The Law Firm Network

FAR-REACHING LEGAL SOLUTIONS

CROSS-BORDER CONTRACT GUIDE

2017

LEGAL NOTE

Information contained in this guide is general information and not intended to constitute legal advice by The Law Firm Network, the editor, the authors or the attorneys of the contributing law firms and they expressly disclaim any such interpretation by any party. Specific legal advice depends on the facts of each situation and may vary from situation to situation. Should you require legal advice, you should seek assistance of counsel.

PREFACE

Editor's Note

In the modern globalized economy, companies engage in business transactions around the world and contracts are entered into with business partners across jurisdictions. Globalization creates challenges to companies, including diverse legal challenges. Not only that the legal systems and the legal concepts applicable even to such standard process as an international sales contract may vary significantly from country to country. Also, what may be common practice in one jurisdiction may be inappropriate in another jurisdiction. Therefore, knowledge of the legal system and trade usages may be decisive for achieving success in negotiations.

This country-by-country guide aims at providing a practical introduction for all those responsible persons dealing with cross-border contracts by giving a general description of the legal system at the beginning of each country chapter and dealing with certain issues often faced in (cross-border) contracts. While the emphasis is on the setting of a sales contract, the main issues covered may also become relevant in other settings. This guide may give an indication if and in which manner an issue is usually dealt with under local law in each of the jurisdictions. This may help the reader to achieve an appropriate outcome in its business negotiations.

It is important to note that the challenges faced by the parties of a cross-border contract may vary significantly. Therefore, the persons responsible are well advised to seek independent professional advice to identify potential pitfalls at an early stage.

Kai Graf v. der Recke
Partner, Haver & Mailänder

Executive Director's Note

As the Executive Director of The Law Firm Network (LFN), I am a "networker" by nature. So I am always delighted to see if I can be of assistance to anyone anywhere. While I no longer practice corporate law, I believe I am attuned to the needs of commerce internationally.

With this in mind, please feel free to avail of my help or assistance in seeking out the answers you are looking for or who to contact for independent legal or other professional services anywhere- either from LFN's Member Countries or elsewhere.

LFN is a rapidly growing global network of mid-sized corporate law firms, basically one per country, admitted to LFN usually on Word of Mouth recommendation preferably by satisfied clients of existing Members. LFN has doubled in number to 60 countries since the 2008 global financial crash and I have good contacts in over 140 countries.

I hope this Guide is of help.

Anthony M. D. Kirwan
Executive Director, The Law Firm Network

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AUSTRALIA

1. Introduction

Australia's legal system finds its foundations and structure in the English legal system. Notably, it is a common law system.

Australian law has several levels which include the laws of the Australian Constitution, laws enacted through Federal, State and Territorial parliaments and the common law itself. Regulative bodies operate in Australia and their policies also offer an additional layer of control.

Legislation is more powerful than the common law and prevails over it if there is any inconsistency.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Parties to a cross-border contract under Australian law are at liberty to determine which law will apply to their contract. Commonly the law decided upon will be one of the home states of the contracting parties or a neutral state.

If Australian law is selected contracting parties should be weary of the impact of the *Goods and Services Tax* (GST) upon their transactions. Generally-speaking international transactions involving goods will be caught by the GST but some international service based offerings may be exempt (i.e. if an Australian service provider had provided services to a foreign business).

2.2 Inclusion of the UN Sales Convention

Australia is a signatory to the *United Nations Convention on Contracts for the International Sale of Goods* (the Convention). The Convention applies throughout Australia.

The Convention applies unless parties expressly exclude it. The intent of the Convention is to provide a fall back option for parties in the event that their contract is not customized to suit cross-border transactions.

The Convention has been designed to manage cross-border transactions and certainly has its advantages. One great feature of the Convention is its flexibility. Therefore unless contracting parties believe the Convention is going to compromise or conflict with their agreement it is recommended that the Convention not be excluded.

3. Allocation and transfer of risk

3.1 General rule

Most Standard Form Contracts will contain clauses that allocate and transfer risk to a specific party at different stages of the contracting process. For example, Party A will hold liability for the goods during the delivery process and once the goods are delivered Party B then holds liability.

Legislation like the *Australian Consumer Law* (ACL) which forms part of the *Competition and Consumer Act 2010,* applies to clauses that allocate or transfer risk. This legislation contains provisions that concern unfair terms in small business contracts. Unilateral terms

or terms that favour one party at the expense of the other can be unfair. Where contract terms allocate risk unfairly this legislation can mean such clause can be declared void.

It should be noted that shipping contracts are exempt from the operation of the unfair contract terms legislation.

3.2 Advice for contract drafting

When drafting a contract suppliers need to ensure that terms that deal with the allocation and transfer of risk are appropriately drafted. If they are unfair on the purchaser they could be considered void and therefore unenforceable.

4. Liability for defects

4.1 General rule

The ACL has very specific provisions pertaining to this issue and prevents suppliers from contracting out of consequential loss liability in some circumstances. Indeed a number of consumer guarantees exist within the legislation and automatically apply to transactions caught under it (see the definition in section 3 for further detail). Namely, goods must be of an acceptable quality and are fit for their purpose as described. Where goods do not meet these standards the purchaser may be entitled to have the goods repaired or to receive a full refund in certain circumstances.

Furthermore, parties may give further warranties to the purchaser over and above the Consumer Guarantees. Care needs to be taken to ensure there is no conflict in drafting.

4.2 Advice for contract drafting

At first instance the party drafting the contract needs to determine if the ACL applies. If it does consumer guarantees offered under the ACL will apply and these cannot be contracted out of. In addition, the supplier may be exposed to consequential loss and any limitation of liability clauses will be void.

5. Liability for default

5.1 General rule

If a customer is unable to fulfil their obligations under the contract the supplier of goods is entitled to a number of different avenues of recourse. The supplier can take legal action to recover the debt and related costs. In certain circumstances the supplier may also seek to recover the goods supplied under retention of title provisions in its supply contract (see the discussion at section 7).

Additionally, contracts will typically contain provisions referencing third party guarantees. Therefore if a customer fails to meet their obligations under the contract the supplier could seek financial compensation through the third party guarantor.

5.2 Advice for contract drafting

Written contracts should include provisions that comprehensively address the issue of liability for default. Security interests will also help the supplier enforce their right to secure payment of the debt. Meanwhile, guarantee clauses involving third parties also reduce the overall risk presented by a customer defaulting.

6. General liability and its limitation

6.1 General rule

Liability clauses are somewhat controversial in nature. Allocation of liability is subject to robust negotiation in a larger scale contracts. The ACL applies to limitation of liability terms and so can the common law where circumstances exist outside the operation of this legislation.

The ACL deals with limitation of liability clauses and in certain cases such clauses will be of no effect. As previously discussed at section 4, consumer guarantees are built into the legislation and they cannot be contracted out of. Products supplied by a retailer, for instance, must be of an acceptable quality, meet their purpose prescribed under the agreement and match their description. On the other hand, there are different consumer guarantees imposed on a manufacturer. A manufacturer is ultimately liable where goods are defective and they need to provide repair facilities or spare parts for a reasonable time after purchase.

6.2 Advice for contract drafting

Most standard form contracts now include terms that state that they contract out of legislative requirements "to the fullest extent permissible under law". We advise that contracting parties include terms like this but more importantly remain aware of their obligations under legislation that cannot be contracted out of.

7. Retention of title/payment protection

7.1 General rule

Contracts will typically include terms that deal with the procedure relating to retention of title (i.e. the goods will remain in the supplier's name until the purchaser has completed payment under the contract). However, it is now vital that contracting parties are aware of the existence of the *Personal Properties Securities* Register (PPSR).

In 2012 in Australia the PPSR came into operation. It finds its genesis in its New Zealand namesake. The PPSR is a national online register which records the security interests listed against a specific asset or range of assets. Financiers or suppliers can then have their interest in the goods recognised particularly against liquidators.

However, it does have quite significant implications for businesses. For instance, if a business does not register its interest against an asset on the PPSR the interests of secured creditors will prevail against its interest in the event the debtor goes into liquidation. There have been cases in Australia in which suppliers have leased out assets of significant value only to lose title to the asset when the lessee goes into liquidation.

As mentioned at section 5, the PPSR is also a useful tool for suppliers when a customer defaults on payment. A supplier could lodge a security charge against the assets of the customer at the time the contract is entered into, therefore providing security in the event the customer cannot pay for the goods.

7.2 Advice for contract drafting

In addition to retention of title clauses contracts should have specific terms that underline each party's obligations with regard to the PPSR. Suppliers should also use the PPSR to secure the payment of any debt in the event the customer does not pay.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

General terms and conditions contracts are subject to the operation of the ACL and common law.

Recent amendments to the ACL means that unfair contract terms -specifically aimed at general terms and conditions contracts- are now heavily legislated against. The law applies if the following is met: (i) it is for the supply of goods or services or the sale or grant of an interest in land, (ii) at least one of the parties is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis) and (iii) the upfront price payable under the contract is no more than $ 300,000 or $ 1 million if the contract is for more than 12 months. A general terms and conditions or standard form contract is defined as where one of the contracting parties is given limited or no scope to negotiate the terms of the contract.

With regard to Incoterms, in Australia contracting parties can choose to include them in their contract or not. Unlike the Convention it is not presumed to operate if the contract is silent on the issue. Rather Incoterms must be specifically contemplated by the parties and included within the terms of the contract if they are to apply.

8.2 Advice for contract drafting

The parties need to be aware of their obligations under the ACL and the application of legislation like the recent unfair contract terms amendments. If a term is deemed to be unfair it will be void and the rest of contract will continue to operate insofar as it can without the unfair term.

Additionally, Incoterms should be used carefully and both parties should understand why they have been used. Ultimately parties should have more than superficial understanding of the particular Incoterm so that they can determine how they affect the contract.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Australian judicial system is made up of state, territorial and federal courts. Within most state and territorial jurisdictions there exist three hierarchical levels. These are the Magistrates Court, County or District Court and Supreme Court. The first two courts have monetary limits placed on them whereas the Supreme Court does not. The Supreme Court also has appellate jurisdiction.

Federal courts, on the other hand, function with regard to application of federal laws and consequently have a more limited scope of operation.

Ultimately the court with the most extensive jurisdiction in Australia is the High Court and it has appellate jurisdiction over all other courts. Special leave needs to be granted to appeal to the High Court.

9.2 Arbitration

Arbitration is not commonly employed in Australia to resolve disputes between cross-border contracting parties. It is considered expensive and risky.

Consequently the more informal measure of mediation is preferred. Generally contracts will provide that parties agree to head into mediation before filing civil proceedings within the court system. It should be noted that most disputes are settled at mediation. Further, codes like the *Franchising Code of Conduct* actually requires that parties attempt to mediate their dispute before heading to litigation.

10. About the Author

10.1 Law Firm Profile

MST Lawyers is a progressive law firm comprising some 60 dedicated Lawyers and support staff. MST has grown from a small firm originally founded in the 1950s, into a dynamic mid-tier commercial and private client legal practice.

Our clients include individuals, entrepreneurs and businesses, small to medium sized enterprises, national and international corporations, including publicly listed corporations, national retail groups and national franchise groups, many of whom are household names throughout Australia and the world.

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AUSTRIA

1. Introduction

The Austrian legal system is a civil law system. The freedom of contract is the basic principle of Austrian contract law and consequently grants contractual parties flexibility to pursue legal relationships in the form and manner determined by them. Austria is a member of the European Union ("EU") and its law system since 1995.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

A choice-of-law clause in supply contracts or contracts for works and services is generally effective in the Austrian jurisdiction (with very few exceptions concerning, e.g. consumer protection, public policy). Parties are advised to include an express choice of law clause in their contract. For example, non-Austrian business partners may include a choice of law clause in their contract, pursuant to which Austrian law shall apply to the contract as it is broadly seen as a neutral law (being very similar to Swiss and German law). In exceptional cases, the choice of law may even be implied from the circumstances of the case.

Pursuant to the principle of separability, an arbitration clause is considered to be a separate agreement from the underlying contract. An arbitration agreement may therefore be governed by a different law than the law applying to the underlying contract. In order to avoid confusion on whether the governing substantive law of the main contract should also apply to the arbitration agreement, parties should explicitly choose the law governing the arbitration agreement (e.g. "the law applicable at the place of arbitration").

Further, attention should be drawn to the particular requirements for a transfer of ownership. Austrian law strictly distinguishes between the title for the acquisition of property, which can be made subject to the parties' agreed terms of their contract, and the formalities of the transfer of ownership (e.g. by physical or symbolic delivery or by declaration). The law on the formalities for the transfer of ownership is mandatory and cannot be waived.

2.2 Inclusion of the UN Sales Convention

The United Nations Convention on the International Sale of Goods (*UN Sales Convention*) has been in force in Austria since 1 January 1989. The UN Sales Convention, in particular, applies to contracts of sale of goods between parties whose places of business are in different States, when these States are both contracting States. The UN Sales Convention automatically applies to any contract for the sales of goods governed by Austrian law that fulfils the above mentioned criteria. If parties do not wish its application, they must expressly exclude the application of the UN Sales Convention in their contract.

3. Allocation and transfer of risk

3.1 General rule

In B2B sales contracts involving the shipment of purchased goods, the risk of loss of or damage of the goods usually passes to the buyer, when the goods are handed over to the first carrier. Vis-à-vis a consumer, the risk shifts to the buyer, when the buyer (or a third

person nominated by the buyer) has received the goods or when the buyer refuses acceptance, although the seller has offered delivery in a duly manner.

3.2 Advice for contract drafting

Parties may contractually derogate from the rules of risk allocation. Parties are therefore advised to include in their contract a clear specification on the place of delivery and the modalities for the transfer of risks.

4. Liability for defects

4.1 General rule

The obligor shall deliver goods (or carry out works) in the agreed quantity and quality. If not agreed otherwise, the obligor must supply goods or carry out the contracted work in quality normally expected. Furthermore, the goods have to meet the standard publicly advertised by the seller or the producer. In case of breach of warranty, the buyer can request the seller to repair or to replace the defective goods. The buyer may choose between these two options, unless the chosen option is impossible or disproportionally burdensome for the seller. If both, repair and replacement of the defective goods, are impossible, the buyer will be entitled to an appropriate reduction of the purchase price or to rescind the contract. Warranty claims must be filed with the competent court within a two years limitation period for movable property and within a three years limitation period for immovable property as of the date the goods or works were taken-over. In addition, in B2B transactions the buyer must undertake an inspection of the delivered goods and notify the seller of any defects within a reasonable time (i.e. no longer than 14 days) after delivery. If the buyer fails to do so, the seller may only be held liable for hidden defects (if any).

4.2 Advice for contract drafting

In B2B transactions the rules on warranty are not mandatory and parties are free to modify and even to waive the warranty provisions. In B2B transactions it is, therefore, not unusual to limit or modify the buyer's statutory warranty rights. Warranty rights of consumers, however, cannot be restricted or precluded.

It is important to note that under Austrian law a claim for remedying a defective product can be pursued not only as a warranty claim but alternatively as a damage claim. In this case the obligor bears the burden of proof that the respective defect was not caused by his negligence. A damage claim implies a limitation period, which is more favorable for the buyer. When drafting a contract, the seller may therefore seek to exclude liability for any defects caused by minor negligence. (For damage claims, see: 1.6.)

5. Liability for default

5.1 General rule

Should the debtor fail to fulfill its obligation under a contract or to perform in due time, the creditor is granted the right to either insist on the performance of the contract or to rescind the contract, both however only after setting a grace period. If the delay is the debtor's fault, the creditor may also claim damages. In the event the debtor fails to perform a payment obligation in due time, the creditor in a B2B transaction may charge interest at the rate of 9.2% above the basic interest rate published by the Austrian National Bank, unless agreed otherwise.

5.2 Advice for contract drafting

Austrian law on the rights of the creditor and debtor in case of delay in performance is not mandatory. Parties are advised to include an exact agreement on the rights of the party awaiting performance of the defaulting party, i.e. the length of the grace period, minimum number of grace periods and a cap on the possible claim for damages. In addition to damages, a contract may provide for the payment of a penalty in case of default. Courts have some discretion to reduce a disproportional contractual penalty.

6. General liability and its limitation

6.1 General rule

Austrian law provides for an abstract concept of damages, which differentiates between "positive damage" and "lost profits". The extent of the liability depends on the degree of negligence or fault that has caused the damage. Whereas in the case of minor negligence only "positive damage" (i.e. the economic loss) may be recovered, in case of intent or gross negligence, the injuring party must also compensate lost profits. The statute of limitation for damage claims is three years from the date of the knowledge of (i) the damage and (ii) the person that has caused the damage.

6.2 Advice for contract drafting

Except for personal injury, it is possible to exclude by contract any liability for damages caused by minor negligence, but not for gross negligence or intent.

7. Retention of title/payment protection

7.1 General rule

Pursuant to Austrian law, a retention-of-title clause allows the seller to deliver goods to the buyer and to retain ownership over them at the same time until receipt of the purchase price. The retention of title must be agreed by the parties; to merely state a retention of title e.g. in a delivery note is not sufficient. If the retention of title is validly agreed, the seller is entitled to reclaim the goods from the buyer, should the buyer default on payment or go bankrupt. Under certain circumstances and conditions, the seller will nevertheless lose ownership, despite the agreement of a retention of title (e.g. processing of the goods, *bona fide* acquisition of the property by a third party).

7.2 Advice for contract drafting

In a simple form, the retention of title has the sole purpose of retaining ownership until full receipt of the purchase price. The transfer of ownership may however be tied to other additional conditions (e.g. payment of all debts or fulfillment of other additional obligations). The seller may demand additional security by including in the contract an obligation of the buyer to assign to the seller all the buyer's entitlements with a resale of the goods.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Under Austrian law, unusual provisions in general terms and conditions or in contract forms are void, if they are (i) detrimental to the other party and if that person (ii) could not have expected such provisions (e.g. due to the appearance of the document) and (iii) was not explicitly informed about the provision before entering into the contract. Further, a provision concerning ancillary obligations contained in general terms and conditions or in contract forms are null and void, if considering the circumstances of the case, it puts one party at a gross disadvantage.

8.2 Advice for contract drafting

General terms and conditions only become part of a contract, if the parties mutually consented to them. A mere reference to general terms and conditions by one of the parties is not sufficient. In particular, they must be accessible (e.g. website) and the other party must have had a chance to review the general conditions before signing the contract.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

Austria has a well-functioning judiciary system. Judges are independent, impartial and only bound by the legal system. In response to the needs of the business industry, the Austrian judiciary system provides for a Commercial Court system, which is sufficiently qualified to decide disputes related to complex business transactions, e.g. involving multiple parties, international law and different applicable laws. A judgment rendered by an Austrian court is enforceable within the EU by virtue of EU law. Moreover, Austria is party to numerous bilateral agreements allowing for the mutual recognition and enforcement of judgments and court orders outside the EU. Generally, parties of a B2B transaction can submit their contract to the jurisdiction of their choice by mutual agreement.

9.2 Arbitration

Austria is the seat of the Vienna International Court of Arbitration (VIAC), which is one of Europe's leading arbitration institutions for international commercial dispute resolution (see: www.viac.eu/en). VIAC provides efficient, flexible and impartial administration of dispute resolution proceedings to commercial parties, regardless of their nationality, chosen language and applicable law. The advantage of arbitration versus court litigation is the enforceability of arbitral awards under the "New York Convention" and a speedier as well as more confidential dispute resolution than in court proceedings. In case parties want their disputes to be resolved by arbitration (rather than by domestic courts), they must include an arbitration clause in their contract.

10. About the Author

10.1 Law Firm Profile

BAIER is an Austrian based independent full-service law firm with a major regional focus on Croatia, Czech Republic, Germany, Hungary, Poland, Russia, Slovakia, Switzerland and Turkey. BAIER is beyond Austrian borders well known for its strong arbitration team. Its team members enjoy high reputation as arbitrators or counsels in international arbitrations throughout various industries and regions in Europe, Middle East, Asia and Africa.

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CANADA (QUÉBEC)

1. Introduction

Canada is a Federal State with a Central Parliament having its seat in Ottawa. Ottawa is situated on the shore of the provincial limit between Ontario and Québec, the two most populated Provinces.

The 10 Provinces have their own legislative assembly in their respective Provincial Capitals. The Province of Québec has its capital in Québec City, a patrimonial city founded by the French, in 1608. Québec was the City Capital of New France until 1760.

In 1763, under the Treaty of Paris, the King of France ceded most of his territories in North America to the King of England, including Québec.

By relinquishing its former colony, France, by the same token has left behind as far as that portion of its territories was concerned, approximately 60,000 inhabitants, all French speakers at the time, carrying their own values and traditions. Québec's current population is about 8 million.

Officially at the beginning of the 1970s, French became the official language of the Province of Québec.

French is one of the two official languages of the Federal Government and is also one of the two official languages of the Province of New-Brunswick along with English, in both cases.

All Acts of Parliament, the Statutes of Québec and the Statutes of New-Brunswick are official in both their French and English versions. For them, French and English versions are of equal authoritative value. French and English versions of statutes must be read and understood, for any court official interpretation.

The linguistic specificity of Québec carries legal consequences:

Insofar as contracts are concerned, all contracts entered into by the civil administration of the Province, including the related sub-contracts, must be drawn up in French. Where a party is outside Québec, the contract and the documents related to it can be drafted in another language: *Charter of the French Language* ("C.F.L."): s. 21.

Contracts pre-determined by one party, contracts containing printed standard clauses, and the related documents, must be drawn up in French: C.F.L., s. 55. They may be drawn up in another language as well, but solely at the express wish of the parties: C.F.L., s. 55, *in fine*.

Please note that if the contract (commercial and non-commercial) is not drafted in French, insert a clause, in French, stating that it is the express wish of the parties that this contract is drawn up in French: "*Il est de la volonté expresse des parties que ce contrat soit rédigé en français*."

Contracts entered into by itinerant merchants, consumer contracts of credit, except loans repayable on demand, consumer contracts including a conventional option to purchase, long-term leases, consumer used automobile sales, service contracts involving sequential performance for training or assistance or contracts with physical fitness studios and the attached documents must be drawn up in French. Where they are drawn up in French and

in another language, in the case of divergence between the text, the interpretation more favourable to the consumer prevails: *Consumer Protection Act* "C.P.A.", s. 26.

Please make sure that a reliable version of the contract you intend to prepare and use is available in French where you intend to offer your product or services to the consumer.

Website interfaces that allow users to access databases, carry out commercial transactions, exchange various types of documents or obtain technical support must be in French: C.F.L., s. 52.1 and 205.1.

Please make sure that an updated and complete version of your transactional commercial website is in French.

In 1774, by the *Québec Act*, an English statute, French Civil Laws that used to apply prior to the conquest were re-enacted, in respect of property and civil rights.

Consistent with history, the 1867 Canadian Constitution known as the *British North America Act* ("B.N.A.A.") gives the Provinces complete legislative autonomy about Property and civil rights.

The Québec civil law was, for a first time, codified in 1865 in the *Civil Code of Lower-Canada* (C.C.L.C).

In the mid-twentieth century, the Québec legislature began a reform of the civil law that resulted, in 1994, with the enactment of a much more modern piece of legislation known as the *Québec Civil Code* ("Q.C.C."). In their structures, the two Civil Codes were modelled after the French Napoleonic Code of 1804, in a way consistent with the civil law in its purest tradition:

> *"The Civil Code is an organic, ordered, structured, harmonious and cohesive whole that contains the substantive subject matters of private law, governing, in the civil law tradition, the legal status of persons and property, relationships between persons, and relationships between persons and property."*
>
> *(Citation from P.-A. Crépeau taken from* Dell Computer *v.* Union des Consommateurs*, [2007] 2 S.C.R. 801, 820).*

The 1994 Q.C.C. comprises the *jus commune*, a body of rules that is not limited to private law rules. The intention of the legislature is to give the Q.C.C. the broadest operational scope, including certain public law rules, such as the rules of civil liability that apply to public bodies, subject to the prevailing public Common Law exceptions and defences that may apply.

Insofar as Québec commercial law is concerned, it was influenced by the common law. This continued to be the case after the C.C.L.C. was adopted and even today.

Civil procedure is also codified. Civil procedure is primarily made up of laws adopted by the legislative assembly, found in the *Code of Civil Procedure* ("C.C.P."), and not of judge-made rules. The C.C.P. does leave room for rules of practice. It also allows for targeted judicial interventions and gives the authority to issue orders that address the particular context of court cases.

The Q.C.C. comprises ten books: Book One: Persons, Book Two: The Family; Book Three: Successions; Book Four: Property; Book Five: Obligations; Book Six: Prior Claims and Hypothecs; Book seven: Evidence; Book Eight: Prescription; Book Nine: Publication of Rights.

The chapter on arbitration is found in the important Book Five of the Q.C.C. on obligations.

