract, the knock-out	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

	rule applies, as long as the parties have agreed on the core obligations (i.e., the price and object).	*BGB*.
Significant imbalance (unfair contract terms)	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. In B2B relationships, the courts will review contractual terms for their compliance with the principle of: ▸ Good faith (Section 242 of BGB) ▸ Public policy (Section 138 of BGB) ▸ The observance of the statutory prohibitions and form requirements (Section 134 and Section 125 of BGB) When it comes to public policy, it: ▸ Must be understood as a basic value judgment 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 ▸ 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 et seq. of the *BGB* and corresponding case law, must be observed. These specific regulations apply to contract terms (according to Section 305 of the *BGB*), which are (cumulatively): ▸ Pre-formulated ▸ Intended for repeated use ▸ 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 take into account each individual contractual term (high standards in practice) for discussion (*Ernsthaft zur Disposition stellen*).	*BGB* is based on the principle of freedom of contract. 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. 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 *BGB*. This is true even if, technically, Sections 308 and 309 of *BGB* are directly only applicable to B2C contracts. Furthermore, T&C that are considered unfair or an unreasonable disadvantage to the contracting party are legally impermissible, according to Section 307 of *BGB*. This includes the standard terms that: ▸ Are not compatible with essential principles of the statutory provision from which it deviates ▸ 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 *BGB*. The remainder of the contract will basically continue to be valid, as per Section 306, paragraph 1 of the *BGB*.
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.	

Price: determination, revision and indexing	The price must be fixed or at least determinable, otherwise, the contract is void. The parties may agree on a: ▸ Price renegotiation clause, pursuant to which an adjustment of prices would require the consent of both parties ▸ 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 For certain business sectors (e.g., financial services, tenancies, energy and gas), further or different specific requirements need to be considered. Generally, the transfer of ownership is not linked to the payment of the purchase price, unless in the case of reservation of title.	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. 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: ▸ Describe the calculation method for the price adjustment in significant detail ▸ Allow for price adjustment in either direction (increase or decrease) ▸ Provide the right for the other party to terminate the contract if the price adjustment may constitute an unacceptable hardship Under 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.
Payment Terms	Payment terms in commercial relationships are regulated. According to Section 271a *BGB* an agreement under which the creditor can only demand the fulfilment of a claim for consideration after more than 60 days from receipt of the consideration is only valid if it is expressly made and is not grossly unfair in relation to the creditor's interests. If the debtor receives an invoice or equivalent payment statement after receipt of the consideration, the date of receipt of this invoice or payment statement shall replace the date of receipt of the consideration referred to in the first sentence. It shall be presumed, pending proof of another date, that the date of receipt of the invoice or payment statement falls on the date of receipt of the consideration. If the creditor has specified a later date, that date shall replace the date of receipt of the consideration. Moreover, payment terms are even stricter regulated in T&C. According to Section 309 no.1a of the *BGB*, it is not permissible to use a provision in T&Cs by	Further restrictions apply in case the debtor is a governmental authority or other legal person governed by public or private law established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

	which the user reserves an unreasonably long period of time for the fulfilment of a claim for payment by the contractual partner. If the user is not a consumer, a period of more than 30 days after receipt of the consideration or, if the debtor receives an invoice or equivalent payment statement after receipt of the consideration, a period of more than 30 days after receipt of this invoice or payment statement is deemed to be unreasonably long.	
Exclusivity Provisions	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. In practice, several types of exclusivity provisions are known and used depending on the specific contractual situation, such as: ▸ An exclusive purchase obligation (Alleinbezugsverpflichtung) ▸ An exclusive supply obligation (Alleinbelieferungsverpflichtung) ▸ An exclusive distribution right (Alleinvertriebsrecht)	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).
Non-compete obligations	The legal permissibility and consequences of non-compete obligations are usually dependent on the time of applicability, i.e., during the term of the contract or after termination of a contract. Generally, the legal permissibility of post-contractual non-compete obligations is more limited. Often, it comes with the consequence that the party that has to obey the non-compete obligation receives some kind of financial compensation, as further specified by applicable laws.	Non-compete 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). Non-compete obligations often comes with contractually agreed specific penalty in the case of infringement, in addition to the general liability for damages, in the case of breach of non-compete obligation.
Governing law (implied content and public order)	Generally, the 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). However, freedom of choice may be limited: ▸ 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)	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. 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.

	▸ Parties cannot artificially choose the governing law of another country (Article 3(3) Rome I)	
Judicial powers related to the contract	The judge shall interpret the parties' intention when analyzing a contract whose provisions are ambiguous or unclear. This shall be done in line with the principles of interpretation of a contract as set forth in Sections 157, 242 of the *BGB*.	The burden of proof and demonstration follows the general principles under the German Code of Civil Procedure (*Zivilprozessordnung*). Anyone claiming a loophole must therefore also present and prove the facts from which the loophole arises.

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	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. Both fixed terms and indefinite terms are common in commercial relationships. 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. If the agreement provides for an indefinite term, each party may terminate the contract at any time without any justification (please refer to Section 3: Duration and Termination - 'Notice of termination' mentioned below).	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 the individual case), according to Section 307 of the *BGB*. 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. However, a certain explicit notice period will typically have to be observed in the case of an indefinite contract term (please refer to Section 3: Duration and Termination - 'Prior notice of termination' mentioned below).
Prior notice of termination	In the 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. 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: ▸ The parties have concluded an indefinite ongoing obligation	In some cases, the German law also sets forth mandatory fallback rules on the termination for 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. The actual application of the case law regarding

	▸ No contractual right to terminate the contractual relationship applies ▸ The parties did not exclude the right to terminate the ongoing obligation ordinarily	extraordinary termination with a certain notice period is subject to individual determination by weighing interests of both parties on a case-by-case basis. 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.
Termination Clause	The extraordinary notice of termination for good cause without notice period (*Außerordentliche sofortige Kündigung*) may be based on good cause within the meaning of Section 314 of the *BGB*, 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 *BGB* 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 mutually agreed upon 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 *BGB*), 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: ▸ The runtime of the ongoing continuing obligation, including the right to terminate it with notice ▸ The consequences of termination for the other party ▸ The severity of a contractual violation (if any) ▸ 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: ▸ When the contractual partner is in a significant 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 ▸ 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 ▸ 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 considered.

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, formed and performed in good faith. The principle of good faith and fair dealing (*Treu und Glauben*) is statutorily addressed in Section 242 of the *BGB*. Details are not spelled out in the statute but are subject to interpretation of this general principle by the courts.	In the 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 *BGB* (please refer to Section 1: Formation - 'Pre-contractual obligation' mentioned above).
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	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. In the event the contract provides for specific consequences in the 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. 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.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	Section 313 of the *BGB* 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. 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): ▸ The circumstances forming the basis of the contract at its conclusion have significantly changed or been found to be incorrect	The requirements for the application of 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. 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. The parties are basically free to decide the

	▸ 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 If adaptation is not possible or reasonable, Section 313, paragraph 3 provides the disadvantaged party with a right to withdraw from the contract.	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.
Force majeure	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. 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 *BGB* (please refer to Section 4: Performance and Non-performance - 'Hardship clauses' mentioned above). However, as *force majeure* events are not specifically covered by Section 313 of the *BGB*, the additional implementation of *force majeure* clauses is common in commercial contracts governed by German laws in order to precisely define such events with a view to the specific characteristics of the contract. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	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. The clause may also provide for the conditions for the termination of the contract or its renegotiation. 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.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	In B2B sales, the buyer has to: ▸ Examine the delivered goods promptly for defects following their delivery or handover ▸ 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. Apparent defect must be notified as soon as the examination was or should have been completed and in the 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.	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 *BGB*. What is considered to be 'promptly' within the meaning of Section 377 of the German Commercial Code depends on the circumstances of each individual case, such as the industrial sector, the size of the organization and the type of the product. The buyer must describe the discovered defects as precisely as possible.

	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 their warranty claims. Otherwise, in case a defect is reported in time, the buyer will benefit from their 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: ▸ Cure of the defect by means of repair or replacement (Section 439 of the BGB) ▸ Rescission of the contract or withdrawal (Sections 440 and 323 of the BGB) ▸ Reduction of the purchase price (Section 441 of the BGB) Compensation of damages or reimbursement of expenditure, provided that culpable act or omission is given (Sections 440 and 280 and following of the *BGB*)	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 *BGB*, 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 themselves 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
Limitation of liability (between corporate parties, not consumers)	Generally, under statutory German law, damage claims shall cover all direct and indirect damages, including lost profits, without limitation. In light thereof, contracts often include specific provisions to limit the quite broad statutory liability for damages. 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 provide for a number of restrictions in relation to the legal permissibility of such clauses on the restriction of the liability. Namely, there must not be any exclusion of: ▸ Liability for death or injury to body and health caused by the other party ▸ Liability for willful intent and gross negligence ▸ The strict mandatory liability in accordance with the German Product Liability Act ▸ Furthermore, according to the German case law, liability for the negligent infringement of material contractual obligations (Kardinalpflichten) may only	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 a 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 could mean unlimited liability for all direct and indirect damages of the other party, including lost profits. In particular, it should be stated in T&C that 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. Such restriction or exclusions is for individual and specific negotiation between the parties on this specific point, and detailed documentation thereof.

	be limited to characteristic and typically foreseeable damages. Characteristic and typically foreseeable damages must basically not be excluded.	
Alternative dispute resolution procedures (mediation/conciliation)	The parties may agree to submit the dispute to a mediator before submitting the case to ordinary courts or arbitration courts. The characteristic feature of mediation is that not a third party intervenes in the parties' dispute, but that the parties themselves decide on the outcome of the conflict. The mediator merely acts as a catalyst in the process of consensus finding, which is the responsibility of the parties themselves. Mediation/conciliation may be less expensive and a good way to maintain the business relationship between the parties. Some basic rules on mediation are laid down in the German Mediation Act (*Mediationsgesetz*).	
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: ▸ Both parties have a common jurisdiction and the user of the T&C chooses a jurisdiction elsewhere ▸ The parties choose a jurisdiction that has no connection to the content of the contract or to the seat of the user ▸ 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.	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 because usually all hearings before the ordinary courts are open for the public.

	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. Foreign arbitral awards are recognized and enforceable in Germany, as the Federal Republic of Germany is a member of the UN Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention).	

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Temporary measures adopted in relation to the COVID-19 pandemic	The German legislator introduced a number of regulations to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal proceedings. Regarding contract law, the following two temporary changes are of importance: ▸ The possibility of terminating a rental agreement because the tenant has not made past due rental payments has been restricted. From 1 April to 30 June 2020, the lessee could have suspended payment of the rent without the lessor being able to terminate the rental agreement for this reason. The tenant only had to prove that the non-payment of the rent is due to the effects of the COVID-19 pandemic. The rent must then be paid in arrears no later than 30 June 2022, i.e., within two years, otherwise the statutory right of termination will be revived. The same applies to lease agreements ▸ Further, consumers and micro-entrepreneurs were entitled to refuse fulfilment of essential continuing obligations (i.e., contracts required for adequate utility services, such as electricity, gas, telecommunication and water) if such contracts had been concluded prior to 8 March 2020 and provided that the respective consumers or micro-entrepreneurs are unable to perform such contracts without jeopardizing their decent livelihood due to the COVID-19 pandemic. The right to refuse fulfilment was restricted to obligations arising in the period between 1 April to 30 June 2020	

Italy (civil law)

Contact(s):

Matteo Zapelli

Last updated: 4 September 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Pre-contractual good faith constitutes a general clause of the Italian legal system and is an expression of the principle of solidarity, within the limits of an appreciable sacrifice of those who exercise such good faith obligation. From a structural point of view, the obligation of good faith is characterized by its flexibility. From the pre-contractual obligation of good faith, it is possible to draw a series of additional obligations, adaptable to the circumstances of the specific case, including obligations of clarity, secrecy and, above all, information. Information is a determining element in the process of forming the contractual will, so that each party has the obligation to communicate to the other the circumstances relevant to the conclusion of the deal. A specific obligation to provide information is governed by Article 1338 of the Italian Civil Code. A limit to the duty of information resides, on the other hand, by virtue of the principle of self-responsibility, in the burden of information on each party entering into negotiations.	
Non-written agreement	The Italian law provides that the willingness to stipulate an agreement can be manifested, as a rule, in any form. The only requirement is that the intention to enter into a contract is comprehensible to the persons for whom it is addressed. Sometimes, however, the law requires, for the validity of the contract, that this is expressed in a specific form. Generally, the form so required is the written form, which may consist both in a private agreement and in a public deed. In exceptional cases, the simple written form is not sufficient, and the solemnity of the public deed authenticated by a notary public or a public deed is required.	
Signature: counterparts, representation and electronic signature	▸ Counterparts: The Italian law does not provide for specific number of counterparts of a contract and an agreement can executed by and exchange of correspondence ▸ Representation: Under Italian law a representative is allowed to sign a contract in the name and on behalf of a third party if provided with the duly powers and if entitled by law ▸ Electronic signature: Legislative Decree 82/2005 establishes that the electronic signature (with specific technical characteristics) can be used in the context of private agreements, whether or not the written form is required, simply whenever their subscription is required	

Contracts concluded electronically	According to the Italian law, it is possible to use the electronic stipulation of the contract using computers. It is therefore recognized to use the agreement between subjects by use of computer tools that are connected to each other and that, therefore, are not present in the same place, since their direct interface is constituted by the computer tool used. The reference discipline is constituted by Legislative Decree 70/2003 implementing Directive 2000/31/EC on electronic commerce and Legislative Decree 82/2005.	
Language of the agreement	No specific language requirements are provided for the execution of contracts under the Italian law. 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. However, pursuant to Article 9 of Legislative Decree no. 206 of 6 September 2005, all information intended for consumers and users must be made at least in Italian.	

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	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. The United Nations Convention on Contracts for The International Sale Of Goods 1980 (CISG) is applicable under the Italian law.	
Significant imbalance (unfair contract terms)	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.	

Consideration	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.	
Price: determination, revision and indexing	The price must be fixed or at least determinable. Otherwise, the contract is null. 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 will be determinable and, therefore, the validity of framework agreement is guaranteed. In the 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. Parties can agree on adjustment methods and additional price (such as an earn-out clause). However, a precise and clear method of calculation must 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. The price may be stipulated in a foreign currency.	
Payment Terms	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. In addition, Article 62 of Decree Law 24 January 2012, n. 1, converted, with amendments, by Law 24 March 2012, n. 27 states that the maximum period for the payment of food products, whose delivery takes place in the territory of the Italian Republic, must be 30 days for perishable products and 60 days for other food products. In both cases the period begins from the last day of the month of receipt of the invoice. These obligations also affect retail stores, bars, restaurants, street vendors, artisans, florists, commercial agents dealing with food (perishable and non-perishable).	
Exclusivity Provisions	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.	

Non-compete obligations	A non-compete clause is allowed during the performance of the contract and after termination of a contract, for a specific term. The non-compete clause cannot be undefined and generally it shall contain a specific reference to the term, the territory and the objects that it applies to. The clause can provide a financial penalty in the case of infringement by the obligor.	
Governing law (implied content and public order)	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. If the parties do not choose a governing law, it will be determined by the courts. The exceptions to the freedom of choice include: ▸ The mandatory local laws 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)	
Judicial powers related to the contract	Article 1374 of the Italian Civil Code identifies the law, usages and fairness as integrative sources of the contract. As far as fairness is concerned, unlike the law and usages, it is the result of the decisions of the judge, who in this way can establish the content of the contract in a judicially correct manner.	

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	Under Italian law, the term is the future and certain event on which the effectiveness of the contract or its termination depends. There is no specific regulation governing the term. The Italian Civil Code, therefore, regulates only the term of payment (Article 1183) and the computation of the statute of limitation (Article 2963), as well as the use of it in some contracts (the lease has a specific regulation governing the term, the prohibition of selling can be filed for a reasonable period of time etc.).	.

	The term of the contract is at the discretion of the parties and is not always provided for in the contract. However, there are some contracts that are not compatible with a fix term (marriage, family law obligation, heir institution, acceptance and waiver of inheritance). On the contrary, there are contracts where the application of the term is obligatory (the usufruct agreement, the lease, the irrevocable proposal, etc.).	
Prior notice of termination	A party must give reasonable prior notice of termination of a contract, even if this is not provided in the contract. This also applies to fixed-term (if renewed and not excluded) or indefinite term contracts, or in the case of absence of contract, if there is an established business relationship. The reasonable notice period is calculated on the basis of the term of the contract. Failure to give reasonable prior notice will expose the terminating party to damages for early termination.	
Termination Clause	A clause on termination for cause, under the Italian law, should refer to specific obligation in the contract, which should be clearly identified. On the other hand, case law considers that a termination clause, referring to the breaches of all obligations of the agreement or in general to the obligations of the agreement, is null and void. If the contract does not provide specific grounds for termination, the non-breaching party may apply to the judge to terminate the contract. Besides the intervention of the judge, it is possible to terminate the agreement in the following two cases: ▸ Pursuant to Article 1454 of the Italian Civil Code, the non-breaching party can notify the breaching party, in writing, to fulfil 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 ▸ In case a contract provides 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) ▸ In case a contract provides for an express termination clause, that is the one by which the contracting parties demonstrate that the contract is intended to be terminated upon the occurrence of one or more specific events that are not necessarily serious, but also of minor importance. In this case the termination operates by right, not only upon the mere occurrence of the fact, but after the contractor has expressly declared that they intend to make use of the clause	

4. Performance and non-performance

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). The general principle of good faith in the execution of the contract imposes on each party to the contractual relationship the duty to act in such a way as to preserve the interests of the other, regardless of the existence of specific contractual obligations and of what is expressly established by individual legal provisions. By virtue of this principle, each party is obliged, on the one hand, to adapt its conduct in such a way as to safeguard the utility of the other party, and, on the other hand, to tolerate the non-performance of the other party that does not seriously harm its own interest.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	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. A change of control clause is valid when aimed at guaranteeing the identity of the counterpart. It may be provided in contracts in instances when there is an interest of the parties in having the identity of the counterpart. This is so that any kind of change would eliminate the interest in maintaining the contractual relationship. 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.	

Hardship clause, i.e., unforeseeable circumstances and renegotiation	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 must continue to perform the contract. In the 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. Since such a mechanism is not mandatory, parties can, therefore, agree to exclude it expressly in their contracts.	
Force majeure	Within the Italian legal system, it is not possible to find a precise definition of *force majeure*, since there is no rule that explicitly describes the case in question. The term " *force majeure* " is mentioned in some provisions of the Italian Civil Code, including Article 1785 of the Italian Civil Code, concerning the limits of liability of the hotelier in the case of deterioration, destruction or removal. In any case, the concept of *force majeure* is identified in essence by Article 1467 of the Italian Civil Code, which recognizes the debtor's right to request termination of the contract when the service they owe has become excessively onerous due to extraordinary and unforeseeable events outside their sphere of action. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	
Warranty of latent defects (specific to sales between corporate parties, not consumers)	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 about 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. 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 (otherwise the limitation or exclusion of the warranty is not effective). Moreover, the warranty is not mandatory if, at the time of purchase of the good, the purchaser was aware of the defects, or the defects were evident or easily recognizable.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	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. However, the stipulation that the debtor is not liable for a damage that they might do to the creditor intentionally shall be null and void. The debtor cannot limit liability in advance for gross negligence and willful misconduct but only for light negligence.	
Alternative dispute resolution procedures (mediation/conciliation)	The Italian legal system recognizes the mediation and conciliation. Civil and commercial mediation (mediation aimed at the conciliation of civil and commercial disputes) consists in a nutshell, in the activity, however named, carried out by an impartial third party and aimed at assisting two or more parties in finding an amicable agreement for the settlement of a dispute. In general, anyone who is a party to a civil dispute (concerning available rights) can freely try to resolve the dispute through such an instrument, while for some specific disputes the use of mediation is imposed by law (e.g., condominium; rights in rem; division; inheritance; family pacts; lease; accommodate; etc.) Conciliation, in Italian law, is a way of resolving civil disputes through which the parties reach an agreement with the help of a third party. It is called judicial, when the third party is a judge who resolves the dispute and extra-judicial when it is carried outside the judgement and is reserved to a conciliator.	
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.	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.

	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 jurisdictionsthat have signed the New York Convention of 1958. For the other decisions and awards, an exequatur will be required with the competent Italian court of appeal. Enforceability shall be declared if a judgment is enforceable in the state of origin and there are no specific obstacles. The exequatur is not required for the enforceability of judgments rendered by the courts of other EU Member States.	

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Temporary measures adopted in relation to the COVID-19 pandemic	Article 1218 of the Italian Civil Code (which concerns the debtor's liability) prescribes that "the debtor who does not exactly perform the service due is required to pay compensation for damages, if he does not prove that the non-performance or delay was caused by the impossibility of the service resulting from a cause not attributable to him". On the other hand, Article 1223 of the Italian Civil Code concerns the compensation for damages resulting from non-performance. Decree Law No. 6, February 2020, 23 has provided that the compliance with the COVID-19 "containment" rules provided by Law is always considered for the exclusion of the debtor's liability, provided by Articles 1218 and 1223 of the Italian Civil Code.	Only the "containment" rules adopted by the President of the Council of Ministers and the competent authorities are considered for the exclusion of the debtor's liability provided by Articles 1218 and 1223 of the Italian Civil Code. All cases in which the impossibility of the debtor is derived from the pandemic crisis itself would remain outside the case.

Ivory Coast (civil law/common law)

Contact(s):

Eric N'Guessan; Sockna Diaby

Last updated: 22 September 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	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. 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.	For e.g., a party may be held liable for damages for acting in bad faith or for misconduct upon terminating pre-contractual negotiations.
Non-written agreement	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.
Signature: counterparts, representation and electronic signature	▸ 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. ▸ Representation: The law provides the conclusion of contracts in consideration of the person of the co-contractor. Consequently, if accepted by the other party, the co-contractor can be represented with a power of attorney. ▸ Electronic signature: In Ivory Coast, the electronic signature is authorized and regulated by the decree 2014-106 of 12 March 2014 which lays down the conditions for establishment and preservation of the written and signature in electronic form.	▸ Counterparts: In Ivory Coast, it is recommended that at least two copies of the contract be signed by the parties or their authorized representatives. The process of signing a contract is a matter of evidence. ▸ Representation: It is recommended in the case of representation to get a power of attorney. ▸ Electronic signature: Based on the law, where a written document is required for the validity of a legal act, it may be drawn up and kept in electronic form, provided that it includes a secure electronic signature linked to a qualified electronic certificate. The said certificate may be considered qualified only if it is issued by a certification service provider approved by the authority of telecom (ARTCI).

Contracts concluded electronically	In Ivory Coast, the electronic contracts are authorized and regulated by the decree 2014-106 of 12 March 2014 which lays down the conditions for establishment and preservation of the written and signature in electronic form.	Any person engaged in electronic commerce is required to provide those intended for the service with easy, direct and permanent access using a standard open to information on the contract.
Language of the agreement	In principle, the language of the contract may be agreed on freely between the parties, except for specific matters. The language has to be understood by all parties to the contract. 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.	The French language is mandatory in dealing with French-speaking public services and administrative authorities. If more than one language is used, it is necessary to specify the one that will prevail, especially for performance and dispute. 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.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	T&C form the basis of commercial relationships. T&C of the seller are enforceable against the buyer if the latter accepts them at the formation of the contract. There might be discrepancies between the seller's T&C and those of the buyer. In the case of contradiction between them, both T&C will be deemed as void, and the general law of sales of Ivory Coast will apply. 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.	
Significant imbalance (unfair contract terms)	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.	The obligations of the parties depend on the nature of the contract. For e.g., in a sale contract, the seller must transfer or deliver the goods 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 service 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.

Consideration	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 (Please refer to Section 4: Performance and non-performance – 'Hardship clauses' mentioned below).	
Price: determination, revision and indexing	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 the 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. The price may be stipulated in a fixed currency according to the parties.	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. 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 and illustrated with an example.
Payment terms	Payment terms are regulated and need to be specified in writing.	
Exclusivity Provisions	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.	In the area of distribution, the exclusivity clause must be limited in time or in its geographical coverage.
Non-compete obligations	A non-compete clause is permitted during the performance of the contract and after termination of a contract, under conditions laid down by the courts. The clause may validly provide for financial penalties in the case of infringement by the obligated party.	Non-compete clauses will be under scrutiny from a competition law perspective. In addition, such clauses can also be upheld in the assessment of possible significant imbalance between the parties' respective obligations. Financial compensation is mandatory for non-compete undertakings in employment relationships.
Governing law (implied content and public order)	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. If the parties do not choose a governing law, it will be determined by courts. There are exceptions to freedom of choice, such as the following: ▸ 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)	
Judicial powers related to the contract	The parties must choose the competent jurisdiction applicable to each contract, based on the place of execution of the contract.	

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: It must be enforced until expiry of the said term or the possibility to renew the contract ▸ An indefinite term: Each party may terminate the contract at any time without any justification, but it is subject to prior notice (Please refer to Section 3: Duration and termination – 'Prior notice of termination' below)	
Prior notice of termination	A party must give a reasonable prior notice of termination of a contract, even if this is not provided for in the contract. Prior advance notice is required for fixed (if renewed) or indefinite term contracts, or in the case of absence of a written contract, if courts recognize an established business relationship between the parties. Timing for prior notice must be reasonable. The reasonableness criteria are assessed on the basis of various factors. 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).	It is recommended to specify the duration of the reasonable prior notice in the contract.
Termination Clause	If the contract provides grounds for termination, the relevant clause should identify precisely the breaches that would serve as valid ground for such termination for cause. If the contract does not provide for specific grounds of termination, termination for cause will be subject to the following conditions: ▸ The non-breaching party may apply to the judge to terminate the contract ▸ Serious breach is required ▸ The non-defaulting party must have given the defaulting party a prior notification to remedy the breach	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy under the Ivorian law. A party may be liable for damages in the case of breach of this obligation.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	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. 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.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	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. Since unforeseeability or 'imprevision' is not mandatorily addressed, the parties can therefore agree to exclude such mechanism in the contract. 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 the case of refusal by the other party, the demanding party may ask the judge to revise the contract or terminate it.	The court will determine whether the conditions of unforeseeable circumstances, as defined by the parties, are met. It is recommended to provide for the notification of the circumstances that trigger the clause and the conditions of renegotiation. It is also recommended to properly articulate *force majeure* (Please refer Section 4: Performance and non-performance – *'force majeure'* below) and hardship clauses in the contract.
Force majeure	*Force majeure* would result in validly excusing one or both parties from the non-performance 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. The following criteria must be met in order for an event to be considered as *force majeure* under the Ivorian law: ▸ 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	The court will determine whether the conditions of *force majeure* are met. 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. The clause may also provide for the conditions for the termination of the contract or its renegotiation. Prior notification of the *force majeure* event is required.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	The Ivorian law provides for a specific regime dealing with non-conformity and latent defects. Limited warranty clauses are valid under certain conditions.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	In principle, a breach of contract leads to compensation for direct foreseeable loss or damages, exclusively. Contractual exclusions and limitations clauses are valid under the following conditions: ▸ 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 wilful 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.
Alternative dispute resolution procedures (mediation/conciliation)	The parties to the contract can freely choose for a mode of alternative dispute resolution procedures (mediation/conciliation).	
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are free to choose between arbitration and the court system, except in certain matters. Enforcement is carried out under the relevant international treaty or convention in the country where the award has been rendered. 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).	In international commercial matters, parties are usually entitled to choose any court to settle the dispute.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	The commercial contract must be concluded based on a certain object which forms the subject matter of the undertaking and a lawful cause in the obligation.	
Temporary measures adopted in relation to the COVID-19 pandemic	Any termination, suspension of commercial contracts and leases must be assessed under the *force majeure* clause.	As a result of the COVID-19 pandemic, no specific period has been defined. However, the application of the clauses relating to the suspension and termination of contracts must be assessed on a case-by-case basis in the light of *force majeure*.

Luxembourg (civil law)

Contact(s):

Stephen d'Errico

Last updated: 16 October 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Article 1134 of the Luxembourg civil Code provides that contracts must be performed in good faith. This is a public policy provision that cannot be waived, limited or excluded in any form whatsoever. Each party has a duty at the pre-contractual stage to negotiate a contract carefully and loyally. 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.	Pre-contractual liability (Culpa in contrahendo) is of an extra-contractual nature and sanctioned in accordance with Article 1382 of the Luxembourg civil Code (Tort Law). Among others, liability can appear in one of the following situations: ▸ Terminated negotiations as a consequence of acting in bad faith or by misconduct; ▸ Fraud or coercion ▸ Breach of information obligations
Non-written agreement	In principle, contracts do not have to be written to be binding under Luxembourg law. A contract is formed by the sole consent of the parties.	A written contract is always preferable.
Signature: counterparts, representation and electronic signature	▸ Counterparts: Luxembourg law does not contain any provision imposing to sign separate or single counterparts of a commercial contract to ensure its validity, except in exceptional cases. However, in terms of evidence, Article 1325 of the Luxembourg civil Code provides that the document formalizing a contract may only be used as evidence if made in a number of counterparts equal to the number of separate interests in the contract. ▸ Representation: Contracts must be signed by the parties themselves or by the authorized representatives of the parties. Luxembourg courts also recognize the 'theory of appearance' (*théorie de l'apparence*), according to which a party may be bound by a contract signed by a non-authorized representative if the other party legitimately believed that this person was duly authorized to sign the contract. ▸ Electronic signature: According to Article 1322-1 of the civil Code the signature of a Contract can be handwritten or electronic. According to Article 1322-2 of the Luxembourg civil Code, electronic signature of a document executed under private seal (*sous seing privé*) is permitted when it presents reliable guarantees as to the maintenance of its integrity from the time it was first created under its final form.	

Contracts concluded electronically	Article 11(2) of the Luxembourg e-Archiving Act of 25 July 2015 prescribes the principle of non-discrimination of electronic documents, providing that electronic documents cannot be rejected by a judge solely on the grounds that they are in electronic form or do not comply with the authenticity and integrity/durability requirements set out in Luxembourg law	
Language of the agreement	The language of a commercial contract may be agreed freely between the parties. In case that different language versions exist, the parties in practice include a prevalence clause, to having one language prevailing in the case of issues.	English is the business language of Luxembourg. Most agreements are prepared in this language, without any translation in any of the three local languages (Luxembourgish, French, German)

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	Article 1135-1 of the Luxembourg civil Code provides that T&C of a party are binding for the other party subject to the three following conditions: ▸ 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 explicitly or implicitly accepted these general T&C 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 Luxembourg law.	The general T&C of a contract which have been pre-established by one party can only be opposed to the other party if it had access to them when signing. In click-through agreements, if the general T&C are available, then by clicking the "I agree" button, it would be presumed that the general T&C have been read and accepted as a result of a free and informed choice.
Significant imbalance (unfair contract terms)	Article L-211-2 of the Luxembourg consumer Code defines an "abusive clause" as follows: ▸ In contracts concluded between a trader and a consumer, any term or combination of terms which leads to an imbalance of rights and obligations in the contract to the detriment of the consumer is abusive and, as such, is deemed null and void and unwritten. The unfairness of a term may also be assessed in the light of those contained in another contract where the conclusion or performance of the two contracts are legally dependent on each other. ▸ In the case of doubt as to the meaning of a clause, the interpretation most favorable to the consumer shall prevail. This rule of interpretation is not	Luxembourg law does not have a general system for controlling unfair terms / significant imbalance, outside consumer law.

	applicable in the context of the action for an injunction provided for in Article L. 320-3.	
Consideration	Luxembourg law does not strictly recognize the common law concept of consideration. Instead, it uses the notion of cause, i.e., the rationale for the commitment of the parties, which is a condition of validity of the agreement.	
Price: determination, revision and indexing	According to Articles 1583 and 1591 of the Luxembourg civil Code applicable to sales contracts, the price of the sale must be determined by the parties and sales contracts are enforceable as soon as parties agree on the product and the price, irrespective of any condition relating to the delivery or the payment of the price. In terms of property sales, Article 1601-5 of the Luxembourg civil Code provides that the price and the terms of payment must be indicated in the contract. In terms of consumer law, article 113-1 and L-221-2 of the Luxembourg consumer Code provides that before the conclusion of a contract, "the consumer must receive the price of the goods or service, inclusive of all taxes or, where an exact price cannot be determined, the method of determining the price, enabling the consumer to verify it". The transfer of ownership is not linked to the payment of the price, except otherwise provided in the contract.	
Payment terms	Payment terms may be freely decided upon between the parties. In matters of sales, article 1650 of the Luxembourg civil Code provides that the principal obligation of the buyer is to pay the price on the day and at the place settled by the sale.	
Exclusivity Provisions	They are permitted whether on the sale or the buy side.	
Non-compete obligations	A non-compete provision is permitted during the performance of the contract and after termination of a contract under conditions laid down by Luxembourg courts, notably limitation in time and limitation is geographical scope. A financial penalty can be provided for by a non-compete clause in the case of infringement from the obligated party. If a judge considers the consequences of a non-compete clause to be excessive, they can declare the clause null and void.	In matters of employment law, the noncompete clause is not presumed, it must be in writing in order to be valid. It can be inserted directly into the initial employment contract or any subsequent amendment to the contract.