The various rules governing the private international law order of Québec, still based on English law, are found primarily in Book Ten of the Q.C.C. These rules cover a broad range of interrelated topics, including: the jurisdiction of the court, the discretionary powers of the court to eliminate inappropriate fora under the doctrine of *forum non conveniens*. They allow Québec Courts to recognize and enforce foreign decisions.

Please make sure that the legal counsel you hire is a qualified Québec civil law practitioner. Separately, a common mistake is to use the same forms and the same contract templates as those used for the rest of Canada. All contracts and all forms intended for use in Québec should be reviewed beforehand by a lawyer qualified in Québec Civil Law.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

The parties may choose the law applicable to their contract: Art. 3111 Q.C.C.

In Consumer Contracts (Art. 3117 Q.C.C.) and in Contracts of Employment (Art. 3118 Q.C.C.), a choice of law clause cannot result in depriving the consumer or the worker of the protection afforded to him by the mandatory rules of the State where he has his residence.

Contracts of non-marine insurance (Art. 3119 Q.C.C.) can only be governed by the law of Québec: (a) if the policyholder applies for the insurance in Québec or (b) if the insurer signs or delivers the policy in Québec or (c) if the covered interest is situated in Québec.

Avoid choice of law clauses for consumer contracts, for labour contracts and for insurance contracts.

Choice-of-law clauses are subject to critical scrutiny in the event they are found in an external document. Both in a consumer contract and in any contract of adhesion (commercial or not), a choice-of-law clause found in an external clause would be null if, at the time of the formation of the contract, the clause was not expressly brought to the attention of the consumer or of the adhering party, unless proven that the consumer or the adhering party otherwise knew of it: Art. 1435 Q.C.C.

Choice-of-law clauses must be legible and comprehensible. In a contract of adhesion (as well as in a consumer contract), a clause that is hard to read or to understand from the standpoint of a reasonable person is null if the consumer or the adhering party is placed at a disadvantage, unless the other party proves that an adequate explanation of the nature and scope of the clause was given to the consumer or adhering party: Art. 1436 Q.C.C.

Bearing in mind the general rule that choice-of-law clauses are perfectly valid, a choice-of-law clause in a consumer contract or in a contract of adhesion could be nullified by the court if found to be “abusive” as defined in Art. 1437 Q.C.C.

Advice for contract drafting: make sure that your choice of law clause is drafted in lay language, is visible and that the contracting party can easily access it.

2.2 Inclusion of the UN Sales Convention

The Province of Québec did incorporate into domestic law the UN Convention on Contracts for the International Sales of Good through An Act respecting the United Nations Convention on Contracts for the International Sale of Goods, R.S.Q., c C-67.01 which has been in effect since May 1st, 1992.

Please verify whether the States from which the parties are signatories of the UN Sales Convention. If so, bear in mind the differences between the Q.C.C. and the Convention. Notably, under the Convention, if a buyer is not bound to pay the price at a specified place, he must pay the seller at the seller's place of business: Art. 57 (a). Under the Q.C.C., if no place is indicated by the parties, payment is rather made at the domicile of the purchaser: Art. 1566 Q.C.C., 2nd paragraph.

Be aware that unless there is a choice of forum clause in your contract, the UN Sales Convention may produce an unexpected result in terms of whose court may entertain a case.

3. Allocation and transfer of risk

3.1 General rule

The transfer of a real right vests the acquirer with the right upon the formation of the contract even if the property is not delivered immediately: Art. 1453 Q.C.C.

However, the debtor of the obligation to deliver the property continues to bear the risks attached to the property until it is delivered: Art. 1456 Q.C.C., 2nd paragraph.

3.2 Advice for contract drafting

Be specific about the allocation and transfer of risk as the parties are free to allocate and transfer the risks according to their specific situation and common intention. Make sure that your insurance arrangements are consistent with your contract provisions.

4. Liability for defects

4.1 General rule

The conditions for enforcing the warranty against latent defects are essentially: the defect must be serious, it must have existed before ownership was transferred, and it must be latent.

A defect will be serious if it renders the good unfit for its intended use or so diminishes its usefulness that the buyer would not have bought it at the paid price: Art. 1726 Q.C.C.

The latency of a defect is analysed in relation to the buyer's level of expertise.

Any professional seller:

(a) is presumed to have known the existence of the latent defect. He cannot rebut this presumption unless the seller was just an intermediary and he could not inspect the property sold by him (for instance, if he sold a product sealed in a container);

(b) he cannot exclude or limit his liability by contract: Art. 1733 Q.C.C., and;

(c) he is liable not only for the price paid by the purchaser, but also for the damages directly and immediately caused to the purchaser: Art. 1728 Q.C.C.

The warranty against latent defects follows the property. It is transmitted from the first purchaser to the following purchaser: Art. 1442 Q.C.C.

Manufacturers and distributors are bound to repair the injury caused to a third person by a safety defect in things they have manufactured or distributed: Art. 1468 Q.C.C.

4.2 Advice for contract drafting

If you are a professional seller or distributor, you cannot rely on a clause to exclude or to limit your liability. If you are an ordinary seller, you can exclude or limit your liability but you must stipulate that the purchaser is buying "at his own risk" (Art. 1724 Q.C.C., 2nd paragraph or, that the property is sold without any legal warranty or warranty of quality.

5. Liability for default

5.1 General rule

The Q.C.C. provides that everyone has a duty to honour his contractual undertakings. Where there is a failure to that duty, he or she is liable for any bodily, moral or property injury he causes to the other contracting party and is bound to make reparation for the injury: Art. 1458 Q.C.C.

5.2 Advice for contract drafting

If you stipulate that the mere lapse of time will have the effect of placing the debtor in default, say it in a clear and express stipulation. You may also stipulate that the debtor will be in default in the case of partial, deficient or inadequate performance. Make sure that the debtor consents to these clauses in a free and enlightened manner and that he is aware of the consequences.

To avoid long and arduous debates at trial, you may stipulate that the debtor will suffer a penalty if he fails to perform his obligations. Do not stipulate that the creditor has the right to seek both specific performance and the penalty unless the penalty is for mere delay in performing the obligations: Art. 1622 Q.C.C., 2nd paragraph. Make sure that the amount of the penal clause you stipulate is enough to compensate the probable injury however: (a) do not provide for unreasonable or grossly disproportionate amounts when compared to the probable injury and (b) do not insert a penal clause as means to limit your legal liability if you cannot limit or exclude your liability, or, with a view of limiting your liability in case of intentional or gross fault.

Bear in mind that the Civil Law on contracts:

a) recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: Arts. 6, 7 and 1375 Q.C.C. Our advice is to deal fairly with the other contracting party in all circumstances;

b) for contract interpretation, it gives precedence to the common intention of the parties over the literal meaning of the words chosen: Art. 1425 Q.C.C. Our advice is to not rely too much on the strict, literal meaning of the words you choose. The words must make sense in the context; and

c) it gives the judge discretion to imply terms, *see*: Art. 1434 Q.C.C. You should avoid leaving gaps that would bring unexpected implied terms into play. You should avoid giving a too expansive account of the other party's obligations without also making a meaningful account of your own obligations under the contract.

6. General liability and its limitation

6.1 General rule

In the absence of a contract, there is a duty to abide by the rules of conduct incumbent on everyone, according to the circumstances, usage or law, so as not to cause injury to another.

In the event of failure, the author of the fault is liable for the injury he causes and is bound to make reparation for the injury, whether it be bodily, moral or to property: Art. 1457 Q.C.C.

A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it: Art. 1470 Q.C.C.

A manufacturer, distributor or supplier of a movable thing is not bound to make reparation for injury caused by a safety defect in the thing if he proves that the victim knew or could have known the defect, or could have foreseen the injury: Art. 1473 Q.C.C., 1st paragraph.

A manufacturer is not bound to make reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the thing, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware of the defect: Art. 1473 Q.C.C., 2nd paragraph.

A person may not exclude or limit his liability for property damage caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence: Art. 1474 Q.C.C., 1st paragraph.

No one can exclude or limit his liability for bodily or moral injury caused to another: Article 1474, 2nd paragraph. The limitation respecting exclusions of liability for bodily and moral injury is consistent with protection of the physical integrity of the person being one of the fundamental values of the Q.C.C.

A notice, whether posted or not, stipulating the exclusion or limitation of the obligation to make reparation for injury resulting from the non-performance of a contractual obligation has effect, with respect to the creditor, only if the party who invokes the notice proves that the other party was aware of its existence at the time the contract was formed: Art. 1475 Q.C.C.

6.2 Advice for contract drafting

Where possible, exclude your liability for property damage, loss of use and property damages caused by a defective product or by fault, bearing in mind that in a sale by a professional, this clause has no value. As well, in the event of gross negligence or intentional fault, or in the event of bodily injury, the clause will have no effect.

7. Retention of title/payment protection

7.1 General rule

Instalment sales and resolutely clauses in contracts of sale are possible at certain conditions.

A reservation of ownership with respect to a road vehicle or other movable property determined by regulation, or with respect to any movable property acquired for the service or operation of an enterprise, may be set up against third persons only if it has been published; the reservation may be set up against third persons from the date of the sale provided the reservation of ownership is published within 15 days. As well, the transfer of such a reservation may be set up against third persons only if it has been published: Art. 1745 Q.C.C, 2nd paragraph.

Where the sale of movable property was made without a term, the seller may, within 30 days of delivery, consider the sale resolved and claim back the property if the buyer, being in default, has failed to pay the price and the property is still entire and in the same condition, not having passed into the hands of a third person who has paid the price thereof or of a hypothecary creditor who has obtained surrender thereof: Art. 1741 Q.C.C.

Under the Q.C.C., the legal causes of preference are prior claims provided entirely by the law, or they are hypothecs: Art. 2647 Q.C.C. In the rare cases where the contractual payment protections involved are not hypothecs, they would, in any event, be subject to formalities and/or will need to be filed either in the Land Registry for immovables or, in the Registry of Real Rights and on Moveable and Personal Property (R.D.P.R.M.) for movables, which includes intangibles.

7.2 Advice for contract drafting

Make sure that you have chosen the right collateral for your type of business, amongst the several available, and that you have made sure that all conditions have been met so that your collateral is validly set-up against third-parties. Be aware that in this area, even the best drafted clause may have no actual impact if the required formalities are not complied with. Also, hypothecs on real estate are exclusively authenticated by Québec's civil law Notaries on pain of nullity.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

A contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable, is a contract of adhesion: Art. 1379 Q.C.C.

In a contract of adhesion, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the adhering party otherwise knew of it: Art. 1435 Q.C.C.

Terms and conditions available to web users by clicking one on a hyperlink entitled "Terms and conditions" are not external clauses and are not therefore subject to Art. 1435 Q.C.C.: *Dell Computer* v. *Union des Consommateurs*, [2007] 2 S.C.R., 801, 854.

Clauses that are excessively and unreasonably detrimental to the adhering party and are therefore contrary to the requirements of good faith are void, or the obligation arising from them can be reduced: Art. 1437 Q.C.C.

Incoterms that are part of the I.C.C. rules such as “F.O.B.” are accepted and enforced under Québec Law.

8.2 Advice for contract drafting

Make sure that your terms and conditions and, for that matter, all clauses of your contract, are reasonably accessible so that they are regarded as an integral part of the contract. If your terms and conditions are made available through the internet, make sure that there is an obvious hyperlink available allowing the web user to easily access them. Make sure that the language of your Terms and Conditions is understandable. You can refer to the Incoterms but make sure that your terms and conditions are consistent with them throughout.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

With respect to their personal and patrimonial claims, the parties may, in their agreement, submit present or future disputes to the court of their choice even in the absence of a connection with the chosen State: Art. 3148 Q.C.C. (4) and *in fine*, the exceptions being: consumer contracts, contracts of employment, claims based on an insurance contract and claims regarding exposure to raw material: Art. 3129, 3149, 3150 and 3151 Q.C.C.

Avoid choice of forum clauses in consumer contracts, in labor contracts and in insurance contracts. In all other cases, make sure that the choice of forum makes sense so that the chosen jurisdiction is not too costly. For certain international disputes, Québec is an excellent choice as its Courts are fluent in both English and in French. Courts are also familiar with both the Common Law and the Civil Law systems. There is no risk that a Québec Court declines to hear your case: the Q.C.C. recognizes that the parties are free to choose a forum even if the chosen forum has no connection to the case or to the parties.

9.2 Arbitration

In 1986, in Bill 91, the Québec legislature incorporated into its legislation the New York Convention and the *UNCITRAL Model Law on International Arbitration*.

Arbitration Agreements are valid (Art. 2638 Q.C.C.) except for disputes over the status and capacity of persons, family matters, consumer contracts (Section 11.1 of the *Consumer Protection Act* “C.P.A.”) or other matters of public order in view of which the jurisdiction of the Québec Courts cannot be ousted by the parties: Art. 2639 Q.C.C.

If a dispute arises after a contract has been entered into, consumers may then agree to refer the dispute to arbitration: Section 11.1, C.P.A., 2nd paragraph.

9.3 Advice for contract drafting

Avoid arbitration clauses in contracts affecting the status of persons, for family matters and in consumer contracts. Arbitration clauses are often the last ones considered. Preset rules of arbitration are rarely adapted to the needs of the parties. Do not incorporate rules without having made sure that those rules are suitable. Consider whether the parties are ready to waive their right to appeal a possible wrong award. If compulsory arbitration is still your choice, make sure that mention is made that the arbitrator, or the arbitral panel, will have exclusive jurisdiction over any court of law.

10. About the Author

10.1 Law Firm Profile

Lamarre-Linteau & Montcalm was founded 1998 by lawyers who already had a solid expertise in Business Law. From the beginning, it was decided to limit the growth of the firm to create the framework of a compact group in constant interaction with the clients.

The author, Jean-François Lépine, joined the firm in 2010. He was called to the Barreau du Québec in 1987 and has been in private practice since then. During his 15 first years of practice, his focus was on insurance litigation, collaterals and insolvency. In the last 15 years, he was also involved in a variety of commercial disputes, often with an international component. Jean-François is an active member of the Canadian Bar Association, both at the National Level and in the Québec Division.

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PEOPLES REPUBLIC OF CHINA

1. Introduction

The Chinese civil and commercial legal system is mainly a civil law system, which was historically influenced by the civil laws of Japan and Germany to some extent. China has not yet formed a unified civil code. The whole civil and commercial legal system is comprised of the General Principles of Civil Law and plenty of slip laws (e.g. the Contract Law, the Tort Law, etc.), regulations and judicial interpretations, among which, the General Principles of Civil Law, promulgated in 1986, established five basic principles of Chinese civil and commercial law, i.e., equality, voluntariness, fairness, good faith and prohibition of abuse of rights. China National People's Congress enacted the General Provisions of Civil Code on March 15, 2017 which will become effective on October 1, 2017 and replace the General Principles of Civil Law.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Chinese law, the parties to a contract with a foreign element are free to choose applicable law for such foreign-related contract unless the Chinese law mandatorily requires otherwise (as discussed below). If the parties fail to do so, the default applicable law shall be the law of the regular residence of the party whose fulfilment of obligations under the contract can best realize the contract features or the law which has the closest relationship to the contract.

Notwithstanding the above, (a) Sino-foreign equity joint venture contracts, Sino-foreign cooperative joint venture con-tracts and Sino-foreign contracts for the cooperative exploitation and development of natural resources, which are to be performed within the territory of China; and (b) civil relations containing foreign elements that involve the social public interests of China, including employee protection, food and public health and safety, environmental security, foreign exchange control and financial security, anti-corruption and anti-dumping, shall be mandatorily governed by Chinese law.

2.2 Inclusion of the UN Sales Convention

China joined the UN Sales Convention (United Nations Convention on Contracts for the International Sale of Goods dated April 11, 1980) in 1986. Under Chinese law, if both parties to the contract are from the member states of the UN Sales Convention and they fail to expressly specify the applicable law of the contract, the UN Sales Convention shall automatically apply. In practice, it is customary to exclude UN Sales Convention from the international sales contract, especially when a Chinese company is seller, because Chinese courts and judges are less familiar with the UN Sales Convention than the Chinese laws and furthermore, the UN Sales Convention is more buyer friendly.

3. Allocation and transfer of risk

3.1 General rule

Both parties to the contract are free to determine the allocation and transfer of risk through negotiation under Chinese law. If there is no contractually agreed allocation or transfer of risk, the risk shall transfer upon delivery: to be more specific, the damage and

loss shall be borne by seller before the delivery, while after the delivery, the damage and loss shall be borne by buyer.

3.2 Advice for contract drafting

To avoid unnecessary controversy and dispute, it is advisable for both parties to a sales contract to clearly set the time for transfer of risk. For international sales contract, the most common way is to use the Incoterms (International Commercial Terms of the International Chamber of Commerce) which provides clear definitions of risk allocation and transfer. Incoterms is also familiar to the Chinese courts and widely used by Chinese companies in international sales contracts.

4. Liability for defects

4.1 General rule

Under Chinese product quality law, the products shall (a) meet applicable national and industry standards, with no unreasonable danger to personal or property safety; (b) have the functions that are designed to have except for those defects that are disclosed; and (c) conform to the product standard and quality warranty marked on the products or their packages or specifications. Otherwise, seller shall be responsible for the repair, change, return, and shall compensate for losses that buyer or the final consumer suffers.

4.2 Advice for contract drafting

The product quality law gives relatively more protection to buyer; however, seller may alter it through negotiation with buyer to (a) take away buyer's right to terminate the contract for product quality; (b) expressly disclose the defect of the products (if any); (c) specify in the contract the product and quality standard; and (d) set a liability cap to the greatest extent permissible under the applicable law (the liability cap will not apply under circumstances of severe personal injury or death or property losses due to wilful act or gross negligence).

5. Liability for default

5.1 General rule

Under Chinese law, the liability for default arises if a party fails to perform the contract provisions, most often fails to render performance within a designated time frame. Under such circumstance, liability for default generally includes the followings: (a) specific performance; (b) taking remedial measures; and (c) compensation for the damages. The total amount of compensatory damages shall include benefits that the other party would have been able to obtain upon the contract being performed, but this amount shall not exceed the total losses resulting from breach of contract that the breaching party, at the time of concluding the contract, foresaw or should have foreseen.

5.2 Advice for contract drafting

The rules regarding liability for default are very general, which leaves great room to both parties to negotiate the terms of liability for default. It is customary but no a must for both parties to negotiate a grace period, during which a breaching party may have a chance to correct its breach of contract after it receives a written notice from a non-breaching party. If the breaching party fails to render specific performance within the grace period specified in the notice, the non-breaching party can further claim liability for default against

the breaching party. It is also customary for both parties to negotiate the circumstances under which the contact shall be rescinded.

6. General liability and its limitation

6.1 General rule

Under Chinese law, the punitive damages, treble damages or the like seldom apply. The party in breach shall generally compensate the other party for losses resulting from the breach of contract, which, at the time of concluding the contract, shall be foreseeable or should have been foreseen by the breaching party. As the actual loss is often hard to calculate, both parties can agree upon liquidated damages in a form of a specific liquidated damage amount or a calculation method. The liquidated damages shall be "reasonable". Specifically, if the liquidated damages exceed or fall below 30% of actual loss, the party can apply to the court for adjustment. If buyer delays in payment, the damages for the delayed payment that seller is entitled to shall be within the four times of the bank loan interest for the same delay period.

6.2 Advice for contract drafting

It is a common practice to negotiate a liquidated damages clause, which, from the perspective of burden of proof, is relatively less burdensome for the parties to claim damages in the event of breach of contract. It is also common to limit the scope of the liability in the contract.

7. Retention of title/payment protection

7.1 General rule

Under Chinese law, seller may retain the title if buyer fails to pay the price or fulfil other obligations under the contract. In general, the retention of title clause provides that seller may retain the title until full payment has been forwarded by buyer to seller. In the event that buyer defaults in payment, seller can reclaim and resell the item as the title is retained. However, even if there is such retention of title under which initial seller retains the title, a bona fide buyer may obtain the title from the resale by seller provided that buyer is bona fide.

7.2 Advice for contract drafting

For buyer, it always prefers not to have a clause of retention of title; but seller will enjoy more protection if it has such clause.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

The general terms and conditions or standard term contracts under the Chinese law are those clauses that a party drafts in advance for repeated use, and are not negotiated with the other party at the time when the contract is concluded. Generally, (a) the general terms and conditions shall be drafted based on the principle of fairness; (b) the drafting party shall take reasonable steps to draw the other party's particular attention to those clauses which eliminate or limit the drafting party's liabilities; (c) the drafting party shall

be obliged to explain the general terms and conditions upon request; (d) the general terms and condition shall lose its effect if they exclude the liabilities of the drafting party, or unduly increase the liabilities of the other party, or exclude important rights enjoyed by the other party; and (e) where any dispute arises over the interpretation of general terms and conditions, the interpretation which is less favourable to the drafting party shall be adopted.

8.2 Advice for contract drafting

General terms and conditions or standard term contracts reduce transaction cost substantially by precluding the negotiation of details of a contract while there is the potential for inefficient and even unjust terms to signatories. Therefore, it is advisable to: a) draft the contract based on the principle of fairness and equality; (b) provide access to full terms; (c) remind the other party of its "duty to read"; and (d) print the boilerplate terms in a salient way.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The parties are allowed to choose the dispute resolution method freely, i.e., by means of either litigation or arbitration. If both parties intend to solve the dispute through litigation, they may choose the court forum in writing from the defendant's domicile, place of performance of contract, place of execution of contract, domicile of the plaintiff, the place where the subject matter is located, that has actual connection with the dispute.

9.2 Arbitration

As arbitration possesses the advantage of confidentiality and enforceability under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, it is widely used in cross-border commercial transactions. Both parties can choose the arbitration rule and arbitration court freely. The reputable and experienced arbitration institutions that hear international cases in China include China Interna-tional Economic and Trade Arbitration Commission (CIETAC) and China Maritime Arbitration Commission (CMAC).

10. About the Author

10.1 Law Firm Profile

Martin Hu & Partners (MHP) is a fully licensed Chinese law firm that is adept in high-profile cross-border transactions and international dispute resolutions. With a professional legal team, a collaborative approach, a vast network of colleagues across the globe, and a strategy of Sino-foreign collaboration, MHP has been providing comprehensive legal services for a wide range of clients across the world, which includes Fortune 500 companies, publicly-listed companies, dynamic small-and-medium-sized enterprises as well as prestigious foreign and domestic universities, many of whom are active leaders in their sectors. Since 2010, MHP has been ranked as one of the Leading Law Firms in Chambers & Partners and has been highly recommended as a Leading PRC Law Firm in Corporate and M&A. In 2016, MHP was awarded as one of the China Top 10 Boutique Firms to Watch by ALB owned by Thomson Reuters, and CBLJ Award winner in Dispute Resolution.

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CZECH REPUBLIC

1. Introduction

The Czech legal system is a civil law system with its roots in Roman law and strongly influenced by the Austrian legal system. As a consequence, most of the areas of law are codified. The Czech Republic has been a member of the European Union since 2004, but it is not a part of the Eurozone, its national currency being the Czech crown (CZK).

The Czech civil law was substantially changed by the adoption of a new Civil Code effective from 2014, which is generally understood as a break with the old Civil Code adopted during the communist era and repeatedly amended after the velvet revolution in 1989. At the same time, the new Business Corporations Act and the Act on the International Private Law were adopted. The current Czech Constitution and the Charter of Fundamental Rights and Basic Freedoms, which secure the fundamental principles of a democratic society, have been in force since 1993, i.e. since the establishment of the independent Czech Republic after the division of Czechoslovakia.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Parties to a contract with a cross-border element may determine which national law shall govern their contract. The choice of law must be made expressly or at least clearly demonstrated by the circumstances of the case. However, the choice of law is not without limits; the choice of law cannot abrogate certain mandatory statutory provisions of law that would apply to the relation of the contracting parties in absence of the choice of law – for instance when transferring ownership to the real estate.

2.2 Inclusion of the UN Sales Convention

The Czech Republic is a signatory of the UN Sales Convention (*United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980, 'Convention')*. The UN Convention is a part of the Czech legal system and applies automatically to any contractual relationship as long as all of the following prerequisites are met: (i) The parties enter into a contract on sale of goods, (ii) the goods fall within the scope of the Convention, (iii) the parties to the contract have their place of business in different states and both these states are signatories of the Convention and (iv) the parties have not excluded the application of the Convention. The parties must therefore exclude the application of the UN Sales Convention explicitly or choose a law of a non-signatory to the UN Sales Convention as the governing law, when they do not want to submit their contract to the application of the Convention. In practice, parties usually opt to exclude the application of the Convention.

3. Allocation and transfer of risk

3.1 General rule

The moment of transfer of risk and title depends on several factors, but in general, the title passes to the purchaser upon entering into an agreement, while the risk passes to the purchaser upon handover of the goods, unless agreed otherwise. When the goods are shipped, the risk shall pass at the moment of the handover of the goods to the carrier.

The risk of damage on goods determined by kind shall not pass to the buyer who did not take the goods over before the goods are sufficiently separated and distinguished from other goods of the same kind.

3.2 Advice for contract drafting

It is advisable for the parties to the contract to agree on which party will bear the most foreseeable risks, i.e. loss, destruction or damage on goods. The rules can be expressly drafted by the parties or incorporated by a reference to Incoterms (International Commercial Terms of the International Chamber of Commerce) which are widely recognized.

4. Liability for defects

4.1 General rule

The purchased goods must have the characteristics that the parties agreed on (such as quality or amount). Have the parties not agreed on any characteristics of the goods, the goods must be appropriate for their purpose, whether stipulated in the contract or customary.

The liability for defects is stricter in B2C relationships. The extent of rights arising from defects depends on whether the defect constitutes a material or an immaterial breach of the contract. Generally, rights arising from defects are as follows: delivery of a new item or delivery of the missing item/part, repair of the item, reduction of the purchase price, rescission of the contract (in case of a substantial breach) and liability for damage. The liability for defect will be limited if the purchaser has not inspected the goods or has not notified the supplier about the defect in time; business purchasers are required to be more diligent when inspecting the goods.

4.2 Advice for contract drafting

It is customary to modify the rules of liability for defects, as well as to define cases that are to be considered material and immaterial breach of the contract due to defects. It is also common to exclude the liability for insignificant defects of goods. Depending on the nature of the items purchased, the liability for damage may be also limited to an agreed extent. Further, the obligation to inspect the goods and to notify the supplier of the damage in time is also commonly excluded by mutual agreement. Commercial B2B contracts usually include contractual penalties in case of defects, so that the purchaser does not have to prove actual damages caused by those defects.

5. Liability for default

5.1 General rule

In case of monetary claims, the default of the debtor leads to the right of the creditor to claim an agreed interest on the amount due (if no interest rate has been agreed on, the statutory late payment interest will apply - currently in the amount of eight percent above the base interest rate of the Czech National Bank). Moreover, the creditor is also entitled to claim damages exceeding the amount covered by the interest.

In addition, as long as the debtor's default lasts, the debtor assumes the risk of damage to the goods. If the default constitutes a material breach of the contract, the creditor can rescind the contract with immediate effect. In case of default which qualifies as an immaterial breach the creditor may rescind the contract after a given additional time period. In

B2B relations, it is presumed that the costs connected with assertion of each claim amount to at least CZK 1200 (approx. EUR 45).

5.2 Advice for contract drafting

The statutory rights are often altered by the parties. A formal notice and a fixed time period from the delivery of the notice is often required in order to be able to rescind the contract due to the default of the supplier. On the other hand, contractual penalties are often agreed for the cases of the supplier's delay, so that the customer does not have to prove actual damages caused by the delay.

6. General liability and its limitation

6.1 General rule

Liability for damage is based on the principle of strict liability – the injured party must prove that the damage has been caused by a breach of certain duty by the liable person whereas the liable person may release itself from the liability if proving the existence of grounds for release, such as force majeure.

The breach of contract or law entitles the injured party to seek remedies. Primarily, the damage is remedied by restoration to the original state. If this is not reasonably possible, or if so requested by the injured party, the damage is payable in money. In certain cases, a non-monetary relief is also possible. The monetary remedies cover the actual damage and lost profits. For reasons deserving special consideration, a court may proportionately reduce damages; however, that is not possible, for instance, in case of breach of due professional care.

A contractual limitation of liability for damage is not excluded under Czech law. Damages cannot be claimed when a contractual penalty is agreed, unless the parties agree otherwise.

6.2 Advice for contract drafting

It is common that liability for damage is contractually limited, especially in certain fields such as construction or machinery. However, the possibility to limit the liability is not boundless. Liability for damage caused intentionally or by gross negligence cannot be excluded. Liability towards the weaker party to the agreement may not be limited either. The latter restriction of liability limitation may often represent a risk for the parties relying on the liability limitation contained in their contracts as the meaning of the term 'weaker party' is, due to missing judicial interpretation, rather uncertain.

7. Retention of title/payment protection

7.1 General rule

Parties to a contract can agree on a retention of title. The transfer of title is then postponed until the purchase price is fully paid. However, the risk of damage to the goods passes to the purchaser as early as upon its takeover.

To have effect on third parties, the clause on retention of title must be executed either in form of a public deed or the signatures of the parties have to be notarized. If the item is registered in any public register, the retention of title has to be registered too in order to have effect on third parties.

Pre-emptive right to property might also be stipulated in a contract - if the purchaser later intends to sell such property to a third party, they shall be obliged to offer the purchase of the property to the person entitled from the pre-emptive right.

7.2 Advice for contract drafting

It is advisable to have the signatures notarized when including a clause on a retention of title into the agreement.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

A part of the contents of the agreement can be included by a reference to terms and conditions either attached to the agreement or known to the parties. The stipulations contained directly in the contract, which differ from such terms and conditions, prevail. When both parties attach their own terms and conditions to the agreement, the agreement is concluded to the extent in which the terms and conditions do not contradict. Should any term contained in the General Terms of either of the parties be not reasonably anticipated by the other party, the term is not effective, unless the party protected by this rule explicitly accepts such a term.

Under certain conditions, terms and conditions can be unilaterally changed; the parties must agree to such procedure in advance and the other party must be entitled to refuse the changes and, as a result, terminate the contract with a sufficient notice period.

The parties to B2B relationships can also substitute a part of an agreement by a reference to terms and conditions drawn up by specialized or interest organizations, or by a reference to interpretation rules, such as the Incoterms. Similar in nature to General Terms are adhesion agreements, i.e. the agreements, whose basic conditions have been determined by one party without the other party having the opportunity to influence the contents of the agreement. Therefore, the requirements for enforceability of adhesion agreements are stricter (a typical example of such agreements are form agreements, where only the names of the parties need to be filled in).

8.2 Advice for contract drafting

When possible, it is advisable to take special precautions when concluding adhesion agreements, especially if the other party may be deemed substantially weaker. Parties also need to bear in mind that a reference to General Terms in a contract (even if these General Terms are not attached to the contract) might make the General Terms part of the contract.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Czech judiciary system consists of 4-tier system of courts and is based on two-instance proceedings, with the Constitutional Court standing outside the general court structure. The length of the court proceedings is usually perceived to be the main problem of the judiciary, even though new measures are being gradually implemented in order to speed up the proceedings, including the introduction of electronic data boxes through which the

courts communicate with companies and other legal entities (their use is voluntary for private individuals).

Generally, in commercial matters, the parties can agree on a jurisdiction in their contract. Within the Czech Republic, the parties may agree on a territorial jurisdiction of a court of the first instance for their disputes. If no agreement on jurisdiction is made, the matter will most often be resolved by the court determined according to the registered office/residence of the defendant. In standard civil proceedings, the matter is decided by a sole judge in the first instance, while the appeal is considered by a panel consisting of three judges.

9.2 Arbitration

Arbitration, which provides a more flexible and speedy way of disputes resolution, has become a broadly used instrument for the settlement of disputes of commercial nature, particularly in complex transaction in areas such as construction, investments or energy.. Moreover, the rulings issued by courts in certain countries (e.g. USA) are not always easily enforceable in the Czech Republic and vice versa; on the other hand, the arbitration awards issued abroad – based on the New York Convention – can be effectively enforced in the Czech Republic and Czech arbitration awards can be enforced in most countries. The contracting parties may agree that any property dispute arising from their B2B relations shall be decided either in an ad hoc arbitration or by a permanent arbitration institution, such as the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic, which is the leading and widely-respected arbitration court in the Czech Republic also handling domain-name disputes. Arbitration agreements may either be contained in the main contract or form a separate agreement. There is no prescribed content of the arbitration clause apart from its written form.

10. About the Author

10.1 Law Firm Profile

LTA is an advisory firm which provides integrated legal, tax, accounting and auditing services to Czech and foreign clients - predominantly to large and medium-sized businesses. In the prestigious ranking “Czech Law Firm of the Year 2016”, LTA has been named in the category of recommended law firms in the area of tax law. LTA is located in Prague, Czech Republic, and through its network of partner offices, including members of The Law Firm Network, also provides its clients with a link to qualified consultancy services in other countries.

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DENMARK

1. Introduction

The Danish legal system is a civil law system, which has been partly influenced by German law. The Danish civil law never adopted the Roman law as part of the law, but received Roman influences, partly through Germany.

The Danish legal system is based on the so-called two-tier principle. On this basis, the parties have the option of appealing the ruling of one court to a higher instance. The higher court can then either reach the same conclusion (uphold the ruling) or change the ruling.

Most cases begin at district court level with the option of appealing to one of the high courts. In special cases, a case which was initially heard at district court level may be brought before the third and highest instance (the Supreme Court), but this requires a permission of a special licensing board.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Denmark has ratified the Rome I regulation, which regulates the choice of material law in the courts of the EU Member State. According to Rome I regulation art. 3 (1), a contract shall be governed by the law chosen by the parties. On this basis, the parties are free to determine the material law that shall apply to their contract. Choice of law clauses must be explicit or clearly result from the contract or its circumstances.

The parties can only dispose over the applicable law for their contractual obligations, whereas they cannot dispose over such parts of the transaction having an *in rem* effect, e.g. transfer of title or possession, pledging of things and rights, etc., which are subject to the *lex rei sitae* the law of the place where a contractual item is located.

Regarding enforceability, there is no uniformity of practice among the European States in regard to the recognition and enforcement of judgments rendered by non-EU Member States. Generally, Denmark does not enforce any foreign judgments in the absence of a treaty obligation to do so.

2.2 Inclusion of the UN Sales Convention

Denmark is party to the UN Sales Convention (*United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980)*. Under Danish law, the UN Sales Convention automatically applies if the parties to the contract are member states, and the contract is within the convention's scope. On this basis, the parties do not need to explicitly agree on the UN Sales Convention.

3. Allocation and transfer of risk

3.1 General rule

The allocation of the risk in an international sales contract under Danish law depends on when delivery has taken place based on factors as ownership of the contractual item, agreed or statutory place of performance and agreed shipment procedure.

Once the risk has passed, the buyer must pay the price agreed, even though the goods, which the buyer received were damaged on the way, etc. The seller bears the risk of the goods until delivery has taken place. However, in relation to international sales of goods, the risk passes to the buyer when the goods are handed over to the first carrier, provided the first carrier if the carrier is a third party.

3.2 Advice for contract drafting

It is advisable to include a clear-cut contractual agreement, determining what will happen if the contractual object is lost, destroyed or damaged. This is commonly done by reference to Incoterms (International Commercial Terms of the International Chamber of Commerce). This provides the advantages of common interpretation in different languages and legal systems.

4. Liability for defects

4.1 General rule

According to Danish law, the purchased item/goods must be suitable for customary use and fit for the purposes, for which item/goods of the same description would "ordinarily" be used, unless the parties have agreed on a specific characteristic or suitability for a specific use.

In case of a defect, the buyer's remedies are, reduction of the purchase price or rescission of the contract (in case of a fundamental defect) and damages if the seller has acted negligently. The Seller is under certain conditions entitled to provide a subsequent performance. In situations of Business to Business (B2B), any liability for defects is excluded if the purchaser has not inspected the purchased goods. Similar, if the seller has required the purchaser to inspect the goods, and the purchaser should have discovered the defect.

4.2 Advice for contract drafting

The Danish contract law governs the principle of freedom of contract, hence the Rules governing liability for defects can be altered by the parties. The parties can modify the general rules in favor of the seller. As an example, the parties can agree to limit the requirements for liability by excluding rescission of the contract. Further, the parties can apply a liability cap for damage claims and can agree to waive or modify the requirements of giving immediate complaint in the case of a defect. Certain restrictions can apply regarding the parties General Terms and Conditions. However, in a Business to Consumer (B2C) setting, special mandatory rules apply, which means that the clauses in the Danish Sale of Goods Act cannot be waived to the detriment of the consumer.

5. Liability for default

5.1 General rule

The buyer can claim compensation for damages caused by the delay, if the seller does not render performance, and this is a result of negligence.

5.2 Advice for contract drafting

The parties can agree to alter the rules governing legal consequences of delay in performance. In this connection, the parties can specify the requirements and can e.g. grant the debtor a fixed time period for performance and certain restrictions can apply in regarding

the parties General Terms and Conditions. However, in a Business to Consumer (B2C) setting, special mandatory rules apply, which means that the clauses in the Danish Sale of Goods Act cannot be waived to the detriment of the consumer.

6. General liability and its limitation

6.1 General rule

The Danish legal system does not provide for punitive damages. However, a party liable for damages must compensate all losses that can be attributed to the contractual breach.

6.2 Advice for contract drafting

According to the Danish legal system it is common practice to limit the liability for both parties. On this basis, the parties can individually negotiate a liability clause, however, certain liabilities cannot be waived.

7. Retention of title/payment protection

7.1 General rule

According to Danish law, retention of title can be contractually agreed between the parties, but only if certain requirements are fulfilled, e.g. that the object of the contract is not meant to be resold by the purchaser. The purchaser obtains possession of the contract item, but transfer of title item is subject to the complete payment of the purchase price by the purchaser (simple retention of title).

The parties can agree that the purchaser is permitted to a further resale of the contract item with, however, this necessitate an explicit contract and extensive control by the original seller.

7.2 Advice for contract drafting

Until all payments by the purchaser have been made, it can be agreed that the seller retains title in the sold item. In the case of purchaser's default, seller may rescind the agreement and reclaim the item from third party.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Models or sample agreements which are intended to be used in general during a common transaction etc., which are imposed by one party unilaterally upon the other party are considered to be General Terms and Conditions (GTC). In Danish law GTC are commonly known and used. GTC often contain general terms, and whether they can be enforced depends on how specific and diverging GTC may be compared to other similar contract areas.

In case of disagreement, it is often an issue, whether the GTC can be enforced. Essentially, this means that the GTC has to be fair and reasonable, particularly regarding consumers, but most important is that it can be shown that the GTC has been accepted by the contracting party.

8.2 Advice for contract drafting

In order to avoid issues regarding enforcement of the GTC it is recommended to make sure that at least the decisive contents of contracts are clear and accepted (one way or the other) by the contracting party (before or during the agreement i.e. not in an invoice).

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Danish judiciary system is a system with high judicial powers and procedural functions attached thereto, including probate, bankruptcy, bailiff´s court, land registration and general administration. The Danish judiciary system is capable of handling complex commercial or corporate matters.

The competent court may result from either a specific venue (place of fulfilment, place of a branch office) or a general venue (the court where the defendant has his residence or place of business). However, the parties can explicitly agree the venue (which court is territorially competent to resolve a dispute).

9.2 Arbitration

In Denmark, the relevant legislation is the Danish Arbitration Act (DAA), which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law). The Danish Institute of Arbitration, see http://voldgiftsinstituttet.dk/en/arbitration/) has the capability of solving commercial and international disputes. The dispute is decided in the form of a final award, which is issued by one or more independent and impartial arbitrators who are selected by the Parties and confirmed by the Institute on a case-by case basis.

According to Danish law, an arbitration agreement does not need to be in a specific form. However, for evidence purposes written agreements are recommended.

10. About the Author

10.1 Law Firm Profile

Mazanti- Andersen Korsø Jensen is Denmark's oldest law firm, founded in 1853. It is a high-profile law firm specialized within all significant areas of law. It is pivotal for us to provide progressive and to the point advice and to be at the absolute forefront when it comes to effective negotiations and tailor-made and client specific advice.

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DOMINICAN REPUBLIC

1. Introduction

The Dominican legal system is a civil law system largely influenced by French Law. The fundamental code for civil law is the Dominican Civil Code (Código Civil); an almost identical article-to-article translation of the original French Civil Code (Code civil des français) established under Napoleon I in 1804. Being a unitary state, the Dominican legal system extends over 31 provinces and the National District. The Dominican Constitution and international treaties signed and ratified by the Dominican Republic provide for certain guarantees and irrevocable fundamental rights, thus securing the rule of law.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Dominican Law, the parties of a cross-border transaction are free to choose the material law that shall apply to their contractual obligations. Accordingly, the recently enacted Dominican Private International Law Act of 2014 enables the parties in an international contract to determine the law that will be applicable to them. However, the parties can only dispose over the applicable law for their contractual obligations, whereas they cannot dispose over provisions which are deemed essential to public interest, such as those provisions concerning political, social and economic order. Applicable-law-clauses must be explicit or clearly result from the conduct of the parties and the provisions of the contract, considered altogether.

2.2 Inclusion of the UN Sales Convention

The Dominican Republic ratified its adherence to the UN International Sales Convention upon Congress approval and resolution adopted by the same in 2010. Under Dominican Law, and considering the basic principle of contractual freedom applied to the international sale of goods, parties to this convention can exclude its application or dispense with and from specific provisions. For instance, parties can adopt the domestic law of a contracting State or that of a non-contracting State as the applicable law in their transactions.

3. Allocation and transfer of risk

3.1 General rule

Allocation and transfer of risk is a fundamental factor that must be carefully analysed in the context of an international sales contract. Under Dominican law, the Code of Commerce contains the basic provisions applicable to the allocation and transfer of risk. The general rule is that risk is transferred upon delivery of the item from the seller to the person or entity in charge of transporting the item subject to the transaction. This rule is also contained in the UN Sales Convention. Accordingly, the person transporting the item will be responsible for any damages, lost or destruction of said item, excluding those situations when the item was damaged, destroyed or went missing as the result of a defect in the item or as the product of unforeseen circumstances of *force majeure*.

3.2 Advice for contract drafting

To avoid the complications surrounding allocation and transfer of risk in Dominican law, it is advised that the parties to the transaction include in their contract a reference to the

International Commercial Terms of the International Chamber of Commerce (INCOTERMS).

4. Liability for defects

4.1 General rule

Under Dominican law, liability in general is governed by the principles of the Dominican Civil Code. The general rule is that the seller shall guarantee the sold goods against any hidden flaws or defects. General Law No. 358-05 on the Protection of Consumer Rights adds that a good is deemed to be defective, if it does not comply with the purpose for which it was destined, or is otherwise affected by any conditions with respect to their performance or decrease in their value, in such a fashion that the purchaser wouldn't have otherwise purchased them if these hidden flaws or defects had been apparent.

4.2 Advice for contract drafting

When agreeing on general or particular terms and conditions to a transaction, or relying on an adhesion contract, it is important to verify that the provisions included therein meet the tests provided by General Law No. 358-08 on Consumer Protection.

5. Liability for default

5.1 General rule

The Dominican Civil Code also provides the general rules applicable for default in the performance of a contractual obligations, including when a delay occurs in such performance. With the derogation of special laws which provided for a legal interest rate in the Dominican Republic.

5.2 Advice for contract drafting

To recover from the damages suffered upon a delay in the performance of an obligation, it is important for the creditors of such obligations to demand and agree on a penalty interest clause for compensate for delays.

6. General liability and its limitation

6.1 General rule

Following French law tradition, in the Dominican legal system, civil liability results from a direct causal link between the fault of one party and the damage suffered by another party. The damage must be the direct consequence of the fault. Dominican civil liability law does not provide for punitive or exemplary damages as compensation. However, a party which is liable for damages must answer for those losses that can be attributed to its contractual breach.

6.2 Advice for contract drafting

In order to limit the liability risk in their transactions, the parties can limit the scope of their responsibility with the incorporation of limited liability clauses.

7. Retention of title/payment protection

7.1 General rule

A general right of retention is admitted under Dominican law for any creditor holding property belonging to its debtor until payment is honoured by the latter. In the particular case of a sale, the right is explicitly granted under Article 1612 of the Dominican Civil Code.

7.2 Advice for contract drafting

As the risks on the property are assumed by the seller until such time the subject-matter to the sale is delivered, if retention is to be exercised by said seller, allocation of such risks to the purchaser should be explicitly agreed to under such circumstances.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Standard contract terms, characteristic of adhesion commercial contracts, can help facilitate transactions for providers of goods and services as well as for consumers. Nonetheless, such terms are individually negotiated by sellers and suppliers and can therefore result in an unfair or unreasonable advantage for them thus threatening the basic principle of contractual freedom. Dominican law is generally consumer-friendly. General Law No. 358-05 on the Protection of Consumer Rights addresses this issue by stating that disclaimer clauses and terms that excessively limit or completely waiver responsibility will be considered void. Said annulment however does not imply the cancellation of the entire agreement inasmuch only the “abusive” provisions will be void.

8.2 Advice for contract drafting

The best way to avoid this issue is for both parties to jointly negotiate the terms of their contract, although these is not always a feasible solution. Another option is for both parties to at least negotiate key provisions of their agreement such as those regarding liability.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Dominican legal system allows for the parties of a commercial or corporate transaction to specifically agree on a venue for their contract. If no specific venue is agreed, jurisdiction will be determined by the provisions of Dominican Civil Procedure Law. The general rule is that the competent court is the local court placed within the respondent’s domicile.

9.2 Arbitration

The Dominican judiciary system is inefficient inasmuch it is unable to expeditiously and adequately resolve the cases that are brought before it. Given this situation, parties to complex commercial and corporate transactions are strongly advised to include arbitration clauses in their contracts, thus avoiding Dominican tribunals in the event of litigation. In addition to providing a significantly more expeditious procedure, arbitration also provides the advantage of confidentiality.

Dominican commercial arbitration law is based on the Model Law of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL). The enactment of Law No. 489-08 on Commercial Arbitration and the development of arbitration institutions reflects how Dominican law is moving towards the use of arbitration as a reasonable alternative to litigation before national tribunals. Special arbitration is also available for members of Chambers of Commerce and Production under Law 50-87, customarily, the choice of preference for local disputes. The Dominican Republic is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

10. About the Author

10.1 Law Firm Profile

QUIROZ SANTRONI, Abogados Consultores is a Dominican business law firm specializing in legal assistance and comprehensive consulting in the development of investment projects, with a strong focus on environmental matters, tourism projects, corporate and project finance, and M&A, having been recognized as a leading law firm in such areas of law by international law firm ranking guides and organizations.

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FEDERAL REPUBLIC OF GERMANY

1. Introduction

The German legal system is a civil law system going back to Germanic tribe law and has largely been influenced by Roman law. The fundamental code for civil law, the German Civil Code (Bürgerliches Gesetzbuch, "BGB") has been in force since 1900 with its main principles applying down to the present. Additionally, the German legal system is largely shaped by the law of the European Union. Germany being a federal state, its legal system extends over the federal level as well as 16 federal states. The German constitution has been in force since 1949 and guarantees certain irrevocable fundamental rights, thereby securing the rule of law.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under German law, the parties of a cross-border contract are free to determine the material law that shall apply to their contract. However, the parties can only dispose over the applicable law for their contractual obligations, whereas they cannot dispose over such parts of the transaction having an *in rem* effect, such as transfer of title or possession, pledging of things and rights, etc., which are subject to the *lex rei sitae*, i. e. the law of the place where a contractual item is located. Choice of law clauses must be explicit or clearly result from the contract or its circumstances. In the case of cross-border transactions, it is not uncommon to agree on Swiss law as a "neutral" regime, if one party opposes to German law.

2.2 Inclusion of the UN Sales Convention

Germany is a member of the UN Sales Convention (United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980). Under German law, the UN Sales Convention automatically applies if the parties to the contract are member states and the contract is within the convention's scope. The parties do not need to explicitly agree on the UN Sales Convention, they don't even have to be aware of its applicability. If the parties do not want to submit their contract to the UN Sales Convention, they must explicitly exclude it. It is generally customary to exclude the UN Sales Convention and to submit to German law because German law is considered to provide more legal certainty and the UN Sales Convention is said to be more advantageous to a purchaser in comparison with German law. Also, German courts are less familiar with the UN Sales Convention than with German law.

3. Allocation and transfer of risk

3.1 General rule

The allocation of risk in an international sales contract under German law depends on various factors, including ownership of the contractual item, agreed or statutory place of performance and agreed shipment procedure. Generally, the risk that the object of the contract may be damaged or get lost is borne by its owner. However, in the case of a (cross-border) shipment of goods, German law provides that the risk shall transfer as soon as the seller has handed the item over to the forwarder, carrier or other person or body specified to carry out the shipment.

3.2 Advice for contract drafting

Due to the complexity of German law on the allocation and transfer of risk, it is advisable to include a clear-cut contractual agreement determining what will happen if the contractual object is lost, destroyed or damaged. This is commonly done by reference to Incoterms (International Commercial Terms of the International Chamber of Commerce), which provide the advantage of common interpretation in various languages and legal systems. Also, they are widely known and enforced by German courts.

4. Liability for defects

4.1 General rule

Unless the parties have agreed on a specific characteristic or suitability for a specific use, the purchased item must be suitable for customary use and comply with public statements on specific characteristics made by the seller (e. g. in advertising). Remedies of the buyer in case of a defect are initially subsequent performance, thereafter reduction of the purchase price or rescission of the contract (in case of a material defect), and finally damages if the seller acted culpably. In a B2B setting, any liability for defects is excluded if the purchaser has not inspected the purchased goods immediately after delivery by the seller and, if a defect is present, given immediate complaint of such defect to the seller. Also, the purchaser cannot raise any warranty claims if he was aware of the defect upon conclusion of the purchase contract.