Governing law (implied content and public order)	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 stated in Article 3(1) of EU Regulation no. 593/2008 (Rome I Regulation); But other conventions or treaties may apply depending on the matter or type of the contract. If parties do not choose a governing law, it will be determined by the Luxembourg courts. There are exceptions to the freedom of choice, such as: ▸ The mandatory local law of a country will apply despite the choice (Article 9 Rome I) ▸ Parties cannot artificially choose the governing law of another country (Article 3(3) Rome I) ▸ There is an exception on grounds of public policy (Article 21 Rome I)	
Judicial powers related to the contract	The judge shall interpret the parties' intention when analyzing a contract whose provisions are ambiguous or unclear. When the mutual intention of the parties cannot be determined, the common intention of the contracting parties should be sought, rather than stopping at the literal meaning of the terms, according to Article 1156 of the Luxembourg civil Code. This interpretation is also made pursuant to article 1162 of the Luxembourg civil Code, which provides that in the case of doubt, the agreement is to be interpreted against the one who stipulated and in favor of the one who contracted.	Sometimes the courts go further and proceed to "complementary" interpretations by imposing on one of the contracting parties an additional obligation that no clause provided for. This is the case of the security obligation imposed on the professional in many contracts.

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	A contract may be entered into force for: ▸ A fixed term: It must be enforced until the expiry of its term or renewed term ▸ An indefinite term: Positive steps from one or both parties will be required to bring about termination of the contract. Each party may terminate the contract at any time without any justification, subject to the notice of termination requirement (Please refer to Section 3: Duration and Termination - 'Prior notice of termination' mentioned below)	

Prior notice of termination	Reasonable prior notice of termination of a contract must be given by a party, even if this is not provided for by the contract. The parties are also free to stipulate in their agreement a specific notice period. This applies to both fixed-term (If renewed) and indeterminate contracts, and in the case of an absence of contract if there is an established business relationship. In contracts concluded between a supplier and a consumer, Luxembourg case law considers void for violation of public order, the termination notice clause which has the effect of seriously affecting the normal right of a party to unilaterally terminate a permanent contract.	
Termination Clause	Events triggering a termination for cause must be clearly specified in the contract. If the contract is silent on early termination for cause, the contract can be terminated if both parties agree on termination or the non-breaching party may: ▸ Force the defaulting party to perform the agreement where possible or request its termination with damages, according to Article 1184 of the Luxembourg civil Code ▸ Apply to the judge to perform or terminate the contract depending on the circumstances, according to Article 1184 of the Luxembourg civil Code	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, formed and performed in good faith. This provision is of public policy, according to Article 1134 of the Luxembourg civil Code. A party may be liable for damages in the case of breach of this obligation.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	▸ Assignment of a contract, assignment of receivables and assignment of debts: According to Article 1689 of the Luxembourg civil Code, the assignment of a contract or receivables requires an agreement between the assignor and the assignee. According to Article 1690, the assignment of a contract shall be carried out either by an authentic deed or by a private seal deed.	

	According to Articles 1693 and 1694 the assignor of the receivables owes the assignee delivery and guarantee of the existence of the debt but not of the solvency of the debtor, unless the creditor specifically guarantees the solvency of the debtor. Such guarantee also relates to the accessories of the claim. The assignment of debts is possible to the extent proper consideration is served to the assignee who takes the debtor position	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	The Luxembourg civil Code does not contain any special provisions which would allow renegotiation of the contract due to the change of circumstances. Article 1134 and seq. are silent. However, in accordance with the contractual freedom principle, the parties are free to agree on the conditions under which the renegotiation of the contract will take place, in order to amend the contract.	
Force majeure	According to Article 1148 of the Luxembourg civil Code, the following cumulative criteria must be met in order for an event to be considered as *force majeure*: ▸ 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 *Force Majeure* usually excuses one or both parties from the performance of the contract in some way following the occurrence of these unforeseeable circumstances or events. This party is excused from or entitled to suspend performance of all or part of its obligations without incurring any liability for damages. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	
Warranty of latent defects (specific to sales between corporate parties, not consumers)	By way of information, there are specific regimes regarding unconformity in the Luxembourg Consumer Code and regarding latent defects in Article 1641 of the Luxembourg civil Code that will not be addressed in this table. Limited warranty clauses are possible under certain conditions and are valid only between professionals having the same specialty. However, the criterium of the same specialty is very narrowly construed by the judge.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	A breach of contract leads to compensation only for the direct foreseeable loss or damage, according to Article 1150 of the Luxembourgish civil Code. Limitation of liability clauses are valid under the following conditions: ▸ A limitation of liability clause must not deprive the contract of its purpose or of the main commitment of one party or it must not exclude a mandatory obligation of legal origin (Lux. 21 mars 2003, n°77/2003 III) ▸ Exclusion and limitation clauses are inapplicable in the case of wilful misrepresentation and gross misconduct ▸ In some specific areas, limitation clauses are not valid	
Alternative dispute resolution procedures (mediation/conciliation)	Parties may agree to submit the dispute to a mediator before submitting the case to ordinary courts or arbitration courts. Thus, the mediator would help the parties reaching an agreement. Mediation rules are set out in the Luxembourg Civil Procedure Code (Principles of confidentiality, independence of the mediators, voluntary basis of the mediation). Mediation may be less expensive and a good way to maintain the business relationship between the parties. It is important to clearly state in the contract whether this preliminary step is mandatory or optional. According to Article 1251-5 of the Luxembourg New Code of civil Procedure a court is not entitled to handle the case if the mandatory mediation procedure has not been activated by the claimant prior to filing the case before the court.	
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are free to agree on arbitration or competent courts, except in certain matters. In Luxembourg, an exequatur is necessary for the enforcement of a foreign judgment. 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 Luxembourg law, recognition and enforcement of international awards are ensured, regardless of the nationality or place of residence of the parties, in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).	

	Recognition of judgments pronounced in other EU member States is automatic, according to Article 39 of EU Regulation no 1215/2012 dated 12 December 2012. Parties may 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.	

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Trade Secrets Law	The Law of 26 June 2019 transposed Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against the unlawful acquisition, use and disclosure.	The Law of 26 June 2019 provides a legal definition of "trade secrets" that was until this law only defined by the courts. The Trade Secrets Law defines as "trade secrets" information which fulfils the three following cumulative criteria: ▸ It is secret, (i.e. it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question) ▸ It has commercial value ▸ It has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. For example, market studies, business plans, customer databases may be trade secrets. The Trade Secrets Law fills a gap for businesses for which trade secrets have significant commercial value but do not satisfy the conditions to be protected under intellectual property law or are not registered as an industrial property title (on a voluntary basis) because of their confidential nature. The trade secret holder will have at its disposal an arsenal of measures and remedies (such as

		prohibitory injunctions, damages and corrective measures) that may be requested from the court against an alleged infringer in civil proceedings. These actions are time-barred after two years from the time the trade secret holder becomes aware of the unlawful acquisition, use or disclosure of the trade secret and of the infringer's identity. The Trade Secrets Law also provides for rules and measures aiming at ensuring the confidentiality of trade secrets during judicial proceedings relating to the latter. Such measures should encourage trade secret holders to assert their rights with respect to the unlawful use or disclosure of their trade secrets before the courts.
Temporary measures adopted in relation to the COVID-19 pandemic	The law of 3 April 2020 on an aid scheme for businesses in temporary difficulty and amending the amended Law of 19 December 2014 allows the Luxembourg State to grant aid in the form of repayable advances to support businesses, including natural persons carrying out their activities as their main activity and in self-employment, experiencing temporary financial difficulties as a result of the COVID-19 pandemic. A Recovery and solidarity fund for businesses has been created by the Luxembourg Government to encourage and maintain employment and support businesses in those sectors hard hit by the health crisis (tourism, events, HORECA (hotel, restaurant and catering sector), culture and entertainment.	Aid applications must be submitted no later than 1 December 2020. The maximum amount of aid has been increased to EUR 800,000 per single undertaking. Micro and small enterprises are exempted from the criterion of a business in difficulty. This repayable financial aid is intended for use by commercial, craft or industrial businesses that hold a business license. Every business in these sectors which sees a drop-in turnover during the months from June to November 2020 of at least 25 % compared with the same period of time in 2019 can claim a monthly payment of aid of an amount calculated on the basis of the number of employees and self-employed workers in the business. The aid consists of EUR 1,250 per active employee and self-employed person (assigned to an eligible activity). The amount of the aid is capped at 85 % of the loss in monthly turnover.

Netherlands (civil law)

Contact(s):

Bart Wolters; Dirk Engelen

Last updated: 16 September 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	The pre-contractual phase is often divided into three stages and is governed by the principle of reasonableness and fairness. ▸ First Stage: Parties can negotiate without obligations to reach agreement and are free to terminate such negations ▸ 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 terminating party ▸ 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 would be formed. The termination party may be liable for damages Certain parties (such as financial service providers) have a duty at the pre-contractual stage to disclose information that is relevant and material to the other party's consent to enter into the transaction.	It is advisable to use clear conditions when negotiating a contract with the other party to manage expectations from both sides. In practice, damages arising from termination of pre-contractual negotiations are rarely granted by the court.
Non-written agreement	Under Dutch law, the general rule is that there are no requirements as to the form of a contract. A contract does not have to be in writing to be binding towards the contractual parties. However, this is subject to a number of statutory exceptions, e.g., an agreement regarding the purchase and sale of real estate.	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. Although verbal contracts are valid, it is not always easy to prove and/or to judicially enforce the verbal agreement. The burden of proof lies with the party that alleges or makes the claim, which means that the party that invokes the verbal agreement needs to prove existence and content thereof.
Signature: counterparts, representation and electronic signature	▸ Counterparts: Under the Dutch law in general, agreements are not subject to any specific formalities and can be signed in counterparts.	▸ 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, shall be an original, but all the counterparts shall together constitute one and the same document.

- Representation:

  Under Dutch law, a power of attorney can be granted by a principal (i.e., a natural or legal person) to another person to perform legal acts in the principal's name. A power of attorney can be granted expressly or tacitly.

  Dutch law makes a distinction between a general power of attorney and a special power of attorney.

  A general power of attorney applies to all affairs of the principal and to all legal acts, except that which has been unequivocally excluded. However, a general power of attorney does not extend to acts of disposition (i.e., a disposal or encumberment of goods), unless it is unequivocally so provided in writing.

  All powers of attorney which are not general powers are special powers of attorney, e.g., powers granted for a specific legal act or for a specific purpose. A special power of attorney which has been granted in general terms does not include any acts of disposition, unless the power of attorney unequivocally provides, therefore. Nevertheless, a power of attorney granted for a specific purpose extends to all acts of administration and disposition which can serve to attain this specific purpose.

  A power of attorney can be granted by a legal entity to one or more persons, such power of attorney can be limited or in full. If the power of attorney is unlimited in time, or for a longer period, such power of attorney is usually registered with the trade register of the Dutch Chamber of Commerce.

- Electronic signature:

  If not used for a transaction which requires the involvement of a Dutch civil law notary or a Dutch governmental organization, electronic signature is generally accepted in the Netherlands. However, Dutch law stipulates, with reference to definitions as set out in Regulation (EU) No 910/2014, that a 'qualified signature', an 'advanced electronic signature' and 'electronic signature' shall have the same legal effects as a handwritten signature, provided that the method used for signing is sufficiently reliable in view of the purpose for which the electronic signature is used and to all other circumstances of the case. The differences between the type of electronic signatures are in the level of guarantee of the identity of the signatory and the authenticity of the electronic signature. It needs to be assessed on a case-by-case basis, whether the relevant type of electronic signature is sufficient for the purpose of the relevant agreement.

- Representation of legal entities:

  For other type of Dutch form of businesses, not being legal entities (i.e., not having legal personality), the manner of representation of such form of business can differ per type of form of business. It is recommended to have this verified per form of business.

  With regard to legal entities (e.g., public traded company (N.V.), limited liability company (B.V.), cooperation (*Coöperatie*), association (*Vereniging*) or foundation (*Stichting*)), in principle, the board of managing directors as a whole, or one managing director can represent a Dutch legal entity (e.g., N.V., B.V. *coöperatie, vereniging* or *stichting*). However, the articles of association of a Dutch legal entity can stipulate that only two managing directors acting jointly or only specified directors acting jointly (e.g., Director A + Director B) can legally represent the legal entity.

  The trade register with the Dutch Chamber of Commerce shows the representative authority of the relevant managing directors.

Contracts concluded electronically	As a general principle, almost all contracts can be concluded electronically under Dutch law. Contracts that are required to be concluded in writing can also be concluded electronically if: ▸ The contract can be consulted by all parties ▸ The authenticity of the contract is ensured ▸ The moment that the contract has been concluded can be determined sufficiently ▸ The identity of each party can be determined sufficiently	As there are several ways of contracting electronically, it is important to keep in mind that the authenticity and reliability of the contract is ensured. Using reliable and well known digital and software programs and tools that include certain verification processes is recommended when concluding more complex contracts.
Language of the agreement	There are no legal requirements for regular contracts (not notarial deeds etc.), so parties are free to agree upon the language used in the contract.	If more than one language is used, the one that prevails must be specified, especially for performance and disputes. The language of articles of association of a Dutch entity must be Dutch. An unofficial translation in another language can be provided by the notary to the parties involved.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	T&C are often used between commercial parties. Under Dutch law, a reference to a party's T&C only may not be sufficient to make them applicable. As a principle rule, The T&C need to be handed over to the contractual counterparty prior to entering into the relevant contract. In the event of battle of forms, Dutch law determines that the T&C of the party with the second referral are not applicable (and therefore the 'first-shot rule' applies), unless such party explicitly rejects the first T&C by means of a written statement, and states that its own T&C are applicable. It is possible, but not compulsory, for a party to file its T&C with the Dutch Chamber of Commerce or at a Dutch court. A stipulation in T&C may be nullified: ▸ 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 contractual parties, and other relevant circumstances	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. The Vienna Sales Convention provides for a different legal framework on T&C. It is common practice to exclude the International Sale of Goods (Vienna Sales Convention) in contracts.

	▸ If the user of the T&C has not given the other party a reasonable opportunity to take note of the T&C	
Significant imbalance (unfair contract terms)	There is no specific Dutch law provision that prohibits significant imbalance in a contract. The Parties are free to negotiate their agreement in the way they see fit. The general principle of reasonableness and fairness applies at all times and could form a basis to argue against an imbalance in a contract. (Please refer to Section 4: Performance and non-performance - 'Obligation to act in good faith' below)	A legal act that infringes a mandatory statutory provision, public policy or public morality is in principle null and void. In the event the content of the agreement is not sufficiently clear, the agreement can in some circumstances be nullified.
Consideration	The common law concept/requirement of 'consideration' is not known as a formal legal concept in Dutch law. Agreements without any consideration are valid agreements under Dutch law. However, in such case the legal basis of the agreement will be different. For instance, an agreement without consideration may generally be considered as a 'gift' or 'donation'. However, contracts that are not at arm's length can have other legal implications.	
Price: determination, revision and indexing	In the case of purchase contracts, Dutch law provides that the price for the purchased good or service must be at least determinable, otherwise, the contract can be nullified. 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. Adjustment methods and additional prices, such as an earn-out clause, can be provided for. The transfer of ownership (legal title) is not linked to the payment of the price, and specific contractual arrangements in this regard can be agreed upon. The price may be stipulated in any other currency than Euro.	It is possible to appoint an expert to determine the price for goods or services, if parties do not reach 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.
Payment Terms	Invoices issued between companies (i.e., B2B) must in principle be paid within 60 days, unless a longer period has been agreed upon 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. Large companies, who meet certain thresholds, cannot agree upon a longer payment term than 60 days if the other contracting party is a small to medium-sized company or a self-employed entrepreneur.	Different mandatory maximum payment terms can apply per different business sector, e.g., on basis of national law or an EU directive/regulation.
Exclusivity Provisions	Exclusivity clauses (whether on the sale or buy side) are generally permitted.	Exclusivity could be subject to limitations, pursuant to competition and regulation law and must be assessed in each individual case.

Non-compete obligations	A non-compete clause is in general permitted during the performance of a contract and, subject to certain limitations (e.g., with respect to period and scope), after the termination of a contract. The conditions, scope and period of non-compete obligations are normally laid down in a contract. It is common practice that a non-compete clause is supplemented with a financial penalty in the case of infringement of the non-compete obligation.	If the terms and scope of the non-compete obligation are too extensive, it is possible that the clause is subject to nullification (in or out of court) or that the conditions, scope or period of the non-compete are mitigated by a judge.
Governing law (implied content and public order)	Parties are free to choose their governing law for international contracts. That choice of law may apply to the whole or a part of the contract. This is in accordance with the principle laid down in Article 3(1) of EU Regulation EC no. 593/2008, Rome I Regulation. Other conventions or treaties may apply depending on the matter and type of the contract. If the parties have not made a choice of law or are in dispute on the applicable law, Dutch courts will ultimately determine the applicable law on the basis of Dutch international private law or other applicable (European) legislation. There are exceptions to this freedom to choose the governing law, which include the following: ▸ The mandatory local law of a country will apply despite the choice of the parties (Article 9 Rome I) ▸ Where all other 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, the choice of the parties cannot prejudice the application of mandatory provision of the law of that other country (Article 3(3) Rome I) ▸ The application of a provision of law is manifestly incompatible with the public policy (Openbare orde) (Article 21 Rome I)	The Rome I Regulation sets out EU-wide rules for determining the applicable national law that should apply to contractual obligations in civil and commercial matters involving more than one country/jurisdiction.
Judicial powers related to the contract	The choice of forum for disputes related to a contract may be agreed upon freely between the contractual parties. There are exceptions to the freedom of choice, which include the following: ▸ In general, a choice of forum cannot be included in individual employment agreements ▸ Parties cannot apply a choice of forum in respect of judicial powers that have been directed in a European directive (such as EU Regulation No 1215/2012 (Brussel-I), Dutch international private law or international treaties to certain (International) courts	A forum choice cannot be 'general' but needs to cover a certain legal relationship, such as a contract.

	▸ A choice of forum can only be applied for by parties in respect of legal relationships which are at their free disposal. Criminal matters can therefore not be included in a choice of forum (Please refer to Section 5: Dispute - 'Competent jurisdiction, execution of foreign decisions and exequatur' below)	

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	The Parties to a contract are free to determine its term. A contract may be entered into for: ▸ A fixed term: The agreement shall end automatically at the end of the fixed term, if the agreement does not provide for a (automatic) renewal and such renewal has not taken place. However, if parties continue their legal relationship, it may be argued that the agreement is automatically renewed or extended ▸ An indefinite term: It is recommended to include provisions that govern termination (Opzegging/ontbinding), such as termination grounds or events, notice periods and procedural arrangements. If such provisions are not included, general rules of the Dutch law apply regarding termination, such as the principle of reasonableness and fairness and non-fulfilment / breach and damages compensation	If a contract has been entered into with a fixed term but without any termination clauses, or without any applicable mandatory termination provisions, such contract is in principle not subject to (early) termination during the relevant term, except for unforeseen circumstances. If a contract has been entered into for an indefinite term but without any termination clauses, or without any applicable mandatory termination provisions, such contract is in principle subject to termination. However, the principle of reasonableness and fairness, taking in account the type and content of the contract and all other relevant circumstances, may require that for instance: ▸ Termination is only possible if sufficient ground exist which justify the termination ▸ A certain notice period needs to be observed ▸ The termination notice needs to include an offer to compensate for any damage or loss incurred by the other party pursuant to the termination If a contract has been entered into for a fixed or an indefinite term and it contains termination clauses, or it is subject to mandatory termination provisions, such contract can be terminated pursuant to the applicable termination clauses and/or provisions. However, the principle of reasonableness and fairness may require that:

		▸ Certain (additional) requirements need to be obtained with respect to the termination (e.g., a longer notice period) ▸ The termination of the contract be simply unacceptable
Prior notice of termination	Parties to a contract are free to determine if a prior notice of termination shall apply, and if so, what notice period shall apply. It is common practice to include in the contract that a party must give a reasonable prior notice (in writing or electronically) of termination of a contract, except in case there are grounds for immediate termination such as imminent bankruptcy or fraudulent behavior. 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 the principle of 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.	
Termination Clause	Parties to a contract are free to determine grounds for termination (which may trigger a 'termination for cause'). If the contract provides for termination for cause (i.e., breaches of contract/obligations), it is recommended that the relevant clause precisely identifies the events that give ground for termination. If a contract does not provide for arrangements on breach of contract, the provisions of Dutch contract law shall apply, meaning: *any* breach of contract obligations is considered a ground of termination (*ontbinding*), unless the breach (in view of its nature or minor importance) does not justify termination of the contract. However, prior to termination of a contract, the defaulting party in principle needs to receive a 'notice of default' from the non-breaching party, including a reasonable period of time to remedy the default/breach. A prior notice of default is not required if: ▸ The default comes from the expiration of a specific contractual or mandatory term ▸ The default arises from tort or relates to any obligations to pay certain damages which is not immediately fulfilled ▸ That the defaulting party has stated, expressly or tacitly, that it will not fulfil its obligations under the contract It is possible to limit or exclude in the contract the statutory provisions regarding termination.	A party can also nullify if the contract is concluded under the influence of an error (*dwaling*) and which it would not have concluded, had the assessment done by that party on the basis of correct information: ▸ Provided that the error is due to information given by the other party, unless the other party could assume that the contract would have been entered into irrespective of such information ▸ Provided that the other party, in view of what they knew or ought to know regarding the error, should have informed the party in error ▸ Provided that at the time of the entering into the contract, the other party made the same incorrect assumption as the party in error, unless the other party need not have understood that the party in error would be prevented from entering into the contract even if there had been a correct assessment of the facts It is common practice to exclude nullification on grounds of error. A contract can also be nullified in the case of threat, fraud or unfair exploitation:

		• Threat (*bedreiging*): This occurs in the event that a person makes another person enter into a contract by unlawfully threatening that person or a third party with harm to such person or party, or its property. The threats must be such that a reasonable person would be influenced by it • Fraud (*bedrog*): This occurs in the event that a person makes another person enter into a contract by intentionally providing that person with inaccurate information, by intentionally concealing any fact the was obliged to communicate, or by any other pretense. • Unfair exploitation (*misbruik van omstandigheden*): This occurs in the event a person knows or ought to understand that another person is being made to enter into a contract or the entering of the contract is stimulated as a result of special circumstances (e.g., a state of necessity, dependency, abnormal mental condition or inexperience), although the person's knowledge or ought of understanding of the special circumstance or, for instance, the disadvantage of the entering of such contract, should cause that person to refrain from entering in the contract with the other person

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	As a general principle of Dutch law, contracts must be negotiated, formed and performed in good faith under Dutch law. Such good faith principle is part of the broader and more general Dutch legal principle of reasonableness and fairness.	The wording of the contract is in principle guiding in the case of any discussion between the contracting parties with respect to the commitments made to each other and the legal effects applicable. However, an important principle in Dutch law is that a contract cannot only have the legal effects agreed to by the parties, but also those which apply, given the nature of the contract: • By virtue of law • By common practice

		▸ The requirements of reasonableness and fairness The extent to which the wording of the contract is guiding, or if also other legal effects are applicable (based on the aforementioned principle), is, amongst others, depended on whether parties have made use of professionals' advisors (e.g. lawyers or financial advisors) when negotiating and concluding the relevant contract.
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	Dutch law stipulates that the assignment of a contract requires a written agreement between the assignor and the assignee, and (in principle) requires the approval of the other party, unless otherwise stipulated in the contract. In the absence of a specific contractual clause, a party may not oppose the other party's change of control, unless the contract provides for it. Under Dutch law, it is possible to agree that a specific person needs to perform one or more obligations under the contract or be part of the team that is involved with the performance of the contract (*Intuitu personae* clause). If such clause is not included, but an agreement is concluded on the premise that a certain person is involved with the performance of the contract, that person may also have the performance (completely) done by another person. However, such performance by the third party should then takes place under supervision of the person who is contracting, who in principle also remains responsible and liable for the actual performance under the contract as if that person performed the obligations themselves.	Change of control, *intuitu personae* clauses and assignment clauses are common in Dutch contracts.
Hardship clause, i.e., unforeseeable circumstances and renegotiation	The concept of 'hardship' as used in common law, is not generally used in Dutch law. However, Dutch law does provide for rules relating to 'unforeseen circumstances. Under Dutch law, the court may, at the request of one of the parties, modify the effects of a contract in the case of unforeseen circumstances. The courts may set the effects of the contract 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	*Force majeure* is a concept used and set out in Dutch contract law. Dutch law stipulates that in the case of *force majeure*, one or both parties are excused 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 due to *force majeure*, is not liable for damages. The contract may, however, still be terminated by the other party. The definition of *force majeure* can be extended or tailored by the parties, for instance to include strikes. An event can be considered as *force majeure* under Dutch law if the following criteria are met: ▸ 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 (one of) the parties Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	As Dutch law contains provisions on *force majeure* and its consequences, it is not strictly necessary to include contractual arrangements in contracts governed by Dutch law. If, however, the Parties wish to make such contractual arrangements on *force majeure*, it is recommended to provide for the definition of the events and circumstances that will (in any case) qualify as a *force majeure* event. It may also be important to exclude certain events from qualifying as *force majeure*, and to specify rules for implementation and the effects or consequences on the contract. The clause may also provide for conditions for the termination of the contract or its renegotiation in the case of a *force majeure* event.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	Under Dutch law, there is a specific regime regarding non-conformity and contingent defects relating to sales contracts. A buyer may expect that the goods bought have the characteristics: ▸ Which has agreed upon in the contract, also taking in account the nature of the goods and the statements made by the seller with respect to the goods ▸ Which are necessary for normal use and may otherwise reasonably be expected from the goods, as well as those characteristics that are necessary for a specific use that has been provided for in the contract In commercial contracts between legal entities, the applicability of this specific Dutch legal regime regarding purchase contracts is often excluded and replaced by tailor made contractual arrangements relating to conformity of goods/services and the repair of defects.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	The general principle under Dutch law is that a breach of contract that is attributable to one of the parties leads to the liability of the breaching party towards the other party and a legal obligation for compensation of resulting damages as incurred or to be incurred by the other party. Such liability may, however, be excluded or limited, unless the liability results from gross negligence, willful misconduct or intent.	
Alternative dispute resolution procedures (mediation/conciliation)	Parties are free to choose for alternative dispute resolution (ADR) procedures such as arbitration, mediation and conciliation. Under Dutch law, such alternative dispute resolution proceedings are on a voluntary basis. Furthermore, the alternative dispute resolution procedures mediation and conciliation do not exclude judicial proceedings with the competent court.	The Netherlands has several Arbitration Institutes (e.g., Netherlands Arbitration Institute or the ICC International Court of Arbitration), which is well developed. Dutch law contains specific stipulations with respect to arbitration. In large commercial transactions it is common to include arbitration clauses in Dutch contracts.
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are in principle free to choose a forum, whether it is an arbitration procedure or a court case. However, parties can only choose for arbitration in relation to legal acts which are at their disposal. (Please refer to Section 2: Content - 'Judicial powers related to the contract' above) Enforcement is carried out under the relevant international treaty or convention in the country of enforcement and the country where the foreign ruling was rendered. In the Netherlands, an exequatur from a Dutch court is required to enforce a foreign judgment, except for judgments rendered in other EU Member States (in accordance with EU Regulation No 1215/2012 (Brussel-I). Under Dutch law, recognition and enforcement of arbitrational awards are possible, regardless of the nationality or place of residence of the parties (according to the New York Convention). Enforcement of an arbitrational award also requires an exequatur from a Dutch court.	In international commercial matters, parties are usually entitled to choose any court to settle the dispute. Arbitration is more flexible, as there is the right to choose the arbitrators, the language and the seat of the arbitration. It can be faster but more expensive. Arbitration allows for confidentiality of hearings.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Not applicable.	Many commercial parties try or have tried to assess whether the legal concepts of *force majeure* or hardship/unforeseen circumstances would apply to their contracts and contractual relationships in view of the COVID-19 pandemic. However, so far, Dutch case law shows, also looking to earlier crises, that judges do not easily rule in favor of a claim of *force majeure* or unforeseen circumstances. The strategy and legal arguments to be made should be assessed on a case-by-case basis, as they depend on the content of the contract and, more specifically, on the relevant *force majeure* and/or 'hardship' clauses included therein (if any) in combination with multiple other circumstances. The consequences of the COVID-19 pandemic may also require that template contracts subject to Dutch law are reviewed and/or amended to better protect the relevant party or parties in the future.
Temporary measures adopted in relation to the COVID-19 pandemic	There are no temporary measures adopted in relation to commercial contracts yet.	

Portugal (civil law)

Contact(s) :

Carlos Vaz de Almeida

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1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Under section 227 of the Portuguese Civil Code, when negotiating a contract, one must act in good faith, in both the preliminary stages and in the formation of the contract. This is an expression/result of the so-called principle of good faith and fair dealing. As a consequence of this obligation, each party has the pre-contractual duty to disclose any information that it knows to be relevant and/or material to the other party's intention to enter into the agreement. In practice this type of information is normally contractually covered through general representations and warranties of the parties.	In general, these pre-contractual duties do not prevent parties to freely discontinue negotiations. The discontinuation of negotiations will only be deemed unlawful if the party is provenly at fault (e.g., never had intentions to actually execute the contract). Breach of these pre-contractual duties is commonly designated as *culpa in contrahendo* and entitles the counterparty to be indemnified for damages, under the general terms of the law (more specifically, under section 498 of the Portuguese Civil Code).
Non-written agreement	As a general rule, under section 219 of the Portuguese Civil Code, a contract does not have to be executed in writing. However, there are some exceptions, notably the following: - The sale of any real estate assets must be executed through a public deed (Escritura pública) or an authenticated document (Documento particular autenticado), under section 875 of the Portuguese Civil Code, as well as the encumbrance of these assets - Pursuant to section 1069 of the Portuguese Civil Code, urban lease agreements must be executed in writing - Under section 1143 of the Portuguese Civil Code, civil loan agreements (Contrato de mútuo) must be executed in writing when the total amount exceeds €2,500 and require a public deed (Escritura pública) or an authenticated document (Documento particular autenticado) if it exceeds €25,000, unless otherwise provided for in specific legislation - The transfer of quotas – the unit of ownership of the registered capital of private limited liability companies by quotas (Sociedade por quotas) – must be executed in writing, pursuant to section 228 of the Portuguese Commercial Companies Code - Pursuant to Law no. 41/2015, construction agreements with a value higher than €16,600	Even though it is legally permitted to execute non-written agreements, for legal certainty and evidence purposes, it is market practice and, ultimately, highly recommended to execute all commercial contracts in writing. For registry purposes, a certified copy (*Cópia certificada*) of the contract is normally required. Certain public authorities (and courts) may require the original version of the contract to be submitted. A contract is deemed void whenever the legally required form is not adopted, pursuant to section 220 of the Portuguese Civil Code (unless otherwise determined in specific legislation).