4.2 Advice for contract drafting

The rules governing liability for defects are generally friendly for the purchaser, but can be altered by mutual consent. In almost any commercial transaction, it is customary to modify the general rules in favour of the seller. Particularly, it is customary to limit the requirements for liability, i. e. by excluding rescission of contract, by excluding liability in case of only slight negligence or in the case of immaterial defects. Further, it is customary to apply a liability cap for damage claims. Lastly, it is customary to waive or modify the requirement of giving immediate complaint in the case of a defect. Certain restrictions as to the modulation of the general rules apply when using General Terms and Conditions.

5. Liability for default

5.1 General rule

If the debtor is in default, then the creditor can claim compensation for the damage caused by the delay if the debtor culpably does not render performance despite maturity and reminders. In case of default in a B2B setting, a monetary claim is subject to interest amounting to eight percent above the basic interest rate of the European Central Bank. Also, the creditor has the right to rescind the contract.

5.2 Advice for contract drafting

The rules governing legal consequences of delay in performance can be altered by mutual consent. This is commonly done to specify the requirements of reminders and grant the debtor a fixed time period for performance. Also, the requirements for a rescission based on default are often increased in favour of the supplier. In case that the default relates to specific contractual performance (e. g. delivery), commercial contracts generally include penalty clauses, which relieve the customer from actually having to bring full evidence of

damages that were caused by the supplier's delay. Certain restrictions as to the modulation of the general rules apply when using General Terms and Conditions.

6. General liability and its limitation

6.1 General rule

The German legal system does not provide for punitive damages, treble damages and the like. However, a party which is liable for damages must compensate all losses that can be attributed to the contractual breach. Particularly in large transactions, the liability risk can easily threaten the existence of a business.

6.2 Advice for contract drafting

It is common practice to limit the scope of liability for both parties, particularly for the supplier/work contractor. Where the parties individually negotiate a contract, including the liability clause, modifications of the general rule are broadly possible and only limited by the principle of good faith. However, where General Terms and Conditions come into play, deviations from the general rule are only possible within a narrow scope.

7. Retention of title/payment protection

7.1 General rule

A retention of title can be contractually agreed. Technically, the purchaser obtains possession of the contract item, but the transfer of title of the contract item is subject to complete payment of the purchase price by the purchaser (simple retention of title). It can also be agreed that the purchaser himself is permitted to a further resale of the contract item with the provision that this resale must also be done under retention of title (extended retention of title). However, if any purchaser of the item under retention of title processes the item (e. g. in a manufacturing process), then the initial seller can lose his title and thereby his security.

7.2 Advice for contract drafting

The seller retains title in the sold item until all payments by the purchaser have been made. In the case of purchaser's default, seller may rescind the agreement and reclaim the item. The purchaser may resell the item with the provision that if the item is used in a manufacturing process, the initial seller acquires joint ownership in the newly manufactured product. If the item is not located in Germany, then the contract must be drafted in accordance with the *lex rei sitae*.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Models or sample agreements which are intended to be used in more than three cases and which are imposed by one party unilaterally upon the other party are considered to be GTC under German law. German law has rather specific and unique rules of interpreting such GTC, whereby it has to be examined whether or not there is a disproportionate impairment of the other party. If a GTC clause includes such disproportionate impairment,

then the GTC clause is invalid and unenforceable. A disproportionate impairment is assumed if a provision in the GTC is not compatible with the essential concepts of the statutory provision from which the parties are deviating or if the essential rights and obligations stemming from the nature of the contract are limited to such an extent that the proper functioning of the contract is endangered. This essentially means that there is a test of fairness and reasonableness.

8.2 Advice for contract drafting

The German concept of GTC and their judicial control (test of disproportionate impairment) proves as challenge and risk for any German or foreign company doing business under German law. The best way to avoid these issues is to individually negotiate a contract, or at least decisive contents of contracts (e. g. liability clauses). If the user of the GTC can produce evidence that a questionable clause was individually negotiated between the parties, then the test of disproportionate impairment does not apply. Further, any standard contracts or model templates should be drafted specifically to fulfil as closely as possible the requirements of German case law in order to pass judicial scrutiny.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The German judiciary system has a high standard and judgments are of good quality. Courts are capable of handling complex commercial or corporate matters on a reasonable standard and also within reasonable time frame. Generally, the parties can explicitly agree on a place of jurisdiction in their contract. If no specific place of jurisdiction is agreed, then under the German Code of Civil Procedure, the competent court may result from either a specific venue (such as place of fulfilment, place of a branch office) or a general venue, which is automatically the court where the debtor has his residence or place of business.

9.2 Arbitration

Arbitration agreements are widely used in B2B transactions, particularly in the cross-border sector. The German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit – “DIS”, see www.dis-arb.de) has the capability to administer all kinds of international disputes. Despite the high quality of German state courts, arbitration provides the advantages of confidentiality and facilitated enforcement of awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention").

10. About the Author

10.1 Law Firm Profile

HAVER & MAILÄNDER is a German business law firm with strong international focus. We advise German and international companies in all areas of business law. Our firm is one of the few German medium sized law firms with national and international renown. Our services are characterized by teamwork, reliability and personal commitment. Our strict orientation towards solutions is well proven in complex and cross-border projects. Our main office is in Stuttgart, Germany, we further maintain offices in Brussels, Frankfurt and Dresden.

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GREECE

1. Introduction

Greek law belongs to the civil law tradition. Private law consists of three sectors; Civil law, Commercial Law and Labour Law. Civil Law contains rules that regulate the relations of citizens, regarding personal matters and property. The basic provisions of Greek Civil Law are provided in the Civil Code (hereinafter "CC"), which became effective in February 23rd, 1946 and remains in force up to present.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Greek law, the applicable law on an international sale of goods is provided by the rules of Rome I Regulation (EU Regulation 593/2008 of the European Parliament on the law applicable to contractual obligations). The Rome I Regulation (hereinafter "Regulation") replaced the Rome Convention 1980 and applies to contracts concluded since 17 December 2009. Although the Regulation is enacted as a European Union measure, according to Article 2 of the Regulation, it applies universally (*erga omnes*), meaning that whether the law of a Member State or a non-Member State is designated as applicable is not relevant.

The Regulation is a legal tool which deals with the law applicable in case of a conflict of laws in contractual matters. According to the Regulation, the contract shall be governed by the law that the parties have chosen (Article 3.1). According to the aforementioned Article: "The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract".

In addition, the Regulation includes a list of types of contracts for which the law applicable, in the absence of choice, is determined (Article 4.1). Particularly, in case that there is no agreement between the parties about the applicable law, the law of the habitual residence of the seller shall govern the contract for the sale of goods (Article 4.1a).

It must be noted that the aforementioned apply in case of contractual transactions, but a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated (*lex rei sitae*).

As it has already been mentioned, the parties are free to choose the applicable law of their contract. However, the parties should be aware that according to the Regulation, where all other elements of the situation are located in one country other than the country whose law has been chosen, the choice is valid, and the foreign law will apply, but without prejudice to the application of the "law of that other country which cannot be derogated from by agreement" (Article 3.3 Regulation). When the parties enter into an international contract, it is advisable to include a choice of law clause, in order to preserve their right to choose the law that will govern their contract.

2.2 Inclusion of the UN Sales Convention

Apart from this general rule, Greece is also a party and has ratified the UN Sales Convention (United Nations Convention on Contracts for the International Sale of Goods dated

11 April 1980) by Law 2532/1997. As it is known, the UN Sales Convention automatically applies to the contract if the parties are member states and the contract is within the convention's scope. The parties do not need to explicitly agree on the UN Sales Convention. Therefore, if the parties do not prefer to submit their contract to the UN Sales Convention, they should clearly exclude its application. Generally, the UN Sales Convention is considered more favourable to sellers.

If the parties have agreed that the Greek law is applicable to the contract for a sale of goods, the rules of the following sections apply.

Under Greek law, the sale contract is promissory and bilateral, which means that rights and obligations arise under the law of obligations. The seller has the obligation to transfer the property of the item (without defects and with the agreed quality) and deliver them to the buyer, while the buyer undertakes the obligation to pay the agreed price to the seller. In addition, the seller is obliged to sell the item without legal faults (Art. 514 CC). However, if the buyer was aware of the legal fault, the seller's liability is excluded, except for confiscation or pledge, for which the seller is liable despite the buyer's knowledge (Art. 515 CC). Although Greek law does not generally provide a form requirement, the parties should conclude international sales contracts in writing.

3. Allocation and transfer of risk

3.1 General rule

According to Art. 522 CC, the risk for the at random destruction, loss or deterioration of the goods is transferred to the buyer at the time of delivery. In case of sale to destination according to buyer's instructions, Greek law provides that the risk is transferred to the buyer as soon as the goods are handed over to the carrier specified to carry out the shipment (Art. 524 CC).

3.2 Advice for contract drafting

It is advisable to include a clear provision in the contract, which will determine what will happen in case of deterioration or damage of the item, but also who bears the risk. This can also be done by reference to the so-called "INCOTERMS" (International Commercial Terms of the International Chamber of Commerce). The INCOTERMS are standards accepted worldwide and their application is optional for the parties.

4. Liability for defects

4.1 General rule

The main obligation of the seller is to deliver the goods with the agreed characteristics and without defects (Art. 534 CC). Remedies of the buyer in case he discovers a defect after the delivery are to: a) demand the repair of the item or substitution of it free of charge, b) diminish the price or c) withdraw from the contract, unless the defect is not substantial (Art. 540 CC).

4.2 Advice for contract drafting

The parties are free to regulate the seller's liability in a different way. However, there is always the limit of the provision of Civil Code which provides that if the contract contains a clause foreseeing the seller's a priori dismissal from his obligations when acting at fault, the latter is void. (Art. 332 CC).

5. Liability for default

5.1 General rule

If the debtor fails to perform, performance is still possible and the creditor is still interested in the performance, the latter has the following rights: (a) suspension of the performance of her/his obligations that are based on the same or another related contract until the debtor performs (b) Claim for performance (c) Claim for damages because of the delay, if the delay is debtor's fault (Art. 343-345 Greek Civil Code).

If the debtor fails to perform, performance is still possible but the creditor is not interested in the performance, the latter has the following rights (Art. 383-385 Greek Civil Code): a) set a time limit, within which performance must be completed and declare to the debtor that she/he will reject the performance after the end of the time-limit. This step, however, is not necessary when the creditor is no longer interested in performance. b) After the deadline (if it is necessary), the creditor can request to be fully compensated for non-performance, if the debtor is at fault as to non-performance or repudiate the contract.

If the debtor fails to perform and performance has become impossible, the creditor has the following rights: (a) if the impossibility is not debtor's fault, then both parties are released from their obligations to perform b) If the impossibility is debtor's fault, then the creditor can request damages for non-performance. A party that fails to be consistent with its obligations except for delay or non-performance has the obligation to fully compensate the other party, if she/he is at fault.

5.2 Advice for contract drafting

A party is at fault when the breach of contract results from intention or negligence. A person is considered to be negligent when she/he has not taken the appropriate care that is necessary in common affairs (Art. 330 CC). The parties can limit their contractual liability, but they cannot exempt any party for intentional or gross negligent breaches of contract (Art. 332 CC). Any clause which limits liability for intentional or gross negligent breaches of contract is not enforceable.

Furthermore, there is no special treatment for standard form B2B commercial contracts. Generally, the contract should not include abusive terms, but should contain fair terms based on good faith and commercial practice.

6. General liability and its limitation

6.1 General rule

The contractual liabilities can be limited by the parties only for mere negligence. Clauses of the contract that limit liability for intent or gross negligence are null and void. Plus to this, the parties are responsible for the fault of their employees that occur during the performance of their contractual obligation, as it was their own fault (Art. 334 CC).

6.2 Advice for contract drafting

In general, the right to request compensation can be individually negotiated by the parties, but must always be subject to the principle of good faith and common commercial practice. Under Greek law, the concept of liquidated damages is not recognised as in other jurisdictions. However, other types of compensation are provided in order to serve this purpose: a) Penalty clause (Art. 404–407 CC). b) Down payment (Art. 402–403 CC).

7. Retention of title/payment protection

7.1 General rule

Under Greek law, the seller is obliged to transfer the ownership and possession of the goods to the buyer with the intention that the latter becomes the owner. However, if the contract of sale incorporates a condition pursuant to which the seller retains ownership until full repayment of the purchase price, then it is deemed that title passes to the buyer as of the fulfilment of the relevant condition [payment of the purchase price] and if the buyer delays payment of the purchase price, then the seller is entitled either to demand payment of the purchase price or to declare the contract avoided by exercising its rights that result from ownership (Art. 532 CC).

7.2 Advice for contract drafting

Under Greek Law if the contract of sale includes a retention of title clause, the buyer bares the risk from the moment the goods are handed over to her/him.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

According to the Civil Code, the parties are bound to act in good faith during negotiations, the conclusion and performance of the contract. In particular, each party must take into consideration the legitimate interests of the other party and abstain from any abusive exercise of rights that might violate the principles of good faith. In addition, under Greek law, contract terms should be interpreted, considering good faith.

8.2 Advice for contract drafting

A consumer is protected by law against contract terms that are considered unfair, when entering a contract with a professional, as follows:

Contract terms that have not been negotiated individually, but are drafted in advance for future contracts, i.e. General Terms and Conditions of Contacts, (hereinafter “GTCC”), are regulated under Art. 2 of the Law 2251/1994 which enacts in Greek law the Directive 93/13/EEC. According to the aforementioned Article “Terms that have been set forth in advance for future contracts (general terms for transactions) are not binding to the consumer if, upon compilation of the contract, the consumer was innocently unaware of them as, and most particularly, in cases when the supplier does not indicate the existence of these terms or deprives the consumer of the possibility to acquire knowledge of their content”. GTCCs are considered as abusive when the balance of rights and obligations are at risk and lead to the detriment of the consumer. Such terms are null and void. In addition, in case that the content of a term creates uncertainty about its meaning, it is interpreted in favour of the consumer. GTCCs, which are entailed in consumer contracts concluded in Greece, should be drafted in Greek in a plain and intelligible way.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

Justice in Greece is one of the three functions of the state. In line with the principle of the separation of powers, justice is independent of the legislative and executive powers. Justice is administered by an independent judiciary, which is divided into civil, criminal, and administrative courts. The right of access to the courts is constitutionally guaranteed, according to art. 20 par. 1 of the Constitution. Private Law disputes fall under the jurisdiction of the civil courts. The territorial competence is generally decided by the place of the residence of the defender. However, there are also by other criteria, such as the place of fulfilment, the location of the disputed immovable property etc. Generally, the parties may explicitly choose a specific district court in their contract.

Greek courts provide high quality of judgments and legal decisions, and are in general positive to recognise and enforce foreign judgments and arbitral awards.

9.2 Arbitration

Under Greek law, international commercial arbitration is regulated by Law 2735/1999 which almost literally transposes the UNCITRAL Model Law on International Commercial Arbitration. Law 2735/1999 applies to international commercial arbitration proceedings that have their seat in Greece. Domestic arbitration proceedings are governed by Articles 867 et seq. of the Greek Code of Civil Procedure.

Greece is a contracting party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified pursuant to Law 4220/1961 (in force since 14 October 1962). Greece is also a contracting party to the Washington Convention of 1968 on the settlement of investment disputes between states and nationals of other State (the ICSID Convention), ratified pursuant to Compulsory Law 608/1968 (in force since 21 May 1969).

10. About the Author

10.1 Law Firm Profile

NOMOS is a law firm based in Thessaloniki with a strong commercial focus, mainly specializing in company law and real estate. Having both English and German speaking lawyers NOMOS is orientated to serving the needs of international clients. With a wide network of lawyers, tax advisors, auditors, notaries and engineers across Greece we can guarantee comprehensive and competent consulting.

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HONG KONG

1. Introduction

The Hong Kong legal system originates from the English legal system, while Hong Kong was a British colony before the change of sovereignty on the 1st July 1997, when she becomes the Hong Kong Special Administrative Region of the People's Republic of China. Under the Basic Law which is Hong Kong's mini constitution, all laws previously in force in Hong Kong, i.e. the common law, rules of equity, statutes and customary law, shall be maintained, subject to amendments by the legislature, unless they contravene the Basic Law. Under the doctrine of precedent, judgments of superior courts in Hong Kong are legally binding on lower courts. Hong Kong courts may also refer to persuasive precedents from other common law jurisdictions, especially England and Wales and other Commonwealth countries. However, Hong Kong does not have jurisdiction over defence and foreign affairs which are matters within the purview of the Central Authorities of China. Under the Basic Law, fundamental rights of citizens, such as the right to confidential legal advice and access to the courts, are also maintained, thereby upholding the rule of law.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Hong Kong law, the parties of a cross-border contract are also free to determine the substantive law that shall apply to their contract. However, where real property is concerned, the applicable law usually follows where the real property is actually located, which may in turn affect the applicable law in actions brought against the real property of the debtors, foreclosure of mortgages and the enforcement of different liens. While such common law actions are initiated *in rem*, i.e. enforceable against everyone, Hong Kong law also encompasses the doctrine of the bona fide purchaser for value without notice, which is quaintly regarded as "equity's darling." Actions brought *in personam* are enforceable against the relevant parties, but not the bona fide purchaser who bought a legal estate for value without notice of any interests in the property. That said, such a purchaser is put on enquiry and should take all reasonable steps to ascertain whether there are any equitable interests in the property, in which case, he would be bound by it. Hong Kong has a very transparent system of registration of ownership of properties and encumbrances in the Land Registry, Companies Registry, Trademark Registry, etc. People are deemed to have constructive notice of all information registered therein.

2.2 Inclusion of the UN Sales Convention

The UN Sales Convention applies to Mainland China but not Hong Kong. There has been no Hong Kong-related depositary notification for the UN Sales Convention having been filed with the Secretary-General of the United Nations by the People's Republic of China. Pending such filing, the courts of Mainland China and Hong Kong are unlikely to regard the UN Sales Convention effective in Hong Kong. Hence, contracting parties may submit themselves to Hong Kong law, i.e. the Sale of Goods Ordinance and common law applying this Ordinance, for the sake of legal certainty.

3. Allocation and transfer of risk

3.1 General rule

Goods generally remain at the seller's risk until property (i.e. title) passes to the buyer. In case of shipment of goods, allocation of risk depends on whether the parties have agreed to ship the goods pursuant to a free on board ("FOB") or cost insurance freight ("CIF") contract. For FOB contracts, the seller pays all the charges for loading the goods in a designated port of shipment and risk normally passes to the buyer when the goods are put across the ship's rail. For CIF contracts, property passes at the time the buyer pays and takes up the shipping documents and risk passes at the time of shipment of the goods by the seller, or where the contract is made after shipment, risk may pass at the time of the contract or retrospectively from the date of shipment at the option of the contracting parties, so that the goods can be deemed to have been at the buyer's risk since the time of shipment.

3.2 Advice for contract drafting

For FOB contracts, the buyer should make sure that he can be indemnified by his insurer as he may insure his interest in the goods by himself from the time of shipment. However, parties can vary the seller's duties and the point at which risk passes, e.g. by stipulating that the goods are to be delivered "fob stowed and trimmed," so that risk will not pass until the goods are loaded, safely stowed and trimmed by the seller. For CIF contracts, the buyer has the benefit of the contract of carriage and insurance policy in the sense that the buyer may claim for damages for breach of contract if the seller did not obtain the type of insurance policy required. However, the buyer needs to be aware that he may be exposed to risks not covered by the contract of carriage or insurance policy and thus should make sure whether to exclude appropriation by the seller in cases where goods become damaged, deteriorated or lost.

4. Liability for defects

4.1 General rule

The Sale of Goods Ordinance provides that goods for sale must be of merchantable (satisfactory) quality, i.e. meet the standard that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price and all other relevant circumstances. This condition is not implied as regards any defect specifically drawn to the buyer's attention before the contract was made, or where a pre-purchase examination ought to have revealed. Merchantable quality includes fitness for all purposes for which the goods of the kind in question are commonly supplied, or any particular purpose mentioned by the buyer to the seller. However, the buyer may have no claim under this limb, if he places no reliance upon the seller's skill and judgment in respect of the goods. Nevertheless, if the goods are not the same as described on the package, display sign or by the seller or where there is a bulk purchase but the bulk does not correspond with its sample in quality, the seller shall be liable for breach of contract, misrepresentation and breach of the Sale of Goods Ordinance, whereby the buyer may reject the goods and demand a full refund of the money paid.

4.2 Advice for contract drafting

It is common practice for sellers to include a clause to exclude liability for breach of the implied condition as to merchantable quality and fitness for purpose. However, the rules

governing liability for defects are also generally more friendly for the purchaser. The *contra proferentem* rule of construction requires that, where a clause is truly ambiguous, the meaning which gives the clause the lesser effect and favours lesser for the party putting forward the clause. Thus, the seller should, in addition to ensuring that a clause limiting or excluding liability is properly drafted and incorporated into the contract, and make sure that the wording of such clause is sufficiently clear for interpretation, especially when such a clause purports to exclude a fundamental breach of contract.

5. Liability for default

5.1 General rule

If the debtor is in default, the creditor has a chose in action over the debt. If the debt is secured by the debtor's property, the creditor may enforce the security by selling off the debtor's property to recover the loan with surplus in proceeds returned to the debtor, or, in the case of any shortfall, claim for damages against the debtor. The creditor may also, in entering into the contract with the principal debtor, require a guarantor to see that the principal debtor duly perform his obligations to the creditor under a guarantee.

5.2 Advice for contract drafting

The creditor may include a clause that provides for payment to be made within a negotiable fixed period of time and provide for setting off of any sums due from the creditor to the debtor under the contract. The parties could agree in the contract as to the circumstances whereby a delay in performance or non-performance by one party gives rise to repudiation, giving the other party the right to terminate the contract and seek damages. On the other hand, penalty clauses which determine the sum or penalty that must be paid on a contractual breach are unenforceable to the extent that the sum stipulated in the contract as being payable is substantially higher than the loss likely to be suffered as a result of the breach. This is distinguished from clauses requiring a defaulting party to pay sums already due (but unpaid) on termination following an event of breach which will not be penal and thus enforceable. The liquidated damages clause must be a genuine pre-estimation of the actual loss of the innocent party. Usually, it is a realistic formula for calculation. The rule against penalties is absolute and is only invoked sparingly by the courts, as it is an exception to the principle of general freedom to contract. The burden of proof in relation to disproving a penalty rests with the party intending to rely on the liquidated damages clause.

6. General liability and its limitation

6.1 General rule

The Hong Kong legal system recognizes damages as the liability of the defaulting party to pay pecuniary compensation to an innocent party to an action, the objective of which is to compensate the loss actually suffered by the innocent party and not what the defaulting party should reasonably pay and thus the amount of damages payable for a breach of contract is based on the loss to the innocent party rather the gain to the defaulting party. The innocent party may elect to sue for damages or specific performance.

6.2 Advice for contract drafting

It is common practice for both parties to limit their liability in contracts. But as will be explained in more detail below, the Control of Exemption Clauses Ordinance restricts the

extent to which civil liability for breach of contract, negligence or other breach of duty can be avoided by contract. A clause limiting liability will only be upheld if it is reasonable. The limits of liability should be reasonable upon taking into account whether the parties are business-to-business or business-to-customer. Customers enjoy more protection under various statutory provisions.

7. Retention of title/payment protection

7.1 General rule

A retention of title clause results in title being retained by the seller for some considerable time even after delivery until the purchase price has been fully paid. It can also be an all monies/liabilities clause, where the seller retains title until the buyer has satisfied all his liabilities to the seller. The purpose of a retention of title clause would be to put the seller in a stronger position in the event of the buyer going into liquidation. If the goods had not been paid for, it enables the seller to retake possession of the goods irrespective of how many other creditors the insolvent buyer might have. However, a buyer may need to be able to sub-sell the goods to maintain his cash flow to settle his debts. However, if the buyer cannot pass good title to the sub-buyer, he may not be able to find willing sub-buyers. In a sub-sale, there is always a risk that the sub-buyer would, if unaware of the retention of title clause, claim to obtain title by virtue of the exception to the *nemo dat quod non habet* principle. There are also various cases where a retention of title clause ceases to be effective once the goods have lost their identity in the buyer's manufacturing process.

7.2 Advice for contract drafting

A sensibly drafted retention of title clause will authorize the buyer to sub-sell the goods so that the seller would not lose ownership and the sub-buyer would not acquire ownership until, according to the terms of the sub-sale, property passes from the buyer to the sub-buyer. To retain an interest in the proceeds of the sub-sale, the clause need to clearly state that the buyer, in having possession of and sub-selling the goods, is the agent, bailee or fiduciary of the seller, and selling for the account of the seller. To protect the seller where the goods have been incorporated into something else in the buyer's manufacturing process, the seller should register a charge created by the buyer over the manufactured product.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Terms and conditions of contracts are governed by Hong Kong law. Under the Control of Exemption Clauses Ordinance, exemption clauses may have no effect and may be unenforceable if they are proved to be unreasonable. The relevant exemption clause must be fair and reasonable having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the agreement was made. Liability arising from the death or personal injury of a buyer due to the seller's negligence cannot be excluded. Besides, under the Unconscionable Contracts Ordinance, a clause must not be unconscionable (i.e. unfair or not sensible) in circumstances relating to the contract at the time when it was made. Otherwise, courts may refuse to enforce

the clause, or revise or alter the unconscionable part of the contract, so as to avoid any unconscionable result.

8.2 Advice for contract drafting

The parties should, in negotiating a contract, take into account the respective bargaining positions of the parties and ensure that the buyer knows or ought reasonably to have known of the existence and extent of the clause. The parties need to discuss with each other on whether it is reasonable at the time of the contract to expect that compliance with the condition in the clause would be practicable. The buyer should also examine whether he is required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the seller. The seller should ensure that no undue influence or economic duress is exerted on the buyer in which case the courts may interpret the clause against the seller.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The English common law system is well established in Hong Kong with the English legal system in place for more than 150 years, notwithstanding the change of sovereignty in July 1997. The legal system shall remain unchanged until 30th June 2047.

Hong Kong courts have jurisdiction to handle complex corporate and commercial cases on its own with the power of final adjudication in the Court of Final Appeal. That said, parties may confer jurisdiction on the courts of more than one country, e.g. by providing that a party bringing a legal action will do so in the courts where the other is domiciled or trades. For instance, in a licence agreement, the licensor may in any case wish to bring an action in a jurisdiction where the licensee trades or where it has substantial assets. Given the niceties and differences in the laws of foreign jurisdictions, parties must be cautious not to make a concession on law and jurisdiction without seeking specialist advice and understanding the ramifications of such concession.

9.2 Arbitration

Arbitration agreements are usually found in an arbitration clause provided in the commercial contract entered into by the parties. Such arbitration agreement or clause provides the basis of the arbitral tribunal's jurisdiction over the parties' disputes and claims arising out of or in connection with a particular contract. The flexible process provides parties with an efficient, confidential, fair, final and binding dispute resolution. The Hong Kong International Arbitration Centre ("HKIAC") provides facilities and support services for arbitrations conducted in Hong Kong, whether such proceedings are administered by the HKIAC or not. The Arbitration Ordinance has made Hong Kong a United Nations Commission on International Trade Law ("UNCITRAL") Model Law jurisdiction.

Either an arbitral award made in or outside Hong Kong is enforceable in the same manner as a court judgment having the same effect, but leave from the court to enforce the award is required. If a settlement agreement is entered by the parties in the arbitration proceedings, the agreement may be enforced with leave of the court, as if the agreement were an arbitral award. Arbitral awards granted in Hong Kong are enforceable in all signatory states to the New York Convention. New York Convention arbitral awards may also be enforced in Hong Kong except where the arbitral agreement is invalid, there is procedural irregularity, etc. The party seeking to enforce it must produce a duly authenticated original award and the original arbitration agreement or its duly certified copies. Under the

Arrangement Concerning Mutual Enforcement of Arbitral Awards between the People's Republic of China and Hong Kong, arbitral awards are reciprocally enforceable between the People's Republic of China and Hong Kong, provided that the People's Republic of China arbitral awards are made by recognized Mainland China arbitral institutions. Hong Kong arbitral awards can be enforced in all signatory states of the New York Convention and in the People's Republic of China by application to the intermediate people's court of the place where the unsuccessful party is domiciled and/or in the place where the properties of that party are situated. The limitation period for an application for enforcement of an arbitral award in Mainland China is two years from the effective date of the arbitral award. Further, under the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between Hong Kong and Macau, Hong Kong and Macau can enforce each other's arbitral awards.

10. About the Author

10.1 Law Firm Profile

LILY FENN & PARTNERS ("LFP") are formed by experienced legal practitioners in Hong Kong of diversified experience and expertise. LFP is one of the leading medium sized law firms with the strength to handle complex legal matters while maintaining efficient communication and interaction with clients. Thanks to our lawyers in various specialized fields, we strive to provide quality legal services to our local and international clients. There are 6 departments, namely, 1) Litigation and Arbitration; 2) Corporate Commercial; 3) Intellectual Property and Information Technology; 4) Aviation; 5) Matrimonial Causes; 6) Conveyancing, Probate and Trust.

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HUNGARY

1. Introduction

The Hungarian legal system is a traditional continental civil law system. The current constitution of the country is the Fundamental Law of Hungary, which was adopted by the parliament in 2011. This document replaced the constitution of 1949, which was originally made when Hungary became a communist country, but was almost completely redrafted in 1989, after the fall of the communism.

Hungarian private law has its origins in the Roman law, but is also heavily influenced by the German legal system. As a member state of the European Union since 2004, EU law is also applicable in Hungary.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

The autonomy of the parties in choosing the applicable law for international contracts was accepted in Hungary by the judicial practice and was later codified in both the Hungarian Private International Code (PIC) and in Regulation (EC) No 539/2008, commonly known as the Rome I Regulation.

However, mandatory provisions of Hungarian law and public policy are important restrictions on the choice of law. This means that regardless of which law is agreed in the contract, Hungarian courts will nevertheless apply mandatory provisions of Hungarian law, and may also disregard some provisions of the applicable foreign law, if that would be contrary to Hungarian public policy.

2.2 Inclusion of the UN Sales Convention

The Convention of the United Nations on Contracts for the International Sale of Goods ("CISG") entered into force in 1988 in Hungary. Unless it is explicitly excluded in the contract, the CISG is applicable to the contract, provided that both parties are situated in a state contracting to the CISG, or if according to the rules of private international law Hungarian law would be applicable to the contract.

3. Allocation and transfer of risk

3.1 General rule

The risk that the subject of the contract may be damaged or gets lost is borne by the owner and shall not transfer sooner than at the time of the performance of the contract. The risk typically transfers as the item is handed over to the buyer, forwarder, carrier or other person specified in the contract. However, the rules of the allocation of risk can vary considerably depending on which type of contract (e.g. sales contract, contract of carriage, shipping contract) is concluded between the parties.

3.2 Advice for contract drafting

It is advisable to agree on the allocation and transfer of the risk explicitly and in detail. For this purpose, Incoterms are frequently used in contracts, as these are widely known and accepted and provide detailed regulation on when and how the risk is transferred.

4. Liability for defects

4.1 General rule

Performance must conform to the contract, that is to say, services, at the time when they are supplied, should be suitable for their intended purpose and for customary use, and they must comply with the requirements defined by law and with the statements given by the obligor. Generally, the obligor is liable for providing a warranty concerning lack of conformity. On the basis of warranty rights, the obligee will have the option to a) require the repair or replacement of the item (unless it results in impossible or disproportionate expenses on the part of the seller), or b) require the reduction of the purchase price or to rescind from the contract (provided that the claims under a) cannot be enforced, or the oblige has lost its interest in repair or replacement). Further, the new Hungarian Civil Code has introduced that in case of B2C sales, the consumer can request the repair or replacement not only from the seller, but also from the manufacturer/importer.

4.2 Advice for contract drafting

Circumstances which constitute a defect and the scope of warranty rights should be defined in the contract very specifically, because it may be difficult to decide whether a specific situation constitutes a defect if we only rely on the Civil Code.

It is also important to note that in compliance with the EU law the Hungarian Civil Code places a strong emphasis on consumer rights, which is sharply reflected in this particular field. Any provision in a B2C contract that diverges from the rules of the Hungarian Civil Code on warranties and commercial guarantees to the detriment of the consumer is null and void.

5. Liability for default

5.1 General rule

In the event of the obligor's delay, the obligee is entitled to require performance, or, if performance no longer serves his interest, or after setting a reasonable deadline for performance, he is entitled to rescind from the contract. In the case of a monetary debt, the debtor shall pay interest on late payment. In contracts between businesses, interest on late payment amounts to eight percent above the basic interest rate of the Hungarian Central Bank.

5.2 Advice for contract drafting

As the parties can depart from the provisions relating to their rights and obligations with mutual consent, it is practical to specify the time frames of the performance and the consequences of the delay. Commercial contracts often include complementary guarantees (e.g. high late performance interest, contractual penalty, guarantee).

6. General liability and its limitation

6.1 General rule

Under Hungarian law, there are two forms of liability for damages.

The first is the liability for the breach of a contract. The par-ty who breaches the contract is liable for any damages which were, at the time of the conclusion of the contract, foreseeable consequences of a breach. The said party is relieved of liability if it is able to prove

that the damage occurred as a consequence of unforeseen circumstances be-yond its control, and there had been no reasonable cause to take action in order to prevent or mitigate the damage. The liability regime of the new Civil Code for breach of contract is, in general, based on the model of CISG.

The other form of liability is the liability for non-contractual damages. The party who causes the loss on a non-contractual basis is liable for the losses without limitation. The said party is relieved of his liability if able to prove that his conduct was not culpable, meaning that it was in line with what can generally be expected in the given circumstances.

Liability for damages can be limited. However, the general restriction is that the attempted limitation of liability for will-fully caused damages, or damages caused to human life or health, is null and void.

6.2 Advice for contract drafting

The foreseeable consequences of a breach should be explicitly mentioned in the contract, so that later the breaching party cannot claim that such consequences were not foreseeable.

7. Retention of title/payment protection

7.1 General rule

The seller is entitled to retain title of ownership until the purchase price is paid in full. As a consequence, the purchaser only obtains the possession of the item when it is handed over to him. Retention of title secures the position of the seller since, in the case of the purchaser's default, the seller can rescind the agreement and reclaim the item.

7.2 Advice for contract drafting

The retention of the title is considered a security in Hungarian law. A contractual security is only enforceable towards third parties if it is registered in the Security Interest Registry, which is kept by the Chamber of Civil Law Notaries. So, in the lack of this registration, the item can still be reclaimed from the buyer, however if the buyer sells it to a *bona fide* third party, the original seller can no longer reclaim the item from the *bona fide* third party buyer. Therefore, the registration of the retention in the Security Interest Registry is recommended, but it should also be noted that the registration requires rather burdensome administration.

8. Use of General terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Under Hungarian law, General Terms and Conditions (GTC) mean contract terms which have been unilaterally drafted in advance by one of the parties for several transactions involving different parties, and which have not been individually negotiated by the parties. Where either party claims that a GTC has been individually negotiated, the burden of proof in this respect is to be incumbent on the party applying the GTC. A GTC is considered unfair and as a consequence null and void if, contrary to the requirement of good faith and fair dealing, it causes a significant and unjustified imbalance in contractual rights and

obligations, to the detriment of the party entering into the contract with the person imposing such a contractual term.

Apart from the general rule, the Civil Code contains a so-called “blacklist” and “greylist” of unfair provisions in B2C general terms and conditions. Provisions on the blacklist are unfair and prohibited in all circumstances, while the unfairness of the provisions on the greylist is rebuttable.

The party using the GTC has to draw the attention of the other party to those provisions which are significantly different to the relevant legislation or the market practice. Such provisions only become part of the contract if the other party explicitly accepts it.

8.2 Advice for contract drafting

Especially in B2C contracts, it is advisable to make the GTC as clear as possible and to try to avoid over complicated and long GTCs. It is also essential to provide enough time and information for the other party to read and under-stand the GTC, otherwise the other party will have a good chance of successfully challenging the applicability and/or validity of the GTC.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Hungarian judiciary system consists of four levels: the District Courts, the Regional Courts, the Regional Courts of Appeal, and the Curia. Generally, the parties can agree on the exclusive jurisdiction of any Hungarian court, provided that such court has jurisdiction over that certain type of dispute (for example, if a dispute belongs to the jurisdiction of a regional court, it cannot be taken to the district court). The exception to the above rule is that the parties cannot agree on the exclusive jurisdiction of certain courts in Budapest, because of the huge caseload handled by these courts.

In the lack of such agreement, the general jurisdiction rules of the Hungarian Civil Procedural Code prevail.

9.2 Arbitration

In a B2B setting, arbitration agreements are frequently used since arbitration offers many advantages (e.g. rapidness, secrecy and expertise). The basic rules of arbitration are regulated by the Hungarian Act on Arbitration, which is based on the UNCITRAL Model Law of 1985. According to the Act, disputes may be settled by way of arbitration if a) at least one of the parties is professionally engaged in business activities and the legal dispute arises out of or in connection with this activity; furthermore, b) the parties may dispose freely of the subject-matter of the proceedings and c) arbitration was stipulated in an arbitration agreement.

Institutional and ad hoc arbitration are both permitted and used in Hungary. The most frequently used arbitration court is the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (www.mkik.hu).

Arbitral awards may only be challenged in front of the ordinary courts in exceptional cases. These cases include major procedural violations during the arbitration, or if the arbitral award would be contrary to public policy.

10. About the Author

10.1 Law Firm Profile

Szecskay Attorneys at Law was founded in 1992 by Dr. András Szecskay and has grown to be a market-leading, independent Hungarian law firm with an extensive international practice which is consistently top-ranked in all the major legal rankings publications (including Chambers & Partners, The Legal 500 and IFLR1000).

Although the firm's size and practices have grown over the past decades, its core values of premium legal work and client service remain unchanged. It provides client-focused and innovative solutions to a diverse multinational and local client base consisting of typically large and medium-sized businesses representing a full spectrum of industry, trade and services.

Through a group of proactive attorneys who value their work and are committed to achieving results, the firm brings a wealth of knowledge and experience to bear for its clients.

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ICELAND

1. Introduction

The Iceland legal system is a civil law system going back to Germanic tribe law and has largely been influenced by Roman law. Germanic tribe law did influence Danish law and from there the influence to Icelandic law is coming. In Iceland was the oldest parliament in the world, Althingi, established in 930 but at that time most other counties had kingdoms. The fundamental code for civil law in Iceland is the Constitution of the Republic of Iceland from 1944 that guarantees certain irrevocable fundamental rights, thereby securing the rule of law with guidelines. Iceland is not a member of the European Union but it has strong connection to it through European Economic Area Agreement (EEA) that provides for the free movement of persons, goods, services and capital within the European Single Market. The EEA Agreement specifies that membership is open to member states of either the European Union (EU) or European Free Trade Association (EFTA). EFTA states like Iceland which are party to the EEA Agreement participate in the EU's internal market without being members of the EU. They adopt most EU legislation concerning the single market, however with notable exclusions including laws regarding agriculture and fisheries.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Icelandic law, the parties of a cross-border contract are free to determine the material law that shall apply to their contract. However, the parties can only dispose over the applicable law for their contractual obligations, whereas they cannot dispose over such parts of the transaction having an *in rem* effect, such as transfer of title or possession, pledging of things and rights, etc., which are subject to the *lex rei sitae*, i. e. the law of the place where a contractual item is located. Choice of law clauses must be explicit or clearly result from the contract or its circumstances. Icelandic courts have ruled that if agreements have determined that other material law than Icelandic law should apply to their contract and later there will be a disagreement regarding the material of agreements the governing law the party that is referring to the disputed clause has the burden of proof regarding the material of that clause and its interpretation. Icelandic courts rely mainly on the Merchants and Trade Act No 50/2000 on the Sale of Goods but that act includes some special rules regarding international sales but the special rules on international sales do not apply in the case of sales where the seller has his place of business in Denmark, Finland, Iceland, Norway or Sweden, and the buyer has his place of business in any of these countries (Nordic sales).

2.2 Inclusion of the UN Sales Convention

Iceland is a member of the UN Sales Convention (*United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980)*. Under Icelandic law, the UN Sales Convention automatically applies if the parties to the contract are member states and the contract is within the convention’s scope. Icelandic courts rely mainly on the Merchants and Trade Act No 50/2000 on the Sale of Goods but in Chapter XV. regarding Special Rules on International Sales there are clauses that directly refer to the UN Sales Convention.

3. Allocation and transfer of risk

3.1 General rule

The allocation of risk in an international sales contract under Icelandic law depends on various factors, including ownership of the contractual item, agreed or statutory place of performance and agreed shipment procedure. Generally, the risk that the object of the contract may be damaged or get lost is borne by its owner unless parties have negotiated otherwise. However, in the case of a (cross-border) shipment of goods, Icelandic law provides that the risk shall transfer as soon as the sales contract has been signed unless the parties have agreed that the risk should not be transferred to the buyer until the seller has handed the item over to the forwarder, carrier or other person or body specified to carry out the shipment.

3.2 Advice for contract drafting

It is advisable in all international sales contract to include a clear-cut contractual agreement determining what will happen if the contractual object is lost, destroyed or damaged. This is commonly done by reference to Incoterms (International Commercial Terms of the International Chamber of Commerce), which provide the advantage of common interpretation in various languages and legal systems.

4. Liability for defects

4.1 General rule

Unless the parties have agreed on a specific characteristic or suitability for a specific use, the purchased item must be suitable for customary use and comply with public statements on specific characteristics made by the seller (e. g. in advertising). Remedies of the buyer in case of a defect are initially subsequent performance, thereafter reduction of the purchase price or rescission of the contract (in case of a material defect), and finally damages if the seller acted culpably. In a B2B setting, any liability for defects is excluded if the purchaser has not inspected the purchased goods immediately after delivery by the seller and, if a defect is present, given immediate complaint of such defect to the seller. Also, the purchaser cannot raise any warranty claims if he was aware of the defect upon conclusion of the purchase contract.

4.2 Advice for contract drafting

The rules governing liability for defects are generally friendly for the purchaser, but can be altered by mutual consent. In almost any commercial transaction, it is customary to modify the general rules in favour of the seller. Particularly, it is customary to limit the requirements for liability, i. e. by excluding rescission of contract, by excluding liability in case of only slight negligence or in the case of immaterial defects. Further, it is customary to apply a liability cap for damage claims. Lastly, it is customary to waive or modify the requirement of giving immediate complaint in the case of a defect. Certain restrictions as to the modulation of the general rules apply when using General Terms and Conditions. There are special laws in Iceland regarding Consumers Purchase and according to those laws parties that fall under the definition of consumers are much more protected and there are limitation for mutual consent regarding modifying all major rights and obligation according those law.

5. Liability for default

5.1 General rule

If the debtor is in default, then the creditor can claim compensation for the damage caused by the delay if the debtor culpably does not render performance despite maturity and reminders.

5.2 Advice for contract drafting

The rules governing legal consequences of delay in performance can be altered by mutual consent. This is commonly done to specify the requirements of reminders and grant the debtor a fixed time period for performance. Also, the requirements for a rescission based on default are often increased in favour of the supplier. In case that the default relates to specific contractual performance (e. g. delivery), commercial contracts generally include penalty clauses, which relieve the customer from actually having to bring full evidence of damages that were caused by the supplier's delay. Certain restrictions as to the modulation of the general rules apply when using General Terms and Conditions. Also as mentioned before the exceptions of the right to alter the rules is if the purchase if defined as consumer sale and purchase agreement that falls under the law of Consumers Purchase the general rule is that the rules cannot be altered by mutual consent.

6. General liability and its limitation

6.1 General rule

The Icelandic legal system does not provide for punitive damages, treble damages and the like. However, a party which is liable for damages must compensate all losses that can be attributed to the contractual breach. Particularly in large transactions, the liability risk can easily threaten the existence of a business. The exception from this are the rules regarding product liability.

6.2 Advice for contract drafting

It is common practice to limit the scope of liability for both parties, particularly for the supplier/work contractor. Where the parties individually negotiate a contract, including the liability clause, modifications of the general rule are broadly possible and only limited by the principle of good faith. However, where General Terms and Conditions come into play, deviations from the general rule are only possible within a narrow scope. There are also limitations if the sale is defined as a consumer purchase as previously mentioned.

7. Retention of title/payment protection

7.1 General rule

A retention of title can be contractually agreed. Technically, the purchaser obtains possession of the contract item, but the transfer of title of the contract item is subject to complete payment of the purchase price by the purchaser (simple retention of title). It can also be agreed that the purchaser himself is permitted to a further resale of the contract item with the provision that this resale must also be done under retention of title (extended retention of title). However, if any purchaser of the item under retention of title processes the item (e. g. in a manufacturing process), then the initial seller can lose his title and thereby his security.

7.2 Advice for contract drafting

The seller retains title in the sold item until all payments by the purchaser have been made. In the case of purchaser's default, seller may rescind the agreement and reclaim the item. The purchaser may resell the item with the proviso that if the item is used in a manufacturing process, the initial seller acquires joint ownership in the newly manufactured product. If the item is not located in Iceland, then the contract must be drafted in accordance with the *lex rei sitae*.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Models or sample agreements which are intended to be used in more than three cases and which are imposed by one party unilaterally upon the other party are considered to be GTC under Icelandic law. Icelandic law has rather specific and unique rules of interpreting such GTC, whereby it has to be examined whether or not there is a disproportionate impairment of the other party. If a GTC clause includes such disproportionate impairment, then the GTC clause is invalid and unenforceable. A disproportionate impairment is assumed if a provision in the GTC is not compatible with the essential concepts of the statutory provision from which the parties are deviating or if the essential rights and obligations stemming from the nature of the contract are limited to such an extent that the proper functioning of the contract is endangered. This essentially means that there is a test of fairness and reasonableness.

8.2 Advice for contract drafting

The Icelandic concept of GTC and their judicial control (test of disproportionate impairment) proves as challenge and risk for any Icelandic or foreign company doing business under Icelandic law. The best way to avoid these issues is to individually negotiate a contract, or at least decisive contents of contracts (e. g. liability clauses). If the user of the GTC can produce evidence that a questionable clause was individually negotiated between the parties, then the test of disproportionate impairment does not apply. Further, any standard contracts or model templates should be drafted specifically to fulfil as closely as possible the requirements of Icelandic case law in order to pass judicial scrutiny. Referring to this it is important to have in mind that according to Icelandic law practice GTC are usually interpreted in the favour of the party that did not make the GTC if there are some unclear clauses in it.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Icelandic judiciary system has a high standard and judgments are of good quality. Courts are capable of handling complex commercial or corporate matters on a reasonable standard. Despite that there has been criticism ongoing after the economic crisis that took place in 2008-2010 the courts were overloaded with cases and workload so experts stated that there was no way that they could deal properly with all those cases with the manpower they had and it is a fact that case process now takes much longer time than before. This criticism is supported with arguments and numbers but today the court system is

undergoing complete review that will change it from being two stage court process with District Court and Supreme Court to three stage court system adding one court stage, National Court and increasing the number of judges and decrease the workload on the Supreme Court. Generally, the parties can explicitly agree on a place of jurisdiction in their contract. If no specific place of jurisdiction is agreed the competent court may result from either a specific venue (such as place of fulfilment, place of a branch office) or a general venue, which is automatically the court where the debtor has his residence or place of business.

9.2 Arbitration

Arbitration agreements are used in B2B transactions, particularly in the cross-border sector but it is not frequent arrangement if number of arbitration cases is compared with the number of court cases. The Iceland Chamber of Commerce operate the Nordic Arbitration Centre that has the capability to administer all kinds of international disputes, see further on the website http://chamber.is/services/NAC. The arbitration operates based on the law of arbitration that is based on the UNICITRAL platform. Despite the high quality of Icelandic state courts, arbitration provides the advantages of confidentiality and facilitated enforcement of awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention").

10. About the Author

10.1 Law Firm Profile

Jonatansson & Co. is an Icelandic business law firm located in Reykjavik. It has a strong international focus and it have some of the world biggest companies and banks on its client list. We advise Icelandic and international companies in all areas of business law. Our services are characterized by teamwork, reliability and personal commitment.

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ITALY

1. Introduction

The Italian Republic ("**Italy**") is based on a Constitution adopted on December 1947 and effective as of 1 January 1948. Italy is divided into 20 Regions and each of them has a specific Regional Council which may adopt law on limited matters. The National Parliament has exclusive competence in the adoption of law regarding the most important matters, such as competition, health and transport.

The Italian legal system is a civil law system, based on statute law and legal codes; therefore, the relevance of the case law is less strong with respect to the common law systems as courts applies statute law to the case submitted to them. In any case, the decisions taken by the Supreme Court *(Corte di Cassazione)*, which is the highest Italian Court, are *de facto* relevant for the decisions of the Tribunal (first level of civil jurisdiction) and of the Court of Appeal (second level of civil jurisdiction).

Italy is a founding member of the European Union and, therefore, it is also subject to the EU regulations and directives.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

In general, in an international contract it is recommended to always determine the applicable law to the contract. According to Italian law the parties may freely determine which law shall apply to it. However, some domestic provisions - which have a particular relevance in respect of their object, scope and public policy' matters - have a mandatory application and they must be applied also when the Italian law is not the law chosen by the parties for their contract. For example: some provisions in the field of labour law, antitrust law and some articles of the consumer Code. Moreover, in case the object of the contract is a property located in Italy, the relative transaction is regulated by Italian law, as the law of the place where the property is located.