Signature: counterparts, representation and electronic signature	▸ Counterparts: Portuguese law does not forbid nor specifically provide for the possibility of executing a contract in counterparts. Therefore, it should be deemed valid. However, if a contract is to be executed in counterparts, that must be expressly provided for in the contract. ▸ Representation: contracts executed by companies must be signed by its legal representatives (i.e., its directors) or by a dully appointed attorney. ▸ Electronic signature: pursuant to Decree-Law no. 290-D/99, there are three types of electronic signatures, that can be used to sign certain contracts: simple, advanced and qualified electronic signatures. Contracts which are not subject to any specific form requirement can be signed by any form of electronic signature. Contracts which the law requires to be executed in writing (not including public deeds or authenticated documents), must be signed with a qualified electronic signature.	▸ Counterparts: in Portugal it is not common practice to execute contracts in counterparts. Therefore, when possible, it is desirable to have both parties sign the original version of the contract. ▸ Representation: the bylaws of a company must determine the number of directors and/or attorneys required to legally bind the company. The power of attorney granting powers to carry out a certain act must be executed in the form legally required for the act the attorney is being granted powers to perform. ▸ Electronic signature: a qualified electronic signature is certified by an accredited entity and is the only signature that has the same probative value as a normal handwritten signature (under section 376 of the Portuguese Civil Code). Simple and advanced electronic signatures' probative value is determined under general terms (i.e., subject to the discretion of a judge). If a contract is to be executed through electronic signatures, it is recommended that it clearly states so.
Contracts concluded electronically	As a general rule, a commercial contract may be concluded electronically, pursuant to section 25 of Decree-Law no. 7/2004. However, the following contracts cannot be executed electronically: ▸ Contracts subject to notary recognition or authentication ▸ Real estate contracts (excluding lease agreements) ▸ Deposit or security arrangements, when the execution of such arrangements is not within the scope of activity of the company granting the relevant security	Please refer to the previous section, for the probative value of electronic contracts, which accordingly to section 26(2) of Decree-Law no. 7/2004 is subject to the legal requirements for electronic signatures.
Language of the agreement	As a general rule, the language of the agreement may be agreed freely between the parties. If the language of the contract is not Portuguese and any issue governed therein is subject to registry, a translation to Portuguese will normally be required by	If a contract is directly executed in two languages (e.g., double column) it is recommended that the prevailing language is clearly stated. Additionally, if a contract is governed by Portuguese

	the registry office. The same applies if a document is submitted to court in a foreign language (Section 134 of the Portuguese Civil Procedure Code).	law and written in a different language, it is highly recommended that technical terms appear translated in the agreement so as to avoid interpretation issues.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	T&C are commonly the basis of commercial relationships. T&C govern a contract if the parties expressly establish so in the relevant contract (the market practice is for T&C to be annexed to the contract), under the contractual freedom principle (*Princípio da liberdade contratual*) set forth in section 405 of the Portuguese Civil Code. An interpretation issue arises when there is a conflict between the T&C of each contracting party. This conflict must be solved through the interpretation rules set out in the Portuguese Civil Code (Section 236 and the following): the contract is to be interpreted in the sense that a reasonable person in the same position as the parties would infer. In the case of doubt, the judge must adopt a solution that leads to a balance of contractual obligations. Ultimately a judge may determine that the knock-out rule applies: the conflicting provision must be deemed void and the contract remains in force without such provision (Section 292 of the Portuguese Companies Code).	To avoid/mitigate conflicts of this nature, a contract normally sets forth the following: ▸ Prevalence and interpretation clauses: the contract must specifically determine which T&C should apply in the case of conflict and how they must be interpreted ▸ Consequences in the case of conflicts: the contract must specifically determine the consequence in case there is a conflict between T&C (i.e., reduction, review or termination)
Significant imbalance (unfair contract terms)	As a general rule and as a consequence of the contractual freedom principle (*Princípio da liberdade contratual*), provisions of significant imbalance are not forbidden under Portuguese law. However, there are a few exceptions: ▸ Section 4 of Decree-Law no. 166/2013 sets forth that agreements between companies must be based on the existence of effective and proportionate compensations ▸ Section 18 and 19 of Decree-Law no. 446/85 on standardized agreements (Cláusulas contratuais gerais) provides for a multitude of provisions prohibited in this type of agreements some of which are based on significant imbalance concerns, such as disproportionate penalty clauses or excessive payment terms On a final note, section 282 of the Portuguese Civil Code determines that contracts where one party takes advantage of the other's need, inexperience, mental state or others, with the intention of obtaining an excessive or disproportionate advantage are voidable	Additionally, in the case of a judicial dispute in court, the existence of significant imbalance may be used as evidence that the party's intention to enter a contract under such provisions was not entirely enlightened nor validly formed.

Consideration	Portuguese law does not recognize the common law concept of consideration. The essential elements for the valid formation of a contract are, the parties' capacity and legitimacy, the valid statement of intention to execute such contract (*Declaração negocial*) and the settlement of the contract's scope.	
Price: determination, revision and indexing	As a general rule, in practice, the price or the method for computation of such price will be determined by the parties. Under section 883 of the Portuguese Civil Code (applicable to general share and purchase agreements), the parties determine the price or the criteria to determine such price in the future (determinable price). If none of this is determined by the parties, the price will be the one usually applied by the seller or applied in the market. If none of these provisions suffices the price will be determined by a judge. Section 884 of the Portuguese Civil Code sets forth that if the object of a contract is reduced, the price will be reduced accordingly. The parties may set forth specific clauses for the renegotiation or adjustment of the price (i.e., clauses that specify certain trigger events that entitle both or one of the parties to review the initially agreed price/price determination criteria). The parties may freely set forth a clause that indexes the price to a certain determined index. Section 551 of the Portuguese Civil Code sets forth that, if the law specifically allows price updates, such updates should be made accordingly with prices indexes.	For certain business sectors (e.g., energy and gas), further or different specific requirements need to be considered. As regards standardized agreements in B2B transactions, section 19 of Decree-Law no. 446/85 forbids clauses that sets forth the possibility of unilaterally reviewing the obligations of one party without the proportional adjustment of the price.
Payment Terms	As a general rule, in practice, the price will be paid under the terms and conditions set forth in the contract. The Portuguese Civil Code sets forth the applicable rules in case the parties do not specifically determine the payment terms in the contract, notably the time, place and method of payment: - Pursuant to section 777 of the Portuguese Civil Code, the creditor may demand the payment at any time and the debtor may also pay the price at any time - Under section 774 of the Portuguese Civil Code the payment must be made on the domicile of the creditor - Pursuant to section 550 of the Portuguese Civil Code the payment must be made in the local legal currency, for its respective nominal value at the time of the payment Even if the parties set the price in a foreign currency the debtor may pay in the local currency (accordingly with the exchange rate on payment day), unless the parties expressly exclude such possibility in the contract.	

Exclusivity Provisions	As a general rule, under the contractual freedom principle (*Princípio da liberdade contratual*) set forth in section 405 of the Portuguese Civil Code, exclusivity provisions are permitted and are commonly set forth. Limitations to exclusivity clauses may arise in connection with B2B transactions, where one of the contracting entities is a natural person (*Comerciante em nome individual*). Such limitations are normally imposed in case law.	The admissibility of exclusivity clauses must be ascertained from a competition law standpoint, to understand if a certain exclusivity clause can be deemed as a practice that restricts competition (*Prática restritiva da concorrência).*
Non-compete obligations	As a general rule, under the contractual freedom principle (*Princípio da liberdade contratual*) set forth in section 405 of the Portuguese Civil Code, non-compete provisions are permitted and are commonly set forth. Limitations to exclusivity clauses may arise in connection with B2B transactions, where one of the contracting entities is a natural person (a merchant). Such limitations are normally imposed in case law.	The admissibility of these clauses must be ascertained from a competition law standpoint, to understand if a certain non-compete clause can be deemed as a practice that restricts competition (*Prática restritiva da concorrência).* A perpetual non-compete obligation, for example, will probably be deemed void if challenged in a judicial court.
Governing law (implied content and public order)	Under section 41 of the Portuguese Civil Code, parties may freely determine the governing law of a contract. The chosen law must, however, correspond to a legitimate interest of the parties or the contract must have a connection to the chosen jurisdiction, accordingly with international private law. Pursuant to section 42 of the Portuguese Civil Code, if the parties do not determine the governing law, the applicable law will be the law of the common residence of the parties and, of not applicable, the place of execution of the contract.	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.
Judicial powers related to the contract	Judicial powers in connection with commercial contracts may be relevant on two different levels: ▸ Interpretation (under the provisions of section 236 and the following of the Portuguese Civil Code): the contract is to be interpreted in the sense that a reasonable person in the same position as the parties would infer. In the case of doubt, the judge must adopt a solution that leads to a balance of contractual obligations. In the case of omission, the provision must be set accordingly with the parties' intentions if they had foreseen the absent issue ▸ Validity: where a certain contractual provision is deemed void, the judge must determine if the contract must remain in force or be terminated. As a general rule, pursuant to section 292 of the Portuguese Civil Code, the contract remains in full force, without the invalid provision, unless proven that the parties would have not entered into the agreement without such provision	

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	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 may be executed for: ▸ A fixed term: the contract is executed for a determined period of time, expiring at its term ▸ An indefinite term: the contract is executed for an indefinite period of time and both parties may unilaterally terminate the contract at any time, provided that it complies with the notice of termination provisions (please refer below for further details) Automatic renewal of contracts is not generally applicable, unless otherwise provided for in certain specific legislation (as occurs in regard to lease agreements) or if expressly foreseen by the parties.	Specific legislation applicable to certain types of contracts may limit the maximum term of a contract – *i.e.*, contracts cannot be executed for more than a determined period of time. This is the case of lease agreements. In these situations, if the contract is executed for a term longer than the legally prescribed limit, the term will be automatically reduced to such period.
Prior notice of termination	Under section 432 of the Portuguese Civil Code, a contract may be terminated if the law sets forth such right or the parties expressly set forth such options (which is very common for contracts with an indefinite term). If the parties did not agree on the termination notice deadline, the party intending to terminate the agreement must notify the counterpart of such intention and the later should define a reasonable deadline for termination to be effective.	It is market practice to specifically identify the conditions (form and deadlines) under which a termination notice must be provided. Pursuant to section 19 of Decree-Law no. 446/85, standardized contracts in B2B transactions may not set forth the possibility of terminating a contract without a reasonable prior notice, unless it provides an adequate compensation.
Termination Clause	Generally, a party does not have the right to terminate an agreement for cause, besides default of the contract (unless it resorts to a judicial claim and the court resolves to terminate the agreement). Therefore, events triggering a termination for cause are normally exhaustively specified in the contract.	Certain specific sectorial legislation, such as lease agreements, may provide for trigger events that entitle a certain party to terminate an agreement.

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Good faith is a fundamental principle of Portuguese civil and contractual law. Therefore, contracts must be negotiated, formed and performed in good faith. Generally speaking, section 762(2) provides for the obligation to perform all	Good faith is the basis for multiple specific civil provisions, having multiple expressions in the Portuguese contracts' framework. Therefore, legal consequences resulting from the breach of such

	contractual obligations in good faith.	principle substantially vary.
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	▸ Assignment of a contract: under section 424 of the Portuguese Civil Code a party may assign its contractual position to a third entity with the express consent of the relevant counterpart. It is market practice to expressly set forth in the contract if one or both parties are entitled to assign its position and, if admissible, under which conditions Intuitu personae and change of control clauses: the law does not regulate this type of clauses. It is market practice to contractually set forth this type of provisions that, when breached, will normally entitle the counterparty to early termination. In the absence of such contractual clauses, a party's change of control is admissible, and the counterparty may not invoke any specific contractual rights on the basis thereof ▸ Assignment of credits and debts: Pursuant to section 577 of the Portuguese Civil Code the creditor may assign its credits regardless of the debtor's consent. Under section 595 of the Portuguese Civil Code, debts may be assigned through agreement between: ▸ The old and new debtor (with the creditor's consent) ▸ The new debtor and the creditor, regardless of the debtor's consent	As regards standardized contracts, section 18 of Decree-Law no. 446/85 deems prohibited assignment clauses (of the contract or debts) in favor of the person who designed the contract, without being subject to the counterpart's consent, unless the third party in favor of whom the assignment will take place is specifically identified.
Hardship clause, i.e., unforeseeable circumstances and renegotiation	Section 437 of the Portuguese Civil Code provides for the general hardship regime: if the circumstances under which the parties based their decision to enter the contract have been subject to an abnormal change, the affected party has the right to terminate the agreement or to request the review of the same (under equity considerations), as long as demanding such party to comply with its obligations severely infringes good faith and is not covered by the normal risk of that contractual type. Where a party requests the termination of the contract based on such regime, the counterparty may oppose to the termination, accepting the revision of the contract.	The fulfillment of the hardship regime requirements is quite strict. Therefore, it is market practice for parties to set forth a specific hardship clause, where they determine specific requirements and identify specific events that will be deemed as unforeseeable circumstances, as well as the regime applicable upon the occurrence of such events (e.g., revision of the contract, price adjustment or termination).
Force majeure	Portuguese law does not specifically regulate *force majeure* events nor its effects on contracts' performance. Section 790 of the Portuguese Civil Code sets forth the regime for objective inability (*Impossibilidade objetiva*) to perform a contractual obligation. This regime does not specifically address *force majeure*, but it may be utilized upon the occurrence of such events. This provision determines that a contractual obligation ceases to exist if compliance with it becomes objectively impossible. The same occurs, if an obligation becomes partially impossible (the debtor will only have to partially comply with its obligation).	Given that the law does not directly address *force majeure* events, it is market practice for contracts to provide for a detailed identification of the events and circumstances to be considered as *force majeure*, as well as the rules for its implementation (e.g., form and advance of the notice) and effects on the contract (e.g., revision of the contract, price adjustments or termination).

	Force Majeure events may as well, in some situations, fulfill the requirements for the application of the hardship regime (please refer to the section above) Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	
Warranty of latent defects (specific to sales between corporate parties, not consumers)	The law does not specifically set forth a general civil regime for warranty of latent defects. Under section 913 of the Portuguese Civil Code (applicable to general share and purchase agreements), the buyer has the right to the repair or substitution of the good. The buyer must notify the seller within 30 days of detecting the defect. This right expires within six months of the delivery of the good. If the parties do not foresee a longer warranty period it will be of six months, for goods that the seller is usually responsible for its good functioning.	It is highly recommended to contractually set forth a detailed description of the goods sold, or services provided, as well as what is to be considered a latent defect and the specific warranty regime (warranty period, notification procedure in the case of defect and consequences). In one-off contracts, specific representations and warranties may be adopted by the parties to mitigate liability risks for latent defects. Specific provisions on certain types of contracts, such as construction agreements, set forth rules for warranty for latent defects

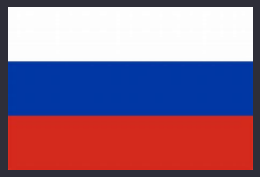
5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	Section 798 of the Portuguese Civil Code provides the general rule for contractual liability: the breach of a contract entitles the counterparty to compensation for actual damages and loss of profits. Pursuant to the contractual freedom principle (*Princípio da liberdade contratual*) set forth in section 405 of the Portuguese Civil Code, limitation of liability clauses is valid. Commonly set forth limitation of liability clauses includes capping of the compensation's maximum amount or limitations on the events that may trigger liability claims.	As regards standardized contracts in B2B transactions, section 18 of Decree-Law no. 446/85 specifically set forth the prohibition to limit liability for the following matters: ▸ Liability for death, personal injuries (physical or mental) or health damages ▸ Liability for non-contractual property damages to the counterpart or third parties ▸ Liability for non-compliance, delay, defective performance of contractual obligations or for acts of its representatives, when acting intentionally or with wilful misconduct (Dolo ou culpa grave)

Alternative dispute resolution procedures (mediation/conciliation)	In general, parties may agree to submit the dispute to mediation before submitting the case to ordinary courts or arbitration courts. Mediation rules are set forth in Law no. 29/2013 (Portuguese mediation act), notably the principles and procedure to be adopted. Additionally, the Portuguese Civil Procedure Code specifically sets forth that in the course of a judicial procedure, in certain situations, an agreement may be reached through mediation or conciliation (e.g., respectively sections 273 and 594 of the Portuguese Civil Procedure Code)	It is market practice to specifically set forth alternative dispute resolution procedures, to be mandatorily or voluntarily adopted by the parties in the case of a dispute. Such clauses normally set forth specific procedure requirements. Mediation and conciliation are generally less expensive and a good way to maintain a good business relationship between the parties.
Competent jurisdiction, execution of foreign decisions and exequatur	▸ Competent jurisdiction: The rules to determine competent jurisdiction are set forth in the Portuguese Civil Procedure Code. Section 94 of the Portuguese Civil Procedure Code sets forth that the parties may choose the competent jurisdiction, in written, provided that it complies with the requirements set forth therein, notably the connection with more than one jurisdiction, the existence of a serious interest of the parties and it does not relate to matter mandatorily subject to Portuguese courts. It is market practice for parties to specifically set forth the competent jurisdiction, i.e., the courts to which any dispute between the parties must be submitted to or its submission to arbitration courts ▸ Execution of foreign decisions and exequatur: Pursuant to section 978 of the Portuguese Civil Procedure Code, all foreign court's decision must be reviewed and confirmed by Portuguese Courts to be effective in Portugal, unless otherwise provided for in certain international conventions and European Regulations. In this context please refer to sections 36 and the following of Regulation (EU) no. 1215/2012, of 12 December 2012, which provides a simplified regime for the recognition and execution of decisions issued by other European member states. Under section 86 (*ex vi* 90) of the Portuguese Civil Procedure Code, the execution of a foreign court decision must be executed by the court of the domicile of the executed party.	As regards standardized contracts, section 19 of Decree-Law no. 446/85 forbids clauses that determine a highly inconvenient competent jurisdiction for a party, when the counterpart's legitimate interests do not justify the choice of such jurisdiction.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Temporary measures adopted in relation to the COVID-19 pandemic	Decree-Law no. 10-J/2020, of 26 March, as amended by Decree-Law no. 26/2020, of 16 June	In the context of the COVID-19 pandemic, the Portuguese Government enacted the identified decree law. This decree law implemented a moratorium for financing arrangements, that companies were entitled to. The moratorium request should have been submitted until 30 June 2020 and was initially set out to last until 30 September 2020, with subsequent extension until 31 March 2021. This decree impacts the relevant contracts in three dimensions: ▸ Prohibition to terminate the agreement during this period ▸ Extension of the agreement's term ▸ Suspension of instalment's payment. The extension and suspension of payments may not trigger default clauses, early termination clauses nor the execution of security As previously stated, this regime can no longer be used by companies, as the request for the application of this moratorium should have been submitted by 30 June 2020. Certain financial institutions have implemented certain specific moratorium regimes, which might still be available.
	Besides the decree-law identified in the previous section and certain sectorial legislation, there were no additional measures implemented by the Government to regulate commercial relationships in B2B transactions. Therefore, companies must refer to the specific contractual provisions of the agreements that it has in place or the general civil Portuguese regime. In this regard, hardship and force majeure clauses have particular importance (please refer to the sections above on these matters for additional information). In general, such clauses may in fact be triggered by the pandemics and commercial parties must reach an agreement in such respect (notably through the amendment of the relevant contracts).	



Russia (civil law)

Contact(s):

Alexey A Markov; Anastasia Kaveshnikova

Last updated: 20 August 2020

Content

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	The parties must act in good faith, and they are deemed to act in a good faith, unless otherwise proven. This is the general and mandatory provision of the Russian law. This principle applies at the pre-contractual stage. 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.	The party not acting in a good faith could be liable for damages. 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 the case of breach.
Non-written agreement	The law allows the contracts to be concluded in both written and non-written form. In addition, the law may require notarization of a contact. All contracts, i.e., between/with legal entities or between individuals, for an amount exceeding ₽10,000 (unless the law requires a written form regardless of the amount) shall be in writing. At the same time, contracts under the Russian law do not have to be in writing to be binding. However, in the case of a dispute, the parties will not be able to refer to the testimony to confirm the agreement and its terms if the contract is concluded in violation of the requirement to comply with a written form. To that extent, a written contract is highly advisable.	In cases expressly specified in the law or in an agreement between the parties, a failure to observe the written form of a transaction shall render the transaction invalid.
Signature: counterparts, representation and electronic signature	▸ Counterparts: In cases provided by the law or an agreement between the parties, a contract in written form may be concluded only by means of the preparation of a single document signed by the parties to the contract (e.g., sale of real estate, the lease of a building or construction) Nevertheless, the Russian law allows the signature by counterparts, which can be completed by exchanging documents. ▸ Representation: Contracts should be signed by the parties themselves or by the authorized representatives of the parties (e.g., acting on the basis of a Power of Attorney) ▸ Electronic signature: A contract could be signed by electronic signature (an electronic key registered with a special certifying centre) of the parties. Under the Russian law, documents signed with electronic signature are equal to hard copy documents with original signatures	▸ Counterparts: In the case of a dispute, the single document signed by the parties will be accepted as an undisputable fact
Contracts concluded	Under the Russian law a contract may be formed and concluded electronically	The contract may be concluded electronically if:

electronically	by: ▸ Using a qualified electronic signature (an electronic key registered with a special certifying center) ▸ Exchanging electronic documents ▸ Commencing the performance of the contract terms stated in an offer	▸ The parties use the electronic or other technical facilities enabling to reproduce the content of the deal on a material medium unchanged ▸ The contract contains the signature that allows to determine the person that has expressed the will The contract can be concluded by the exchange of electronic documents provided it allows to identify a person (a party under the contract) who provides such documents.
Language of the agreement	Under the Russian law, the contract should be made in the Russian language. The parties may agree on any other language of the contract in addition to the Russian one. The language must be understood by all parties, else the validity of the contract may be challenged.	In the case of bilingual contracts, it is highly recommended to specify the prevailing language. In case the prevailing language is not Russian, the notarized translation of the contract will be required for state authorities such as courts and tax authorities.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	Generally, the contract is deemed to be concluded when the parties agree on the essential T&C. The T&C are considered essential when they are named as such by law or by any of the parties. In the case of failure to reach an agreement on such essential T&C, the contract is treated as non-concluded (consensual contract model). Therefore, in the case of divergence of essential T&C, the contract is treated as non-concluded. In the case of divergence of T&C other than the essential ones, the provisions of the Russian law will apply.	The name and quantity of the goods are essential T&C of a supply contract by virtue of law. Based on the established court practice, the supply contract should also provide for the term of delivery.
Significant imbalance (unfair contract terms)	A transaction concluded on extremely unfavorable terms that a person was forced to perform due to hard circumstances which the other party took advantage of may be invalidated by the court at the claim of the interested party. In cases where the draft contract is proposed by one of the parties and contained conditions that are clearly burdensome for its counterparty and materially violate the balance of interests of the parties , and the counterparty was a weak party to the contract, the court is entitled to amend or terminate the contract at the claim of the weak party.	

Consideration	Under the Russian law, each party under 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. The parties are free to agree on any consideration. At the same time, free-of-charge transactions between persons carrying out entrepreneurial activity are prohibited. In any case the transaction with no consideration may be challenged in court, but it is not void by operation of the law.	Free-of-charge transactions, such as gifts between individuals, forgiveness of debt, gratuitous services, etc. are allowed in activities not related to entrepreneurship. Free-of-charge transactions between commercial entities are prohibited.
Price: determination, revision and indexing	The price has to be fixed or at least determinable. Otherwise, the performance or delivery has to be compensated for at the price that is usually charged for similar goods, works or services under comparable circumstances. In some cases, the price or its lower and upper limits may be set by the law (electricity tariffs, water supply tariffs, wholesale resource prices etc.). In cases when the price is an essential T&C, failure to agree on it would prevent the contract to be entered into. Once the price is agreed, the parties may revise it only if provided by the contract or by the law. The parties are free to provide for any payment deadlines. The price may be stipulated in a foreign currency provided that the law on currency control is observed.	Price is not an essential T&C for a supply contract. Therefore, in the 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. 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.
Payment Terms	Payment terms are not essential T&C for a contract. Therefore, in the case of failure to agree on them, the general provisions of the Russian law shall apply.	The parties in practice agree on the following terms in the contract: ▸ Form of payment - money or other form of payment ▸ Method of payment - cash, payment orders, letter of credit, checks ▸ Payment term - a period or a calendar date ▸ Payment procedure - prepayment, advance payment, post-payment, payment by instalments etc. ▸ Bank details of the parties
Exclusivity Provisions	The Russian civil law does not prohibit express exclusivity provisions.	However, such exclusivity provision must assume restrictions of the Russian antitrust law. If the antimonopoly authority finds that such a provision adversely triggers competitive requirements, the parties can be brought to substantial administrative fine.

Non-compete obligations	The Russian civil law does not expressly provide for non-compete construction. The Russian antitrust law considers such an obligation included into contracts as contrary to the law.	If the anti-monopoly authority finds that such a provision adversely triggers competitive requirements, the parties can face substantial administrative fine.
Governing law (implied content and public order)	The parties are free to choose any governing law, including non-Russian law to govern their relations under their contract, provided that a foreign element exists for e.g., one of the parties is a foreign legal entity. However, if the contract is mostly connected with another law, the mandatory provisions of such law shall be observed. 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 contract and the law of a service provider for the service contract. 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.	The governing law shall be expressly provided for in the contract or evinced from its T&C. The agreement on the governing law after the conclusion of a contract has a retroactive effect.
Judicial powers related to the contract	A contract may be amended or terminated by a court decision at the claim of one of the parties: ▸ In the case of material breach of contract by the other party ▸ In other case stipulated by the Civil Code, other laws or the contract, for e.g., in the case of material change in circumstances A breach of contract by one of the parties shall be deemed to be material if it causes such damage to the other party that the other party loses to a great extent what it was entitled to rely on when concluding the contract. Changes in circumstances are deemed to be material when they have changed to such an extent that, had the parties reasonably foreseen it, the contract would not have been concluded at all or would have been concluded on substantially different terms.	If a party for which the conclusion of a contract is mandatory, evades the conclusion, the other party has the right to apply to the court with a claim to compel to conclude the contract. This obligation arises, for e.g., in the case of a public offer or a preliminary contract. In this case, the contract shall be deemed to have been concluded on the T&C specified in the court decision from the moment the relevant court decision comes into force.

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	A contract may be entered into force for:	In case a contract is concluded for indefinite period of time, each party may terminate the contract at

	▸ A fixed term – defined by the reference to calendar date or period of time ▸ An indefinite term A contract may provide for tacit renewal for a particular period, if no party claims otherwise in the manner provided for in the contract.	any time without any justification, subject to the notice of termination requirement (please refer to Section 3: Duration and Termination - 'Prior notice of termination' below).
Prior notice of termination	Russian law does not establish a general obligation to notify the counter party in advance of the contract termination unless otherwise provided by the law or the contract. It is highly recommended to give prior notice of termination of a contract, even if it is not expressly required under the contract. If the contract provides for such notice, the defaulting party may be liable for damages or penalty if provided for in the contract.	The contract may establish the obligation of prior notice of termination, as well as provide for term and form of such notification. As a rule, parties must agree on the termination procedure in a contract (it is highly recommended). Such contractual procedure becomes mandatory for the parties.
Termination Clause	A contract may be terminated by mutual agreement of the parties. Unilateral termination is allowed, as it is provided by law. It can also be provided for in the contract. A contract may be unilaterally terminated based on the court ruling, if such termination is caused by substantial breach by one of the parties thereto.	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.

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	The parties have to act in a 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. Under the Russian civil law, neither party is entitled to gain an advantage from its unlawful or unfair conduct. The party not acting in good faith may be liable for damages.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	Under the Russian civil law, a party may transfer its rights and obligations from the contract to another person, unless otherwise is provided for by the law or the contract. The assignment of a contract (rights and obligations) 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. The assignment of rights under a contract does not require consent of the other party by virtue of law. Whereas, the assignment of obligations under a contract	

	requires, unless the contract provides for the preliminary consent. 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.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	Under the Russian civil law, a material change of circumstances is a ground for renegotiation or termination of the contract, unless otherwise is provided for in the contract or follows from the substance of the contract. 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 a court. 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.	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.
Force majeure	The party cannot be liable for non-performance 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. *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. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	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.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	In the 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. In the case of material defects, the party may terminate the contract.	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.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not	The party is liable for damages in the 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 in the	

consumers)	contract. Exclusion or limitation of liability for intentional breach is invalid and void. The party may be treated as not guilty if, considering the extent of its care and caution, it took all the necessary measures for proper discharge of its obligations.	
Alternative dispute resolution procedures (mediation/conciliation)	The Russian law provides the following alternative dispute resolution procedures: ▸ Negotiations: The parties may settle the dispute through negotiations. While negotiating, the parties should act in a good faith ▸ Mediation: Mediation is a method of settling disputes under the auspices of a mediator for the purpose of reaching a mutually acceptable solution. A mediation procedure shall be implemented under an agreement of the parties (for instance, an agreement on application of a mediation procedure) ▸ Arbitration: The parties may agree to settle the dispute in a Russian or foreign commercial arbitration court	
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. However, the Russian court may refuse to recognize or enforce the foreign awards if the 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, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Temporary measures adopted in relation to the COVID-19 pandemic	▸ Federal Law No. 98-FZ of 1 April 2020 On Amendments to Certain Legislative Acts of the Russian Federation on the Prevention and Elimination of Emergency Situations ▸ Resolution of the Government of the Russian Federation No. 439 of 3 April 2020 ▸ Resolution of the Government of the Russian Federation No. 434 of 3 April 2020	Large business expenses on rent payments is often economically unjustified when certain activities are banned and/or demand falls significantly due to the Covid-19 pandemic. The state authorities have developed measures to support real estate tenants. Most of the support measures apply to tenants operating in the sectors of the economy most affected by the pandemic and/or to small and medium-sized business tenants. The list of such industries is established by the Resolution of the

		Russian Government. Tenant can use the right to defer payments and other benefits if the lease contract was concluded before 1 April 2020. Support measures include: • The possibility of obtaining a deferral of lease payments from the date of introduction of the high alert regime in the respective constituent entity of the federation until 1 October 2020. A landlord must enter into an additional deferral agreement at the request of the tenant and this right of a tenant can be enforced by the court. Also, the tenant should have the opportunity to unilaterally withdraw from the contract without paying the penalties if the landlord violates this right • Exemption from lease payments for the period from 1 April 2020 to 1 July 2020 (applicable to leases of the state property) • Simplified procedure of lease extension for a new term • Preferential regime of unilateral renunciation of the lease contract under certain conditions In addition to the above, the Russian Government has also adopted specific measures related to a variety of sectors such as labor law, corporate law and tax law.
Financial transactions	Federal Law No. 212-FZ of 26 July 2017 'On Amendments to Parts One and Two of the Civil Code of the Russian Federation and Certain Legislative Acts of the Russian Federation'.	Amendments made to the first and second parts of the Civil Code came into force on 1 June 2018. The amendments concerned assignment of rights, factoring, loan, credit, bank deposit and bank account, settlements. Some of the amendments have introduced new provisions. For example: • Legalization of consensual loan (previously a loan contract was considered to have been concluded only from the moment the money was transferred, but now a loan contract can be considered to have been concluded also from the moment the parties reached an agreement on the essential T&C)

		▸ Introduction of the notion of usurious interest (interest, which is more than twice as high as that normally charged under similar conditions, may be reduced by the court to the same amount as that normally charged with certain restrictions) ▸ Introduction of an entirely new type of contract such as Escrow contract. Under such a contract any person, including an individual, can be an Escrow agent Other amendments have significantly changed the already established relations and institution: ▸ The assignment agreement allows the assignor to be relieved of liability for the invalidity of the assigned claim, but only in a part of entrepreneurial activity, and provided that the assignor acted in good faith (generally, civil law prohibits contractual limitations on future liability) ▸ If the contract provided for a prohibition of assignment of the right to receive non-monetary performance, the assignment agreement may be invalidated at the claim of the debtor only if it is proved that the other party to the agreement knew or should have known about the prohibition Other amendments have brought the legislation in line with the relations existing in practice. Rules regulating bank deposits in precious metals have been introduced, rules on various types of bank accounts have been specified.
Electronic transaction form, smart contracts	Federal Law No. 34-FZ of 18 March 2019 'On Amendments to Parts One, Two and Article 1124 of Part Three of the Civil Code of the Russian Federation'.	Starting 1 October 2019, the Federal Law came into force, which had the purpose to establish basic provisions for regulating the market for new 'digital' objects of economic relations (in particular, cryptocurrencies), as well as for the execution of transactions in the digital environment. Key changes are as follows: ▸ A new object of civil rights has appeared, i.e., digital rights (rights, the content and conditions for the implementation of which are determined by the

		rules of the information system that meets the criteria established by law) • Conclusion of a transaction by electronic and other technical means has been simplified. To make a transaction in electronic form it is necessary to be able to reproduce its content in a constant form, as well as to reliably identify the person expressing the will • A rule on the use of smart contracts has been introduced: according to the terms of the transaction, the obligations arising from it may be performed without a separate expression of the parties' will (clicking on the button and filling the checkbox is enough to express the will) The law has introduced the possibility of using electronic means in voting at the meeting, forming a document confirming payment for goods, concluding a nominal account contract and an insurance contract. However, it is not allowed to draw up a testament using technical means.
Bona fide acquisition of real estate by contract	Federal Law No. 430-FZ of 16 December 2019 'On Amendments to Part 1 of the Civil Code of the Russian Federation'.	The legislator continues to consistently develop the institution of a good faith in the civil law. The purchaser is deemed to be bona fide (in a good faith) if they have checked the data on the property purchased under the Unified State Register of Immovable Property. Under this condition the acquired property may not be taken away from the seller with reference to the absence of the seller's right to sell the property. The good faith of the acquirer may be challenged in court.