2.2 Inclusion of the UN Sales Convention

Italy is a member of the United Nations Convention on contracts for the international sale of goods, signed in Wien in 1980 (hereinafter the "CIGS"). Its provisions apply only to international sales i.e. in most cases, contract between parties which have their registered office or domicile (in case of physical persons) in different countries.

Under Italian law, if the parties of the contract come from a member State the CIGS automatically applies. Therefore, if the parties do not want to submit the contract to the CIGS they have to explicitly exclude its application. Moreover, if the parties do not belong to a member State, they may anyway decide to submit the contract to the CIGS. In addition, the CIGS also applies when, only one of the parties comes from a member State and the international private law of such Member State identifies as applicable law the law of a member State. Although the CIGS disciplines certain aspects of the international sale of goods, it is still important to determine the law applicable to the contract, since the CIGS does not cover every possible aspect of the contractual relationship (for example, it does not cover the transfer of title on the goods, the interest rates applicable in case of late payments).

When acting for a seller/supplier it is common to exclude the application of the CIGS since it is considered to be more in favor of the purchaser. However, the CIGS represents a system of clear and balanced provisions, which takes into account the specific necessities of the international commerce.

3. Allocation and transfer of risk

3.1 General rule

According to Italian law, sale is a consensual agreement which enters into force between the parties only with their consent; therefore, the delivery of the goods is not required to finalize the contract and represents a subsequent obligation.

Generally, the risk that the object of the contract may be damaged or get lost is transferred to the buyer as soon as the contract enters into force.

However, when the object of the sale agreement is generic and not determined, does not exist yet, or belongs to a different owner, the transfer of title does not occur when the contract is entered into between the parties, but only at a later state, as soon as the object of the contract is specified, come into existence or when the seller become the owner of the goods.

3.2 Advice for contract drafting

As mentioned above the CIGS does not discipline the transfer of title on the goods, which shall be therefore regulated by the law applicable to the international contract. On the other hand, the CIGS, regulates the transfer of risk on the goods as follows:

- If the goods need to be transported and delivered in a specific place to the buyer or to the carrier the risk passes in that moment; otherwise the risk passes when the goods is delivered to the first carrier;
- If the goods do not need to be transported the risk passes with the delivery to the buyer.
- The risk is held by the seller if the goods are not identified.

It is recommended, however, that the parties of an international contract make reference to the International Commercial Terms set out by the International Chamber of Commerce (INCOTERMS - the last version being the one issued on 2010), to establish the transfer of risk on the goods, thus waiving the national provisions and making reference to a commonly recognized system of terms.

4. Liability for defects

4.1 General rule

In case Italian law applies to the contract (articles 1490 – 1495 of the Italian Civil Code), the seller has to guarantee the suitability of the goods for their specific use. The guarantee shall not apply if the buyer, at the signature of the contract, knew the defects or in case they were easily recognizable.

The buyer should report the presence of defects within 8 days from the delivery of the goods or from the discovery of the defects, in case of hidden defects. The buyer's claim for the termination of the contract or the reduction of the purchase price, is barred in one year from the delivery date.

In case the CIGS shall apply to the contract, the seller has the obligation to guarantee the compliance of the products sold to the characteristics depicted in the contract and, in case this latter does not provide for a specific description, the goods must be appropriate for their specific use. This rule must be a risk for the seller, since he may be required to supply goods with certain characteristics disclosed by the buyer to the seller during the negotiations, although not explicitly indicated in the purchase order.

Finally, the CIGS provides that the term for the buyer to report the presence of defects must be reasonable and runs from the delivery of the goods, in case of visible defects or, from the discovery of the defects, in case of hidden defects. The buyer's claim for the termination of the contract or the reduction of the purchase price, is barred in two years from the delivery date. Any different written agreement between the parties on this respect shall prevail.

4.2 Advice for contract drafting

Apart from the rules set forth above the parties may autonomously discipline the liability for defects. In this case it is advisable for the seller to establish a clear a very precise regulation for the report of the defects and for the remedies applicable in case of defective goods, thus avoiding the risk that the CIGS (which is more favourable to the buyer) shall apply. On the contrary, from a buyer perspective the lesser the guarantee clause is detailed, the easier it will be to claim the liability for defects of the seller. In this scenario, the application of the provisions of the CIGS are much more convenient from the buyer's perspective than the Italian's one.

5. Liability for default

5.1 General rule

If the debtor is in default, the creditor may claim for the performance of the obligations or, alternatively the termination of the contract. In both cases the creditor may additionally claim for compensation of damages. To cause the termination of the contract the default must be evaluated with objective criteria and must not be of little relevance for the non-breaching party.

Pursuant to Italian law, the parties may pre-determine that in case of non-performance of specific obligations which are defined as essential in the interest of one of the parties, the contract shall terminate. The termination may happen automatically with the default of the debtor or, alternatively, the creditor may send a written formal notice to the debtor asking him to perform the obligation within a reasonable term – not less than 15 days – after which the contract shall be considered as terminated.

5.2 Advice for contract drafting

In international contracts the general rules set forth by the applicable national law may be waived by mutual consent. For example, in international commercial contracts penalty clauses are widely used. According to such clauses in case of default, one of the party has to pay to the other a pre-determined amount of money, with the advantage that this latter is released from proving the extent of the damage.

Generally, it is suggested to agree on which obligations shall cause the termination of the contract and determine if the termination is automatic or if the breaching party is granted with a grace period to perform the obligation after a written formal notice.

In case of sale agreement, if the parties do not regulate this aspects, the CIGS provides the buyer with some remedies:

- Claim for performance of the obligations
- Termination of the contract if the default is essential
- Reduction of the sale price

In addition, the buyer may claim for compensation of damages.

6. General liability and its limitation

6.1 General rule

According to Italian law, the debtor is liable in case of non-compliance of the contractual obligations unless the debtor proves that the default or the delay in the performance of such obligations is not attributable to his fault.

In case of contractual liability, the creditor may claim for compensation of damages which include both the losses suffered by the creditor (the so called "*danno emergente*") and the lost earnings (the so called "*lucro cessante*") if they are directly caused by the debtor's default. In addition, case law has pointed out that non-material damages may also be object of compensation if referred to an infringement of fundamental rights. Italian law does not provide for punitive damages.

The parties of a contract may contractually limit their liabilities; however, the Italian civil code provides for the nullity of any clause which limits or exclude the debtor liability for gross negligence and wilful misconduct.

6.2 Advice for contract drafting

In international contracts it is common to agree on clauses which limit the liability of the debtor in case of default and the parties are free to agree on such clause provided that (i) they are compliant with certain formal requirement provided by the law applicable to the contract (for example, double signature requirement – Art. 1341 Italian Civil Code, as provided under the following paragraph 1.8.1) (ii) they are not unfair or unreasonable (iii) they do not exclude liability for personal injury or death (iv) they do not contravene to a mandatory rule provided for by the law applicable to the contract.

Typical limitation of liability clauses is the following:

Force majeure: it is especially inserted in contracts with a long term duration. According to this clause the party which suffers the effects of exceptional circumstances may stop the performance of the contract, or terminate it without any liability towards counterparty. It is important to contractually agree on the definition of "force majeure" because it is differently construed from one State to another. The CIGS defines the force majeure as a breaching caused by none of the party and which was unforeseeable when the contract was finalized.

Penalty clause: According to such clause the parties pre-determines the amount of money that the breaching party shall pay in case of default, with the peculiarity that the non-breaching party is released from proving the extent of the damage and cannot claim for the compensation of a more severe damage if the parties have not agreed on this possibility.

7. Retention of title/payment protection

7.1 General rule

A retention of title clause is a provision in a contract for the sale of goods which means that the seller retains legal ownership of the goods until the payment of the purchase price is fulfilled by the buyer.

According to Italian law in case of sale with retention of title the buyer becomes owner of the products sold only when the last instalment of the purchase price is paid; on the contrary the transfer of risk on the products passes on the buyer upon delivery of them. The retention of title is valid and enforceable vis-à-vis the creditors of the buyer only if it results from a written document having a certified date earlier than the foreclosure/seizure. In case the retention of title clause is on machines having a value higher that Euro 15,49 it must be registered in a special registry kept in the Court where the machine is located.

The buyer should preserve and maintain in good conditions the product, if not the latter has to immediately pay the total amount of the purchase price, otherwise the seller can ask for repossession of the product.

If the contract terminates for default of the buyer, the seller must return the instalments already paid except for a fair compensation for the utilization of the product. However, the termination of the contract does not occur if the unpaid instalment is not higher than 1/8 of the price.

7.2 Advice for contract drafting

The CIGS does not discipline the retention of title. The validity and enforceability of a retention of title clause must therefore be verified according to the law of the State where the good object of the sale contract is located.

When drafting a retention of title clause, it is important to insert in the contract certain obligations for the buyer to ensure that repossession, if necessary, is made as easy as possible for the Seller. These could include obligations to (i) store the goods separately from goods belonging to third parties, (ii) mark the goods as the seller's property (iii) allow the seller access to the buyer's premises to verify that the obligations are being complied with.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Contracts which are intended to be used with several clients are generally characterized by standard clauses arranged by the party who has more contractual power. Pursuant to Italian law (article 1341 of the Italian civil code) these general clauses are valid and enforceable if the other party knew or should have known them, according to normal standard of diligence, when the contract was entered into.

However, some clauses which provide for a special discipline in favor of the party who has set out such clauses are considered null and void if they are not separately signed by the other party. These clauses provide for limitation of liability, right of withdrawal and right

to interrupt the performance of the contract for the strongest party, instead for the other party they may provide for limits to raise exceptions or limitations to contractual freedom.

The above provision does not apply with reference to international contract. For examples, in sales agreement the CIGS provides for the principle of freedom of form and the double signature for such clauses is not required, unless the contract is regulated by Italian law and the applicability of the CIGS is expressly excluded.

8.2 Advice for contract drafting

Apart from the strict rule on double signature of certain clauses of the general terms and conditions (GTC) by the receiving party, which rule is applicable when the GTC are regulated by Italian law, the most common problem emerging when, in the negotiation of an international contract, both parties make reference to their GTC is which conditions shall finally apply to the contractual relationship entered into between the parties. This problem is commonly referred to as "*battle of forms*". The first issue to be solved is when a binding contract may be considered entered into between the parties. According to the "*mirror image*" rule for contract formation - which is incorporated in the CIGS - contracts are concluded with an offer and acceptance that correspond in all aspects. In any event, the contract is concluded when one of the parties starts the performance of this latter.

As to which GTC shall finally apply to the contractual relationship, this is an issue which mainly depends to the applicable law and to the concrete modalities pursuant to which the contract has been entered into between the parties. There are indeed two different rules applicable in this case: according to the "*last shot rule*" - which is also accepted by the CIGS - when one of the parties accepts the whole content of the proposal of the other party except for the GTC and performs the contract, upon receipt of the counterparty's GTC as last conditions exchanged between them, this latter has *de facto* accepted also the counterparty's GTC. Some legislations follow, instead, the rule of the "*knock out doctrine*", according to which when both parties make reference to their GTC, none of them apply.

As a consequence, while drafting the GTC to be applied in an international environment it is always important to take into consideration the risk that certain clauses shall not be enforceable vis-à-vis the other party.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Italian Court System is based on principles listed in the Constitution and in the Italian Civil Procedure Code. The main principles are:

- Everyone has the right to commence a judicial proceeding in order to defend their rights and none can be subject to a proceeding without having the possibility to take part in it and to defend themselves;
- Judge must be appointed according to pre-determined rules and must be impartial in his decisions.

The Italian Civil Procedure Code provided for different types of judicial proceeding: **Ordinary proceeding** is divided in three phases (i) introductive phase characterized by the deposit of writ of summons and writs of defence; (ii) central phase in which evidences (written and oral, such as deposition of witnesses) are acquired by the judge and (iii) decisional phase characterized by final defences and by the issuing of the decision.

Urgent proceeding is a short proceeding compared to the ordinary proceeding in which the right to be defended is threatened and it is impossible to wait the end of the ordinary proceeding. Urgent proceeding requires the so called fumus boni iuris (i.e. evidences that the claimed right is well founded) and periculum in mora (evidences of the damages that the right will be subject to if the urgent proceeding would not be commenced).

Enforcement proceeding concerns the enforcement of a title when the debtor does not perform spontaneously the judge's decision.

Voluntary jurisdiction proceedings are generally aimed to solve personal issues.

9.2 Arbitration

In commercial agreements, in particular in cross borders operations, the parties often agree to submit the disputes to an arbitration Court. Compared to the traditional courts, arbitration offers higher standards of specialization of the arbiters, confidentiality and shorter proceedings. An arbitration award may be issued in a short time, generally 1/1.5 years.

The agreement through which the parties decide to submit to arbitration the dispute must be proved through a written clause or agreement.

In Italy, the Chamber of Commerce of Milan offers a high quality service in the settlement of a wide range of commercial disputes.

10. About the Author

10.1 Law Firm Profile

Cocuzza & Associati is an Italian independent law firm founded in 1993. It constantly grown and developed and it has now over 20 years of experience on the legal services market, supporting the clients 'business.

Cocuzza & Associati focuses on striking a balance between professionalism, efficiency and inter-personal relations on the one hand and specialisation and the ability to cover a wide range of services on the other.

Cocuzza & Associati covers a number or practice areas, among which: real estate and re-tail, corporate and M&A, labour and employment, litigation and arbitration, commercial contracts and agency contracts, compliance and data protection, intellectual property and information technology, bankruptcy and restructuring, competition and antitrust.

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JAPAN

1. Introduction

The Japanese legal system is a civil law system and its Civil Code, which went into effect about 120 years ago, has largely been influenced by the laws of Germany and, to a lesser extent, France. Currently, overall amendment of the Civil Code is under way and the following discussion is lim-ited to the Civil Code currently in force.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Japanese law, the parties of a contract may, in principle, freely determine the governing of their contract. In the absence of the choice of law by the parties, the law of the jurisdiction which has the closest connection with the transaction is applied and, in the case of a sale of goods, the law of the jurisdiction where the seller permanently resides is deemed to have the closest connection with the transaction. Notwithstanding the choice of law with respect to a sale of goods contract, the law of which jurisdiction applies with respect to the title to, or the possession of, the goods, or the security interests over movables or immovable, is determined in accordance with the principle of *lex resi sitae*.

2.2 Inclusion of the UN Sales Convention

Japan is a member of the UN Sales Convention (*United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980)*. The UN Sales Convention automatically applies if the parties to the contract are member states unless the parties agree to exclude the application of the Convention.

3. Allocation and transfer of risk

3.1 General rule

Under Japanese Civil Code, the principle is that the risk of loss is borne by the seller, except that the risk of loss is borne by the buyer (i) if the goods to be delivered are specific, (ii) if the goods to be delivered are non-specific, but have been designated as the subject matter to be delivered by agreement or by the completion of action required for delivery or (iii) if the goods to be delivered under a conditional contract are lost while the conditions are still pending. However, it is pointed out that in sale of goods contracts between merchants as defined in the Commercial Code, the principle of the Civil Code described above is almost always amended by mutual assent and, in practice, it is considered as a custom of trade that the risk of loss transfers to the buyer at the time of delivery of goods to the buyer, or at the time of inspection and receipt of goods by the buyer. In cross-border transactions, Incoterms (International Commercial Terms of the International Chamber of Commerce) are usually refereed to. In most transactions, FOB and CIF are chosen as trade terms relating to the risk of loss, and in some transactions Free Carrier or C&F is designated.

3.2 Advice for contract drafting

The allocation of risk should be clearly agreed by the parties and set out in the contract. Even if the transaction refers to Incoterms, it is not rare that trade terms such as FOB or CIF are amended to reflect the needs of the parties.

4. Liability for defects

4.1 General rule

Defects are considered to exist if the standard of characteristics, shape, benefits, value, etc. fall short of the standard of those set out explicitly or impliedly in the contract. Under the Commercial Code which apply to transactions between merchants, the buyer is obligated to inspect the goods and notify the seller of any defect without delay after the receipt. If the defects are latent and cannot be detected at the time of receipt with reasonable care, the buyer is obligated to notify the seller immediately if the buyer detects the defects within six months. If the buyer fails to comply with these obligations to notify the seller, the buyer forfeit the right of remedy. In addition, in order for the buyer to be granted remedy, the buyer must take action within a year from the time of the discovery of defects. The buyer in compliance with the required procedures are eligible to (i) the demand of full performance, (ii) damages, or (iii) rescission of the agreement.

4.2 Advice for contract drafting

It is often pointed out that the above rules regarding defects are too unfriendly toward the buyer, especially when the defects are latent. Therefore, the buyer might want to amend the rule of notification, especially in the case of latent defects. The buyer also might want to limit the type of remedies available to the seller to prevent rescission of the contract.

5. Liability for default

5.1 General rule

If the debtor is in default, then the creditor can claim compensation for the damage caused by the delay or nonperformance if the debtor does not render performance despite maturity without any justifiable reason. Also, the creditor has the right to rescind the contract.

5.2 Advice for contract drafting

The rate of legal interest which applies to transactions between merchants is 6% in the absence of agreement in respect of interest. Interest rate is allowed to be raised by mutual assent up to 14.6% if one of the parties is a consumer as defined in the Consumer Contract Act and, if both of the parties are merchants, there is no limit as to the interest rate unless the contract falls within a certain category of contract such as a loan.

6. General liability and its limitation

6.1 General rule

The Japanese legal system does not provide for punitive damages, treble damages and the like. However, a defaulting party must compensate all losses that have substantial causal relation with the default or breach.

6.2 Advice for contract drafting

The buyer demanding payment of damages is required to prove the amount of actual amount of loss or cost which it incurs and it often is difficult to prove the amount of the actual loss or cost. If the parties agree on the amount of the damages in the contract in the case of default by the seller, the buyer is not required to prove the actual amount of

loss or cost and is entitled to the pre-agreed amount for damages. The court is bound by such pre-agreed amount and may not increase or decrease the amount to reflect the amount of the actual loss.

7. Retention of title/payment protection

7.1 General rule

A retention of title can be contractually agreed. Without agreement as to the timing of the transfer of title, it is generally interpreted that it is the intent of the parties that the title passes from the seller to the buyer upon delivery or the complete payment of the purchase price by the buyer.

7.2 Advice for contract drafting

The timing of the transfer of title should be explicitly agreed upon in the contract.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

In general, General Terms and Conditions are binding upon parties and the parties to GTC are deemed to have intent to be bound by such GTC if the parties enter into such GTC without expressing their intent not to be bound by the GTC, unless the disputing party proves the contrary.

However, GTC must abide by public policy and the principle of good faith. Neither can it be in violation of relevant laws and regulations.

8.2 Advice for contract drafting

There is no big difference between drafting standard or model contracts and drafting individually negotiated contracts. What is important is to ensure that each clause in such standard or model contracts does not violate any relevant laws and regulations.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

Although the quality of Japanese judiciary system is high, all of the documents and evidence submitted to court are required to be translated into Japanese and, therefore, litigation between and a Japanese party and a non-Japanese party tend to be more cumbersome, prolonging and costly than domestic litigation. In the absence of a jurisdiction clause or, the Japanese courts have jurisdiction over claims seeking performance of contractual obligations or damages arising from breach of contract if (i) the place of performance of the contract is designated as a place located in Japan, (ii) the place of performance of the contract is considered to be in Japan in accordance with the law designated by the parties as the governing law of the contract, or (iii) the general venue of the defendant is located in Japan.

9.2 Arbitration

It is not common to include an arbitration clause in contracts between Japanese parties, but, in cross-border transactions arbitration is widely used. Japan's leading arbitral body is the Japan Commercial Arbitration Association. However, parties to cross-border contracts tend to prefer the jurisdiction of major internationally recognised arbitration centres, such as the American Arbitration Association (AAA), the International Court of Arbitration and the International Chamber of Commerce (ICC) or the Singapore International Arbitration Centre (SIAC).

10. About the Author

10.1 Law Firm Profile

Kuwayama Law Offices is a law firm established in 2012 by Katsuhiko Kuwayama, a Japanese attorney. The name partner, Katsuhiko Kuwayama, has experience in working as a partner at major domestic law firms. At Kuwayama Law Offices, we have brought together our knowledge and experience gained at large law firms with the mobility and flexibility of a small law firm. We offer to both companies and individuals our legal services with a new balance between quality, costs and speed.

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MEXICO

1. Introduction

The Mexican legal system is divided in three areas; the Executive, Legislative and Judicial. The Legislative is confirmed by a Congress with two Chambers, the first one, the Deputies and the second by Senators. At first, Mexico was ruled by laws created in colonial times, which were gradually replaced by new laws. After several changes in the Government System and the creation of new Constitutions as a consequence of the slow evolution. Our legal system is divided as follows: (i) Written Laws, (ii) Jurisprudence, (iii) Custom, (iv) Individual Rules and (v) General Principles of Law.

The Mexican Constitution being the highest level law, the Constitution makes reference to Human Rights, Individual Guarantees and the most important and general laws. In the next level we can find International Treaties and the Federal Laws, which are followed by the Local Laws.

In reference to contracts, it is important to mention that they might enter Mexico's legal system through an international contract executed with a Mexican company or individual, even if the contract is entirely performable in another country. Many such contracts are executed on order to cover the distribution of products, the granting of franchises, or the transfer of technology, among other legal relationships.

In Mexico, the execution of a contract depends solely on the existence of the agreement between the parties. The parties do not need to give “legal consideration” to bind themselves, their intent to agree is sufficient. The power to carry out the development and to be bound by a contract depends on “the legal capacity of the party”, and accordingly, contracts involving illegal activities will be cancelled.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Mexican law, the Latin principle “Pacta sunt servanda” is followed, so the parties executing a Contact have complete freedom to compel each other at their convenience as long as the obligations compelled are according to our legislation, from there on out, the parties are bound to what they agree upon.

The Mexican Law derives from the Roman Law and its principal characteristic is the creation and application of its rules in a codified legal system, which is rigid and whose main source is the written laws, being the Federal Constitution the principal law.

It is important to make reference to the application of International Law during the negotiation, execution and conclusion of an international sale agreement including several pragmatic rules, which have always been followed by international trade practices.

The above mentioned refers to those commercial practices that have been followed during the existence of the exchange of goods and merchandise among merchants.

The International Sale Agreements involve the parties (seller and buyer) that can be individuals or companies through its Legal Agent, who acknowledges the powers of attorney granted by means of a legal document known as a power of attorney.

The rules applicable to the international letters of credit known as Practices and Uniform Uses for Documentary Credits and identified by the International Chamber of Commerce as UCP 600, translated into the payment of merchandise prices, must be taken into consideration for the execution of the Contract.

We conclude that the principles of UNIDROIT published by the International Institute for the Unification of Private Law must be taken into account and that it is a set of rules applicable to commercial contracts in the international arena highlighting a double advantage since in relation to the international contract of sale we will see it as a supplementary application jointly to the United Nations Convention on Contracts for the International Sale of Goods.

2.2 Inclusion of the UN Sales Convention

Mexico is a member of the recent list of ratifying countries of the Vienna Sales Convention ("CISG" or "Convention") which includes five jurisdictions from Latin America. Only two of those five (Argentina and Mexico) have some experience with the application of CISG. None of the decisions rendered in Mexico and Argentina were handed down by courts of last resort, though at least in theory the supreme courts of those countries are trusted with the final word on the interpretation of international treaties, under the federal law that both jurisdictions regard as the supreme law of the land.

The CISG governs international sales contracts if (1) both parties are located in Contracting Countries, or (2) private international law leads to the application of the law of a Contracting State (although, as permitted by the CISG (article 95), several Contracting Countries have declared that they are not bound by the latter ground). The autonomy of the parties of the international sale agreements is a fundamental topic of the Convention: the parties can, by agreement, not apply any CISG rule, or can exclude the applicability of the CISG entirely in favour of another law. When the Convention applies, it does not govern every issue that can arise from an international sales contract.

The execution of the international sale agreement is the culmination of a series of stages that result of meetings, communications, exchanges of points of view, proposals and counterproposals and a proper negotiation and proper conclusion in the full exercise of contractual autonomy among other issues will depend on the success of our contract for the benefit of both parties.

For more than two decades, the United Nations Convention on Contracts for the International Sale of Goods has been in force, which is recognized as the best order to apply to contracts in this way. First, it has the status of International law Treaty and it´s characterized by having an order that will govern the contract and the contracting parties with respect to the obligations and benefits derived, for this reason represents a great advantage for the seller and the buyer to be able to be sure that any circumstance of interpretation, fulfilment or settlement of disputes will be resolved equitably regardless of the countries. Another important characteristic to mention is that it has the character of supranational.

3. Allocation and transfer of risk

3.1 General rule

One of the most important principles in relation with the risk is the "Rebuc sic stantibus" clause, which means that if the object perishes for its owner once the price and the object have been agreed upon. The estimation of risk implies that the entity considers that this risk may occur and may affect the part that assumed it in certain value or a percentage of

the contract. Principles general allocation of risks can be summed up in three simple statements:

→ The risks should be assigned to the parts that feel able to take them.

→ Each of the parties involved in the contract should take those risks that is capable of better control.

→ Those risks which, having a substantial importance in the balance of the contract are difficult to control by any of the parties.

There are three definable groups of risk prior to the exercise of allocation of risks, and establishing the "assignment by default". Therefore, we propose the following group classification of risks for the purpose of their allocation (knowing that it does not define the "solution" to the problem, but provides some clarity).

→ Risks inherent in a natural way to the scope of the contract/business (risks transferred by default). It should be understood that by default, any risk posed by the economic operation of the asset are transferred. The risks of the activities of design, construction, operation (including revenue collection), maintenance, replacements and financing are always risks transferred with the exception of those risks that result obvious.

  This includes for example (with exceptions, as we shall see next) difficulties with the term of the work, variations of costs, technical obsolescence risk of demand in projects between others.

→ Risks related to responsibilities that are not part of the scope of the contract or are not specific to the contract, (risk obtained by default).

→ Risks that neither party is able to control or manage efficiently (shared by default risks).

In the sales contracts, the delivery of the merchandise or its availability to the buyer is fundamental, because it is the moment in which the seller is released from the main obligation that he acquired when signing the contract. In an international sale acquires special relevance when a seller and buyer find themselves in two different places, that moment may not coincide with the arrival of the merchandise at its destination, but simply with the transmission of risk from one to another, risk that increases with the volume of the operation.

When the parties have not agreed on the transmission of risk, the sale involves the transport of the merchandise. As a rule the risk is transmitted when the seller puts the merchandise at the disposal of the first carrier. Otherwise the risk will be transmitted when the buyer takes charge of the merchandise or when it is made available to him. It is important to note that the merchandise must be clearly identified for the purposes of the contract for transmission to occur, so it should not be forgotten that once the risk is transmitted any deterioration or loss of the merchandise will be responsibility of the buyer regardless of who has assumed the cost of transportation and insurance.

3.2 Advice for contract drafting

There are many types of contracts. They may be written, oral and may include personal or professional issues, but in all of them it is important that the terms and conditions are clear, written properly and that they do not give rise to confusion.

A correct wording of a contract is important to understand the limitations and extensions of it. When we are negotiating the contract we must agree upon the delivery of the merchandise that best suits the operation and our interests knowing the proper Incoterm well, it is advisable to check that the merchandise is insured and can be established guarantees for the alleged cases of non-compliance.

4. Liability for defects

4.1 General rule

The traditional principle of our law of damages is that of liability for fault or negligence. However, an evolution can be seen in the criteria of attribution responsibility: latest doctrine and jurisprudence opt clearly for a liability when it comes to activities involving risk.

In fact, the principle of strict liability has been imposed gradually in various recent legislative texts, such as:

→ The law of management of building.

→ ("LOE") (which refers specifically to real estate promoter).

→ Relative to material damage responsibility consists in the obligation that a person has to another to compensate the damage and harm that it caused is contractual responsibility extends to the case of the breach of obligations which are source the unilateral declaration, which establishes the principle that the legal provisions on contracts are applicable to other legal acts, as does not object to the nature of these.

4.2 Advice for contract drafting

At the time of the drafting of contracts, it is important to know that in the practice, damage compensation and damages are very difficult to be achieved, not always it can be shown that the damage or injury actually was caused immediately and directly by the breach of the obligation and which is the amount in other to avoid these difficulties the contracting execution of the obligation or late performance set in advance the amount of compensation which should correspond to that breach.

When parties stipulate a penalty, they have the advantage that if the required failure to comply with its obligation, the creditor does not have to prove that this breach caused him damage, for this reason prevents calling the penalty, the creditor is not required to prove that it has suffered damage or the debtor may exempt from satisfying her proving that the creditor has not suffered any harm, but only to show that the debtor has failed may require payment of the penalty.

5. Liability for default

5.1 General rule

A defects liability period is a set period of time after a construction project has been completed during which a contractor has the right to return to the site to remedy defects.

As a general rule: The responsibility of the seller in the international sale for the quality of the goods is that in the absence of a contractual agreement, the seller responds for the apparent or hidden defects of the merchandise, whose existence it ignores without fault that they manifest at the moment.

The buyer had them physically. If the Seller knows and ignores the defects culpably responds without limit of time, this responsibility results in the replacement or repair of the Goods, reduction of price and compensation for damages, It is important to note that in Mexico and according to the Convention of International Sale of Goods the cases of goods that have to be tested for their use in time and appropriate circumstance that manifest their quality a special case would be the existence of rights Third parties on goods derived from intellectual property.

5.2 Advice for contract drafting

We consider important to mention that it must be stated in the international contract of sale that in the absence of a contractual agreement, the seller is responsible for the apparent or hidden defects of the merchandise. This responsibility gives rise to any of these assumptions:

→ The repair of the goods,

→ The reduction of the price

→ Compensation for damages.

As far as the buyer has the option of the 4 resources indicated above.

6. General liability and its limitation

6.1 General rule

The obligation is a legal link between the creditor and the debtor, by means of which the first has the right to demand the second and the duty to fulfil in favor of one, a feature that can be given, made or not made. Any developments foreseeable or unforeseeable, performed without human intervention, or with the intervention of one or more persons, certain or indeterminate, that is also inevitable, by virtue of which good is lost or it hinders the fulfilment of the obligation is understood by unforeseen circumstances or overwhelming force.

6.2 Advice for contract drafting

In Mexico the impossibility for the fulfilment of the obligation, fortuitous or force majeure, should be absolute, so that neither the debtor nor any other person can be due delivery.

It is important that the obligated to lend a fact, does not do so, the creditor has the right to ask that at the expense of one run by another, where substitution is possible. This will be observed if the debtor does not make the fact in the agreed manner. In this case the creditor may also require to dispose the bad made. No one is obliged to fortuitous or force majeure but when it has been given cause or contributed to it, when he has expressly accepted that responsibility or when the law imposes it is. (The underlined is ours).

7. Retention of title/payment protection

7.1 General rule

The retention of ownership of the goods is agreed in the international contract of sale in this condition should be very careful in the information received from third parties if applicable (carriers, freight workers, custom agents) as well as the one that is exchange with

the buyer in order to avoid claims between the parties. Regarding the date and place of delivery, the description of the Incoterm established for this purpose.

7.2 Advice for contract drafting

We recommend that the seller declare that the merchandise is fully compliant with the appropriate packaging system for proper handling, transportation and delivery, the seller must be obliged to deliver the certificate of the quality of the goods before being sent.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

In international trade operations, the main creative source of rules governing agreements which become parties, is the autonomy of the will. Parts are which set their rights and obligations, being able to change custom or any usage that is not to your liking use for a particular operation.

“Incoterms” is defined as a set of rules applicable internationally and to facilitate the interpretation of the commonly used trade terms.

While it is very important to know the functioning of the incoterms, we must not forget that they aren't rules binding on the parties, unless they so agree to it expressly, including their initials in the contract, and are free to modify them totally or partially. The incoterms thus respected the autonomy of the will of the parties.

8.2 Advice for contract drafting

We also consider that Incoterms provide virtually complete freedom to parties regarding the modalities of payment. Corresponds to forecast with precision the place, date, form of payment and other financial conditions. Payment problems arising from the development of the sales contract shall be resolved in accordance with what they have planned parties or, failing that, under the applicable national law. Also the conflicts generated in terms of ownership of the goods and other similar problems will be resolved in this way.

Finally, we must highlight that incoterms apply to relations between buyer and seller, and any of its provisions affect, either directly or indirectly, the relations of either of them with the carrier; these are determined in the contract of carriage. Transport becomes a fundamental criteria to choose the adequate incoterm mode.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

In Mexico, the plaintiff files a complaint providing written evidence with supporting documents and statements from witnesses. The defendant files a response, again in writing, with supporting documentation and witness statements. The judge reviews the submissions, asks for more evidence if he deems it necessary, and then renders a decision. There is no discovery process and lawyers are not allowed to be present when either party or witnesses are called in to make statements. Based on the decision, awards are made for damages but they are much smaller. There are no special or punitive damages and each party pays their own fees and costs.

Mexican law provides for two different types of formalities: (1) the contract may be required to be in writing, and (2) it may also be required to be in the form of a public deed issued before a notary public or a public commercial broker.

The interpretation of contracts are found in Articles 1851-1857 of the Federal Civil Code. For instance, Article 1851 provides that a "contract should be interpreted in accordance with the intention of the parties." Article 1853 states, "the court should favour an interpretation that will give validity to the contracts." And according to Article 1856, "Judges are to interpret contracts in accordance with the usages and customs of Mexico." The language of these articles seems to indicate that courts will not be adverse to the introduction of extrinsic evidence to prove a contract under Mexican law. In Mexico, courts of general jurisdiction are found at both the Federal and State level.

Arbitration is a form of conflict resolution in which the parties agree to designate a third party to settle their dispute agreements has the advantage that it is much less rigid and more expeditious than the jurisdictional processes. The arbitration is carried out by means of the fulfilment of certain formalities that can be established in a law, or to be agreed by the parties in a conventional way.

Arbitrations may be of a righy-hand or amicable composition in the former, the first is based on the legal rule applicable to the case in question the award is duly complied with in the juridical norm applicable to the case, that in the second the award is distated based on the conscience and in the rules of equity.

Mexico is a federal republic and courts are divided into federal and state (local) courts.

Federal courts have jurisdiction over commercial disputes (Article 104, Mexican Federal Constitution). However, in cases dealing only with private interests (for example, breach of a commercial contract) claimants can choose to file a claim in either a federal or a local court.

Amparo proceedings are one of the unique features of Mexican law and they are always available as the last-stage resort in court actions. "Amparo" proceedings allow a party to challenge a decision on the grounds of a fundamental human rights violation (for example, the right to be heard and the right to legal certainty). As a general rule, a party must exhaust the statutory appeal process before initiating "amparo" proceedings.

9.2 Arbitration

Mexico recognizes arbitration as an alternative for dispute resolution. Mexico's arbitration statues applies to all national (parties that reside in the same country) and international (parties that reside in different countries) arbitration when the place of arbitration is in Mexico, unless there are treaties or laws that state that certain disputes are not susceptible to arbitration.

The Federal Commercial Code of Mexico and the Civil Procedure Codes of the several state of Mexico set forth basic recognition and use of arbitration. The Federal Commercial Code recognizes the enforcement of foreign arbitral awards.

General Rules

The agreement to arbitrate in the case of dispute should be given in writing between the parties (in the principle contract or a separate agreement) and in the case of invalidness of the contract, the arbitration clause will still exist, unless expressly agreed otherwise or the invalidity extends directly to this agreement to arbitrate.

It is possible to choose specific sets of arbitration rules to solve dispute issues in Mexico, to the extent not contrary to the laws applicable where enforcement is sought.

Mexico's Law on Arbitration

Mexico passed an updated (by Decree) Commercial Arbitration Statute as of July 22, 1993, by modifying and adding to the content of Title 4 "Commercial Arbitration" of the Federal Mexican Commercial Code (see articles 1415 through 1463 of the Commercial Code). This statute is structured after the 1958 United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards, and it is as follows:

(1) General Provisions

a) Applicability: This law is applicable to all matters of arbitration in Mexico, whether local or international, provided that it is in Mexico. All of the provisions of an arbitration agreement will automatically include all of the provisions of this arbitration statue.

b) Place for Arbitration: The parties to the dispute can chose the place to arbitrate at the time of signing the contract or when the dispute arises, otherwise the law will apply the place that has the most substantial relationship to the contract.

c) Objections to Arbitration: Objections to arbitrations are to be made prior to or at the commencement of the arbitration, not during or after. If not made before arbitration, then his right to objection therefor will be waived.

d) Subsequent Litigation: If any of the parties to arbitration attempts to litigate via judicial court once the arbitration has been agreed upon, the court of law will order the lawsuit be dismissed and that the parties arbitrate the matter as in their agreement.

e) Provisional Remedies: The parties to the arbitration may ask a court of law to provide/grant provisional remedies (without defining what they are), either prior to or during the arbitration process. This is different than the Arizona Arbitration Act, since the latter does not have this.

f) Makeup of the Arbitration Court: The arbitration court will be made-up of either 1 or 3 member arbitrators (uneven number), as is agreed upon by the parties prior to or at the time of arbitration. In the event that the parties do not agree (within 30 days), then it will be one arbitrator, and if the parties do not agree upon the arbitrator's person (within 30 days), then the court will decide who shall be the arbitrator. When the disputing parties decide on three members of the tribunal, each will chose one of them and the chosen members will chose the third.

(2) Procedures for the Arbitration

a) Decisions on Procedure: The presiding arbitrator (president) may decide on questions of procedure if authorized by the parties or authorized by the other member arbitrators that make up the arbitration court.

b) Evidence and It's Receipt: This is at the discretion of the arbitrators. The arbitrators can see the assistance of the court of law for assistance in acquiring the evidence it needs. Any communication that was personally delivered to the addressee's normal residence shall be considered received as long as it is sent to

the last known address by certified mail. This communication will be considered delivered/received on the date delivery was made.

c) Language: The language is chosen by agreement of the parties, or if they cannot or will not agree, then the language is chosen by the arbitrator(s).

d) Hearing: No hearing is needed unless the Arbitration court decides is needs one, or one or both of the parties so requests.

e) Default Judgment: If either of the parties is not present at the hearing or does not respond to (answer) the complaint, the arbitrator(s) can issue judgment in basis of the evidence that is presented.

f) Experts: The arbitration court may acquire experts, when they believe they are needed.

g) Requisition of Attendance of Witnesses or Delivery of Documents: The arbitrators must request that the judicial/law court judges issue the requisition.

(3) The Arbitration Judgment

a) Full Authority of the Arbitrator(s): The arbitrators have full authority to decide a dispute, including determining the admissibility, relevance and force/weight of evidence.

b) By Majority Rule (Where there are 3 members to the arbitration court, the majority decision will be the ruling one.

c) The Judgment Confirming a Composition/Decision: The judgment settling the matter is enforceable.

d) The Written Arbitration Judgment: This judgment must be in writing and signed by the members of the arbitration court. Each of the parties to the arbitrated dispute is to receive an original copy of the judgment.

e) Expenses of the Arbitration Process: The party that is considered as having lost under the arbitration will be the one to pay for the arbitration process. If there is no complete winner but each party wins a point, then the expenses will be prorated between them. The expenses will include the fees of the attorneys, if the parties had agreed upon this at the commencement of the procedure. The parties can agree to prorate the costs independent of whomever wins.

f) Interpretation of the Judgment: The parties may request the interpretation of a judgment and if the arbitration court deems it correct, it will give the interpretation within 30 days and it will become part of the judgment. If the parties believe that certain presented claims were not addressed in the judgment, they may request to have them included, and the arbitration court will decide on it.

(4) Appeal of the Arbitration Judgment

Limited Appeal: The appeal it a court of law will be permitted: if there is a lack of legal capacity by one of the parties to submit himself/herself to the arbitration process, if the agreement is contrary to the law, if one or more of the parties to the arbitration process did not receive notification of the arbitration process, if the arbitration judgment (award) went further than the extent of the arbitration agreement. This appeal is to be made to the court wherein the arbitration award was given.

10. About the Author

10.1 Law Firm Profile

Alfonso Villalva is a Partner of Bufete Villalva, S.C. a law firm founded in 1998 consisting of professionals with an intense practice in commercial matters, and mainly involved with sophisticated international transactions with a high complexity. The company works within the areas of mergers, acquisitions, strategic partnerships and alliances, finance, entertainment, real estate, infrastructure and intellectual property and private businesses, among others.

We provide legal services with a solid technical knowledge, with a vision and an understanding of the business, with high international standards of quality and with a total dedication to innovation. It is necessary that our clients know that their lawyer is part of their team.

Our Law Firm represents private and public companies, both Mexican and foreign, of practically all regions of the world, promoting a deep partnership with them, which helps to promote the multi-disciplinary teamwork in favor of the best results for our clients.

Our long-term relationships are a indicative of our commitment for fulfilling our clients' expectations, generating values of loyalty and reliability; which is why we permanently attempt to keep relationships that, in several occasions, last for decades, as well as in generating new durable relationships.

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THE NETHERLANDS

1. Introduction

The Dutch legal system is a civil law system. The main parts of the fundamental code for civil law, the Dutch Civil Code (*Burgerlijk Wetboek*, "BW"), were introduced in 1992. The BW is divided into 10 different law areas, so called Books.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Dutch law, the parties to a cross-border contract are free to determine the material law that shall apply to their contract. However, the parties can only dispose over the applicable law for their contractual obligations, whereas they cannot dispose over such parts of the transaction having an *in rem* effect, such as transfer of title or possession, pledging of things and rights, etc. Choice of law clauses must be explicit. Despite the recognition of the freedom to contract principle, the enforceability of a contract may in some cases depend on factors other than the established consensus between the contracting parties, the most important being the corrective application of reasonableness and fairness to concluded contracts, which principles can be found throughout the BW.

2.2 Inclusion of the UN Sales Convention

The Netherlands are a member of the UN Sales Convention (*United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980)*. Under Dutch law, the UN Sales Convention automatically applies if the parties to the contract are member states and the contract is within the convention's scope. The parties do not need to explicitly agree on the UN Sales Convention, they don't even have to be aware of its applicability. If the parties do not want to submit their contract to the UN Sales Convention, they must explicitly exclude it. In most business contracts, the UN Sales Convention is excluded, as the UN Sales Convention is said to be more advantageous to a purchaser in comparison with Dutch law.

3. Allocation and transfer of risk

3.1 General rule

As a general rule, the allocation of risk in an international sales contract under Dutch law depends on various factors, including ownership of the contractual item, agreed or statutory place of performance and agreed shipment procedure. Generally, the risk that the object of the contract may be damaged or get lost, is borne by its owner. Once the seller has delivered the object, the risks transfer to the purchaser, even if ownership has not yet passed.

3.2 Advice for contract drafting

It is advisable to include a clear-cut contractual agreement determining what will happen if the contractual object is lost, destroyed or damaged. It is common to refer to Incoterms (International Commercial Terms of the International Chamber of Commerce), which provide the advantage of common interpretation in various languages and legal systems. Also, they are widely known and enforced by Dutch courts.

4. Liability for defects

4.1 General rule

Unless the parties have agreed on a specific characteristic or suitability for a specific use, the purchased item must possess such characteristics as the purchaser may reasonable expect. Remedies of the purchaser in case of a defect are (in general, at the purchaser's choice:) subsequent performance or dissolution of the contract as well as damages. The purchaser loses his rights in case of a late complaint.

4.2 Advice for contract drafting

The rules governing liability for defects are generally friendly for the purchaser, but can be altered by mutual consent. In almost any commercial transaction, it is customary to modify the general rules in favour of the seller. Particularly, it is customary to limit the requirements for liability, i. e. by excluding dissolution of contract, by excluding liability in case of only slight negligence or in the case of immaterial defects. Further, it is customary to apply a liability cap for damage claims.

5. Liability for default

5.1 General rule

If the debtor is in default, then the creditor can claim compensation for the damage caused by the delay if the debtor culpably does not render performance despite maturity or lapse of a reasonable term granted. In case of default in a B2B setting, a monetary claim is subject to interest amounting to eight percent (rate per 1 January 2017). Also, the creditor has the right to dissolve the contract.

5.2 Advice for contract drafting

The rules governing legal consequences of delay in performance can be altered by mutual consent. This is commonly done to specify the requirements of reminders and grant the debtor a fixed time period for performance.

6. General liability and its limitation

6.1 General rule

The Dutch legal system does not provide for punitive damages. However, a party which is liable for damages must compensate all losses that can be attributed to the contractual breach. Particularly in large transactions, the liability risk can easily threaten the existence of a business.

6.2 Advice for contract drafting

It is common practice to limit the scope of liability for both parties, particularly for the supplier. Where the parties individually negotiate a contract, including the liability clause, modifications of the general rule are broadly possible, but always limited by the principle of reasonableness and fairness.

7. Retention of title/payment protection

A retention of title can be contractually agreed. Technically, the purchaser obtains ownership of the object under the suspensive condition of complete payment of the purchase

price by the purchaser. If the object is sold on to a good faith subsequent purchaser, the retention of title is lost. It is also possible to extend the retention of title to objects sold between parties in the scope of another contract than the one which the retention of title clause is part of.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Models or sample agreements which are *intended* to be used in *a number of cases*, are considered to be GTC under Dutch law. Dutch law has specific rules regarding both the applicability and the contents of GTC, whereby it has to be examined whether or not there is a disproportionate impairment of the other (mainly small) party. If a GTC clause includes such disproportionate impairment, it may (depending on the size and capacity of the other party) be voidable by the other party. There are statutory lists of provisions which *are* disproportionate (*black list*) and provisions which are *presumed* disproportionate (*grey list*). Dutch case law provides a variety of rules on battle of forms issues in relation to GTC.

8.2 Advice for contract drafting

It is advisable that contracts be individually negotiated, or at least decisive contents of contracts (e. g. liability clauses). If the user of the GTC can produce evidence that a questionable clause was individually negotiated between the parties, the issues mentioned above to not occur.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Dutch judiciary system has a high standard and judgments are of good quality. Courts are capable of handling complex commercial or corporate matters on a reasonable standard and also within reasonable time frame. Generally, the parties can explicitly agree on a place of jurisdiction in their contract. If no specific place of jurisdiction is agreed, then under the Dutch Code of Civil Procedure, the competent court may result from either a specific venue (such as place of fulfilment, place of a branch office) or a general venue, which is automatically the court where the debtor has his residence or place of business.

9.2 Arbitration

Arbitration agreements are widely used in B2B transactions, particularly in the cross-border sector. The Netherlands Arbitration Institute (*Nederlands Arbitrage Insitituut*, "NAI" – see http://www.nai-nl.org/en/) has the capability to administer all kinds of international disputes. Arbitration provides the advantages of confidentiality and facilitated enforcement of awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention").

10. About the Author

10.1 Law Firm Profile

Wieringa Advocaten is a Dutch law firm with a strong emphasis on business and insolvency law. We advise Dutch and international companies in all areas of Dutch business law. Our services are characterized by teamwork, reliability and personal commitment. Our strict orientation towards solutions is well proven in complex and cross-border projects. Our office is in Amsterdam, the Netherlands. In the case of international intersections, we work with our international colleagues from The Law Firm Network.

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NEW ZEALAND

1. Introduction

The New Zealand legal system is derived from English law and remains similar in many respects. Although it is based upon English law, New Zealand has an independent judiciary. Due to the absence of a codified constitution, the law of New Zealand is derived from several sources. The key sources of legislation are parliament enacted statues and common law developments through the Courts of New Zealand.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

New Zealand law endorses contractual freedom and as such parties to cross border contracts are free to determine the jurisdiction that is to be applicable to their contract. Where the parties to a contract have not expressly provided for a particular jurisdiction, the Court may determine the jurisdiction taking into consideration the country with which the transaction has the closest and most real connection. Often the decision on the applicable jurisdiction will depend upon the commercial bargaining power of the parties.

2.2 Inclusion of the UN Sales Convention

New Zealand is a member of the UN Sales Convention (United Nations Convention) on Contracts for the International Sale of Goods dated 11 April 1980. The Convention became part of New Zealand law in 1994 when the Sale of Goods (United Nations Convention) Act 1994 was passed. Accordingly, it is now part of New Zealand's domestic law. When applicable, it replaces the Sale of Goods Act 1908 along with other common law principles. The Convention applies if the parties to a contract are member states and the contract falls within the scope of the Convention. It is possible to contract out of these provisions, however it is insufficient for the parties to simply adopt New Zealand law as a means of exclusion as the Convention forms part of domestic law. If the parties wish to exclude the convention, they must do so expressly within the contract.

3. Allocation and transfer of risk

3.1 General rule

At its simplest form, the principles regarding allocation of risk in New Zealand provide that the goods remain at the seller's risk until the property is transferred to the buyer. However, particular circumstances associated with overseas contracts involving shipping have been subject to elaborate clarification by the Courts and further terms have been imposed by the Convention to the effect that in some instances risk in goods passes on transfer to the carrier (provided that no alternative arrangements have been agreed in the contract).

3.2 Advice for contract drafting

Given the complexity surrounding the allocation of risk, parties to cross border contracts and commercial contracts, would, generally, be sensible to agree to clear and practical arrangements to cover instances of loss or damage to goods. This can be done by reference to Incoterms (International Commercial Terms of the International Chamber of Commerce), which provide the advantage of common interpretation in various languages and legal systems.