Spain (civil law)

Contact(s):

Lourdes Centeno Huerta; Francisco Aldavero Bernalte

Last updated: 28 August 2020

Content

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Contracts must be negotiated, formed and performed in good faith. This provision is of 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. 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.	The Spanish law recognizes the freedom to break the negotiations, but a party may be liable for damages in the case of bad faith or misconduct. 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.
Non-written agreement	A contract does not have to be in writing to be binding under the Spanish law. However, this is subject to certain 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.
Signature: counterparts, representation and electronic signature	▸ Counterparts: The Spanish law does not regulate this aspect. However, it is possible to sign in counterparts and it is a common practice ▸ Representation: The Spanish law provides for representation to sign. It can be delegated through a Power of Attorney ▸ Electronic signature: The Spanish Law recognize that the advanced electronic signature has the same value as the handwritten signature	▸ Counterparts: The market practice is that each party keeps one counterpart. However, if the contract is executed in a public deed, contract signed by the parties is attached to the public deed and the parties are delivered certified copies of such public deed ▸ Representation: If the Powers of attorney are general, they must be registered. If they are special, they do not need to be registered ▸ Electronic signature: For those documents for which signatures must be verified and notarized to grant the document public status, or when the document needs to be filed with the Commercial Registry, an original (Wet ink) signature may be required (e.g., certificate of the minutes)
Contracts concluded electronically	Contracts concluded by electronic means shall produce all the effects provided for, by Spanish Law, when the consent and the other requirements necessary for	The prior agreement of the parties on the use of electronic means is not necessary for the contract to

	the validity are fulfilled.	be valid.
Language of the agreement	In principle, the language of the agreement may be agreed on freely between the parties. 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. 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.	There is an obligation to use the Spanish language for agreements for contracting out public services with Spanish administrative authorities. 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. If more than one language is used, it is recommended to specify the one that will prevail, especially for performance and dispute.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	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. In the 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. 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.	
Significant imbalance (unfair contract terms)	▸ The autonomy of the parties is the basic principle of the Spanish contractual law. Contracts will be binding as long as parties have consented ▸ 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 In general terms, the legal concept of abuse cannot be alleged by companies and professionals.	

Consideration	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. 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. The parties would usually expressly identify the cause of the contract in order to limit the risk of significant imbalance (please refer to Section 2: Content- 'Significant imbalance (unfair contract terms mentioned above).	
Price: determination, revision and indexing	The price must be fixed or at least shall be determinable. Otherwise, the contract is void under the Spanish law. On the basis of bad faith, in the 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. The adjustment method and additional price (such as an earn-out clause) can be provided for. However, the method of calculation must be precise. 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. The price may be stipulated in a foreign currency. 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.	It is possible to appoint a third party to determine the price. The third party does not necessarily need to be an expert. 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.
Payment Terms	According to Spanish Civil Code, the buyer is required to pay the price of the thing sold at the time and place fixed by the contract. If it has not been established, the payment must be made at the time and place of transfer of the goods sold. The Spanish Law prohibits terms of grace, courtesy or that, by any other name, imply a delay in the performance of the obligation unless expressly agreed in the contract or ordered by law. In the case of sale of goods or services, if the period for payment has not been established in the contract, payment must be made within thirty calendar days of receipt of the goods or services.	

Exclusivity Provisions	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.	Exclusivity must not constitute or result in an anticompetitive practice, such as abuse of dominant position or an anticompetitive agreement.
Non-compete obligations	▸ Non-compete covenants are permitted during the performance of the contract and after its termination ▸ The clause can provide a financial penalty in the case of infringement by the defaulting party	Non-compete 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.
Governing law (implied content and public order)	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. 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. There are exceptions to the freedom of choice, including the following: ▸ 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. The form and solemnities of the agreements shall be governed by the laws of the country where they are granted.
Judicial powers related to the contract	According to the Spanish Law, the parties are free to determine the jurisdiction to which they submit the contract.	

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	Under the Spanish law, a contract may be entered into for: ▸ 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 (please refer to Section 3: Duration and Termination - 'Prior notice of termination' below)	Not all contracts can be entered into for an indefinite term under the Spanish law – for instance, lease agreements. 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.
Prior notice of termination	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 the case of absence of contract, if there is an established business relationship.	
Termination Clause	▸ If the contract provides for grounds for termination, the clause should identify precisely the breaches that may result in termination for cause ▸ In the 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 In both cases, the non-breaching party shall be empowered to claim damages and late interests against the breaching party.	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.

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, formed and performed in good faith. This provision is of public policy under the Spanish law. A party may be liable for damages in the case of breach of this obligation.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	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. 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.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	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. 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 the case of refusal or failure of negotiations, the parties have the right to terminate the agreement. 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.	*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. In accordance with the Spanish case law, it may be alleged when the following conditions are met: ▸ The existence of a long-term contract ▸ The occurrence of an extraordinary change on the circumstances or an unforeseeable event ▸ One party being on a clear disadvantage in comparison with the other party
Force majeure	The following criteria must be met in order for an event to be considered as force majeure under the Spanish law: ▸ 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 Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	The court will determine whether the conditions of *force majeure* are met. The legal definition of *force majeure* can be extended by the parties, for instance, to include strikes. 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. Prior notification of the *force majeure* event is required. 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 been foreseen but that, if foreseen, could have been avoided.
Warranty of latent defects (specific to sales between	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	

corporate parties, not consumers)	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.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	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. Limitation of liability provisions are valid. However, the Spanish Civil Code prohibits: ▸ Exclusion of liability clauses when the party has intentionally not committed with its obligations ▸ Total exclusion of liability In some specific areas, such as personal injury, limitation clauses are not valid.	
Alternative dispute resolution procedures (mediation/conciliation)	Mediation and Conciliation are procedures by which a third party ('Mediator' or 'Conciliator') intervenes between parties with the objective of bringing them into contact. In the procedure of Conciliation, the parties appear and present their allegations before the conciliator; The conciliator proposes a resolution that, if accepted by the parties, is mandatory and can be claimed in court. The role of the mediator is to bring together the positions of the parties involved in the conflict so that they can reach an agreement by managing, on their own, the resolution of the dispute.	
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are free to choose arbitration or courts, except in certain matters. 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).	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.

	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). In Spain, to enforce foreign judgments, an exequatur is required before the Spanish jurisdiction, except for judgments rendered in other EU Member States.	

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	In commercial relations there are no prohibitions as a consequence of the COVID-19 pandemic. However, there are regulations that have been approved though Royal Decrees (e.g., arrangement with creditors)	
Temporary measures adopted in relation to the COVID-19 pandemic	Eight pieces of legislation—Royal Decree-Law 6/2020, Royal Decree-Law 7/2020, Royal Decree 463/2020, Royal Decree-Law 8/2020, Royal Decree 465/2020, Royal Decree-Law 9/2020, Royal Decree-Law 10/2020 and Royal Decree-Law 11/2020 —provide initial measures to address the COVID-19 pandemic.	▸ From 14 March 2020 until the end of the state of emergency, the statute of limitation and the expiry periods of all actions and rights will be suspended. The above does not affect the time limits established in contracts to perform obligations. ▸ In addition to the temporary measures adopted, where the purpose of the agreement was been forbidden, restricted or limited by reason of the declaration of the state of emergency, the occurrence of force majeure or application of the rebus sic stantibus clause could be argued to obtain the termination, review or suspension of an existing contract.

Sweden (civil law)

Contact(s):

Anna Byström

Last updated: 28 August 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
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.	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. Under general contractual legal principles, including the doctrine of *culpa in contrahendo*, 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.
Non-written agreement	A contract does not need to be in writing under Swedish law, unless specific legislation applies, 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.
Signature: counterparts, representation and electronic signature	▸ 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 applies, for instance, in the case of real estate transactions. ▸ Representation: Contracts must be signed by the parties themselves (if individuals) or by the authorized representatives of the parties. ▸ Electronic signature: Electronic signatures are accepted in accordance with the EU Regulation No 910/2014 regarding electronic identification and trust services for electronic transactions in the internal market.	▸ Counterparts: 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.
Contracts concluded electronically	Contracts can be concluded electronically, either with electronic signatures or even through acceptance via email.	
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 the forms, Terms and Conditions (T&C)	In the 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. 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.	In the case of conflict, specifically negotiated terms have priority over standard terms that have not been negotiated specifically. 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.,
Significant imbalance (unfair contract terms)	Swedish law contains some regulations regarding situations where the contracting parties are imbalanced, for instance the Swedish Agreement Terms Acts (Sw. *Lag om avtalsvillkor mellan näringsidkare* and *Lag om avtalsvillkor i konsumentförhållanden*) and Article 36 of the Swedish Contracts Act (regarding unreasonable agreement terms).	
Consideration	Swedish law does not apply the common law concept of consideration.	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.
Price: determination, revision and indexing	The price is primarily determined by the contract. 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 'fair price' 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. Adjustments, revisions and indexing of price are generally not accepted during the term of the contract, unless regulated in the contract itself.	
Payment Terms	In commercial contracts, payment should be made latest 30 days from the invoice date, unless otherwise agreed with the creditor.	
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.
Non-compete obligations	Non-compete clauses are generally permitted under Swedish law during the term of a contract and during a 'reasonable' time after. The clauses may include 'reasonable' financial penalties in the case of breach by the obligor.	Non-compete clauses are subject to specific consideration from a labor and competition law perspective. Moreover, such a clause could be considered unreasonably burdensome and may thus be disregarded.
Governing law (implied content and public order)	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. If the parties do not choose a governing law, it will be determined by the Swedish courts. There are exceptions to freedom of choice, such as the following: ▸ 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.
Judicial powers related to the contract	When a contract is analyzed, the parties' intentions shall be interpreted. If the parties' intentions cannot be determined, the content of the contract or a specific provision shall be determined with consideration of a number of circumstances including for instance the wording of the provision, circumstances in relation to the negotiation of the contract, the purpose of the contract and the parties' behavior after the conclusion of the contract.	

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	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. 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 'reasonable' notice.	
Prior notice of termination	A reasonable prior notice is required for indefinite-term contract when not provided for in the contract.	
Termination Clause	Contracts can be terminated in accordance with their provisions. 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. If the breach is material, the non-breaching party generally has the right to terminate the contract immediately.	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	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. Once a contract has been entered into, contracting parties need to act in good faith.	If a party acts in bad faith during a contract, they may be held liable for damages (*Culpa in contractu*).
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	The assignment of a contract generally requires consent from both parties, unless otherwise agreed. A party may not oppose the other party's change of control, unless the contract provides for it.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	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. 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 the case of refusal or failure of negotiations, the contract may be revised or terminated by the court at the request of that party.	The Swedish Contracts Act provides a possibility to adjust the contract if it becomes unreasonably burdensome for one party. 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.

Force Majeure	*Force Majeure* clauses are allowed under Swedish law, and it is possible to agree to include and specify certain *force majeure* events. *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. *Force Majeure* is only applicable when performance is not possible. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	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. 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. Prior notification of the *force majeure* event is generally required.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	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. The buyer may not rely on defects that it ought to have known if the goods had been duly examined. 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.	The Swedish Sale of Goods Act is applicable in the case of sale and purchase of movables or chattels, albeit not in the case of consumer transactions, in which case the Swedish Consumer Sales Act applies.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	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. A limitation of liability when a party has acted intentionally or grossly negligent would generally be considered as unreasonable and could be declared void. In some specific areas, such as personal injury, limitation clauses are not valid.	The Swedish Contract Act may be used to adjust provisions deemed unreasonable as indicated under the 'Hardship clause' section mentioned above. Please refer to Section 4 - Performance and Non-performance.
Alternative dispute resolution procedures (mediation/conciliation)	Parties may choose to have disputes resolved by arbitration tribunals.	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 it can also be much more expensive. Arbitration allows for confidentiality of hearings.

Competent jurisdiction, execution of foreign decisions and exequatur	Parties are free to choose arbitration or courts, except in certain specific matters. Regarding jurisdiction, recognition and enforcement within the EU Regulation No. 1215/2012 applies. If there are no provisions in the contract, disputes are resolved in competent courts.	In international commercial matters, parties are usually entitled to choose any court to settle the dispute.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	The Swedish Contracts Act may be used to adjust provisions deemed unreasonable. This regulation can prevent a contracting party from being subject to unreasonable terms.	
Temporary measures adopted in relation to the COVID-19 pandemic	The Swedish government introduced a rent reduction that would be available for companies that operates in industries affected by the COVID-19 pandemic. The landlord would, upon application, be entitled to retroactive compensation for the rent reduction that the landlord has offered to the tenant during the period between 1 April 2020 and 30 June 2020. Deferral may be granted for payments of social security contributions, taxes withheld from employee salaries and VAT. Changes have been made to the rules on tax allocation reserves for 2019, for sole proprietors and individuals who are partners in partnerships. This may result in reduced tax liability and refund of already paid preliminary income tax for 2019. Financial support to companies with a significant decrease in turnover was available from 22 June 2020. The central Swedish government guarantees 70% of new loans that banks provide to companies experiencing financial difficulties due to the outbreak but that are otherwise financially robust. The guarantee is issued to banks, which provide guaranteed loans to companies. Interest payments on the loans may be deferred for the first twelve months. Social security contributions paid by employers, sole proprietors and partners in partnerships are temporarily reduced. The Swedish Tax Agency will not charge a late filing fee for tax returns submitted within one month from the original due date. This applies to all types of tax	

	returns (income tax, Payroll, VAT and EC sales) between the due dates 12 March and 31 August. It applies for all types of organizations, and for individuals who have their income tax return prepared by an accounting or bookkeeping firm (these individuals should have submitted their tax return by 15 July at the latest).	

Switzerland (civil law)

Contact(s):

Oliver Blum; Roman Schlager

Last updated: 20 August 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	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 (SCC)). Therefore, contracts must be negotiated, entered into and performed in good faith. Under certain circumstances a party may have the duty at the pre-contractual stage to disclose information that is relevant and material to the other party's consent to enter into the contract. The parties are obliged to negotiate in good faith. They also have to comply with the duty of truthfulness and applicable confidentiality obligations.	In the case of a breach of pre-contractual duties, pre-contractual liability (*Culpa in contrahendo*) may apply. Therefore, a party acting in bad faith may be liable for damages caused by the breach.
Non-written agreement	The validity of a contract is not subject to compliance with any particular form, unless a particular form is prescribed by law (Article. 11 paragraph 1 Swiss Code of Obligations (CO)). If the law requires a certain form (e.g., written form) the contract is only valid if such requirement is satisfied, unless there is a provision to the contrary. (Article. 11 paragraph 2 CO). Where the law requires that a contract be concluded in writing, that provision also applies to any amendment to the contract (Article. 12 paragraph1 CO).	A contract required by law to be in writing must be signed by all persons on whom it imposes obligations. Signatures must be appended by hand or by way of a recognized electronic signature (as indicated under the 'Signature: counterparts, representation and electronic signature' section mentioned below). It is advisable to enter into a contract in written form for evidence purposes.

Signature: counterparts, representation and electronic signature	▸ Counterparts: Swiss law permits the signing on separate counterparts of a contract
	
	▸ Representation (Article. 32 ff. CO): Under CO, different types of representation exist, such as:
	
	  ▸ Contractual representation: The rights and obligations arising out of a contract made by an agent in the name of another person accrue to the person represented, provided the agent is authorized to enter the contract (Article. 32 paragraph 1 CO). 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 they ratify the contract (Article. 38 paragraph 1 CO).
	
	  ▸ 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.
		▸ Representation: 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

	▸ 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 (Article. 419 CO). ▸ Electronic signature: An authenticated electronic signature combined with an authenticated time stamp is deemed equivalent to a handwritten signature, subject to any statutory or contractual provision to the contrary (Article. 14 paragraph 2bis CO).	▸ Electronic signature: Only certificates from accredited providers are permitted for electronic signatures.
Contracts concluded electronically	Since the validity of a contract in general is not subject to compliance with any particular form, a contract may also be concluded electronically. However, if the contract is required to be in writing, then such an electronical contract would have to be signed by an authenticated electronic signature (as indicated under the 'Signature: counterparts, representation and electronic signature' section mentioned above).	
Language of the agreement	In general, the language of a contract may be agreed on freely between the parties. A translation into the respective Swiss official language (such as German, French, Italian and Rhaeto-Romanic) is required for the registration of agreements with authorities and administration bodies (e.g., land registry and commercial register). Swiss courts sometimes require a translation of contracts into the official language of the competent canton. In the case of various official languages, the cantons regulate the use of the language.	If more than one language is used, the language that prevails should be specified. 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.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	T&C become part of a contract if the parties have accepted them and if each party had access to the T&C. It is highly recommended that each party sign the T&C in order to confirm their application. In the case of contradictions between the T&C of the contractual parties, the contradicting parts of both T&C are void (partial disagreement), and the Swiss statutory rules apply instead. This rule applies as long as the parties have agreed on the essential elements of the contract, such as subject matter and price. Without agreement on the essential elements of the contract, a contract cannot come into existence.	Unusual clauses in T&C only come into effect if the other party is expressly made aware of these clauses.

Significant imbalance (unfair contract terms)	Where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness, the person suffering damage may declare within one year that they will not honor the contract and demand restitution of any performance already made (Article. 21 paragraph 2 CO).	The one-year period commences on conclusion of the contract (Article. 21 paragraph 3).
Consideration	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 contract.	
Price: determination, revision and indexing	▸ Determination: The price to be paid can be freely determined by the contract parties. The price should be fixed or be objectively determinable. If no price is indicated in the contract, as a rule the contract is invalid. Under certain circumstances, however, the price may be presumed to be the average current market price at the place of performance ▸ Revision: The parties may include price adjustment mechanisms in the contract ▸ Indexing: In long term business relationships, the price can be indexed. The parties are free to choose any index of their choosing. In general, such prices are indexed by the Swiss Consumer Price Index (CPI). The parties may also agree on indexation and renegotiation clauses at the time of the conclusion of the agreement	Where the price is based on the weight of the goods, the weight of the packaging (Tare) is deducted. The purchase price can be stipulated either in a local or in a foreign currency. 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.
Payment Terms	Under Swiss Law there are no mandatory payment terms. However, there are statutory payment terms which in absence of an agreement by the parties become applicable e.g., in a contract of sale payment is due as soon as the property passes into the buyer's possession, unless some other payment term is agreed (cf. Article. 213 par. 1 CO).	A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum. Where the contract provides for 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 relationships, where the normal bank discount rate at the place of payment is higher than 5%, default interest may be calculated at the higher rate.

Exclusivity Provisions	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.	
Non-compete obligations	Non-compete obligations are relevant in different kinds of obligations ▸ Employment Law (Article. 340 ff. CO) ▸ Commercial Agency contracts (Article. 418d CO) ▸ Other Forms of Commercial Agency (Article. 464 CO) ▸ Corporate Law (Article. 536, 561, 803, 812 CO) Non-competition clauses can provide for a financial penalty in the case of infringement. Employment Law (Article. 340 ff.): ▸ During the term of employment, the employee may not compete with the employer ▸ Non-competition clauses are also permitted for the time after termination of a contract. However, such clauses must be limited in time, territory and scope. The prohibition to compete may exceed three years only in special circumstances ▸ The post-termination prohibition of competition is binding only where the employment relationship allows the employee to have knowledge of the employer's clientele or manufacturing and trade secrets and where the use of such knowledge might cause the employer substantial harm ▸ Non-competition clauses in employment contracts must be made in writing and contain at least the employee's signature in order to be valid	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)	▸ Unless the parties agree on a different governing law, contracts where both parties are domiciled in Switzerland are governed by 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 expressed or clearly evident from the terms of the contract or the circumstances. In the absence of a choice of law in international contracts, Article 117 et seq. of the Swiss Code on Private International Law (CPIL) apply. Special provisions regarding the governing law apply, among others, to the following international contracts: ▸ Sale of movable property	Treaties or international conventions may also define the applicable law in an international context.

	▸ Real property ▸ Consumer contracts ▸ Employment contracts ▸ Contracts concerning intellectual property rights	
Judicial powers related to the contract	The judge may have the power to adapt certain clauses of a contract (cf. e.g., Please refer to Section 2: Content - 'Non-compete Obligations, Hardship clause, Limitation of liability' above)	

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: 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 If a contract with a fixed term is tacitly continued, its duration becomes indefinite.	If a contract is entered into for a fixed term, it cannot be terminated ordinarily. However, an extraordinary termination is still possible. In the case of a tacit continuation of a contract and a change to an indefinite duration, any mandatory statutory notice periods must be observed (please refer section below).
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 Clause	Each party may terminate a contract with immediate effect at any time for cause.	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, entered into and performed in good faith. A party may be liable for damages in the case of a breach of this obligation.	
Assignment of a contract, *Intuitu personae* clause, 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, i.e., unforeseeable circumstances and renegotiation	In principle, 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, then the respective party may ask for a renegotiation. In the meantime, the party must continue with the performance the contract. In the case of a failure of negotiations regarding the amendment, the parties may agree on the avoidance of the contract or ask the judge to adapt it (*Clausula rebus sic stantibus*).	Statutory provisions that enable an adjustment include and are not limited to the following: ▸ Article. 266g paragraph 1 CO: In the case of a rental contract, both parties may terminate the contract with the statutory notice period if there are circumstances that make the performance of the contract unacceptable, even if the contract provides for a longer notice period or a fixed term ▸ Article. 337a CO: In the case of an employment contract, the employee may terminate the contract without notice if the employer becomes illiquid and does not secure the employees' claims ▸ Article. 373 paragraph 2 CO: In the case of a contract of work, the judge may allow a termination 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 the case of a loan agreement, where the deterioration of the borrower's economic situation doesn't justify an amendment of the contract.
Force majeure	There is no detailed legal provision under Swiss law regarding *force majeure*. However, Swiss law states the consequences of a breach of contract if this breach occurs through no fault of the breaching party. Thus, it is not necessary to contractually provide any *force majeure* regulations. If the performance of a contract has become impossible by circumstances not attributable to the obligor, the obligation is deemed extinguished. In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses their counterclaim to the extent it has not yet been satisfied. This however does not apply to cases in which the risk has already passed to the obligated party (Article. 119 CO). Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	If a contract includes a *force majeure* clause, it should 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.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	There are no provisions regarding latent defects which apply specifically to sales between corporate parties. The same provisions which apply to any sales contract apply also to sales contracts between corporate parties. The buyer must inspect the condition of the purchased object as soon as feasible in the normal course of business. If they discover defects for which the seller is liable under warranty, the buyer must notify the seller without delay (Article. 201 paragraph 1 CO). If the buyer fails 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 (Article. 201 paragraph 2 CO). When such latent defects become apparent, the seller has to be notified immediately. Otherwise, the object will be deemed accepted even in respect of such defects (Article. 201 paragraph 3 CO).	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	There are no provisions regarding limitation of liability which apply specifically to contracts between corporate parties. The same provisions which apply to anybody, apply also to contracts between corporate parties. 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. Limitations of liability are permitted in advance except for the exclusion or limitation of liability for unlawful intent or gross negligence.	At the discretion of the court, an advance exclusion of liability for simple negligence may also be deemed void in the following cases: ▸ 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 a government license (e.g., banking) No exclusion or limitation of liability is permitted with respect to product liability.
Alternative dispute resolution procedures (mediation/conciliation)	In principle, any litigation has to be proceeded by an attempt at conciliation before a conciliation authority (Article. 197 Civil Procedure Code (CPC)). If all parties so request, the conciliation proceedings can be replaced by mediation (Article. 213 paragraph 1 CPC). Also, the court may recommend mediation at any time (Article. 214 paragraph 1 CPC).	Conciliation proceedings are not held, inter alia (Article. 198 CPC): ▸ In summary proceedings ▸ In certain debt enforcement proceedings ▸ In disputes for which a court of sole cantonal instance has jurisdiction pursuant to Articles 5 and 6 (for instance disputes in front of a commercial court of regarding intellectual property rights) ▸ For principal intervention, counterclaim and third-party actions ▸ If the court has set a deadline for filing the action
Competent jurisdiction, execution of foreign decisions and exequatur	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.	The conditions that need to be fulfilled for a foreign award to be generally recognized according to the CPIL include the following: ▸ 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

	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 jurisdictions concerned, enforcement is carried out under the CPIL and the CPC.	already a legally binding court decision concerning the relevant matter (Res iudicata) No review of the merits of the case takes place.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Temporary measures adopted in relation to the COVID-19 pandemic: Rent	The Federal Council extended the period for subsequent payment for residential and commercial premises which were due between 13 March 2020 and 31 May 2020 from 30 days to 90 days. However, the due date of the rent remains the same and default interest of 5 % becomes due. Additionally, as of now, there is a motion pending to issue a statute pursuant to which businesses which had to close their business because of the COVID-19 pandemic only owe 40% of the rent during that period.	
Temporary measures adopted in relation to the COVID-19 pandemic: Prevention of insolvency	The Federal Council enacted various measures to prevent insolvency. First of all, it ordered a general stay of the enforcement proceedings. Furthermore, it issued measures to prevent over indebtedness, simplified the procedure of debt-restructuring moratorium and issued a special COVID-19-moratorium , which allowed small and medium sized businesses to request a moratorium for all outstanding claims of a maximum of three months (with option of extension of up to three months) during which they can reorganize and prepare themselves for the time after the pandemic.	

AMERICAS

Canada (common law and civil law) (only in the province of Quebec)

Contact(s):

David Witkowski

Last updated: 14 August 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	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.
Non-written agreement	Although written contracts are strongly recommended, a verbal contract is generally enforceable by law. Most contracts do not necessarily have to be in writing to be binding, but there are certain exceptions, such as real estate property contracts.	
Signature: counterparts, representation and electronic signature	▸ 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 delivered to the other parties. ▸ Representation: Unless stipulated otherwise in a corporation's articles or bylaws, generally, the board of directors of a corporation can choose to authorize any director(s), officer(s) or agent(s) to execute an agreement on the corporation's behalf, acting as a representative of the corporation. ▸ Electronic signature: Canadian corporate law permits electronic signatures on most documents. An electronic signature clause ensures a PDF or electronic signature are accepted as an original. Canada has enacted legislation at both the provincial and federal level to allow the use of electronic signatures.	▸ Representation: The authority to bind corporation can be given within a limited scope, for e.g., to execute one agreement or granted more broadly to facilitate day-to-day or ongoing business/banking matters. ▸ Electronic signature: Generally, electronic signatures are acceptable/permitted from a legal perspective in Canada. However, there are some exceptions (including some powers of attorney, codicils and wills, real estate, various official court documents, etc.). In addition, in certain provinces, there are particular documents relating to annual compliance or changes within a corporate structure that are filed with the provincial registries that require original signatures. Notwithstanding the foregoing, it is always important to check that a corporation's governing documents do not impose limitations on the execution of documents via electronic signature. ▸

Contracts concluded electronically	Electronic signatures are generally acceptable for most contractual arrangements, including corporate/commercial agreements and some consumer contracts.	As noted above, there are common exceptions to the use of electronic signatures including wills and codicils, powers of attorney and negotiable instruments (which may include cheques, promissory notes or bills of exchange). It is always important to check the applicable legislative framework, as well as to consider any common law considerations.
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 the forms, Terms and Conditions (T&C)	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. 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. Next, courts will look at when the contract was formed, keeping in mind two basic contract law principles: ▸ An offer and acceptance must occur to create a contract ▸ A fully formed contract's terms generally cannot be modified without all parties' consent	
Significant imbalance (unfair contract terms)	Generally, courts do not assess the quantum of consideration and whether it was equal or reasonable – courts generally only assess whether any consideration flowed to each party.	

Consideration	Under common law, consideration is one of the key criteria that must 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 and indexing	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 (or unambiguous) 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 criminally excessive interest rates. An adjustment clause and additional price may be provided for in the contract. The price may also be stipulated in a foreign currency.	
Payment Terms	Payment terms are generally permitted and up to the parties to negotiate and determine.	However, note that with respect to some industries in Canada, like construction, legislation has been introduced provincially and federally to ensure prompt payment by introducing standard payment terms across the industry.
Exclusivity Provisions	Exclusivity provisions are generally permitted.	
Non-compete obligations	Non-competition obligations are generally permitted in commercial agreements but are more difficult to enforce in the context of individuals/employment. The rationale is that stopping someone from competing interferes with individual liberty and restricts open competition. Consequently, non-competition clauses are difficult to enforce in such circumstances. From a commercial perspective, non-competition clauses made in the context of the sale of a business, will presumably be enforceable.	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 the restriction is, and whether it is unambiguous and not unreasonably broad.
Governing law (implied content and public order)	The Canadian law, with respect to the choice of law and choice of forum in the commercial context (as opposed to employment context), 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: ▸ 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 However, in some circumstances local statutory regimes may apply regardless of the parties' choice of law (e.g., parties cannot choose to exempt themselves from certain tax/employment laws which may statutorily apply).	
Judicial powers related to the contract	In *Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 (CanLII),* the Supreme Court of Canada described the proper approach to contractual interpretation as a practical, common-sense approach that is not dominated by technical rules of construction but focused on the intent of the parties and their scope of understanding. It is a question of mixed fact and law. Generally, Canadian courts do not compel performance of a contract, making damages the most usual/common remedy for breach of contract. However, where damages would be an inadequate remedy, there are also equitable remedies available including specific performance, injunctions or an accounting of profits, for example. The court can also render a contract void for reasons of public policy. Punitive damages may be awarded for breach of contract, but these are reserved for exceptional cases.	

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.	s
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. What constitutes reasonable notice is determined at the time of termination and various matters may be considered such as the formality of the arrangement, length of relationship, duration and scope of obligations under the contract, consideration of the general circumstances/practices of a particular industry, etc.	
Termination Clause	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 e.g.,	

	▸ 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. In addition to any stipulations as to termination that may be contractually agreed between the parties, the common law may allow for termination of a commercial contract where, based on the facts and circumstances of the case, there has been a repudiation of the contract. Repudiation must be more than a mere breach of contract but may occur where one party is substantially deprived of the whole benefit of the contract or where the breaching party indicates an intention to no longer be bound by the contract. Parties may also be released from their obligations under a contract where the contract has been frustrated. Frustration may occur where there is a supervening event that occurs after contracting through no fault of either party, and which was not foreseeable at the time that the parties entered into the contract, that changes the nature of the parties' rights and obligations to such a degree that performance is impracticable, impossible or unjust in the circumstances.	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	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 *Bhasin v. Hrynew, 2014 SCC 71 (CanLII)*, 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.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	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 several 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.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	Hardships clauses generally overlap *force majeure* clauses. Hardship clauses may be considered for situations such as insolvency.	
Force majeure	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. As described by the Supreme Court of Canada in *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Company Limited, [1976] 1SCR 580,* 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. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	
Warranty of latent defects (specific to sales between corporate parties, not consumers)	Provincial Sale of Goods legislation in the common law provinces and territories implies warranties as to quality and fitness. In addition, unless the circumstances of the contract show a different intention, there is an implied condition on the part of the seller that it has the right to sell the goods. An implied warranty that the buyer will have and enjoy quiet possession of the goods, and an implied warranty that the goods will be free from any charge or encumbrance in favor of any third party that is not declared or known to the buyer before or at the time when the contract is made. However, the parties to a commercial contract can expressly exclude these implied terms. Under the Civil Code of Quebec, there is a warranty for quality, which requires merchants to warrant that a product is free of latent defects that would render the product unfit for the use for which it was intended, or diminish its usefulness to the point that the buyer would not have bought it or paid had the buyer been aware. In commercial contracts, the parties may add to the obligations of this legal warrant, diminish its effects or exclude it altogether, but under no circumstances may the merchant exempt itself from liability for personal acts or omissions.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	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, *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd., [1993] 3 SCR 206.* 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.	
Alternative dispute resolution procedures (mediation/conciliation)	Contractual disputes may be resolved by litigation unless parties mutually agree to an alternative method of dispute resolution. Alternative dispute resolution options include negotiation, mediation and/or arbitration. Therefore, parties must expressly outline their desire to proceed by with alternative dispute resolution procedures in the contract. Parties can also mutually agree to an alternative method of dispute resolution when a dispute arises.	
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are generally free to choose the forum for resolving disputes. Depending on the wording of the clause, the parties may give exclusive, non-exclusive or concurrent jurisdiction to a particular forum. 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. Non-exclusive jurisdiction: Parties may also want to agree to one forum but not to the exclusion of others. Concurrent jurisdiction: As a subset of a nonexclusive jurisdiction clause, parties may want to allow disputes to be heard in more than one forum.	

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Not applicable in Canada. However, Canadian contractual law is guided by an organizing principle of good faith in contractual performance (as outlined by the Supreme Court of Canada, in its decision *Bhasin v. Hrynew, 2014 SCC 71 (CanLII)).*	

Temporary measures adopted in relation to the COVID-19 pandemic	In the commercial context, because courts have been closed and/or operating at a limited capacity, in some jurisdiction limitation periods for various types of claims (including commercial claims) have been suspended. There have also been statutory measures introduced in specific contexts such as residential tenancies (limiting evictions) and employment (limiting statutory constructive dismissal claims in prescribed scenarios for lay-offs or reduction of hours). It is not yet clear how courts will take the COVID-19 pandemic environment into account when rendering decisions on the basis of the common law principles noted herein.	

Mexico (civil law)

Contact(s):

Edmundo Torres Barajas

Last updated: 14 August 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information 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. Written form is recommended. In Mexico, a good faith presumption is applicable to all contractual arrangement. The parties must comply with the obligations expressly stated in their contracts and those implied by statute, depending on the type of contract. 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.	The court may force the execution of the final contract in the event one party refuses to execute it. 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. Promissory agreements may include penalty clauses in the case of breach by the defaulting party.
Non-written agreement	Agreements or 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.	It is advisable to execute written contracts. 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. In the event of a judicial dispute, the original version of the agreement would need to be submitted in court. The Mexican Commercial Code provides for the digitization of written contracts, provided that certain requirements are met.
Signature: counterparts, representation and electronic signature	▸ Counterparts: The Mexican law does not impose any restriction regarding signing a contract by counterparts The process of signing a contract is a matter of evidence. 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. ▸ Representation: Contracts may be signed directly by the parties or through their authorized representative or attorney in fact of the parties. The authority	▸ Counterparts: In the event of a judicial dispute before a Mexican court, the original executed documents or other proof of its existence will be required ▸ Representation: In the event of a judicial dispute before a Mexican court, the opposing party may challenge the representation of the other party.

	of the representative or attorney in fact must expressly include the power to entered into the relevant agreement ▸ Electronic signature: According to the Mexican Commercial Code, electronic signature is permitted and has the same legal effects as the hand-written signature, if the identification procedure is reliable and ensures the associated between the document and the relevant electronic signature	Thus, legal documents containing such representation is required Contracts entered on behalf of another by someone other than their legitimate representative might be void, unless the principal ratifies them before they are challenged by the other party. ▸ Electronic signature: Electronic signature is admissible evidence in court
Contracts concluded electronically	According to the Mexican Federal Civil Code, contracts may be concluded by electronic means. According to the Mexican Commercial Code, an electronic contract, which is signed according to the requirements set out by this Code and applicable provisions, has the same evidentiary effects as a written contract, provided that it is drafted and recorded in conditions that guarantee its integrity, ensure the association between the documents and the electronic signature and accessibility for future reference.	When a legal act must be granted before a Mexican notary public and is concluded electronically, the Mexican notary public must record this in the public instrument and for some Mexican States the electronic signature must be certified by a licensed company.
Language of the agreement	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. 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.	Mexican governmental authorities request the use of Spanish. 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. If more than one language is used in the contract, it is advisable to specify the language that will prevail in the case of discrepancy, preferably the language of the country of the applicable law and jurisdiction chosen in the contract.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	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. If the T&C of the parties are contradictory, the contract must be interpreted on the basis of: ▸ The subjective intent of the parties ▸ Its legal nature and desired effects ▸ The applicable commercial practices If it was impossible to resolve the contradiction between the T&C of each party, the Mexican law stipulates that: ▸ If the contradiction affects a non-substantial provision of the contract, the contract must be interpreted in the less onerous way for all parties ▸ If the contradiction affects a substantial provision of the contract, the contract will be void	
Significant imbalance (unfair contract terms)	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 must clearly specify the intention of the parties and the subject matter. Otherwise, the contract may be held void. As opposed to the Mexican 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, i.e., in 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 needs 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 might be void in the event the motive of inducement of the parties is illegal or against laws of public order.	
Price: determination, revision and indexing	The price must be fixed or determinable. Otherwise, the contract may be held void. The price shall be paid pursuant to the T&C specified in the contract. Otherwise, the price shall be paid up front. The price may be stipulated in a foreign currency. Indexing clause: Adjustment method and additional price may also be agreed on, provided that the calculation method is specified in the contract. The transfer of ownership is not necessarily linked to the payment of the price.	Federal, State and Municipal Tax and transfer pricing implications need to be taken into account to determine the price if the contract is executed between related parties. 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. 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.
Payment Terms	It is advisable to include in the contract a penalty clause in the case of late payment of the price. In the absence of such clause, by statute of law, a penalty of up to 6% may be applied.	
Exclusivity Provisions	Exclusivity provisions are considered as relative monopolistic practices and are allowed, provided that the following conditions are satisfied: ▸ The market competition is not affected as provided by the federal competition law (abuse of dominant power in the relevant market or anticompetitive agreement) ▸ Parties do not have substantial power in the relevant market	
Non-compete obligations	Non-compete clauses are allowed, provided that the undertaking is limited to: ▸ A certain period of time (usually no more than five years) ▸ A given territory	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

	▸ A certain scope (clearly identifying competitive activities)	acceptable period of time for non-compete obligations. From the labor law perspective, the non-compete clauses are sometimes challenged under the argument that such obligations violate constitutional right to work.
Governing law (implied content and public order)	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. Notwithstanding the non-Mexican applicable law chosen by the parties, the Mexican law will apply in the following events: ▸ 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.	With respect to Contracts for the International Sale of Goods, for the applicable cases, Mexico has a double regulation: ▸ If the parties are Mexican residents, these contracts will be governed by the domestic law ▸ If a contract party is foreign, it will be understood that these contracts will be governed by the United Nations Convention on Contracts for the International Sale of Goods, unless parties expressly waive its application Also, the rules set forth in the Mexican 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. The general principle of law, *lex rei sitae* (or *lex situs*) is recognized by the Mexican law.
Judicial powers related to the contract	The judge shall interpret the parties' intention when analyzing a contract whose provisions are ambiguous or unclear. When the mutual intention of the parties cannot be determined, the custom and commercial practices of the country will be considered to interpret the ambiguities of the contracts.	

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	The term of the contract may be: ▸ A fixed term: It would be in force until the expiry of the specific term, unless the parties agree to renew the contract	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, except for the commercial loan contract in which any payment obligations have to

	▸ An indefinite term: Each party may terminate the contract at any time, provided that a written notice is given in advance 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 upon by the parties.	be satisfied within 30 days as from the execution of the contract, unless otherwise agreed by the parties. 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.
Prior notice of termination	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. In the case of indefinite term contracts, 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).	
Termination Clause	As a general rule, termination for cause is only available in the event of default by any of the parties. In such a case, the remedies available to the non-defaulting party are: ▸ The termination of the agreement, and the payment of damages and loss of profits ▸ The specific performance of the contract, and the payment of damages and loss of profits	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Contracts must be negotiated, formed and performed in good faith. A contract executed in bad faith may be held void.	Good faith is presumed; Thus, bad faith must be demonstrated. 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.
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	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: ▸ The assignment is expressly contemplated in the contract or, otherwise, the assignment is agreed by all parties	The assignment of rights and/or obligations is enforceable against third parties, provided: ▸ The assignment is not prohibited by contract or statute.

	▸ In the event the contract includes obligations payable to a third party, such third-party consents to the assignment ▸ In the event the contract includes obligations payable by a third party, such third party receives an assignment notice in writing Change of control provisions are acceptable under the Mexican law.	▸ The rights under the contract to be assigned are not "intuitu personae" right (e.g. inherent to and inseparable from one of the parties). ▸ All the parties to and the beneficiaries of the agreement consent to the assignment.
Hardship clause, i.e., unforeseeable circumstances and renegotiation	Under the Mexican Commercial Code, a hardship clause is not mandatory, but parties are free to provide for same in their contract. 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.	
Force majeure	The existence of *force majeure* or acts of god will relieve the obligor from complying with their obligations upon the occurrence of the following: ▸ 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 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: ▸ 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 otherwise liable by applicable law	The court will determine whether the conditions of *force majeure* or acts of god are met. 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 (i.e., the COVID-19 pandemic), and to agree on all applicable T&C upon occurrence of such event. The clause may also provide for the conditions for the termination of the contract or its renegotiation. Prior notification of the *force majeure* or act of god event by the obligor to the other party is required.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	The Mexican Commercial Code provides the following in respect of purchase and distribution contracts: ▸ 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 ▸ The purchaser may take action against the seller if the following conditions are satisfied: ▸ 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
Limitation of liability (between corporate parties, not consumers)	Parties are free to limit their contract liability, except when: ▸ The breach of contract is a consequence of the wilful misconduct of one of the parties ▸ Such limitation violates the public order or the rights of third parties 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 to avoid double indemnification of the same damage. Penalty clauses are valid subject to the following: ▸ 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	The enforceability of obligations and contractual liabilities may be limited or affected by tax, labor, bankruptcy, insolvency or similar laws affecting creditors´ rights. The enforcement of contractual indemnity clauses may be limited by the Mexican public policy.
Alternative dispute resolution procedures (mediation/conciliation)	Parties may agree to submit the dispute to a mediator/conciliator before submitting the case to ordinary courts or arbitration courts. Thus, the mediator/conciliator would help the parties reaching an agreement. Mediation and conciliation rules are set out by local law of each Mexican state. Mediation/conciliation may be less expensive and a good way to preserve the business relationship between the parties. It is important to clearly state in the contract whether this preliminary step is mandatory or optional.	
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:	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 (*P*rescripción o caducidad), notwithstanding the fact that the parties

	▸ 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 must 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: ▸ Comply with the legal requirements of the jurisdiction where the court that has issued the judgment sits ▸ 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) ▸ Not be against the Mexican public policy or any international treaty that Mexico is a signatory of, or general principles of international law ▸ Be final ▸ Be translated into Spanish by an authorized translator The second requirement is that the service of process must be made in person, i.e., service of process by mail is not valid under the Mexican law.	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.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	There has been no recent regulation in respect to prohibitions in commercial relationships related to the COVID-19 pandemic. Nevertheless, Mexican authorities have been vigilant to any commercial practices affecting consumers rights and monopolistic practices.	
Temporary measures adopted in relation to the COVID-19 pandemic	Although there have been no mandatory measures issued by Mexican authorities concerning commercial practices (other than debtor-relief programs applicable to banks), the sanitary emergency constitutes an event of *force majeure*, so many companies have taken measures, such as: ▸ Align standard terms and conditions to the new normality	

	▸ Stipulate rules for the interruption of activities, reductions or deferral of interest and payments ▸ Add enhanced force majeure or acts of god contract provision ▸ Enhance contracts with IT providers regarding confidentiality and data protection issues derived of the use of local networks due to remote work	

ASIA

China (civil law – customary law)

Contact(s):

Dr. Zhong Lin; Daisy Wang; William WL Zhang

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1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Pre-contractual obligations are set forth in the Chinese Contract Law in Article 42 (Good faith) and Article 43 (business secrets protection). A party shall be held liable for not acting in good faith in the course of concluding a contract, if the party: ▸ 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	The party shall be liable to pay compensatory damages if it violates the pre-contractual obligation 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.
Non-written agreement	Parties may conclude contracts in writing, orally or in some other form. However, a contract shall be concluded in writing where laws or administrative regulations stipulate, or where the parties agree to use the written form. The following contracts must be concluded in a written form: ▸ 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	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. 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.
Signature: counterparts, representation and electronic signature	▸ Counterparts: 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. In general, a contract shall be signed by the legal representative or other authorized person of an organization from both sides.	

	▸ Representation: Contracts must be signed by the parties themselves or by the authorized representatives of the parties. However, according to Article 49 of the Chinese Contract Law, where a person who has no power of agency, oversteps the power of agency, or whose power of agency has expired concludes a contract in the principal's name, and the counterparty has the reason to believe that the person has the power of agency, such act of agency shall be effective. ▸ Electronic signature: According to Article 3 of Law of the People's Republic of China on Electronic Signature, the parties may stipulate the use, or non-use, of electronic signatures or electronic data in a contract or other documents and documentations in civil activities. The legal effect of any document that uses electronic signatures and/or electronic data, as stipulated by the parties, shall not be denied simply because it takes the form of an electronic signature and/or electronic data.	▸ Electronic signature: Electronic signature shall not apply to the following documents: ▸ Documents concerning personal relations, such as marriage, adoption and succession, etc. ▸ Documents concerning the termination of water supplies, heat supplies, gas supplies or other public-utility services ▸ Other circumstances, under which electronic documents do not apply, as prescribed by laws and administrative regulations
Contracts concluded electronically	According to Article 11 of the Chinese Contract Law, the written form refers to any form that can show the described contents visibly, such as written contractual agreements, letters and electronic messages (including telegrams, telexes, fax, electronic data interchange and e-mails). According to Article 33 of the Chinese Contract Law, where the parties conclude a contract in the form of a letter, electronic message or otherwise, they may require that a letter of confirmation be signed before the conclusion of the contract. The contract shall be established when the letter of confirmation is signed.	According to Article 16 of the Chinese Contract Law, an offer becomes effective when it reaches the offeree. If a contract is concluded in the form of electronic messages, and the recipient has designated a specific system to receive the electronic messages, the time when the electronic messages enter the system shall be the time of arrival. If no specific system is designated, the time when the electronic messages first enter any of the recipient's systems shall be deemed as the time of arrival.
Language of the agreement	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.	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. Where the words used in the different languages of the contract are not identical, the contract shall be interpreted in accordance with its purpose. If more than one language is used, it is highly recommended to specify the language that prevails.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	The State Administration for Industry and Commerce and the local administrations for industry and commerce in China Mainland prepare and release some model texts of contracts that the relevant parties may choose to use or amend at their free will. 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. 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 mitigate the other party's liabilities or other terms having significant interest with the other party in a reasonable manner and explain the standard terms at the request of the other party. If the party providing the standard terms fails to perform the obligation of drawing attention or making explanation, causing the other party not to notice or understand the terms, the other party may claim that such terms do not constitute part of the contract. The non-standard clause will prevail when a standard clause and a non-standard clause have different effects or conflicts.	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. It is important to make the standard clauses clear and avoid ambiguities when there are different meanings.
Significant imbalance (unfair contract terms)	Parties shall observe the principles of good faith in exercising their rights and performing their obligations. 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. Parties shall observe the principle of fairness in defining their rights and obligations.	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.
Consideration	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.	
Price: determination, revision and indexing	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:	

	▸ 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.	
Payment Terms	With respect to an obligation involving the payment of money, the creditor may, unless otherwise stipulated by the law or agreed by the parties, require the debtor to perform the obligation with the lawful currency at the place of actual performance.	Parties may agree on the amount, time and place of the payment. The buyer shall pay the price in the agreed amount at the agreed time and place.
Exclusivity Provisions	Parties may agree on exclusivity provisions subject to the competition law and anti-monopoly law. 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. A party having dominant market position is prohibited from refusing to trade with relevant trading counterparts without justified reasons.	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.
Non-compete obligations	Non-compete is a term used under the Labor Contract Law of China. The non-compete 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.	The Chinese Contract Law does not provide for non-compete 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.
Governing law (implied content and public order)	Parties to a contract with a foreign element may choose the governing law, except otherwise provided for by the Chinese laws. 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.	Law of the People's Republic of China on Application of Law in Foreign-related Civil Relations (The Law) come into effect as of 1 April 2011. The Law is formulated for the purpose of resolving problems in relation to the application of law in foreign-related civil relations, reasonably settling foreign-related civil disputes and protecting the legitimate rights

		and interests of the parties concerned.
Judicial powers related to the contract	When trying a case involving a contractual dispute, judicial powers shall insist on the principle of encouraging transactions, and fully respect the will of the parties concerned with regard to autonomy. It shall affirm the validity of the contract in a legal and prudential way. It shall, under the principle of good faith, reasonably interpret contract clauses and determine performance contents, reasonably determine the relationship of rights and interests between the parties concerned, prudentially apply the contract cancelation system, adjust excessive liquidated damages according to the law, intensify the protection for acts in good faith of the observant party, and increase the costs of illegality and breach of agreement, thereby promoting the construction of a credible society.	The Summaries of the National Conference for the Work of Courts in the Trial of Civil and Commercial Cases (The Summaries) were adopted in principle at the 319th meeting of the Civil Administrative Professional Committee of the Judicial Committee of the Supreme People's Court on 11 September 2019. Summaries is of great significance to standardizing the discretion of judges. Example of the Summaries: are issues related to validity of contracts, the Summaries stipulates that in the process of the trial of a case involving a contractual dispute, a people's court shall examine as per its functions and powers whether a contract falls into a situation of invalidity, pay attention to the differences between invalidity and any other form of validity of the contract such as revocability, no validation or validity to be determined, accurately affirm the validity of the contract, and as per different circumstances of validity and in combination with the claims of the party concerned, determine the corresponding civil liability.

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	Parties may agree to attach a time limit to the effectiveness of a contract. It is allowed to provide for tacit renewal of a fixed-term contract. (A contracting party may make an expression of intent explicitly or impliedly. The implication shall be deemed as an expression of intent only when it is stipulated by the law or agreed by the parties concerned or conforms to the trade usage between the parties.)	If an Employer fails to conclude a written labor contract with an employee within one year from the date the employee commences work, they shall be deemed to have entered into an open-ended labor contract.
Prior notice of termination	Either party to a contract shall give a notice to the other party if it proposes to rescind the contract in accordance with the law. The contract shall be terminated upon receipt of the notice by the other party. If the notice specifies that the obligor fails to perform the obligation within the time limit, the contract shall be rescinded automatically. If the obligor fails to perform the obligation within the time limit, the contract shall be rescinded upon the expiration of the	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.

	time limit specified in the notice.	
Termination Clause	The parties to a contract may rescind the contract under any of the following circumstances: - The purpose of the contract is rendered impossible to achieve due to force majeure - Any party to the contract indicates expressly or by conduct, before the expiration of the performance period, that it will not perform its principal obligations - Any party to the contract delays performing its principal obligations and fails to perform the same within a reasonable time period after being urged to do so - Any party to the contract delays performing the obligations or commits other acts in breach of the contract, resulting in the impossibility to achieve the purpose of the contract - Other circumstances as provided by the law An indefinite term contract with the obligation of continuous performance as the content may be rescinded by a party at any time, provided that the party notifies the other party in advance of a reasonable time limit. The parties may agree on certain other conditions pursuant to which one party may terminate the contract.	Where the other party objects to such rescission, either party may petition a people's court or an arbitration institution to confirm the effectiveness of the rescission of the contract.

4. Performance and non-performance

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.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	Either party to a contract may transfer its contractual rights and obligations collectively to a third party with the consent of the other party. Where contractual rights and obligations are collectively transferred, the provisions on the transfer of claims and debts shall apply. The beneficiary / creditor of an obligation or a right may assign, in whole or in part, its claims to a third party, except under any of the following circumstances: - The claims shall not be assigned in light of the nature of the claims	Where the beneficiary/creditor assigns its claims but fails to notify the obligor, the assignment is not binding on the obligor. Notification of the assignment of claims shall not be revoked, unless agreed by the assignee.

	▸ The claims shall not be assigned in accordance with the agreement between the parties ▸ The claims shall not be assigned in accordance with the law The parties may not challenge any bona fide third party if they have agreed that non-monetary claims are non-transferable. The parties may not claim against a third party if they have agreed that the monetary claim shall not be assigned. If the obligor assigns its obligations, in whole or in part, to a third party, it shall obtain consent from the beneficiary / creditor first. The obligor or the third party may urge the beneficiary / creditor to give their consent within a reasonable period. If the beneficiary / creditor does not give their consent, their consent shall be deemed to have been refused.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	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: ▸ 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 ▸ 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	A party may be partially or wholly excused from liability because of an event of *force majeure*, except where laws provide otherwise. 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. If *force majeure* occurs after a party has already delayed performing its obligation, the said party will not be excused from its liability. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	Either party to a contract that is not able to perform the contract due to *force majeure* shall give a notice to the other party in due time so as to reduce the losses that may be caused to the other party and provide evidence within a reasonable time limit.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	Producers shall bear tortious liability for damage caused to others by their defective products. For damage caused to another person by defective products, the injured party may seek compensation from either the producer or the seller. Where the product defect is caused by the producer, the seller may, after paying compensation, claim the same from the producer. Where the product defect is	Where a product is found to be defective after it is put into circulation, the producer and the seller shall timely cease sales, give warnings, recall the defective product, or take other remedial measures. If any damage is expanded due to the untimeliness or ineffectiveness of remedial measures, the producer and the seller shall bear tortious liability

	caused by the seller, the producer may, after paying compensation, claim the same from the seller.	for the expanded damage. Where recall measures are taken in accordance with the preceding paragraph, the producer and the seller shall bear the necessary expenses so incurred by the party whose rights are infringed upon.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	The limitation of liability mutually agreed by the parties in the contract is permissible, subject to reasonable foreseeability and the principle of fairness. 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.	
Alternative dispute resolution procedures (mediation/conciliation)	The parties may resolve contractual disputes through reconciliation or mediation. Civil mediation shall refer to the activities of civil mediation committees in promoting the parties to voluntarily reach mediation agreements through consultation on the basis of equality by persuasion, guidance and other methods to resolve disputes. The parties may apply to the civil mediation committee for mediation. The civil mediation committee may also offer to provide mediation. If one party explicitly refuses mediation, no mediation may be conducted. The civil mediation committee may, in light of the requirements for mediating disputes, appoint one or more civil mediators to conduct mediation and the parties may choose one or more civil mediators for the mediation. In the mediation of disputes, if no mediation agreement can be reached, civil mediators shall terminate the mediation and, in accordance with provisions of relevant laws and regulations, inform the parties of rights to safeguard their rights through such channels as arbitration, administration and judicature. Civil mediators shall record the mediation information. The oral mediation agreement shall take effect on the date when the parties	The civil mediators may, in light of the requirements for mediating disputes and after obtaining the consent of the parties, invite relatives, neighbors, colleagues, etc. of the parties to participate in the mediation and also may invite personnel with specialized knowledge and specified experience or members of relevant social organizations to participate in the mediation. The civil mediation committees are mass organizations established in accordance with law for mediating disputes among people. Where a mediation agreement is reached through the mediation of the civil mediation committee, a written mediation agreement may be prepared. If the parties deem the preparation of a written mediation agreement unnecessary, oral agreement may be adopted and the content thereof shall be recorded by civil mediators. A written mediation agreement may state the

	reach the agreement. The mediation agreement reached through the mediation of the civil mediation committee shall be legally binding and the parties shall perform in light of their stipulations. The civil mediation committee shall supervise the performance of the mediation agreement and urge the parties to perform the stipulated obligations.	following particulars: ▸ Basic information of the parties ▸ Major facts of dispute, disputed matter and responsibilities of all parties ▸ Contents of the mediation agreement reached by the parties, and method and time limit for the performance The written mediation agreement shall take effect on the day when it is signed or affixed with the seal or fingerprint of all parties, signed by civil mediators, and affixed with the seal of the civil mediation committee. Each party holds one copy of the written mediation agreement and the civil mediation committee shall keep one copy.
Competent jurisdiction, execution of foreign decisions and exequatur	The parties may resolve contractual disputes through reconciliation 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 According to the Contract Law of the People's Republic of China, it shall be a common practice for all types of contracts. Specific legal provisions are as follows: ▸ The parties to a contract involving foreign interests may select the applicable law for the settlement of their contractual disputes, except as otherwise provided by law. If the parties to a contract involving foreign interests have not	The parties shall implement any for 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 Mainland, 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,

	made a selection, the laws of the country to which the contract is most closely connected shall apply • In respect of contracts for Sino-foreign equity joint ventures, Sino-foreign contractual joint ventures and Sino-foreign cooperative exploration and development of natural resources to be performed within the territory of the People's Republic of China, the laws of the People's Republic of China shall apply The arbitration procedure is divided into the following phases: • Application and Acceptance • The selection of arbitrators and the composition of the arbitration tribunal • Hearing and Arbitral Awards • Enforcement It should be noted that, under certain circumstances, an application may be made for cancellation of an award. The mediation procedure is divided into the following phases: • The parties may apply to the civil mediation committee for mediation; the civil mediation committee may also offer to provide mediation. If one party explicitly refuses mediation, no mediation may be conducted. • The civil mediation committee may, in light of the requirements for mediating disputes, appoint one or more civil mediators to conduct mediation and the parties may choose one or more civil mediators for the mediation. • In the mediation of disputes, if no mediation agreement can be reached, civil mediators shall terminate the mediation and, in accordance with provisions of relevant laws and regulations, inform the parties of rights to safeguard their rights through such channels as arbitration, administration and judicature.	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

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Civil Code of the People's Republic of China (effectiveness: To be effective) (effective date: 1 January 2021)	All civil subjects engaging in civil activities shall observe the principles of voluntariness, fairness, good faith, and no civil subject engaging in civil activities may violate laws or go against the public order and good morals. All civil subjects engaging in civil activities shall help

		save resources and protect the ecological environment. A party shall be liable for compensation if it falls under any of the following circumstances when concluding a contract, thereby causing any losses to the other party: ▸ Negotiating the contract in bad faith under the pretext of concluding a contract ▸ Deliberately concealing important facts relating to the conclusion of the contract or providing false information ▸ Performing any other act against the principle of good faith
Temporary measures adopted in relation to the COVID-19 pandemic	▸ Circular of the Supreme People's Court on Issuing the Guiding Opinions (I) on Several Issues concerning the Proper Trial of Civil Cases Related to the COVID-19 pandemic According to the Law (Guiding Opinions (I)) ▸ Circular of the Supreme People's Court on Issuing the Guiding Opinions (II) on Several Issues concerning the Proper Trial of Civil Cases Related to the COVID-19 pandemic According to the Law (Guiding Opinions (II)) ▸ Circular of the Supreme People's Court on Issuing the Guiding Opinions (III) on Several Issues concerning the Proper Trial of Civil Cases Related to the COVID-19 pandemic According to the Law (Guiding Opinions (III))	Guiding Opinions (I) instruct people's courts at all levels to: ▸ Give full play to the safeguarding role of judicial services, i.e., balance the interests of all parties concerned, protect the legitimate rights and interests of the parties concerned, and serve economic and social development ▸ Accurately apply rules for force majeure in accordance with the law ▸ Properly try cases related to contract disputes in accordance with the law ▸ Handle labor dispute cases in accordance with the law ▸ Apply punitive compensation in accordance with the law ▸ Suspend the limitation of action in accordance with the law ▸ Extend the time period for action in accordance with the law ▸ Strengthen judicial assistance

		▸ Take flexible preservation measures to effectively reduce the burden on enterprises and help them resume work and production ▸ Effectively guarantee the uniform application of the law Guiding Opinions (II) instruct people's courts at all levels to properly try civil cases on contracts, financial affairs, and bankruptcy related to the COVID-19 pandemic in accordance with the law. Guiding Opinions (III) instruct people's courts at all levels regarding the below: ▸ Parties concerned in litigation ▸ Evidence in litigation ▸ Time limit for litigation ▸ Applicable laws ▸ Trial of cases involving foreign-related commercial affairs ▸ Trial of cases involving transportation contracts ▸ Trial of cases involving maritime affairs and commerce ▸ Fast track for lawsuits ▸ Trial of cases relating to Hong Kong, Macao or Taiwan

Hong Kong SAR (common law)

Contact(s):

Kelly Ho; Adrian Wong; Mary Li

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1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Certain case laws suggest that a duty of good faith in contractual negotiations is not generally recognized in Hong Kong law. For example, in *Hyundai Engineering and Construction Co Ltd v. Vigour Ltd* (2005) 3 HKLRD 723, the Court of Appeal held that an agreement to use best endeavors to negotiate or to negotiate in good faith was not enforceable, because a court was not in a position to determine the good faith or otherwise of negotiations, given that a party was entitled to negotiate in any way it felt fit. Hence, parties are seldom legally bound to initiate or continue pre-contractual negotiations and may simply terminate negotiations at its discretion, subject to, if any, binding contractual liability like confidentiality and exclusivity. It is worth mentioning that save in exceptional circumstances under which express and specific contractual duties arise, a party usually does not owe a general duty to disclose information to the other party. Each party should take care of its own interest by making necessary inquiries.	Note that if the parties have manifested a clear intent in a written contract including provisions for good faith negotiation, and in particular where legal advisers had been consulted in the drafting of those terms, the court may conclude that such provisions were enforceable (*PetromecInc v. PetroleoBrasileiro SA Petrobras (No. 3)* (2006) 1 Lloyd's Rep 121). Therefore, it should not be assumed that all agreements to negotiate in good faith are unenforceable. It is worth mentioning that if clauses on pre-contractual obligation and/or good faith are found to be enforceable, the court may provide remedies against specific forms of bad faith, for example, rectification for unilateral mistake as it sees fit.
Non-written agreement	In Hong Kong (a special administrative region of China), in general an agreement does not have to be in writing and oral contracts are valid and enforceable if the essential elements of a valid contract are present, unless the laws express require an agreement to be in writing.	For example, Conveyancing and Property Ordinance (Cap. 219 of the Laws of Hong Kong) provides that 'no action shall be brought upon any contract for the sale or other disposition of land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorized by them for that purpose.'
Signature: counterparts, representation and electronic signature	▸ Counterparts: An agreement can be executed in counterparts and all signed counterparts form a single agreement. An agreement will not take effect unless and until all parties to that agreement sign it ▸ Representation: Companies Ordinance (Cap. 622 of the Laws of Hong Kong) (the 'CO') provides that a company can (but does not have to) execute a document by either ▸ Affixing its common seal in accordance with the requirements contained in its articles of association	▸ Counterparts: Commercial contracts can usually be delivered electronically or physically, unless otherwise agreed

	▸ The document being signed by any two directors, or any director and the company secretary, or of its sole director in the case of a single-director company ▸ A company may adopt other methods (e.g., an authorized non-director signing instead of directors) for executing documents as long as such methods are resolved by the directors and are consistent with its articles of association.	▸ Electronic signature: Electronic Transactions Ordinance (Cap. 553 of the Laws of Hong Kong) (the 'ETO'), electronic signatures have the same legal status as paper-based signatures, subject to specific requirements regarding provision of electronic information and electronic signatures being met The three basic requirements for a valid electronic signature are: ▸ The person whose signature is required uses a method to attach the electronic signature or associate the electronic signature with an electronic record to identify themselves and indicate their approval of the information in the electronic record ▸ The method is reliable and appropriate so that the information in the electronic record is communicated ▸ The recipient consents to the use of an e-signature by the signatory ▸ However, under Schedule 1 of the ETO, several documents are specifically excluded from this rule, such as wills, powers of attorney, government leases and real estate transactions requiring a deed instrument.
Contracts concluded electronically	Electronic contracts are recognized in Hong Kong SAR. Pursuant to the ETO, an offer and acceptance of an offer may be in whole or in part expressed by means of electronic records, and the validity or enforceability of a contract will not be denied solely because an electronic record has been used for the formation of a contract, whether in whole or part. Further, an electronic signature attached to (or logically associated with) an electronic record used for the formation of a contract will not be denied legal effect on the sole ground that it is an electronic signature.	It is worth mentioning that the ETO governs the admissibility of electronic records in court. Without prejudice to any rules of evidence, an electronic record will not be denied admissibility in evidence in any legal proceeding on the sole ground that it is an electronic record.

Language of the agreement	There is no requirement in Hong Kong SAR that contracts must be written in the local or any specified language to be valid and enforceable. The language of the contract may be agreed freely by the contracting parties.	It should be note that all legal proceedings in Hong Kong SAR must be conducted in either or both of the official languages, namely, English and Chinese. Documents including any contract in languages other than English or Chinese must be translated into English or Chinese before it can be submitted before the courts in Hong Kong SAR.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	In a 'battle of forms' situations, the party who accepts the latest terms put forward by the counter party, whether by conduct or otherwise, is taken to have agreed to them. This is on the basis of the traditional analysis of offer and acceptance whereby if A makes an offer on A's conditions and B then accepts that offer but on B's condition, and without more, and performance of both parties follows, then the contract is on B's terms (*Butler Machine Tool Co Ltd v. Ex-Cell-O Corp (England) Ltd* (1979) 1 WLR 401).	This is named as the 'last-shot' rule. The rule is subject to the documents passing between the parties and their conduct or a course of dealings showing that their common intention was that other terms were intended to prevail. The canons of offer and acceptance are not technical rules but are simple standards for the court to ascertain the actual or presumed intentions of the parties to see if they were in agreement.
Significant imbalance (unfair contract terms)	▸ Hong Kong SAR has enacted some statutory legislations in an effort to protect consumers (as contrast to entities engaging in business activities) from unfair terms which are unconscionable or seek to require a consumer to indemnify a supplier for any losses caused to the supplier by the consumer's negligence, or to limit or exclude a supplier's liability to the consumer for breach of contract, negligence or misrepresentation. ▸ The legislations include the Unconscionable Contracts Ordinance (Cap. 458 of the Laws of Hong Kong) (the 'UCO'), the Control of Exemption Clauses Ordinance (Cap. 71 of the Laws of Hong Kong), the Supply of Services (Implied Terms) Ordinance (Cap. 457 of the Laws of Hong Kong) and the Misrepresentation Ordinance (Cap. 284 of the Laws of Hong Kong). Please refer to additional remarks provided on unconscionability under UCO.	UCO provides a non-exhaustive list of factors which the court may have regard to when determining the existence of such unconscionability, such as the relative bargaining strengths of the parties and the possibility of the consumer having acquired the same goods or services from another party on terms different to the terms in question. Furthermore, according to *Shum Kit Ching v Caesar Beauty Centre Ltd* (2003) 3 HKLRD 422), in determining whether a contract term is 'unconscionable', the court must have regard to 'all circumstances' relevant to that issue, as well as the factors listed in Section 6(1) of the UCO as appropriate. Examples of unfair terms which may be held as unenforceable by the courts under the UCO include those allowing a supplier to unilaterally vary the terms of the contract without notifying the consumer.

Consideration	Under Hong Kong law, for a contract to be binding (other than those by a deed), there must be consideration (i.e., mutual exchange). When one party makes a promise to do something or refrain from doing something, it must be in exchange for something of value from the other party. Nevertheless, consideration need not be of equivalent value to that which is promised in return. The concept of freedom of contract, together with the practical inconvenience of proving adequacy, means that the court generally will not inquire as to whether the value of the consideration adequately reflects that which is promised in return. The only necessity is that there is an actual value, some reciprocity or *quid pro quo*.	As a general rule in Hong Kong SAR, past consideration is not valid consideration. In *Roscorla v. Thomas* (1842) 3 QB 234, the seller assured to the buyer, after the sale was concluded, that the horse sold to the buyer was sound and free from vice. However, the horse turned out to be vicious. The issue was whether the sale contract constituted valid consideration for the warranty (as to the horse's soundness). The court held that the warranty was independent of the sale as it was given after the sale transaction and that therefore the consideration was a 'past' consideration.
Price: determination, revision and indexing	In Hong Kong SAR, parties are free to agree on the pricing terms in the contract, subject to provisions under laws like the Sale of Goods Ordinance (Cap. 26 of the Laws of Hong Kong) and Section 7 of the Supply of Services (Implied Terms) Ordinance (Cap. 457 of the Laws of Hong Kong). With regard to unspecified price, in the case of dealing with a consumer (as opposed to with a business entity), the price in a contract may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing, one must pay a reasonable price/charge. What is 'reasonable' is a question of fact dependent on the circumstances of each particular case.	
Payment Terms	In Hong Kong SAR, parties are free to agree on the payment terms in the contract.	
Exclusivity Provisions	Hong Kong law does not imply exclusivity in negotiations and therefore parties seeking exclusivity would normally enter into an exclusivity agreement. Such an agreement is not legally binding unless it is either executed as a deed or is supported by consideration (e.g., mutual exclusivity obligations or the payment of consideration). Breach of an exclusivity agreement may entitle the non-breaching party to damages, to the extent that the non-breaching party is able to show loss caused by the breach. As breach of an exclusivity agreement is unlikely to give rise to readily determinable damages, the parties may choose to insert a liquidated damages clause in the exclusivity agreement but should take care to ensure that it does not constitute a penalty to avoid it being unenforceable.	It is also important to ensure that any exclusivity agreement is expressed as a 'lock out', namely that the party concerned will not negotiate with any third party for a specified period, rather than a 'lock in', where there is a positive duty to negotiate, as a lock in will generally not be enforceable for lack of certainty. The agreement should also not be for an indefinite period, or until signature of a transaction (as this will effectively be a lock in). Instead, it should be limited to a reasonable fixed period, for example, two to three months.

Non-compete obligations	The courts in Hong Kong SAR will only enforce a non-compete clause if it is necessary to protect the legitimate business interests of the employer which may include trade secrets, confidential and proprietary information, employer's trade connections (with customers or suppliers) or the stability of the workforce. Once the legitimate interest has been established, the court will assess whether the restraint is reasonably necessary to protect the employer's legitimate interest by reference to duration, geographical boundaries, and scope of restrained activities. The courts will not rewrite the non-complete clause by substituting what in its view would be a reasonable restriction as to time, geographical location, or types of work. Certain case laws in Hong Kong suggested when the court is approaching the principles for the enforceability of restrictive covenants in Hong Kong, in order for the court to uphold the validity of any covenant in restraint of trade, the covenantee must show that the covenant is both reasonable in the interests of the contracting parties (as in, say in a case of sale and purchase, to protect the Goodwill of a business or other subject matter of sale purchased) and reasonable in the interests of the public.	Courts are inclined to rule against the enforceability of a non-competition clause in an employment contract because it may restrict an individual's freedom of choice of work, which is protected in Hong Kong's Basic Law. Whether the Hong Kong courts will enforce a non-compete clause will heavily depend on the specific circumstances and facts of each case.
Governing law (implied content and public order)	In Hong Kong SAR, parties have the freedom to choose the applicable law, even one with no apparent connection to the underlying contract. However, there are certain circumstances where mandatory rules or regulations in Hong Kong SAR that can override the parties' choice of governing law. Please refer to additional remark for examples. ▸ In order for a governing law clause to be valid, it must be drafted with a sufficient degree of certainty. Hong Kong courts will seek to give effect to governing law clauses where the choice of governing law is ascertainable ▸ The Hong Kong courts are less likely to give effect to governing law clauses which provide for the application of a certain governing law at the choice of a particular party, or in the event of certain circumstances occurring after the parties entered into the contract	The choice of foreign governing law will not be given effect if the performance of the agreement is illegal under the laws of the place of performance. The choice of a foreign governing law should not be in breach of the mandatory laws or domestic public policy in Hong Kong SAR. For example, the Gambling Ordinance (Cap. 148 of the Laws of Hong Kong) prohibits unauthorized gambling in Hong Kong SAR. The prohibition extends to all contracts entered into for the purpose of any unauthorized gambling activities to take place in Hong Kong SAR, despite the fact that the parties specified a foreign governing law for the contracts. Another example is the Employment Ordinance (Cap. 57 of the Laws of Hong Kong) (the 'EO'). Even if the parties to an employment contract choose a foreign governing law, the EO is still likely to be applicable to the employment contract if the contract has its closest and most real connection with Hong Kong SAR.

Judicial powers related to the contract	Equitable relief such as specific performance and injunction can be granted by orders of the Hong Kong courts. They are available only at the discretion of the courts. Even if the parties recognize in their contract that damages will not be adequate, this will only be a factor considered by the court in determining whether equitable relief should be granted. The clause might improve the chance for the non-defaulting party of obtaining equitable relief, but it does not guarantee the award of any equitable relief. Only in extreme case and with compelling case-specific evidence would Hong Kong court consider amending the contract. In general, the court is very reluctant to add, modify or rewrite the contract for the parties and it is more common for the court to only sever, in full or in part, certain unenforceable clauses. In determining whether to sever a clause, the court usually takes into account the following factors: ▸ Whether the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains ▸ The remaining terms continue to be supported by adequate consideration ▸ The removal of the unenforceable provision does not change the character of the contract that it becomes "not the sort of contract that the parties entered into at all" Certain case laws suggest that the court is ready to sever a term that does not mean much to the subject matter of the contract (like a questionable force majeure or arbitration clause) from the contract, so long as it is still then possible to give effect to the rest of the agreement without altering the nature of the contract itself.	Available equitable relief includes, but is not limited to specific performance, injunction (prohibitory or mandatory), account of profits, restitution, rescission, constructive trust, subrogation, declaration and tracing and recovery of property from a trustee.

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	Both fixed term contracts and indefinite term contracts are enforceable in Hong Kong SAR. After the expiry of a fixed term, if the parties continue to act in accordance with the terms of the agreement, the court may find that the parties have entered into a new contract by conduct on the same terms as the expired agreement.	The parties may agree that their contract will take effect at a future time or an earlier time. If there is no express term in the contract as to when it will come into effect, the contract becomes effective once the parties have agreed on its essential terms.
Prior notice of termination	▸ Generally, a party cannot terminate a fixed-term contract by issuing reasonable notice if it is not expressly stipulated. However, contracts of employment or	In determining what the reasonable notice period would be, the court will look at all the circumstances of the case (*Mimi Monica Wong v Mirko Saccani &*

	personal service may be subject to an implied term that they are terminable on reasonable notice ▸ On the other hand, where a contract is silent as to duration and it is not possible to ascertain the parties' intentions with regard to termination from the contract, the contract generally will be regarded as terminable by reasonable notice, subject to any statutory exceptions What amounts to 'reasonable notice' will depend on the relevant factors and circumstances existing at the time when notice was given, not when the contract was made.	*Another* (2006) HKEC 1662). Relevant factors include but not limited to: ▸ The duration of the agreement or relationship between the parties ▸ The degree of financial dependence between the parties ▸ The time it will take to replace the business lost due to the termination of the contract ▸ The capital investment made by the party receiving notice of termination
Termination Clause	Some contracts contain provisions that entitle the innocent party to terminate the contract if the other party is in material breach. However, the word 'material' is not defined in statute, and it is for the courts to decide what amounts to a 'material breach' in the circumstances, after considering the specific facts of each case, including for example the nature of the breach and its consequences (both commercial and monetary), the commercial and monetary consequences, a series of minor breaches that may cumulatively constitute a material breach, the impact on the innocent party, and whether the breach was intentional. Another concept for a breach is an 'event of default', which is stipulated in a contract and the occurrence of which entitles a party to terminate a contract. The scope of event of default is usually wider than 'material breach', as an event of default is often explicitly defined in an agreement, which could include the breach of or non-compliance with seemingly minor obligations under an agreement.	Under Hong Kong law, a party cannot rely on its own breach to terminate a contract. Where there has been a breach, the contract will subsist until the non-breaching party chooses to treat the contract as repudiated and have it terminated. The non-breaching party may choose to affirm and continue with the contract by doing so clearly and unequivocally, in which case the contract will not be terminated despite the breach. There are also many non-contractual termination rights which arise in law that a party can seek to rely on. For instance: ▸ If there is a misrepresentation, namely, a false statement of fact made by a party during the precontractual negotiations which induced the other party to enter into the contract, the innocent party can choose to terminate the contract ▸ If a party was under duress or undue influence when entering into a contract, the contract is voidable, and the victim has a right to terminate the contract ▸ If there is a breach of the conditions of a contract, or a serious breach of innominate terms in a contract, the non-breaching party can choose to terminate the contract Such non-contractual termination rights cannot be excluded expressly in an agreement.

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	The Hong Kong law does not currently recognize a universal implied duty on contracting parties to perform their obligations in good faith, other than for certain categories of contract such as employment and fiduciary relationships. Contracting parties are free to do what they like, so long as they do not breach the agreed terms. Nevertheless, contracts can specifically require a party to perform particular obligations or exercise specified discretions acting 'in good faith'. It is less common but also possible to impose an express duty to perform the whole contract in good faith. Any express term will be interpreted carefully, in the context of the entire contract and the commercial relationship between the parties.	Where an express term has been included, the court will need to interpret it to determine the scope and content of the obligation. The usual principles of contractual interpretation apply. The court's aim is to determine the meaning the contract would convey to a reasonable person with all the background knowledge available to the parties at the time the contract was made. As well as the words used and the relevant background, the court will take into account how the clause fits within the contract as a whole and considerations of commercial common sense. The general trend in the case law seems to be in favor of giving a narrow interpretation to express contractual obligations of good faith. Where an express obligation of good faith is included in a contract, it is advisable to clarify both the scope and, if possible, the content of that obligation rather than leaving it for the courts to determine.
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	An assignee can only enforce a legal assignment if the requirements under the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23 of the Laws of Hong Kong) are complied with: ▸ The assignment must be absolute ▸ The assignment must be in writing and signed under hand by the assignor ▸ The assignment must not purport to be by way of a charge only ▸ Express notice in writing of the assignment has been given to the other party to the contract that is being assigned With a legal assignment, an assignee can enforce the assigned rights in their own name. An oral assignment is also valid and enforceable but is treated as an equitable assignment. However, with an equitable assignment, an assignee cannot enforce the assigned rights unless the assignor is made party to the action. If an assignee wishes to enforce the assignment in their own name, the assignment must be perfected as a legal assignment by satisfying the aforementioned	Unlike an assignment, novation transfers both the obligations and rights of a contract to a third party. It is carried out by the parties to the current contract and the party entering into the new contract, which allows a new (third) party to take over the rights and obligations of a party to the original contract. One of the original parties is consequently discharged from the contract. A novation therefore requires the consent of the original contracting parties and the new obligor. If the parties wish to make a contract non-assignable, they should insert a non-assignment clause into the contract. Without a non-assignment clause, and in the absence of specific statutory restrictions or restrictions derived from public policy, a contract generally is freely assignable.

	requirements.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	Hardship clause is a clause according to which parties have a duty to renegotiate the terms of the contract in good faith in case the obligations of one party become significantly more onerous than could have been anticipated when the contract was entered. In Hong Kong SAR, unless the contract contains such a hardship clause, parties have no obligation to renegotiate the contract.	In the absence of an express clause, one should be mindful of the operation of the doctrine of frustration, which operates to terminate the contract when no party is at fault while an event occurs to significantly alter the parties' rights and obligations originally intended under the contract, render the contract factually or commercially impossible to perform, or transform the parties' rights and obligations into something radically and fundamentally different.
Force majeure	A *force majeure* clause excuses one or both parties from having to perform the contract if it is unable to do so because of reasons that are outside of their control. *force majeure* is not implied into contracts governed by Hong Kong law, and so must be expressly included. *Force Majeure* clauses can cover itemized events and natural disasters. If parties wish to include economic events (such as economic downturn and economic hardship) within the scope of the clauses, specific and clear drafting will be required to give effect to their intentions. There is no requirement for a *force majeure* event to be unforeseeable. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	In the absence of an express clause, one should be mindful of the operation of the doctrine of frustration. Please refer to Section 4: Performance and Non-performance - 'Hardship clauses' for detail. The duty to mitigate would not be automatically implied onto the parties seeking to rely on a *force majeure* clause. Whether the parties have a duty to mitigate their loss in the circumstances of a *force majeure* event depends on the construction of the *force majeure* clause. The parties should expressly provide for the duty to mitigate loss if this is their intention.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	For a breach of warranty, the limitation period for a contractual claim is six years. However, if the action is brought under negligence, pursuant to the Limitation Ordinance (Cap.347 of the Laws of Hong Kong), in actions for negligence where the date on which the plaintiff first has the knowledge required for bringing an action for damages in respect of the relevant damage and the right to bring an action falls after the expiry of six years following the date on which the cause of action accrued, the limitation period is three years from the date of knowledge of physical damage (subject to a long stop date).	One should note the operation of selling under 'as is' condition, to the effect that the purchaser purchases with full knowledge of the physical condition of the property and takes it as it stands, under which the purchaser is deemed to be aware of the physical condition of the property, and the vendor is not liable for any physical defects, whether the defects are patent or, in some cases, latent, nor are they obliged to abate the purchase price for any such defects.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	In Hong Kong SAR, the primary statute governing limitations on liability is the Control of Exemption Clauses Ordinance (Cap. 71 of the Laws of Hong Kong) (the 'CECO'). Parties should take note of the requirements in the CECO, which vary depending on the type of liability that the parties intend to exclude or limit under a clause. Furthermore, any ambiguity in an exclusion clause is generally construed against the party seeking to rely on the clause, this is known as the contra proferentum rule (Chau Kei Man Rayman v. Chaters Auction Ltd (2018) HKEC 738). Therefore, any exclusion clause should be unambiguous and expressly made.	For consumers, limitations on liability is also governed by Sales of Goods Ordinance. Moreover, in determining whether an exclusion clause is enforceable, the unreasonable part of an exclusion clause is not severable from the remainder of the clause. In other words, failure to satisfy the reasonableness requirement will render the whole clause unenforceable. Pursuant to the Misrepresentation Ordinance (Cap. 284 of the Laws of Hong Kong), clauses excluding or limiting liability for misrepresentation are of no effect unless they are fair and reasonable having regard to the circumstances, which were, or ought reasonably to have been, known or in the contemplation of the parties when the contract was made.
Alternative dispute resolution procedures (mediation/conciliation)	Arbitration remains a favoured means of resolving large international commercial disputes and offers parties a confidentiality and procedural flexibility. Hong Kong SAR has a number of institutions that administer arbitrations, including the Hong Kong International Arbitration Centre (HKIAC), the International Court of Arbitration of the International Chamber of Commerce (ICC), and the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (CIETAC). If the arbitration agreement sets out the applicable rules, the arbitrator must follow them. If none have been agreed, they may propose a well-recognized set of rules to be followed by the parties. On the other hand, mediation is a private process where a neutral party seeks to assist parties in reaching a resolution. Institutions such as the HKIAC offer mediation facilities and maintain a panel of mediators. Mediation can be used in conjunction with other dispute resolution procedures.	The Hong Kong courts cannot compel the parties to enter into either mediation or arbitration. However, as part of their active case management, courts recognise the need to encourage the parties to use an alternative dispute resolution process if considered appropriate. The Mediation Ordinance (Cap. 620 of the Laws of Hong Kong) provides a framework for mediation that includes the preservation of confidentiality. There are no fixed rules governing the mediation procedure.

Competent jurisdiction, execution of foreign decisions and exequatur	Hong Kong courts recognize express jurisdiction clauses in a contract and give full effect to such clauses in accordance with their terms. However, the wording of such clauses may sometimes give rise to disputes between the parties. Certain wording may be taken to constitute either exclusive jurisdiction clauses or non-exclusive jurisdiction clauses. The courts interpret these clauses differently, particularly in applications for stay and anti-suit injunctions. Where there is an exclusive jurisdiction clause in the contract in favor of the Hong Kong courts, the courts will normally grant an anti-suit injunction to protect its jurisdiction and prevent litigation in other jurisdictions, provided that the application for injunction is promptly made. Under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319 of the Laws of Hong Kong) (the 'FJREO'), judgments from 'superior' courts of commonwealth jurisdictions and certain jurisdictions with reciprocity agreements with Hong Kong SAR are recognized.	Hong Kong courts exercise their discretion in determining whether a particular case should be heard by them by following the principle of the law of the forum (*forum (non) conveniens*). For recognition of a foreign judgment under the FJREO, it must be satisfied that: ▸ There must be reciprocity between Hong Kong SAR and the reciprocating country ▸ The court granting the judgment must be deemed a 'superior' court in the foreign country ▸ The judgment must be final and conclusive and in respect of a sum of money (other than taxes, penalties or fines)

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Limited Partnership Fund Regime	Limited Partnership Fund Ordinance (Cap. 637 of the Laws of Hong Kong) (in operation as on 31 August 2020) On 9 July 2020, Hong Kong's Legislative Council passed the Limited Partnership Fund Bill (the 'Bill') which establishes a new regime for investment funds to be registered in Hong Kong SAR in the form of limited partnership. The new regime will be governed by the Limited Partnership Fund Ordinance (the 'LPFO') which is in operation as on 31 August 2020.	Prior to the Bill, a fund could only be established in Hong Kong SAR in the form of a unit trust or an open-ended fund company under the Securities and Futures Ordinance (Cap. 571 of the Laws of Hong Kong). Upon the introduction of LPFO, a fund can also be structured as a limited partnership and used for managing investments for the benefit of its investors in Hong Kong SAR. In order to be eligible for registration as a limited partnership fund, the fund must satisfy a number of requirements under the LPFO, including but not limited to, the fund must be constituted by a limited partnership agreement with one general partner and at least one limited partner; An investment manager, an independent auditor and a responsible person must be appointed by the general partner. The fund must also submit an application (the 'Application') to the Registrar of Companies. The Application must be submitted on behalf of the fund by a registered Hong Kong law firm or a solicitor admitted to practice Hong Kong law in Hong Kong SAR.

Interim relief arrangement between Mainland China Court and Hong Kong SAR for arbitral proceedings	Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region On 2 April 2019, the Hong Kong Government and the Mainland Supreme People's Court signed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region (the 'Arrangement'), which came into force on 1 October 2019. The Arrangement allows parties to arbitral proceedings seated in Hong Kong SAR to apply, at any time before an arbitral award is made, to Mainland courts for interim measures including property preservation, evidence preservation and conduct preservation.	The interim measures will be available in support of arbitrations administered by six arbitral institutions in Hong Kong SAR. This is a significant development in Hong Kong Arbitration as it places Hong Kong SAR in the unique position of being the first and only seat of arbitration where the parties can access interim relief in China Mainland.

India (common Law – customary law)

Contact(s):

Nidhi Arora

Last updated: 14 August 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	There are no pre-contractual obligations stated as such under the Indian laws. The prerequisites of a contract are, inter alia: ▸ Parties are competent to contract i.e., of sound mind and at least 18 years of age ▸ The object and consideration of the contract must be lawful ▸ Parties agree on the same thing in the same sense (consensus ad idem) ▸ Consent of the parties is not obtained by coercion, undue influence, fraud or misrepresentation ▸ A party must disclose all information that is relevant in obtaining the other party's consent to the contract	A contract that is entered into with a person of unsound mind or with a minor is void. Further, a contract entered into on the basis of any coercion, undue influence, misrepresentation or fraud is voidable at the option of the party that was the victim of such coercion, undue influence, misrepresentation or fraud. 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).
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, the Contract Act stipulates that certain agreements, made without consideration, are void unless reduced to writing. These include contracts made on account of natural love and affection between the parties or promise to pay a time barred debt. Further, 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.
Signature: counterparts, representation and electronic signature	▸ Counterparts: The Indian law does not mandate signing of contracts in counterparts; However, the contracting parties may contractually agree for signature by counterparts. ▸ Representation: A party may sign a contract on its own or through an authorized representative. Depending on the nature/ legal form of the party to a contract, an authorization can be obtained through a board resolution or	▸ Counterparts: In contracts providing for signature by counterparts, the Indian Evidence Act, 1872 recognizes that each counterpart of the contract is deemed as original and all of it together is constituted as one and the same instrument. A counterpart executed by one or some of the parties is primary evidence against the parties executing it ▸ Representation: Persons acting as authorized representatives of parties must themselves be competent to contract.

	through a power of attorney in favour of the authorized representative for the execution of the contract. ▸ Electronic signature: In situations where contracts cannot be executed by way of physical/ wet signatures, the parties may execute the contracts by way of digital/ electronic signatures or by way of providing an email acceptance to the contract. Such execution has the same effect in law as that of a physical/ wet signature. The contracts concluded by electronic signatures are legally valid and are treated at par with physically executed contracts. The Information Technology Act, 2000 defines and gives legitimacy to electronic signatures. Further, in terms of the Indian Evidence Act, 1872, the courts presume that an electronic signature affixed by parties is done with the intention of signing or approving the electronic record.	▸ Electronic signature: A digital signature may be obtained from a certifying authority and may be used for execution and authentication of documents. ▸ These signatures can also be obtained by foreign nationals from the certifying authorities for executing transactions in India. While the general rule is that electronic signatures are at par with physical/ wet signatures, certain documents specifically require physical execution and cannot be executed electronically in India. These are negotiable instruments (other than cheques), power of attorneys, trusts, wills (or any other testamentary dispositions) and contracts for the sale or conveyance of immovable property or any interest in such property.
Contracts concluded electronically	In situations where parties to a contract are unable to conclude contracts physically, they usually resort to providing email acceptances to contracts. An email correspondence between parties may be considered to be a binding contract if the expressions used in such correspondence indicates that there has been meeting of minds, intent of the parties and an agreement has been reached upon, with respect to all material terms. The Information Technology Act 2000 recognizes the communication, acceptance or revocation of proposals (as the case may be) in electronic form or by means of an electronic record for contract formation. Further, in terms of the Indian Evidence Act, 1872, the courts presume that every electronic agreement containing the electronic signature of the parties was properly concluded by such parties.	As good practice, it may be useful to obtain a physically signed hard copy of such a contract once it is practicable.
Language of the agreement	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. 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 the case of conflict.	Contracts should specify the language to be used for dispute resolution process so as to avoid ambiguity.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	Battle of forms is not regulated under Indian laws. The courts in India generally follow a variation of the common law based 'last-shot rule' and 'mirror rule' in resolving disputes relating to battle of forms, whereby the contract form that constitutes a complete and concluded contract prevails. However, in rare instances, contracts where the acceptance is qualified with negligible or immaterial variance have been held to be enforceable and binding on the parties, provided the original offer is not materially affected. 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. 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. In the case of a sale transaction, the terms provided by the seller are relevant, unless otherwise agreed on between the buyer and seller.	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.
Significant imbalance (unfair contract terms)	The concept of significant imbalance in the powers of parties after execution of contract is not specifically covered under the provisions of the Indian Contract Act, 1872. While the courts in India tend to enforce the terms of contracts as agreed between the parties, they are not usually inclined towards enforcing contracts that include terms opposed to public policy, public interest and the fundamental principles of the law of contract. The courts also do not enforce unfair and unreasonable contracts or clauses entered into between parties that are not equal in bargaining power. This may include situations in which there is inequality of bargaining power as a result of economic disparity between the contracting parties or where there is no choice but to accept a prescribed or standard form of contract however unfair, unreasonable or unconscionable it may be. Where such disparity in bargaining power results in significant imbalance in the rights and obligations of the parties, the courts may choose to not enforce such unfair contracts. Further, one of the prerequisites of a valid contract is consent free of undue influence. A contract would be prejudiced by 'undue influence' where the relationship between the parties is such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. Accordingly, the possibility of undue influence leading to significant imbalance between the rights and obligations of parties is	In terms of the Contract Act, a person is deemed to be in a position to dominate the will of another: ▸ Where they hold a real or apparent authority over the other ▸ Where they stand in a fiduciary relation to the other ▸ Where they make a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress The concept of 'significant imbalance' has been recently recognised under the Consumer Protection Act, 2019. The Act provides that contracts that significantly impact the rights of a consumer (i.e., impose unreasonable charges and disproportionate penalties, provide for unilateral termination of contract without reasonable cause etc.) may be null and void.

	likely. Contracts executed under undue influence are voidable at the option of the party that was subject to such undue influence.	
Consideration	Consideration is an essential requirement of a contract. A contract without consideration is treated void, unless: ▸ 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	From a Contract Act perspective, adequacy of consideration is not regulated and may be agreed on purely between the contracting parties. However, the consideration to a contract must always be lawful.
Price: determination, revision and indexing	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. The Sale of Goods Act, 1930 prescribes that, in a contract for sale of goods, if the price or price-discovery mechanism is not explicitly stated, 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. The parties to the contract are free to determine how the price revision will be done and to set the payment terms.	
Payment Terms	Indian laws do not regulate payment terms in commercial relationships. The parties to a contract are free to agree on payment terms as they deem fit and accordingly record the mutually agreeable payment terms in their agreement.	
Exclusivity Provisions	Exclusivity provisions are permitted under the Indian law.	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.
Non-compete obligations	Non-compete obligations are permitted during the subsistence of a contract. Post-term non-compete obligations are permitted under the Indian law, provided that the territorial applicability and tenure of such obligation is reasonable.	The Contract Act provides that a contract that restraints 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

	The Indian law does not recognize post-employment non-compete obligations.	Indian Constitution. Accordingly, while non-compete 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.
Governing law (implied content and public order)	Parties to a contract have the freedom to choose the governing law for the contract. In the absence of a governing law provision, the courts usually determine the governing law on the basis of the jurisdiction within 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.	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 applicability of the rules of Singapore International Arbitration Centre in dealing with disputes thereunder. 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.
Judicial powers related to the contract	In India, there are no specific recognized judicial powers related to contracts. However, judges tend to deal, on a regular basis, with issues relating to contracts including their enforceability, rights and obligations of parties, breach of contract and other disputes that may arise out of contracts. Indian courts may intervene if a contract is bad in law i.e., illegal, against public policy or anti-national.	It is pertinent to note that the judges decide disputes on the basis of the clauses in the contract itself. In the absence of a particular provision in the contract, reliance is placed on the Indian Contract Act, 1872. Judges merely interpret the terms of the contract and do not go beyond the terms of a contract that have been agreed to by the parties.

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 - An indefinite term In the 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.	The duration of a contract is often specified by an express provision in the contract. In the absence of the same, the duration of the contract may be determined from the nature and purpose of the contract.

Prior notice of termination	Parties are free to contractually agree on the duration of the termination notice. A contract may also provide for circumstances wherein the contract may be terminated forthwith by written notice. 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. Failure to serve the notice period amounts to breach of contract and may render the termination infructuous.	
Termination Clause	For the termination of a contract for cause, the events constituting cause should be listed in the contract. In the absence of cause in the contract, i.e., grounds for termination, a party may terminate for the other party's breach when it is deemed critical. Further, the non-breaching party must have given the defaulting party prior notification to rectify the breach.	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	The parties must enter into and perform their obligations under the contract in good faith. This is a requirement under public policy and not a statutory obligation. In the case of breach of this obligation, the breaching party may be liable for damages.	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.
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	Assignability of a contract is determined on the basis of its terms. In case a contract permits assignment, it must be carried out in accordance with the provisions thereof, e.g., intimation or prior consent. If a contract does not contain an assignment clause, it cannot be assumed that assignment of the same is permitted. A distinction is made between assignment of rights and obligations. Obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it implies a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement	In cases where the conferment of a right in a person is contingent upon, or coupled with, the discharge of a liability by such person, then such right cannot be assigned without the consent of the person to whom the co-extensive liability is owed.

	between the parties. Further, if it appears from the language of the contract that it was the intention of the parties that any promise contained in the contract should be performed by the promisor themselves (i.e., *Intuitu personae*), such promise must be performed by the promisor and the same would not be assignable. In other cases, the promisor or their representative may assign the contract to a competent person to perform it. Assignment of contract must be in writing. 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.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	The Contract Act provides that a contract is void if it seeks for an impossible act to be done. Further, a contract that subsequently becomes impossible or unlawful is also treated as void. 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. The parties to a contract may terminate the contract or renegotiate the terms if the same becomes impossible. A clause regarding renegotiation of terms in the event of impossibility, frustration etc. usually forms part of contracts.	
Force Majeure	*Force Majeure* is a creation of contract and can only be relied upon if expressly provided in the contract. 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. 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. 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. In the event that a contract does not contain a specific *force majeure* clause, parties can excuse performance of obligations under a contract in terms of the	Notification obligations must be imposed on the party affected by a *force majeure* event.

	Contract Act whereby a contract becomes void if the act for which it is made, becomes impossible (Doctrine of Frustration).	
Warranty of latent defects (specific to sales between corporate parties, not consumers)	The Sale of Goods 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. 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.	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. 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.

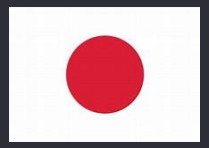
5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	The Contract Act provides that in the case of a breach of contract, the non-breaching party can claim compensation for the loss or damage caused. Parties cannot claim compensation for any remote or indirect loss or damage caused because of breach of contract. In the 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. A contract may provide for exclusions or limitations of liability. Exclusions or limitations of liability are not acceptable in certain cases, such as fraud, personal injury or death.	
Alternative dispute resolution procedures (mediation/conciliation)	Parties may contractually agree to resolve a dispute through mediation, conciliation or arbitration before approaching the courts. A clause is usually added to contracts as an escalation matrix in the event of a dispute between the parties. The parties generally first try to resolve the dispute amicably through negotiations. In the event of failure in the resolution of the dispute by way of good faith negotiations, the parties may submit the dispute to mediation, conciliation or arbitration, as the case may be. The Arbitration and Conciliation Act, 1996, is the key law governing arbitration	The presence of an arbitration clause in a contract or a separate arbitration agreement is mandatory if the parties intend to resolve a dispute by arbitration.

	and conciliation proceedings in India. The Act provides for domestic arbitration, enforcement of foreign awards (New York Convention awards and awards under the 1927 Geneva Convention), conciliation procedures among other things.	
Competent jurisdiction, execution of foreign decisions and exequatur	The parties are free to choose the competent jurisdiction for settlement of their disputes, i.e., arbitration or courts. A foreign judgment or decree is enforceable in India, provided the conditions specified under the Civil Procedure Code, 1908 are satisfied. Other methods of dispute resolution are, inter alia, mediation and conciliation. 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.	While the parties are free to choose an Indian court of their convenience, they cannot choose a court that does not already have jurisdiction. That is, when two or more courts are likely to have jurisdiction over a matter, the parties may choose one court out of the two such courts. 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. Parties opting for international commercial arbitration may seek recourse from Indian courts for interim measures, even if the seat of arbitration is outside India.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	There are no specific laws in India that prohibit commercial relationships.	
Temporary measures adopted in relation to the COVID-19 pandemic	There are no specific measures adopted in relation to the COVID-19 pandemic, however, various governmental departments and regulatory authorities have notified relaxations in respect of compliances under laws. The Indian government has clarified that disruption of supply chain due to the spread of COVID-19 pandemic will be covered under a *force majeure* clause under government contracts. However, this does not apply to private contracts. The possibility of excusing performance of private contacts depends on the language and terms of that contract and specifically the *force majeure* clause set out therein.	



Japan (civil law)

Contact(s):

Junzaburo Kiuchi; Paul Wong; Nobuyuki Nishio

Last updated: 14 August 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Under the Japanese Civil Code, a person is required to negotiate in good faith. For certain transactions (e.g., real property transactions, franchise and financial investments, etc.), a party is also obligated to inform the other party of all material facts and to negotiate in good faith. The duty to disclose material facts will depend on the particular facts of each case.	A party may end negotiations before entering into the contract, but the party may be held liable for damages if the party acted in bad faith or for willful misconduct during pre-contractual negotiations.
Non-written agreement	In general, there is no requirement that contracts must be in writing but certain types of commercial contracts (and contracts recommended by the Government) are required to be in writing. For example, construction contracts and contracts of guarantee are required to be in writing.	For subcontracts, the contractor is required to provide written documentation setting forth the terms of the contract.
Signature: counterparts, representation and electronic signature	▸ Counterparts: Counterpart execution of contracts is permissible, and the contract will be valid upon it being fully executed. The process of signing a contract is a matter of evidence. ▸ Representation: Contracts must be signed by the parties or by the authorized representatives of the parties. If a contract was signed by a non-authorized representative and the other party reasonably believed that the representative was duly authorized to sign the contract, the non-authorized representative who signed the contract will be liable to the other party under the Japanese Companies Act. ▸ Electronic signature: Electronic signatures are permitted. If the electronic signature meets the requirements of the Act on Electronic Signatures and Certification Business, the contract will be presumed to be established authentically.	▸ Counterparts: A scanned countersigned contract is admissible in court and considered reliable evidence to prove the existence of the contract under the Japanese law. However, forgery of the contract (whether the contract had been truly executed by the party) may be an issue for the court. In such case, the court will require the communications surrounding the original signed contract. For instance, if a party claims that the parties did not enter into the contract and that the scanned countersigned contract was forged by the other party, then the original will be required to determine whether the contract had in fact been executed. ▸ Representation: Under the Japanese Companies Act, the party may seek to enforce performance of the contract or compensation for loss or damage to the party ▸ Electronic signature: Japanese authorities have recently provided instructions on electronic signatures because of increased use electronic signatures.

Contracts concluded electronically	Aside from certain contracts that are required to be in writing (please refer to Section 1: Formation - 'Non-written agreement'), contracts may be concluded electronically.	Japanese authorities have recently provided instructions on electronic signature and digital contracts.
Language of the agreement	Parties may freely agree on the language of the contract. The agreed upon language needs to be understood by all parties to the contract; Otherwise, the party that lacks sufficient understanding of the purported agreed upon language might be found to have not validly concluded the contract. A Japanese translation is required when a foreign language contract is submitted or shown to governmental authorities. Foreign language contracts being submitted to Japanese courts must be accompanied by a Japanese translation, pursuant the rules of Japanese civil procedure.	If more than one language is used in a contract, it is highly recommended that the parties specify one language as the governing language of the contract. It also recommended that specific terms be defined as much as possible because interpretations of certain terms may vary from jurisdiction to jurisdiction.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	General T&Cs that are unfavorable to consumers may be held void. T&Cs are required to be provided promptly to other party if the other party request. T&Cs may be unilaterally amended if the amendments are reasonable and fair to the interests of the other party. In case where T&Cs of both parties are applicable, and they conflict, a court may hold both T&Cs as being void and apply the general rules under the Civil Code or Companies Act.	Prior to 1 April 2020, Japan law did not address T&Cs. With the recently amended Japanese Civil Code, laws governing T&Cs were introduced.
Significant imbalance (unfair contract terms)	In principle, parties are free to set forth any obligation in a contract. However, if there are contract terms that so significantly and disproportionately disadvantage one party, such unfair terms may be unenforceable under Japanese law. The unfair contract terms may be void, amended or interpreted by the court in way to diminish the unfairness. Claims in this respect may be brought by the disadvantaged party or by the government under relevant applicable regulation. The party who had proffered the unfair contract terms may be liable to the other party and/or sanction by local authorities under, for example, the Japanese Antitrust Law. The unfair contract terms may be void, amended or interpreted by the court in	Certain standard contracts, such as transportation contracts and electricity supply contracts, are required to be certified or approved by the relevant authorities.

	way to diminish the unfairness. Claims in this respect may be brought by the disadvantaged party or by the government under relevant applicable regulation. The party who had proffered the unfair contract terms may be liable to the other party and/or sanction by local authorities under, for example, the Japanese Antitrust Law.	
Consideration	Japanese law does not recognize the common law concept of consideration. Under the Japanese Civil Code as well as the Commercial Code, different types of contracts and their mandatory components are specified as a condition for their validity.	
Price: determination, revision and indexing	The price should be determined or determinable (by reference to relevant facts, especially fair market value of the goods or service) when the parties enter into the contract. Framework contracts are valid even if they do not provide for a price. A party should not set a price so low that it can monopolize the market or become an unreasonable restraint of trade under Japanese Antitrust Law. Adjustment method and additional price (such as an earn-out clause) may be validly provided for. Price may be set in a foreign currency.	
Payment Terms	Payment terms are not generally regulated. However, payment terms must be within 60 days after the performance or delivery, in contracts between large companies and subcontractors, even if a longer term expressly agreed between the parties.	
Exclusivity Provisions	Exclusive provisions are generally permissible under the Japanese law. In limited cases, exclusivity provisions may be considered void under the Japanese Antitrust Law.	Japan does not have laws specifically protecting distributorships, such as a distribution law. There is no specific maximum duration for exclusivity.
Non-compete obligations	Non-compete provisions are generally permissible under Japanese law if the period of the non-compete obligation is limited for a reasonable period of time. Noncompetitive provisions may be illegal if it breaches the Japanese Antitrust Law.	If a party breaches the non-compete obligation, the other party may seek damages or injunction.
Governing law (implied content	Parties are free to choose the governing law for international contracts, which may apply to the whole or part of contract. This principle is enshrined in Article 7	Pursuant to the Act, Japanese laws will apply to

and public order)	of the 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. Classical exceptions such as mandatory local laws or those provided for in the United Nations Convention on Contracts for the International Sale of Goods. If the parties do not choose a governing law, the governing law will be the law of the place most connected with the contract.	consumer contracts and employment contracts.
Judicial powers related to the contract	Courts will interpret the parties' intention when reviewing a contract whose provisions are ambiguous or not clear. Significant imbalance provisions regarded as being unfair might be amended or interpreted by a court to reduce or remove the unfairness.	

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: It will be enforced until the expiration of the initial or renewal term ▸ An indefinite term: Either party may terminate the contract at any time with or without cause (provided a court may limit the termination in some cases, please refer to Section 3: Duration and Termination - 'Termination for cause' mentioned below)	
Prior notice of termination	Whether a party must give prior notice of termination is determined by the provision of the contract. A party is not required to give prior notice in the case of an indefinite term contract in the absence of any provision to that effect. A 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.	
Termination Clause	If the contract provides for grounds for termination, the clause should set out clearly what would constitute a termination. If the contract does not provide for specific grounds for termination, the non-breaching party may terminate the contract in the case of breach. In such case, the non-breaching party must give notice to the breaching party to rectify the breach and wait for a reasonable period of time for the breaching party to rectify	

	before being able to terminate the contract.	

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	The Japanese Civil Code provides that exercise of the rights and performance of the duty must be done in good faith. A party may be held liable if it abuses its right, even if the contract is silent on this issue.	By reference to this general policy, significantly unreasonable provision in the contract (e.g., non-solicitation obligation) may be held as void by Japanese courts.
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	The assignment of a contract requires an agreement between the assignor and the assignee. In addition, consent of the counterparty to the assignor is required, unless otherwise stated in the contract. A party may not have a claim for change of control of the other party, unless otherwise provided for in the contract.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	The parties are free to decide the conditions under which the renegotiation of the contract will take place. Hardship clauses are permissible. Such clauses will generally provide that if circumstances that were unforeseeable at the time of the contract make performance of the contract excessively onerous for one party, then that party can request for a renegotiation. In such case, the party requesting the renegotiation has to continue to perform under the contract. In the case of refusal or failure of renegotiations, it is likely that the demanding party may validly suspend the performance of its obligations under the original terms.	
Force Majeure	*Force Majeure* is a recognized concept under the Japanese Civil Code. An event may qualify as *force majeure* if it is: ▸ Unavoidable, making the performance of the contract impossible ▸ Unpredictable ▸ Uncontrollable by the parties The typical *force majeure* events are war, earthquake and tsunami. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	It is recommended that parties provide for specific *force majeure* clause and define its exact scope in contracts.

Warranty of latent defects (specific to sales between corporate parties, not consumers)	The Japanese Civil Code in relation to latent defects was modified on 1 April 2020. A latent defect means the subject matter does not conform to the terms of the contract. If the subject matter has the latent defects, the buyer may demand that the seller cure the non-conformity of performance or reduce the price, exercise the right to cancel, or seek compensation for loss or damage.	Non-consumer party may be held liable for damages to consumers under the Japanese Act of Product Liability.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	Contractual limitation of warranty obligations is valid under certain conditions and subject to certain limitations. For example, liability for damages caused by willful misconduct or gross negligence in the contracts regarding maritime transportation may not be excluded. A limitation liability clause must not lead to depriving the contract of its purpose or of the main undertaking or create a significant imbalance. If there is a breach of contract, the other party may request compensation for foreseeable loss or damage.	With respect to consumers, under the Consumer Contract Act, the clause of limitation of liability will be considered invalid, if: ▸ Such a clause exempts non-consumers from all the liability arising from the contract ▸ It limits the liability of the non-consumer party arising from such parties' wilful misconduct or gross negligence Non-consumer party may be held liable for damages to consumers under the Japanese Act of Product Liability.
Alternative dispute resolution procedures (mediation/conciliation)	In Japan, there are several Alternative Dispute Resolution systems, such as for consumer disputes and traffic accidents, however, ADRs are not commonly used to resolve disputes.	
Competent jurisdiction, execution of foreign decisions and exequatur	Parties are free to choose arbitration or courts to settle any dispute arising under a contract. A foreign court judgment is enforceable in Japan if the following requirements are met: ▸ The foreign court had 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 process (except constructive service) or appeared without receiving process	Arbitration will be more flexible, as it provides the right to choose the arbitrators. Also, it will be generally faster, but can turn out to be more expensive. Arbitration allows for confidentiality of hearings. Decisions of punitive damages are not enforceable in Japan, as it is considered to be against public policy.

	▸ The judgment and litigation proceedings are not contrary to public policy in Japan ▸ There is a reciprocity with the place of the court judgment	

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	As all Prefectures have ordinances prohibiting to provide any profits to Japanese organized crime groups (*Boryokudan*), most contracts in Japan will include representations and warranties that both parties are not members of and do not do business with *Boryokudan*.	
Temporary measures adopted in relation to the COVID-19 pandemic	The Japanese government does not provide any temporary measures in relation to contracts due to the COVID-19 pandemic.	
New Civil Code	The Japanese Civil Code was amended and became effective on 1 April 2020. Some of the amendments were to align with court precedent and market practice as well as other new areas such new law governing T&Cs, as mentioned above. For contracts entered into after 1April 2020, they should be reviewed to ensure they are in line with the amended Civil Code. Key areas of the amendment include: ▸ Articles of guarantee contract to protect individuals ▸ Requirements and effects of cancellation ▸ New law governing T&Cs	

Republic of Kazakhstan (civil law)

Contact(s):

Borys Lobovyk; Dinara Tanasheva

Last updated: 20 August 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	There are no pre-contractual obligations stated as such under the Kazakhstan laws. Pre-contractual information provided must be correct, accurate and not misleading. Pursuant to Article 8 of the Kazakhstan Civil Code, the parties should exercise their rights and perform their obligations in good faith, reasonably and fairly and follow the rules of business ethics.	Kazakhstan Civil Code allows claiming the actual damages. Actual damages represent compensation awarded by a court in response to a loss (but not to a future loss) suffered by a party during pre-contractual negotiations. Under the Kazakhstan Civil Code, a contract may be recognized invalid by court because of external vitiating factors, such as deceit, misrepresentation, duress, undue influence and mistake as to identity induced by a fraudulent misrepresentation in dealings.
Non-written agreement	Similar with written agreements, a verbal contract requires an offer, an acceptance of that offer, and a consideration. Once a complete verbal agreement has been made between two competent parties, the contract is just as legally binding as a written contract and claims can be made against a breaching party. However, there are several statutory exceptions to this rule: ▸ If an agreement is carried out in the course of a business activity ▸ If value of the contract exceeds one hundred (100) MCI ($700) In other cases, provided by law or by agreement between parties, an agreement must be made in a written form.	Pursuant to Article 1104 of Kazakhstan Civil Code, a written form for a foreign trade transaction is obligatory.
Signature: counterparts, representation and electronic signature	▸ Counterparts: Kazakhstan Civil Code 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.	▸ Counterparts: Even it is not provided by the Law, in common 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. ▸ Such counterpart clause typically specifies that each of the counterparts when signed shall be deemed to be original and that all the counterparts together is one document. ▸ Representation: According to the Kazakhstan Civil Code, a party is allowed to formally request for

	▸ Representation: The contract shall be signed by legal representatives or authorized representatives of all parties to the contract. ▸ Electronic signature: Electronic signatures are permitted and should be treated as an equivalent to a written signature of the signatory under the Law on Electronic Document and Electronic Digital Signature.	confirmation of the execution of a transaction from the other party. ▸ Electronic signature: Under the Kazakhstan Accounting Law, when compiling primary accounting documents and accounting registers, it is required that entities and private entrepreneurs make a hard copy thereof for other participants of the transaction. Basically, should the process go online, there will always be a need to have the primary accounting documents and accounting registers in hard copy in addition to the electronic documentation.
Contracts concluded electronically	Unless otherwise provided by law or an agreement of the parties, exchange of letters, telegrams, telephone messages, faxes, electronic documents, electronic messages or other documents should be treated equal to a contract in written form.	Under the Kazakhstan legislation, exchange of electronic documents between the state authorities, individuals and legal entities is carried out through the Electronic Document Management System (EDMS). The EDMS is a framework of tools for managing the creation, use, and storage of documents in multiple formats that are created in an organization. When exchanging electronic documents with non-residents of Kazakhstan, i.e., foreign individuals or legal entities, the legislation of the Republic of Kazakhstan is applied, unless otherwise stipulated by the agreement of the parties.
Language of the agreement	Agreements between individuals and legal entities in Kazakhstan should be in the Kazakh and Russian languages, and in any language acceptable thereto. Agreements with non-residents of Kazakhstan, i.e., foreign individuals and legal entities should be in the Kazakh language and in a language acceptable to the parties.	In the case of multilingual contracts, it is highly recommended to specify the prevailing language. In case the prevailing language is not Kazakh or Russian, the notarized translation of the agreement will be required for state authorities, such as courts and tax authorities.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	Under the Kazakhstan Civil Code, a contract is an agreement between two or more persons, or an agreement between two or more expressions of will. Each agreement may contain many T&C, including those which are recognized as essential by law or are necessary for this type of contract, and it is necessary to highlight those, without which the agreement may not be deemed to be concluded. These are the T&C of the agreement. If a contract is not concluded due to the absence of essential T&C therein, or if an agreement on these T&C is not reached, it will have the same consequences as if the transaction is declared invalid.	Breaching the essential contractual obligations usually cause obligation to pay damages to the other party and a right to terminate the contract prematurely.
Significant imbalance (unfair contract terms)	Article 158.9 of the Kazakhstan Civil Code recognizes the concept of an 'unconscionability in contracts'. An unconscionable contract is a type of contract that leaves one party with no real, meaningful choice, usually due to major differences in bargaining power between the parties, i.e., it is so one-sided that it is unfair to one party. As a matter of law, the court may find that the contract has been unconscionable at the time it was made and, therefore, may refuse to enforce the contract and invalidate it.	
Consideration	Consideration is an essential part of any contract under English law. However, under the Kazakhstan law consideration serves as an essential part only of a commutative contract. There are two types of a contract recognized under the Kazakhstan law: ▸ Commutative contract is the one in which what is done or given by one party is considered as an equivalent to or in consideration of what is done or given by the other. The sale and purchase agreement are of this kind ▸ Gratuitous contract in which one party promises to do something without receiving anything in exchange. Therefore, in such contracts only one person is being benefited. The other party receives no profit or advantage, or any advantage promised as a consideration for it. Gift deed is an example of a gratuitous contract.	
Price: determination, revision and indexing	Performance of the agreement is paid at the price set by the agreement. Considering that there are two types of a contract recognized under the Kazakhstan law, the contract price is a material term only for commutative	Kazakhstan law establish prices (tariffs, rates, rates, etc.) for certain agreements, which in its turn are regulated by authorized state bodies.

	contracts. However, when it is clear that 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 article is usually sold at the time of conclusion of the contract and under similar contractual terms. In other words, there are no exact criteria for determining the price, however, it is suggested that if the contract price is not provided for by the contract, the method of its determination to be precise. Possibility of revisions and indexation of the price can be provided in contracts.	The price may be stipulated in a foreign currency provided that the currency control regulations are observed.
Payment Terms	There is no specific regulation of payment terms under Kazakhstan law. The parties are generally free to set any payment terms under the contract. However, if the contract does not provide the payment terms, there is a general statutory rule stating that the obligation, including monetary, must be performed within a reasonable time after the obligation arises. Unless otherwise provided by the law or an agreement, an obligation that is not fulfilled within a reasonable time, as well as an obligation which term is determined by the moment of demand, the debtor is obliged to fulfill within seven days from the date of the creditor's claim for its performance.	While there is no regulation of payment terms under Kazakhstan law, there are statutory rules on late payment, i.e., in the event of a default in monetary obligations, the other party can claim damages for such default or delay (in case there is a delay), or withdraw from the contract.
Exclusivity Provisions	The granting of exclusivity (whether on the sale or buy side) is generally not prohibited under Kazakhstan law.	Pursuant to the Kazakhstan Entrepreneurial Code, exclusivity must not constitute or result in an anticompetitive practice, i.e., an abuse of dominant position or an anticompetitive agreement. This type of contract is likely to be declared null and void. Therefore, any exclusivity clauses shall be drafted carefully.
Non-compete obligations	The Kazakhstan law prohibits companies from entering into contracts with the purpose of limiting the competition directly or indirectly. Kazakhstan antitrust regulation prohibits anticompetitive agreed practices of market participants including those related to: ▸ Establishing and (or) maintaining prices or other conditions for the sale and purchase of goods ▸ Unjustified restrictions on production or sale of goods ▸ Unreasonable refusal to conclude contracts/agreements with certain sellers (suppliers) or buyers	If the antimonopoly authority finds that such provision adversely triggers competitive requirements, the parties can face substantial administrative or criminal sanctions.

	▸ Applying discriminatory conditions to equivalent contracts/agreements with other market participants	
Governing law (implied content and public order)	According to Article 1112 of the Civil Code, the parties may freely decide on the governing law, which should be expressly included as a clause in a contract. Governing law should be explicitly expressed or directly derived from the terms of the contract. The parties to a contract may choose the governing law for the contract as a whole or for its individual parts. The choice of governing law can be made by the parties to the contract at any time, either at the conclusion of the contract or later. The parties may also agree at any time to change the governing law to the contract. If the parties couldn't decide on the governing law, it will be determined by the courts on the basis of the relevant conflict of law rules.	The rights and obligations under the contract, the subject of which is an immovable property, must be governed by the law of the country where this property is located, and in respect of property that has state registration in Kazakhstan, i.e., the law of the Republic of Kazakhstan.
Judicial powers related to the contract	Adjudication of legal disputes between parties and administration of justice in civil matters is carried out by court. Kazakhstan Civil Code recognizes two types of transactions: ▸ Void contract: A contract will be considered void, for example, when it requires one party to perform an act that is impossible or illegal. In contrast, a void contract is inherently unenforceable ▸ Voidable contract: A voidable contract is originally considered to be legal and enforceable but can be rejected by one party if the contract is discovered to have defects. Therefore, a voidable contract can proceed through the court enforcing the clauses because it is a valid agreement between the two parties	Kazakhstan Civil Code also allows to protect the civil rights through the court or arbitration by means of: ▸ Recognizing rights ▸ Restoring the situation that existed before the violation of the right ▸ Suppressing actions that violate the right or create a threat to violate it ▸ Awarding obligations in kind ▸ Recovering of losses and penalties as well as other methods stipulated by the legislative acts of the Republic of Kazakhstan.

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	The parties may enter into contracts for the following terms: ▸ A fixed term must be enforced until the expiry of the (renewed) term. These contracts can be renewed for consecutive periods, for e.g., for lease contracts ▸ For an indefinite period, these contracts last until the obligations generated by the contract are fully met	The termination of the agreement does not release the parties from liability for its violation that occurred before the expiration of this period.

Prior notice of termination	Termination should take place in accordance with the terms of the contract, such as a specified notice period or expiry of a fixed term. A reasonable prior notice should be not less than one month in advance, unless otherwise is provided by the laws of Kazakhstan.	It is highly recommended that the parties 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.
Termination Clause	According to Article 401 of Civil Code, an agreement may be terminated at the mutual consent of the parties. If the agreement provides for specific grounds of termination of the contract, such grounds must be identified precisely in the contract. If the contract does not provide for specific causes for termination, early termination will be subject to the following conditions: ▸ A serious breach is required ▸ A prior notice should be given to the defaulting party	A contract may be repudiated in the following cases: ▸ Inability to perform an obligation under a contract ▸ Bankruptcy of the other party ▸ Changes or cancellations of the state authority's act on the basis of which the contract was concluded

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Exercise the rights in good faith, reasonably and fairly and follow the rules of business ethics are one of the principles prescribed by the civil legislation, which parties shall observe in exercising their rights and performing their obligations. A party may be liable for damages in the case of breach of these obligations.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	A right (claim) that belongs to a creditor on the basis of an obligation may be assigned to another person under: ▸ A transaction (assignment of a claim) ▸ Transferred to another person on the basis of a legislative act Assignment of the rights or obligations of a contract does not require the consent of the debtor, unless otherwise is provided for by the Kazakhstan laws or an agreement. However, if the debtor has fulfilled its obligations towards the initial creditor (assignor) but has not been properly notified on the assignment, then the new creditor bears the risk of adverse consequences caused to itself. Furthermore, such fulfillment of obligations towards the initial creditor (assignor) will be recognized as proper.	The assignment of a claim under an obligation in which the identity of the creditor is essential for the debtor is not allowed without the consent of the debtor. The rules on the assignment of rights of a creditor to the assignee do not apply to recourse claims.

Hardship clause, i.e., unforeseeable circumstances and renegotiation	Pursuant to Article 361 of the Kazakhstan Civil Code, if performance for one party has become impossible due to unforeseeable circumstances for which neither party is responsible, then neither party, as far as the legislation or the contract does not provide otherwise, has no right to demand performance of the contract. In this case, each of the parties has the right to demand the return of all that it has performed without receiving the corresponding reciprocal performance of obligations.	On the territory of Kazakhstan, the circumstances of the occurrence of hardship are confirmed by Chamber of International Commerce of Kazakhstan LLP. The party cannot be held liable for non-performance or undue performance of its obligations as a result of an event of hardship, unless otherwise is provided for by the contract. 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.
Force Majeure	The definition of *force majeure* has not been stipulated by the Kazakhstan 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. The typical *force majeure* events are war, natural disasters, state of emergency, etc. A *force majeure* clause under the Kazakhstan 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. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	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. On the territory of Kazakhstan, the circumstances of the occurrence of *force majeure* are confirmed by Chamber of International Commerce of Kazakhstan LLP. The burden of proving a *force majeure* event rests with the party invoking it.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	Pursuant to Article 429 of Kazakhstan Civil Code, under the sale and purchase agreement, the seller is responsible for defects in the goods if the party proves that they occurred before the transfer to the party or for reasons that arose before that time. The seller is responsible for defects of the goods even when they did not know about them. The 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. At the same time, these must observe the partially strict legal framework set by the Kazakhstan Code and should, therefore, include: ▸ Reduction of the purchase price	Defects shall be notified by the claiming party to the other party no later than within the warranty period, if there is no warranty, no later than two years from the date of the purchase.

	▸ Provide with the additional supply of missing parts ▸ Cure of the defect by means of repair or replacement ▸ Rescission of the contract or withdrawal and reimbursement the money for the product	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	The party is liable for damages in the case of a 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. Pursuant to Article 359 of the Kazakhstan Civil Code, limitation of liability for intentional breach is deemed to be null and void.	
Alternative dispute resolution procedures (mediation/conciliation)	The notion of mediation was introduced into the legal system of the Republic of Kazakhstan in 2011 when the Law on Mediation was adopted. Mediation is carried out by mutual consent of the parties and upon conclusion of a mediation agreement between them. Mediation should be completed within 30 calendar days upon the execution of the agreement and may be extended to another 30 calendar days, but not more than 60 calendar days in total.	The Mediation Law does not specifically identify mediation as an alternative way for dispute resolution and, in general, the laws of Kazakhstan still provide for a limited use of the term alternative dispute resolution.
Competent jurisdiction, execution of foreign decisions and exequatur	The parties are free to choose the competent jurisdiction for settlement of their disputes, except in certain matters. In principle, parties to an international commercial contract are free to choose the court (or, as the case may be, an 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. There is a statutory requirement that foreign court decisions, arbitration awards should be enforced through Kazakhstan court. Not to mention, recently introduced amendments into the Law on Arbitration aligned it with international conventions and practice, in particular, these amendments reduced the grounds of annulment, as well as prohibits Kazakh courts to examine the substance or merits of an award in annulment or recognition proceedings, which is in line with the New York Convention.	The execution of foreign decisions may be submitted for compulsory execution within three years from the date of their entry into legal force.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition of commercial relationships	Not applicable.	Not applicable.
Temporary measures adopted in relation to the COVID-19 pandemic	On 23 June 2020, during the Government session, the Minister of the National Economy of Kazakhstan, Mr. Ruslan Dalenov announced that there will be no new scheduled tax audits for all business categories until the end of the year, i.e., 31 December 2020.	
Potential invalidity of contracts	Under Article 158.1 of the Kazakhstan Civil Code, a transaction that does not comply with the requirements of the law, as well as a transaction that is contrary to the principles of public order, is voidable and may be recognized as invalid by the court. Thus, if the government's emergency measures have expressly prohibited a certain activity and the contract is entered into after the enactment of such measures, then the contract that violates the emergency measures may potentially be considered voidable.	Since the declaration of the state of emergency by the President of Kazakhstan, there was a number of quarantine restrictions introduced across the nation, including suspension of operations of all organizations and enterprises in the ordinary course.
Arbitration	There has been a number of significant amendments introduced to the Law on Arbitration: ▸ Foreign law can now apply to a dispute involving the Kazakh State ▸ Grounds for refusal to recognise and enforce an arbitral award have been brought in line with the New York Convention ▸ A provision has been added that the court is not entitled to examine the substance or merits of an award ▸ A number of requirements as to the content of an arbitration agreement have been removed ▸ A clarification was introduced on irrevocability of the consent of the authorized body	

Singapore (common law)

Contact(s):

Evelyn Ang

Last updated: 17 August 2020

1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	Singapore law recognizes the concept of good faith. The Singapore courts have taken the view that where parties have agreed under the contract to negotiate in good faith, such clauses should be upheld, but have drawn the distinction between such situations and situations where parties are merely in pre-contractual negotiations. At present, there is no general implied duty of good faith derived from the common law.	
Non-written agreement	A contract generally does not have to be written to be binding under Singapore law, but it is strongly advised that all contracts be in writing for purposes of evidence.	

Signature: counterparts, representation and electronic signature	▸ Counterparts: For business contracts, this is to be agreed upon between the contracting parties.
	▸ Representation: Where the contracting party is a company (and not an individual), the contract can generally be signed by a duly authorized representative of the company, such as a director of the company, on behalf of the company.
	▸ Electronic signature: Under Singapore law, the requirement for a signature is satisfied under the Electronic Transactions Act (Cap. 88) of Singapore in relation to an electronic record if:
	  ▸ A method is used to identify the person and to indicate that person's intention in respect of the information contained in the electronic record
	  ▸ The method used is either:
	  ▸ As reliable as appropriate for the purpose for which the electronic record was generated or communicated, in the light of all the circumstances, including any relevant agreement
	  ▸ Proven in fact to have fulfilled the functions described in above paragraph, by itself or together with further evidence
		▸ Counterparts: For documents, such as board resolutions approving such agreements, this will depend on whether the constitution of the company allows for this. The constitutions of most companies allow for signing in counterparts.

Contracts concluded electronically	Contracts may be concluded electronically under Singapore law.	A scanned signed agreement 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.
Language of the agreement	Whilst the language of the agreement may, in principle, be agreed on between the parties, for commercial contracts, it is standard for English to be used.	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 the forms, Terms and Conditions (T&C)	The T&C of a contract are to be agreed upon between the contracting parties. If the standard T&C of the seller or buyer have been incorporated into the relevant contract or order forms, then they will apply.	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.
Significant imbalance (unfair contract terms)	Singapore law does not generally regulate an imbalance of bargaining power between commercial parties.	
Consideration	As a general rule, a promise contained in a contract is not enforceable against the promisor, unless it is supported by consideration. Consideration is something of value (as defined by the law) requested for by the promisor and provided by the beneficiary in exchange for the promise that the beneficiary is seeking to enforce against the promisor.	If there is no consideration involved, parties could consider executing the agreement as a deed instead.
Price: determination, revision and indexing	This is to be agreed upon between the contracting parties. However, under Singapore's insolvency laws, under certain situations such as one contracting party becoming, inter alia, subsequently wound up, a transaction may be unwound if the value of the consideration that such party received under the transaction was significantly less than the value of the consideration that it provided.	
Payment Terms	This is to be freely agreed upon between the contracting parties. There is no	

	mandatory provision governing payment terms.	
Exclusivity Provisions	The grant of exclusivity (whether on the sale or buy side) is permissible under Singapore law.	There is no statutory limit to the number of years such exclusivity provisions may be applicable for. However, parties should be careful to ensure that the exclusivity does not result in anticompetitive practice that breaches the Competition Act (Cap. 50B) of Singapore.
Non-compete obligations	This section will only deal with commercial contracts and not employment contracts. All covenants in restraint of trade are *prima facie* void unless the party seeking to rely on them can show that the covenant is: ▸ Reasonable in the interests of the parties ▸ Reasonable in the interests of the public In addition, there must be a legitimate proprietary interest to be protected by the covenant.	Parties should be careful to ensure that the agreement does not result in anticompetitive practice that breaches the Competition Act (Cap. 50B) of Singapore.
Governing law (implied content and public order)	Parties are free to choose their governing law, provided that such choice is *bona fide*, legal, and not contrary to public policy. In addition, it is not possible to contract out of certain statutory laws (e.g., employment law or immigration law).	
Judicial powers related to the contract	Under Singapore law, a court interpreting a contract must do so based on the intention of the parties at the time they entered into the contract. This will be ascertained based on all the relevant objective evidence.	

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: 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 in accordance with its terms The term of the contract is to be agreed upon between the contracting parties.	
Prior notice of termination	This is to be freely agreed upon between the contracting parties. There is no mandatory provision governing minimum prior notice.	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 Clause	This is to be freely agreed upon between the contracting parties. There is no mandatory provision governing early termination.	If the contract provides for grounds for termination for cause, the clause should identify precisely the situations that are considered valid grounds for termination.

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	Singapore law recognizes the concept of good faith. The Singapore courts have taken the view that where parties have agreed under the contract to negotiate in good faith, such clauses should be upheld, but have drawn the distinction between such situations and situations where parties are merely in pre-contractual negotiations. At present, there is no general implied duty of good faith derived from the common law.	
Assignment of a contract, *Intuitu personae* clause, change of control or assignment clause	Whether or not a contract is assignable would depend on what the parties have contractually agreed, such as whether such contract allows such assignment to be done. Contractual clauses providing for a change of control restrictions are valid. In the absence of such a clause, a party may not oppose the other party's change of control.	
Hardship clause, i.e., unforeseeable circumstances and renegotiation	Singapore laws do not automatically allow a contract to be renegotiated or terminated in the event of hardship. Parties that wish to be able to do so must specifically include such a clause in their contracts. However, the occurrence of an unforeseeable event may trigger the common law doctrine of frustration. Frustration occurs when, without the default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. In such situations, the parties to the contract are automatically discharged from their contract by operation of law.	
Force Majeure	Depending on the language of a *force majeure* clause, such a clause could excuse one or both parties from performance of their obligations under the contract upon the occurrence of certain events or circumstances. The precise construction of the *force majeure* clause is very important because it defines the	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 set out clearly the consequences upon the occurrence of such

	precise scope and ambit of the *force majeure* clause. Generally, the parties would not be able to rely on a *force majeure* clause where the event in question is not covered by the *force majeure* clause. Please refer to the additional tracker created to help you follow changes about *force majeure*, on our dedicated ey.com page. (Please refer to the link provided in the Introductory pages).	events or circumstances.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	This is to be freely agreed upon between the contracting parties. There is no mandatory provision governing warranty of latent defects.	

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	Under Singapore law, it is possible to limit liability for breaches of a commercial contract. However, exclusion or limitation clauses are inapplicable in certain cases. For example, it is not possible to exclude or restrict liability for death or personal injury resulting from negligence.	
Alternative dispute resolution procedures (mediation/conciliation)	This is to be agreed upon between the contracting parties.	
Competent jurisdiction, execution of foreign decisions and exequatur	Parties to a commercial contract are free to choose the jurisdiction in which any dispute relating to the contract should be heard. In principle, foreign judgments can be recognized and enforced in Singapore under the common law rules or under statute. However, whether the judgment can actually be recognized or enforced in Singapore will depend on various factors. In some cases, foreign judgments from superior courts of law of certain jurisdictions have to be registered in Singapore to be enforced. The regimes are set out under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264) of Singapore (RECJA) and Reciprocal Enforcement of Foreign Judgments Act (Cap. 265) of Singapore (REFJA) of Singapore. In 2019, the REFJA was amended (2019 REFJA) to streamline Singapore's legal framework for the statutory recognition and enforcement of foreign judgments in civil proceedings to operate a single statutory regime under the 2019 REFJA.	

	At the same time, the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019 (RECJA Repeal Act), which repeals the RECJA, was passed but is not yet in force. Once the RECJA Repeal Act is in force, the 2019 REFJA will be the main statute governing the recognition of foreign judgments in Singapore.	

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Not applicable.	Not applicable.
Temporary measures adopted in relation to the COVID-19 pandemic	COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020) of Singapore (CTMA)	The CTMA provides temporary relief from the inability to perform certain types of contracts by imposing a moratorium on commencing or continuing an action in court or arbitral proceedings for such inability, where, inter alia, the inability to perform the contract is to a material extent caused by the COVID-19 pandemic. Contracts covered by the CTMA include, amongst others, event contracts, tourism contracts, and construction contracts. These protections are set to last for six months from 20 April 2020 but may be extended (or shortened) by the Minister for Law.
Termination of contract based on insolvency of counterparty	Insolvency, Restructuring and Dissolution Act,2018 (No. 40 of 2018) of Singapore (IRDA)	The IRDA is an omnibus legislation that consolidated Singapore's personal and corporate insolvency and debt restructuring laws into a single piece of legislation. In certain situations, the IRDA restricts the ability of a party to terminate or amend certain agreements with a counterparty just because the counterparty is insolvent.

Turkey (civil law)

Contact(s):

Can Gecim

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1. Formation

Clauses and obligations	Main characteristics	Additional remarks
Pre-contractual obligation: good faith and information obligation	The principle of freedom of contract has pre-contractual aspects. In general, according to the principle, parties are free to conclude or not to conclude a contract as well as free to negotiate and conclude the contract on their own terms. The parties are required to act in accordance with the principle of good faith (also known as *culpa in contrahendo*) which includes the duty to bargain in good faith, to negotiate with care and not to lead the other party to act to its own detriment during negotiations.	There is no clear provision regulated in Turkish law regarding the responsibilities of the parties in the process of establishing the contract. At this point, pre-contractual obligation is met with *culpa in contrahendo* and the source of several provisions in Turkish law is that culpa *in contrahendo* principle
Non-written agreement	A contract is concluded when parties have declared tacitly or explicitly their coherent and reciprocal mutual understandings on essential aspects of the contract. Therefore, the validity of the contracts is not subject to any restriction under principle of freedom of form unless otherwise provided in the relevant Turkish legislation and as long as they are not unlawful.	For e.g., of specific written form requirements: ▸ It is obligatory to conclude contracts of sale of immovable property before the title deeds registry office in a written form. If the contract lacks the statutorily required format, the contract will be deemed to be invalid ▸ The Civil Procedure Law (Law No.6100) establishes evidentiary thresholds for amounts of debt which can be proved by witness testimonies. In this regard, any transaction with an amount over ₺4,480 (for the year of 2020) must be evidenced in a written format
Signature: counterparts, representation and electronic signature	▸ Counterparts: At least one copy of the contract must be signed by the parties themselves/authorized representatives of all parties to the contract either as counterparts or at the same agreement. ▸ Representation: According to Turkish Code of Obligations numbered 6098 (TCO) a duly authorized representation (Agency) composes legal consequences directly for the principal when an agent informs the counterparty regarding the representation. ▸ Electronic signature: According to law on Electronic Signatures, electronic signatures give rise to the same consequences with non-electronic signatures. However, it is valid for the ordinary written validity condition. On the other hand, electronic signature cannot be used for the contract which shall be concluded in official form such as contracts of sale of immovable property.	Under Turkish law signature is used to describe hand-written marks that are eligible for identifying their signatories. In practice, representative of contractual parties (real persons or legal entities) are expected to provide signature circulars and/or power of attorneys, evidencing that they have authorization to bind their principals. Additionally, managers and members of the board of directors are required to sign and execute documents under the corporate seal per Turkish Commercial Code numbered 6102 (TCC). According to the Law on Electronic Signatures (Law

		No. 5070) secure electronic signature tokens can be obtained from authorized service providers. Signatories can be identified by their unique electronic signatures and it can be used to determine whether the document is rectified or amended after the date of signature.
Contracts concluded electronically	No form of condition is stipulated for contracts. Thus, the contracts can be concluded electronically as well with the electronic signatures except contracts which shall be concluded in official written form. A secure electronic signature has the same legal effects as a handwriting signature.	However, concluding a contract electronically is valid for the ordinary written validity condition. On the other hand, contract which shall be concluded in official written form such as contracts of sale of immovable property cannot be concluded electronically.
Language of the agreement	According to Law on Obligation to Use Turkish Language in Economic Enterprises (Law No. 805), it is obligatory to use Turkish language in correspondences relating to all kinds of transactions, agreements and accounts among Turkish business enterprises and companies. This obligation applies to foreign companies in relation to their correspondences and agreements with Turkish companies and businesses (regardless of their shareholder structures, their shareholders' or affiliates' nationalities).	In practice, cross-border contracts are drafted in dual languages which clearly states that the Turkish version shall prevail in the event of a dispute regarding the interpretation of the contract as per the law. Both foreign companies and Turkish companies are required to use Turkish language in their communications, transaction and correspondences with governmental offices and keep their books and accounts in Turkish. However, the foreign companies are not obligated to execute all the contract with Turkish companies in Turkish language.

2. Content

Clauses and obligations	Main characteristics	Additional remarks
Battle of the forms, Terms and Conditions (T&C)	In principle, contracts which are prepared by one of the parties within the scope of freedom of contract and submitted for counter party's signature are governed by Article 20-25 of TCO and are called General Terms and Conditions (GTC). An article's scope, form or content are irrelevant as per to its' qualification to be deemed as GTC. GTC are deemed valid if the counter party has been informed on the existence and context of such term by the other party and has duly accepted the relevant terms. Otherwise, such terms are deemed as unwritten, enabling the courts to	If any GTC are deemed unwritten, the contract is deemed to be valid and binding upon the parties and the rest of the contractual terms apply. In addition, GTC which are unsuitable to the contract in question or to the nature of the transaction are also deemed unwritten. GTC providing unilateral authority to the party who has drafted the GTC to rectify or modify a contract

	ignore them. There is not a prevalent battle of forms rule, enabling courts to make rulings according to the nature of articles which are deemed unwritten. According to the Article 2 of the Civil Code (Law No.4721), in case parties have agreed upon all essential terms, the contract is deemed to be concluded, even if the secondary terms have not been negotiated. The court determines the secondary terms with due regard to the nature of the transaction, if the parties fail to reach an agreement thereof.	to the detriment of the counter party are deemed to be invalid. Since Turkey is a contracting state of the Vienna Sales Convention (officially the United Nations Convention on Contracts for the International Sales of Goods) knock-out rule may apply in accordance with the convention.
Significant imbalance (unfair contract terms)	An equilibrium between the performances of parties is a recognized concept under Turkish law (principle of good faith). If the balance between the performances of parties in an agreement may be disrupted intolerably to the detriment of one party as a result of unforeseeable and extraordinary events after concluding a contract, such party (debtor) may request from the court to adapt the contract to the new circumstances if it has not yet performed its' contractual obligation or performed but reserved the right to exercise legal rights. Alternatively, the debtor may request to rescind the contract where such adaptation is not possible.	This interpretation of the principle of good faith is deemed to reduce the unfavorable consequences of *pacta sunt servanda* (the rule that agreements must be kept and honored). As an example, according to Article 480 of TCO, fixed fee of a construction contract may be amended because of unforeseeable and extraordinary circumstances to the detriment of the debtor. However, in practice, to obtain an adaptation verdict is quite difficult since courts apply different thresholds for foreseeability and ordinary with regards to merchants. Hence, it is advised to include and explicitly draft adaptation clauses in commercial contracts.
Consideration	A consideration as in a common law jurisdiction where each of the parties must furnish by consideration by giving the counterparty something or do a favor as exchange, is not essential to conclude a contract.	In case, their agreement lacks a written format, disputes may arise regarding the price. Contracts or deeds lacking consideration may not preclude parties from tax, duties and other charges such as transaction charges.
Price: determination, revision and indexing	Generally, the price is an essential term of the contract and it must be either determined or negotiable. If the contract lacks an explicitly set price, it is important to concisely set out circumstances and methods to adequately determine the price under the contractual terms.	It is quite exceptional in practice to obtain an adaptation verdict for contractual prices in terms of hardship, since the courts apply prudent businessman rule and expect merchants to act with care of a reasonably prudent person while negotiating and concluding a contract. As a result, the merchants are expected to foresee the possibility of inflation and currency devaluations.

	A hardship event can be used as grounds for judicial intervention if a contract lacks explicit stipulation with regards to revision of the contractual arrangement. Under Article 138 of TCO, in the case of a hardship, a contract can be rescinded or terminated in full or partially in case the debtor has not yet performed or performed but reserved the right to exercise legal rights. If the contract is terminated or rescinded by judicial intervention, the opposing party may request to be reimbursed under unjust enrichment. This article also applies to monetary debts for foreign currency. According to the TCO the price may be stipulated in foreign currency or by price indexing. However, economic conditions may result in radical increases for its' TRY equivalent because of devaluation or plunges in currency values. According to Article 99 of TCO if a contract does not explicitly stipulate that the price shall be paid in a foreign currency, the debtor may reimburse its' TRY equivalent by effective exchange rate on the actual date of the payment.	Under the Circular numbered '2018-32/51' and announced in the Official Gazette on 6 November 2018, certain type of contracts and contractual parties are restricted in terms of price. For instance: ▸ Parties which are domiciled in Turkey shall not conclude contracts in foreign currency or via price indexing for certain type of contracts ▸ Parties which are domiciled in Turkey shall not conclude contracts in foreign currency or via price indexing for contracts which will be performed in Turkey The circular also stipulates exemptions from prohibitions in which parties may conclude such price terms.
Payment Terms	Payment terms are advised to be clearly drafted because they may provide contractual consequences and remedies in the event of the default payment. According to TCO, in the event of a default, the creditor can claim default interest, damages if the default interest is an inadequate remedy. Additionally, the other party may exercise the right to rescind the contract, if it is to the party's detriment and the party cannot be reasonably expected to keep the agreement. According to Article 1530 of TCC, debts arising from sales of goods and procurement of services shall be paid in 60 days from the date of delivery and acceptance of goods and services unless explicitly agreed differently. It should be noted that parties may be agreed on a longer term unless it creates an unfair situation against the creditor. However, if the creditor is a small-scale enterprise or is an agricultural or husbandry business or the debtor is a large-scale enterprise, the payment shall be made in 60 days.	In case the party (creditor) has not yet performed their obligation under the contract, it may also exercise its' right to withdraw performances until the counterparty (debtor) has performed its' obligation.
Exclusivity Provisions	Exclusivity may be agreed between parties. Types of exclusivity provisions such as territory and/or the group of customers can be added to the agreement.	In case exclusivity agreement is violated, it may constitute a non-performance and the creditor may exercise its' rights under the contract or under the TCO.
Non-compete obligations	A non-compete clause may be provided in a contract or a non-compete obligation may arise from the law. For instance, an agent is expected to act with loyalty and non-compete obligation arises out of TCC. It will apply during the term of contract and after the termination of the contract, if not otherwise agreed upon by the parties.	In practice, a non-complete covenant includes the explicit terms and conditions, duration, remedies and financial penalties in the case of infringement. Non-compete clauses in employment agreements must be in written format and reasonable in terms of duration, scope and territory in order to not prevent

		the employee from earning a living.
Governing law (implied content and public order)	Parties are free to choose applicable law to their contractual arrangements with foreign elements (i.e., the place of performance, the nationality of parties, domicile, habitual residence). Turkish law will govern the contract even if there is a choice of law clause in case: ▸ The provision of the foreign law to be applied is openly contrary to the public order of Turkey ▸ If the applicable foreign law provisions cannot be ascertained despite all efforts There are certain limitations to the freedom of choice with regards to governing law: ▸ The parties cannot choose a foreign law to be applied in order to prevent the enforcement of their contract ▸ The Turkish law shall apply to certain type of contracts, such as the sale of immovable property	If the contract lacks an applicable law clause, the Turkish courts shall apply Turkish International Private and Procedural Law ascertain the applicable foreign law as per the foreign elements. According to the Turkish conflict of laws rules if the foreign law which has been designated by parties to govern the contract has two or more regional units and these units have different legal systems, the regional law to be applied shall be determined according to the conflicts of law rules of that state. In case the regional law cannot be determined, the regional law which is most closely connected with the dispute shall govern.
Judicial powers related to the contract	The contract is deemed as a mutually agreed, and binding arrangement between parties. According to the Turkish law a contract will be deemed to be concluded when parties declare their reciprocal and mutual agreement upon terms. Their declaration can be implied or explicit. In other words, contracts can be concluded as implied agreements where parties act and perform their obligations without a written or oral contract if they have mutual and reciprocal agreements. According to Article 19 of TCO, a contract shall be interpreted in accordance with their genuine intents. In this respect, the judge shall evaluate circumstances of the particular case in order to ascertain the authentic will and intent of the parties acting in good faith.	In practice it is quite difficult to ascertain parties' reciprocal and mutual intents in concluding contracts for interpretation. Therefore, general principles which are stipulated in the Civil Code (Law No. 4721) shall apply to determine the scope and content of parties' agreement. (i.e., principle of good faith, prohibition of abuse of power, protection of the weaker party).

3. Duration and Termination

Clauses and obligations	Main characteristics	Additional remarks
Term and tacit renewal	The parties are free to agree upon the duration and reasons of early termination under the freedom of contract. The parties may agree on the ex officio renewal of the contract duration. Furthermore, the contract can be terminated by either party by complying with the notice period, such notice can be designated in the contract.	The contracts may be tacitly renewed according to the parties' will. In terms of conflict, the courts decide whether an act of performance and acceptance of performance of the parties can be deemed as tacit renewal.

Prior notice of termination	In principles, both parties are entitled to terminate the contract with a prior notice. Under Article 18 of TCC, termination notices among merchants shall be made via Turkish notary public, certified mail, secure electronic signatures or by telegram. Turkish law may provide for statutory termination notification period for certain contract types (i.e., lease agreements, labor contracts) based on the principle of the protection of the weaker party.	For instance, the relevant laws determine the minimum period of termination notice to be given to the other party for termination of labor and lease contracts. Generally, it is preferred to make written notices and send them via certified mail or through a Turkish notary public or by hand delivering them in order to avoid disputes. For termination of labor contracts, parties may also give notice via acknowledgement receipt. If contractual or statutory provisions regarding termination notice or unjust termination are infringed, parties may be obliged to remedy damages, pay contractual penalties or pay in lieu of notice.
Termination Clause	In principle, parties may agree upon reasons for termination. However, even if the parties did not agree upon the termination causes, law enables the termination of a contract. If no term is provided for the duration of the contract or for reasons of termination, the contract can be terminated if it is deemed to be unreasonable by the counterparty to honor the agreement. For instance, under Article 121 of TCC, an agency agreement can be terminated if there are valid and just reasons, even if it is a fixed-term contract.	If the contract is terminated without a just cause, the non-terminating party may request indemnification for early termination. According to Turkish law, significant changes as a result of unforeseeable and extraordinary events (i.e., hardships) and substantial breaches of a contract where the other party cannot be reasonably expected to be bound by the contract can be deemed as valid and just reasons. It also must be noted that there may be statutory conditions for just and valid reasons for contract termination (i.e., labor contracts).

4. Performance and non-performance

Clauses and obligations	Main characteristics	Additional remarks
Obligation to act in good faith	According to the Article 2 of Turkish Civil Code, every person must act in good faith while using their rights and obligations. The principle of good faith also applies to pre-contractual arrangements.	Principle of good faith may be also used to fulfill contractual gaps and in interpretation of contracts. The principle of good faith can also be used for a ground for judicial intervention.
Assignment of a contract, *Intuitu*	In order to assign a contract, a valid and transferable contractual relationship	Validity of the assignment of the contract (in full or

personae clause, change of control or assignment clause	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. Furthermore, a party may oppose if the contract has a clause which bans change of control. Change of control clauses are generally included in commercial contracts (especially in Shareholder Agreements, Joint Venture Agreements or Agency contracts) enabling parties to ask for remedies (including the right to terminate the contract) in the case of infringement and request penalties if the transferee does not inform the counterparty before the change of control.	partially) requires the assignment to comply with the statutory required format (if applicable). Assignment of debt or a receivable (transfer of claims) is a typical form of partial assignment. In order to assign a contractual debt to third party, consent of the creditor must be obtained. However, unless otherwise stipulated in the contract or by law, a receivable (money or performance) can be assigned to a third party, without obtaining the consent of the debtor.
Hardship clause, i.e., unforeseeable circumstances and renegotiation	The hardship clause covers the following situations: ▸ Occurrence of an unexpected and unforeseeable event during the performance of the contract (the event must be unforeseeable and be out of ordinary at the time of the contract conclusion, thus not provided for during negotiations) ▸ The event must be beyond the control of the parties ▸ The event must cause unreasonable burden or detriment to the debtor thus disturbing equilibrium between the performances ▸ The hardship clauses can be used as grounds for judicial intervention if their contract lacks explicit stipulation with regards to adaptation of the contractual arrangement. Under TCO, in the case of a hardship, a contract can be rescinded or terminated in full or partially in case the debtor has not yet performed or performed but reserved the right to exercise legal rights. If the contract is terminated or rescinded by judicial intervention, the opposing party may request to be reimbursed under unjust enrichment.	However, Turkish courts apply different principles regarding the commercial contracts with respect to ascertain whether the event constitutes hardship. It must be noted that under Turkish law, merchants are expected to act with prudence and care when doing business. In this regard, an event that would otherwise constitute hardship may be deemed as foreseeable or ordinary. Hence, the definition of a hardship and contractual remedies shall be clearly drafted in the contract.
Force Majeure	TCO neither includes any definition nor consequences of *force majeure*. It is a topic that is mostly addressed by the Supreme Court decisions and the doctrine. *Force Majeure* events are considered as exceptional events beyond control of the parties that render of a performance somewhat impossible. *Force Majeure* events can arise out of social, legislative or natural reasons. There is also case law that deems epidemics and pandemics as *force majeure* events. However, even if an event constitutes a *force majeure* event under a contract, it does not mean it will also be a *force majeure* for others. In this regard, it is generally accepted that all contractual disputes should be ascertained per the nature of obligation and its' particularities. Under TCO, in the case of a *force majeure* event, a contract can be rescinded or terminated partially or fully. If the contract is terminated or rescinded by one of the parties, the opposing party may request to be reimbursed under unjust enrichment. It must be noted that TCO does not provide for suspension of	It must be noted that monetary obligations (payment) are not deemed to be rendered impossible by *force majeure* events. If there is a *force majeure* clause in the contract, then the procedure described in the clause should be followed and legal consequences arise under the contract. If there is no a *force majeure* clause in the contract, under TCO, the party that is unable to perform its' obligation is not obliged to perform the contract as well as endure the consequences of non-performance. In other words, the creditor cannot request specific performance, default interest, or damages or any penalty for breach of contract. The

	performance. Hence, such a mechanism must be included in contractual provisions if the parties agree to it.	creditor has the right to withdraw its' own performance or request to be reimbursed if it has already performed. Additionally, the debtor is obliged to notify the creditor immediately.
Warranty of latent defects (specific to sales between corporate parties, not consumers)	The term of warranty is usually agreed upon between the contracting parties. Under Article 23 of TCC, merchants shall inspect goods for any defects and notify the counterparty within eight days after receiving them. For latent defects, the statutory period is two years after noticing the defect.	The parties may also agree on a release from liability. However, this agreement will be invalid if it is designed to cover serious defect of the seller, intentional and gross negligence of the seller or when the agreement is not reasonable and restrained. Therefore, the balance between the parties of the said agreement should be provided. As an example, the seller cannot be released from all his liability within the agreement.

5. Dispute

Clauses and obligations	Main characteristics	Additional remarks
Limitation of liability (between corporate parties, not consumers)	TCO provides statutory limitations of liability (statute of limitations). Statute of limitations is 10 years for contractual liabilities under Article 146 of TCO unless the relevant law stipulates otherwise. According to Article 147 certain contractual arrangements are subject to five-year statute of limitation period. (i.e., lease, and debts arising from partnerships, contracts between the principal and its' agents, attorneys, managers and auditors). The parties may provide clauses that restricts liability with regards to the scope. However, Article 115 of TCO provides that the following clauses shall be null and void: ▸ Clauses that state the debtor shall not be liable for its' gross negligence or misconduct ▸ Prior agreements that state the debtor shall not be liable for any debts in relation to service contracts ▸ Prior agreements providing that the debtor shall not be liable for its' slight negligence, regarding services, crafts and professions (i.e., attorney ship agreements) that require expertise or a permit	However, according to the Article 72 of TCO, if an act constitutes as a tort and a crime under the Turkish Criminal Code, the statute of limitation of criminal actions shall apply if it provides for longer limitation.
Alternative dispute resolution procedures (mediation/conciliation)	Firstly, under Turkish law, agreements for mediation and conciliation are enforceable Such agreements can be concluded with the contract itself or after a dispute has arisen or during a trial.	In some certain disputes, the arbitration clauses are not applicable. According to Article 408 of Civil Procedure Law

	Commercial disputes are subject to mandatory mediation procedure before filing a suit in Turkish courts even if the contract lacks an article thereof. Consequently, if parties did not fulfill the mediation phase, the case shall be dismissed on procedural grounds before proceeding into the merits. Parties may agree for a mediator to be assigned to their dispute before the trial as well as during the trial. In this regard, parties also are free reconcile through a mediator during any stage of a trial. If parties agree to try mediation for solving their dispute during a trial, court is most likely to suspend the trial if parties declare their intentions to apply for mediation. Secondly, most international commercial contracts include an international arbitration clause. While drafting such clauses, parties are advised to consider facts that may affect the enforceability of clause (i.e., ambiguity) and nature of the dispute. Generally model arbitration clause of the designated arbitration institute is preferred. A valid arbitration clause is binding upon parties to solve their disputes via arbitration. In other words, when parties opt for arbitration as an alternative dispute resolution, Turkish courts will refrain from proceeding into merits and dismiss the case on procedural grounds.	(Law No.6100), disputes arising out of rights in rem over immovable property, and disputes which are not subject to the will of the parties, are not arbitrable. Furthermore, Law on International Arbitration (Law No. 4686) provides that disputes related to subjects that are outside the scope of parties' will are non-arbitrable. Pursuant to the law, the defendant can raise objection regarding non-arbitrability.
Competent jurisdiction, execution of foreign decisions and exequatur	Foreign civil court judgements may be recognized and enforced through an exequatur. Act on Private International Law and Procedural Law (Law No.5718) governs the conditions for eligibility for exequaturs. According to the law; the following conditions apply: ▸ Existence of an agreement, on a reciprocal basis between the Republic of Turkey and the state where the court decision is given or a de facto practice or a provision of law enabling the authorization of the execution of final decisions given by a Turkish court in that state ▸ The judgment must have been given on matters not falling within the exclusive jurisdiction of the Turkish courts or, in condition of being contested by the defendant, the judgment must not have been given by a state court which has accepted themselves competent even if there is not a real relation between the court and the subject or the parties of the lawsuit ▸ The judgement must not be explicitly contrary to public order With regards to the recognition and enforcement of arbitral awards, Turkey is a signatory state to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (also known as New York Arbitration Convention). Recognition of foreign arbitral awards is also subject to the exequatur process as per the Law No. 5718.	A foreign court decree serves as a definitive evidence or final judgment as of the time the foreign court judgment is recognized.

6. Recent legislation and trends, including temporary measures adopted in relation to the COVID-19 pandemic

Clauses and obligations	Main characteristics	Additional remarks
Prohibition in commercial relationships	Not applicable.	Not applicable.
Temporary measures adopted in relation to the COVID-19 pandemic	Turkish Ministry of Commerce has announced an advice regarding corporate meetings. Law numbered 7244 on Reducing the Effects of New Corona Virus (COVID-19) Epidemic on Economic and Social Life and Amendments to Certain Laws ('Law numbered 7244') has come into effect. In addition to the above, the Turkish government has also introduced specific bans, or the condition of prior approval regarding the importation of the certain goods. In order to take precautions against the spread of the COVID-19 pandemic requests regarding the payment of debts, claiming payments under negotiable instruments, seeking the enforcement of judgements, enforcing a lien, attaching a property, foreclosing and similar actions conducted by debt enforcement offices or bankruptcy offices were suspended from 22 March 2020 until 15 June 2020. Pursuant to Article 330 of Law on Debt Enforcement and Bankruptcy, the Presidential Decree suspended the initiation of enforcement and bankruptcy claims across the country. Additionally, Law No.7226 came into effect that all relevant statutory periods or periods that has been determined by the judiciary, debt enforcement offices and bankruptcy offices regarding enforcement of decisions, provisional attachments and seizures were tolled between 22 March 2020 to 15 June 2020. Civil actions hearings were postponed until 15 June 2020 (including this date).	There are no prohibitions towards companies to convene their own general assembly meetings, however the Board of Directors should take into consideration the risks associated with violation of social distancing rules. Accordingly, as of March 2020, companies may postpone a planned and announced general assembly meetings directly by submitting a petition to the relevant Trade Registry which will announce the postponement. The Board of Directors should consider if convening such meetings will be safe for the participants. If the articles of association for a company provides for electronic board or general assembly meetings and companies have adequate IT infrastructure, the companies may proceed with electronic assemblies and meetings.

	Periods in relation to mediation proceedings and trials have also been suspended. However, mediation proceedings could be conducted if the applications are made before the suspension period and if both parties consents. Several payments and filing dates for taxes and statements have been postponed. However, company signatory circulars may be crucial for the continuity of business. Such circulars require Board of Directors resolutions, petition to Trade Registries, and a signature circular to be issued by a Notary Public, which may be delayed due to the outbreak.	Certain general assembly resolutions were prohibited by a provisional article to TCC effective as of 17 April 2020 (i.e., distributing dividends) until 30 September 2020 and the President of the Turkish Republic is authorized to shorten or extend this term by up to three months. ▸ Companies cannot distribute dividends more than 25% of their net profit regarding the 2019 fiscal year ▸ Companies cannot distribute past years' retained earnings or free reserve funds ▸ The General Assemblies of companies cannot authorize the Board of Directors to distribute advance dividends; and even if the General Assembly adopted a resolution to dividend distribution for the 2019 fiscal year, if the shareholders have not yet been paid or if partial payments have been made, companies have to postpone dividend payments more than 25% of their net profit regarding the 2019 fiscal year (until 30 September 2020). However, the communique regarding the application of the provisional article allows distribution of dividends subject to certain conditions and the prior approval of the Ministry of Commerce.
Online Services and Remote Work Models	With the emergence of unprecedented consequences of the COVID-19 pandemic such as travel restrictions and social distancing, public sector and the private sector have adapted their work models in accordance with remote working arrangements and online service models. In accordance with the advice of Ministry of Health, many government agencies (i.e., Trade Registries and courts) have temporarily decreased their number of staff via permitting their staff who are pregnant, over 65 or having chronic health conditions to take administrative leaves. Consequently, to prevent queues, they limited the number of visitors inside government agencies and number of appointments per day. Accordingly, many visitors are directed into online services and service hotlines if possible, rather than in-person applications and visits.	

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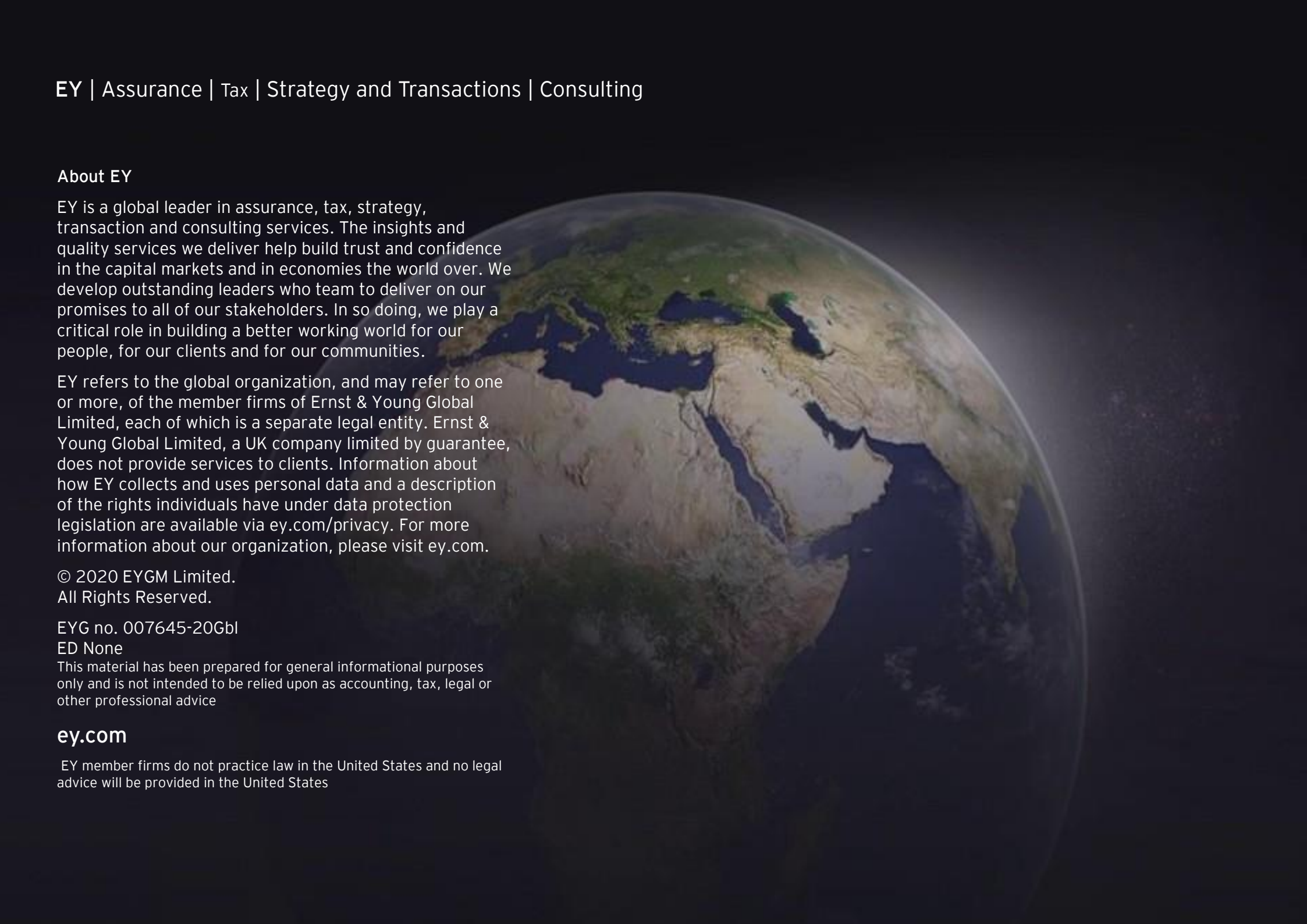

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