4. Liability for defects

4.1 General rule

New Zealand statutes provide consumer protection in the case of defective goods by way of implied warranties. Such statutes are weighted heavily in favour of the party acquiring the goods and give rights of redress in the case of defective goods. Where the parties are contracting in trade (business to business) they are able to contract out of these implied warranties. However, where the buyer (expressly or by implication) makes known to the seller the particular purpose for which the goods are required, the buyer is deemed to be relying upon the seller's skills or judgment and as a result there is an implied condition that the goods must be reasonably fit for this purpose. The seller's liability for latent defects is absolute.

4.2 Advice for contract drafting

With the consent of both parties in a "business to business" contract, consumer friendly rights and remedies can be contracted out of and the parties may then expressly agree upon the consequences for the provision of defective goods or services. Restrictions on liability in favour of the seller are customary, often through the imposition of limitations on liability and the removal of the right to recover any consequential losses.

5. Liability for default

5.1 General rule

Where the buyer wrongfully fails to pay for the goods in accordance with the contract, the seller may pursue an action against the buyer for the price of the goods.

5.2 Advice for contract drafting

Penalty clauses are often negotiated to ensure goods are received by a specified time or a penalty be incurred. It is recommended such clauses are well considered.

6. General liability and its limitation

6.1 General rule

Where the contract does not provide for an express method for quantifying liability, questions of damages can be put before a Court which can decide the appropriate measure. The key considerations of the Court will be the remoteness of any damages together with the possibility of restoring the parties to the position in which they would have been in had the breach in contract not occurred.

6.2 Advice for contract drafting

While it is not possible for a contract to cover all possible losses that may result from commercial arrangements which go wrong, parties should carefully consider typical situations of loss or damage and set in place a method of rectifying such loss or specified damages. Agreed consequences for loss or damage may not only act as a deterrent, but replace the need to for costly litigation.

7. Retention of title/payment protection

7.1 General rule

Where there is an unconditional contract for the sale of specific goods in a deliverable state, the title in the goods (i.e. the ownership) passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is delayed.

7.2 Advice for contract drafting

The seller should retain title in the goods until the contract has been satisfied in full and all monies owing are paid. In the case of default, it is not unreasonable for the seller to retain the ability to reclaim the goods (a lien) to satisfy any outstanding obligation. This can be done in New Zealand by registering a charge under the Personal Property Securities Act.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Parties in New Zealand are generally free to contract as they wish. There are, however, some provisions where a business sells to a consumer where certain guarantees are statutory and cannot be avoided. These are covered in the Consumer Guarantees Act 1993 and some other minor legislation enacted for the purposes of consumer protection.

8.2 Advice for contract drafting

Commercial parties often fall short in their contractual arrangements by seeking to rely on unfair or unreasonable contract terms and are unaware of statutory regimes in place to protect consumers. While it is possible to contract out of some statutory regimes, this must be done so expressly and recorded in the contract.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

New Zealand has a multi-tiered civil court system.

a) Claims for less than NZ$ 15,000 (or NZ$ 20,000 with the consent of the parties) are heard by the Disputes Tribunal. The Disputes Tribunal is a small claims forum where lay people decide the dispute. Lawyers are not permitted to appear and matters are resolved based on broad principles of fairness and justice rather than according to ordinary legal principles.

b) Claims for damages under NZ$ 350,000 are decided by the District Court.

c) Claims for higher amounts are decided in the High Court of New Zealand which is also the appellate court from the District Court.

d) In addition to its general jurisdiction, the High Court also exercises jurisdiction in Admiralty.

e) An appeal from a High Court decision is heard by the Court of Appeal of New Zealand.

There is a final appeal from the Court of Appeal to the Supreme Court of New Zealand.

9.2 Arbitration

New Zealand has enacted the Arbitration Act 1996, which allows parties to resolve their disputes by arbitration without the interference from the Courts except in circumstances of failure of due process or fraud. The Act is based on the Model Law on International Commercial Arbitration (UNCITRAL) and gives effect to various international protocols and conventions. New Zealand is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitral awards from other state parties are recognized and enforceable in New Zealand.

10. About the Author

10.1 Law Firm Profile

Burton Partners is a leading specialist corporate and commercial property law firm in Auckland, New Zealand.

We offer commercially focused and result driven advice to clients based locally, throughout New Zealand and across international borders.

We know what we are good at and focus on this. If advice is required outside our specialist areas, we have a strong network of independent professionals in other areas that are available to ensure a full service can be provided.

Our lawyers are experts in their field and partner with our clients to achieve the best outcome on complex, strategic and sensitive matters.

Our clients include multinational companies, listed property trusts, high net worth individuals and families, foreign investors and commercial property developers.

Confidentiality is assured.

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POLAND

1. Introduction

The Polish legal system is a system based on the continen-tal European legal model. Poland has its currently binding written constitution since 1997, which establishes fundamental rights for whole state such as ownership right and freedom of providing commercial activity. Polish civil law was mainly influenced by Roman Law and foreign legal systems which were in force during the time of Poland's parti-tion (1772-1918), especially by French Napoleonic Civil Code. Polish commercial law in turn is influenced by Ger-man legal system. As a member of European Union, Poland had to harmonize its civil law with European regulations es-pecially in the area of consumer protection. The main act of Polish civil law is Civil Code (Kodeks Cywilny) which is in force since 1964. Polish Civil Code regulates significant part of property law, contract law and inheritance law.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Polish law, the parties of a contract have freedom to determine the law which shall apply to their contract. This issue is governed by the Polish International Private Law Act, EU regulations and international agreements. The principle of freedom of choice of applicable law in case of contracts concluded between parties from different countries are set forth in EU Regulation 593/2008 (so called Regulation Rome I). It shall not apply, in particular, to revenue, customs or administrative matters. It has to be noted that freedom of choice of applicable law is limited especially by overriding mandatory provisions (provisions the respect for which is regarded as crucial by a country for safeguarding its public interests) and public order clause, which is used when application of foreign law would have effects contradictory to fundamental principles of legal order of Poland. Cases concerning countries other than EU members should be examined in the light of international agreements.

2.2 Inclusion of the UN Sales Convention

Poland is a party of United Nations Convention on Contracts for the International Sale of Goods since 01 June 1996. The Convention is directly applicable source of law in the Polish legal system and can be used directly by the courts to resolve disputes with the matter covered by the Convention. Parties may, before the contract is concluded or at any time thereafter to exclude application of the Convention in whole or in part by the relevant contractual obligation.

3. Allocation and transfer of risk

3.1 General rule

In Polish Civil Code upon the release of the thing sold, the profits and burdens connected with the thing and the risk of an accidental loss of, or damage to the thing shall devolve upon the buyer. In B2B contracts, if a thing sold is to be sent by the seller to a place which is not the place of the performance, it shall be presumed, in case of doubt, that the release took place at the moment when the seller, in order to deliver the thing to the place of its destination, entrusted it to a carrier engaged in transporting things of that kind. Parties can stipulate other moment of transfer of risk.

3.2 Advice for contract drafting

Polish entrepreneurs often modulate the time of devolution of risk in cross-border contracts. The Incoterms or regulations of the United Nations Convention on Contracts for the International Sale of Goods are widely incorporated in the contracts. The difference between B2B and B2C contracts should also be taken into consideration. The Polish Civil Code regulation of B2C contracts establishes that the thing shall be deemed released once entrusted with the carrier by the seller if the seller did not have an influence on the selection of the carrier by the buyer. The provisions less favorable to the buyer shall be null and void.

4. Liability for defects

4.1 General rule

According to the Polish law, the seller is liable to the buyer, if a thing sold has a physical or legal defect (statutory warranty). The seller shall be released from the liability for warranty if the buyer knew about the defect when the contract was being concluded. If the thing sold has defects, the buyer may file a declaration on a reduction of the price or renunciation of the contract, unless the seller immediately and with no excessive inconveniences exchanges the defective thing for a thing free from defects or immediately removes the defects. The buyer may not renounce the contract, if a defect is insubstantial.

4.2 Advice for contract drafting

The parties may extend, limit or exclude the liability under warranty. The exclusion or limitation of the liability under a warranty shall be ineffective if the seller insidiously concealed the defect from the buyer. The liability in contracts concluded with consumers is stricter and possibilities of modifications are limited.

5. Liability for default

5.1 General rule

If the debtor delays in making a performance in money the creditor may demand interest for the time of the delay even if he suffered no damage whatever and if the delay was a result of circumstances for which the debtor is not liable. The amount of statutory interest for the time of the delay in commercial transactions from 1 January 2017 is 9,50 % per year. In the case of the debtor's default (delay in the performance which is a result of circumstances for which the debtor is liable), the creditor may demand, regardless of the performance of the obligation, the redress of the damage due to the default. In case of non-pecuniary obligations it may be stipulated in the contract that the redress of the damage resulting from the non-performance or an improper performance shall take place by the payment of a specified sum (contractual penalty).

5.2 Advice for contract drafting

The parties may modulate the consequences of delay by increasing the amount of interest. It should be noted that the maximum level of interest shall not exceed annually twice the amount of statutory interest rate. Also it is common in agreements concluded under Polish law to include a contractual penalty clause in the event of non-performance or an improper performance of non-pecuniary obligations.

6. General liability and its limitation

6.1 General rule

The debtor is obliged to redress the damage resulting from the non-performance or improper performance of the obligation unless non-performance or improper performance were due to circumstances for which the debtor is not liable. Additionally, whoever by his fault caused a damage to another person shall be obliged to redress it (legal person shall be obliged to redress a damage caused by a fault of its body).

6.2 Advice for contract drafting

It is common practice in transactions under Polish law to alter the scope of parties' liability, in particular in B2B contracts. Generally, the debtor may assume by contract the liability for the non-performance or improper performance of the obligation due to specified circumstances for which he is not liable by virtue of statutory law. The stipulation that the debtor is not liable for a damage which he might do to creditor intentionally shall be null and void. It is needed to take into consideration the consumer protection provisions when it comes to modification of liability in B2C contracts.

7. Retention of title/payment protection

7.1 General rule

Generally, the ownership title to a thing defined as to its identity (*res in specie*) transfers on the buyer with the moment of signing the agreement. If the transfer concerns things designated only as to their kind (*res in genere*), the transfer of the ownership shall require the transfer of the possession of those things.

7.2 Advice for contract drafting

Under Polish law it is possible that the seller reserves for himself the ownership of the movable thing sold until the payment of the price. In such case it shall be deemed, in case of doubt, that the transfer of the ownership of the thing took place subject to the condition precedent. If the thing is released to the buyer the stipulation of ownership shall be confirmed in writing. To make reservation effective towards the buyer's creditors, the document should have a certified date.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

In Polish legal system a model form of a contract (general provisions on contractual obligations) set up by one of the parties, in particular general conditions of contracts, standard forms of contracts and rules shall be binding upon another party if having been delivered to such party before concluding the contract. The model form of contract must render its contents unambiguously and comprehensively. In the case of any discrepancies between the contents of a contract and the model form thereof, the parties shall be bound by the contract. Provisions of a contract concluded with a consumer, which have not been individually agreed with him, shall not be binding thereupon, if his rights and duties have been stipulated in conflict with good customs and in flagrant violation of his interest (wrongful contractual provisions).

8.2 Advice for contract drafting

It should be pointed out that in B2B contracts parties who use different standard forms of contract shall not be valid for the provisions of the standard forms which are mutually contradictory. Drafting model forms of contracts with consumers needs taking in consideration probability of using abusive clauses, which were not negotiated with consumer and infringe good customs and client's interest. It is recommend to check contractual clauses in the light of wrongful contractual provisions listed in public register provided by President of the Office of Competition and Consumer Protection and in other decisions of consumer protection authorities (due to last year statutory alteration in wrongful contractual clauses system in Poland, the validity of register shall expiry in 2026).

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Polish judiciary system is two-instance system with extraordinary possibility of submitting the cassation (extraordinary mean of appeal) to the Supreme Court. The parties in most cases are free to choose the court which will be entitled to examine their case in first instance. The freedom of choosing is excluded in particular cases, e.g. when the dispute is in connection with real estate (exclusive jurisdiction). The general rule of Polish civil procedure is that the action should be brought before the court of first instance in whose district the defendant is domiciled.

9.2 Arbitration

Arbitration agreements are often used in commercial transactions in Poland, especially in complicated, international matters. There are many arbitration courts, which specialize in particular area of business, where the disputes are examined by experienced arbitrators, e.g. Court of Arbitration at the Polish Chamber of Commerce, Arbitration Court at the Polish Financial Supervision Authority. For the purpose of subjecting the case to arbitration court parties should include arbitration clause in the contract.

10. About the Author

10.1 Law Firm Profile

BSWW Legal & Tax is a Polish legal firm with its office in Warsaw. The BSWW Legal & Tax team is composed of ca. 60 experienced lawyers providing comprehensive legal services across many sectors of the economy, including real estate, construction, energy, chemical, telecommunications, IT and automotive to name but a few. Our connections within international law networks mean our clients can count on high quality legal services both in Poland and abroad.

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RUSSIA

1. Introduction

The Russian legal system is a part of Romano-Germanic legal family. The Russian law in its present form began to emerge in late 80s of the twentieth century with the end of state-planned economy. It is still being developed rapidly.

The fundamental code for civil law is the Civil Code of the Russian Federation which consists of 4 (four) parts: Part 1. General Provisions (has been in force since 01.01.1995); Part 2. Individual Types of Obligations (has been in force since 01.03.1996); Part 3. Law of Succession and International Private Law (has been in force since 01.03.2002); Part 4. Intellectual property (has been in force since 01.01.2008).

The Russian Federation is a federal state consisting of 85 state entities. The civil legislation is within the exclusive jurisdiction of the Russian Federation, so Russian civil legislation extends over the federal level as well as over all 85 state entities.

The Constitution of the Russian Federation was adopted by national referendum on the 12th of December 1993 with 54.5% of the vote and took effect on the 25th of December of the same year. The Constitution establishes foundations of the constitutional order of the Russian Federation, guarantees certain irrevocable fundamental rights, deals with the Russian federal structure and division of jurisdiction between the Russian Federation and state entities as well as with government branches and local self-government.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Russian law, the parties of a cross-border contract are free to determine the material law that shall apply to their contract or part thereof. The agreement on choice of law must be explicit and clearly result from the contract or its circumstances.

In case the Parties fail to determine the material law that shall apply to a cross-border contract, the applicable law shall be determined according to the principles stipulated in Part 3 of the Russian Civil Code. In particular, the law of the country having the closest relation with contract can be regarded as applicable law.

The law applicable to a cross-border contract shall determine in particular:

a) construction of the contract;

b) the Parties' rights and obligations under the contract;

c) performance under the contract;

d) the consequences of non-performance or improper performance under the contract;

e) termination of the contract;

f) consequences of invalidity of the contract.

The law applicable to a cross-border contract shall **not** determine issues, determined by the personal law of a legal entity, law applicable to proprietary rights and law applicable to relationship between representative or representee and a third party.

2.2 Inclusion of the UN Sales Convention

Russia is a member-state of the UN Sales Convention (United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980).

The UN Sales Convention applies to contracts of purchase and sales of goods between parties whose places of business are in different states if:

a) These states are member states of the UN Sales Convention;

b) The rules of private international law lead to the application of the law of the UN Sales Convention member state.

The UN Sales Convention applies automatically and parties to an international purchase and sale of goods contract do not need to explicitly include the rule concerning the application of the UN Sales Convention.

It should be noted that the Russian courts are less familiar with the UN Sales Convention than with Russian law and more willingly apply the Russian Civil Code. For that reason, if the UN Sales Convention contains provisions being more favourable for a party to an international purchase and sale of goods contract, such party should directly refer to the UN Sales Convention in case of disputes.

The parties to an international purchase and sale of goods contract may exclude the application of the UN Sales Convention or subject to Article 12 thereof, derogate from or vary the effect of any of its provisions.

3. Allocation and transfer of risk

3.1 General rule

Under Russian law, unless otherwise stipulated by a sales contract, the risk of loss or damage of goods shall be transferred to the buyer at the moment when the seller is deemed to have performed its obligation of handing over the goods to the buyer.

Unless otherwise stipulated by a sales contract, the seller is deemed to have performed its obligation of handing over the goods to the buyer at the moment of:

a) Transfer of the goods to the buyer or a person indicated by the buyer in case the sales contract provides for the seller's obligation to deliver the goods;

b) Placement of the goods at the buyer's disposal in case the sales contract provides for the seller's obligation to transfer the goods to the buyer or a person indicated by the latter in the place of the goods' location.

In case the sales contract does not provide for the seller's obligation to deliver the goods or to transfer the goods to the buyer in the place of the goods' location, the seller's obligation of handing over the goods to the buyer shall be deemed to have been performed at the moment of handing over the goods to a carrier or a courier organization, unless otherwise stipulated by the sales contract.

3.2 Advice for contract drafting

For the avoidance of any ambiguities in respect of the risk allocation issues, it is strongly recommended to clearly regulate all the above issues in a sales contract.

The risk allocation provisions of the Russian law are of discretionary nature and leave space for negotiations by the contracting parties.

4. Liability for defects

4.1 General rule

The seller is obliged to transfer to the buyer the goods the quality of which corresponds the provisions of the sales contract.

In case the sales contract contains no provisions in respect of quality of goods, the goods must be suitable for the purposes for which the goods of the same sort are usually used.

If the seller was informed by the buyer about the particular purposes of the purchase of goods, the goods must be suitable for the above purposes.

In case the seller fails to transfer the goods the quality of which corresponds the above requirements, the buyer has the following remedies:

a) Proportional reduction of the purchase price;

b) Gratuitous removal of defects in goods within the reasonable period of time;

c) Compensation of the expenses incurred by the buyer as a result of the defects removal.

In case of material breach of the sellers' obligations regarding the quality of the goods, the buyer's remedies are as follows:

a) Refusal to perform the sales contract and claim of the money paid for the goods;

b) Substitution of the goods by the goods of the adequate quality.

In case of B2B sales contracts (contracts of supply), the supply of goods of improper quality and failure by the seller (the supplier) to eliminate defects within the period acceptable by the buyer shall entitle the buyer to unilaterally and without legal proceedings refuse to perform the contract of supply.

4.2 Advice for contract drafting

Much like the above mentioned provisions regarding the allocation of risk, the legal provisions concerning liability of defects are of discretionary nature. The contracting parties may and it is strongly recommended to specify in advance the requirements to the quality of the goods as well as the criteria of material breach of the sellers' obligations regarding the quality of goods.

Also, it should be noted that the contracting parties may agree upon additional remedies granted to the buyer.

5. Liability for default

5.1 General rule

Russian law provides the injured party with the following remedies:

a) recovery of damages;

b) right to claim contractual penalties;

c) specific performance.

In case of delay in a monetary obligation **fulfilment**, the injured party is entitled to either:

a) claim the payment of interest on the sum owed by the debtor. The interest rate is determined in accordance with the Bank of Russia key rate (as per 01.01.2017 the Bank of Russia key rate amounts to 10% per annum); or

b) claim the payment of contractual penalties for the delay in a monetary obligation fulfilment in case a contract contains provisions regarding penalties.

The contract may provide that both remedies indicated above shall apply simultaneously.

If the injured party suffers damages as a result of delay in a monetary obligation **fulfilment**, it is entitled to claim damages in amount not covered by the payment of the interest.

In case of contracts of supply (B2B sales contracts) the parties thereto shall have a specific remedy, i.e. the right to unilaterally and without legal proceedings refuse to perform the contract of supply in case of material breach of the contract by the other party.

The breach of the contract of supply by the seller (supplier) shall be presumed material in the following cases:

a) supply of goods of improper quality with defects that cannot be eliminated within the period acceptable to the buyer;

b) repeated violation of the deadlines for the supply of goods.

The breach of the contract of supply by the buyer shall be presumed material in the following cases:

a) repeated violation of the payment deadlines;

repeated non-acceptance of the goods.

5.2 Advice for contract drafting

The parties have to be aware of all remedies provided by the legislation (e.g., contractual penalties) and try to include them into the contract.

6. General liability and its limitation

6.1 General rule

As for the first two remedies mentioned above, the general rule is that the injured party is entitled to claim recovery of damages in amount not covered by the debtor's payment of contractual penalties. However, the contract may provide that:

a) the injured party is entitled to claim contractual penalties, but is not entitled to claim recovery of damages; or

b) the injured party is entitled to claim both contractual penalties and recovery of damages (punitive damages); or

c) the injured party is entitled to claim either contractual penalties or recovery of damages at its discretion.

In case of improper performance of its obligations, unless otherwise stipulated by the contract, the debtor shall not be exempted from his obligation of specific performance, even after he paid compensation for loss and contractual penalties.

In case of non-performance of its obligations, unless otherwise stipulated by the contract, the debtor shall be exempted from his obligation of specific performance after he pays compensation for loss and/or contractual penalties.

The parties often agree on a limitation of contractual penalties to a certain percent of the amount due.

Also a court can limit the amount of penalties if it finds that this amount is excessive and does not correspond the consequences of the default. In case a debtor is a consumer not carrying on business activities, such limitation may be made by court on its own initiative. If a debtor is an entrepreneur, the limitation of penalties may be made by court only upon the debtor's request and only in exceptional cases.

6.2 Advice for contract drafting

The Russian law provides the parties with opportunities to protect their interests in the most favourable way, e.g. to agree upon punitive damages or, alternatively, upon limitation of liability for default.

The above should be taken into consideration when drafting a contract.

7. Retention of title/payment protection

7.1 General rule

Although, according to the general rule, the title and the risks pass to the buyer together with the possession of the goods, the parties to a sales contract may agree that the transfer of title to the goods is subject to payment of the contract price by the buyer. In this case the buyer has no right to dispose of the goods received until the title to the goods is transferred to the buyer, unless otherwise provided by the sales contract or unless otherwise follows from designation or nature of the goods.

In the above case if the buyer fails to pay the contract price within the payment term stipulated by the sales contract, the seller shall have the right to claim the return of the goods by the buyer, unless otherwise stipulated by the sales contract.

Also, the Russian law provides that the seller has pledge over the goods sold on credit (i.e., when the contract stipulates that the payment of the contract price shall follow after the receipt of the goods by the buyer) until the payment of the contract price by the buyer, unless otherwise stipulated by the sales contract (statutory pledge).

7.2 Advice for contract drafting

The buyer's obligation to pay the contract price is secured by pledge provided for by the Russian law. The above obligation may additionally be secured by the contractual title retention.

In case the parties agree upon title retention, it is recommended for the buyer to make transfer of risks subject to the title transfer. Otherwise, in case of accidental loss or damage of the goods, the buyer shall be obliged to pay the contract price, even not being the owner of the goods.

If the goods are sold on credit, it is also recommended to the buyer to explicitly exclude the statutory pledge of the goods, which is possible due to the dispositive nature of the statutory pledge.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

The parties to sales contracts often use so called framework agreements, containing general terms and conditions of a sales contract. The specific terms and conditions applicable to delivery of certain parcels of goods are regulated in separate documents (additional agreements, annexes, specifications, etc.) signed by the parties and being integral parts of the framework agreement.

Incoterms are also widely used in sales contracts.

8.2 Advice for contract drafting

In order to avoid ambiguities and disputes in respect of the expenses, risk allocation, parties obligations, customs duties, etc., when performing a sales contract, it is recommended to use Incoterms.

However, Incoterms have no provisions regarding liability for defects, liability for default and limitation thereof. Such issues should be regulated by other contractual provisions, which, due to their dispositive nature, are subject to special attention in order to reach the most favourable regulation possible.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Russian judiciary system is distinguished by its dualism. There are two parallel judicial systems in Russia: arbitrazh (commercial) courts and general jurisdiction courts. Arbitrazh (commercial) courts have jurisdiction over commercial disputes. Non-commercial disputes are within the jurisdiction of the general jurisdiction courts. Both systems enable parties involved in disputes to challenge judgments in superior courts.

As a general rule, parties to a contract are free to enter into jurisdiction agreements with some exceptions concerning exclusive jurisdiction, e.g. in case of corporate disputes (which are heard by a court at the company's location), in case the subject matter of a dispute is real estate (such disputes are hear by courts at the real estate location) or state property (in case of international disputes Russian courts shall have exclusive jurisdiction over such disputes), etc.

9.2 Arbitration

Arbitration agreements are often included into cross-border commercial contracts. The core advantage of arbitration over litigation in case of international disputes is the possibility of enforce arbitral awards according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). To the contrary, it is usually complicated to enforce foreign judgments in Russia and vice versa due to the lack of bilateral international treaties on recognition and enforcement of foreign judgements entered into between Russia and other states.

The most reputable Russian arbitration institutions are International Commercial Arbitration Court (ICAC, see http://mkas.tpprf.ru/en/) and Maritime Arbitration Commission

(MAC, see http://mac.tpprf.ru/en/) at the Chamber of Commerce and Industry of the Russian Federation.

10. About the Author

10.1 Law Firm Profile

Westside law firm is a Russian law firm specializing in all areas of the Russian business law, in particular, corporate and entrepreneurial law, M&A, real estate, restructuration and bankruptcy, corporate finance, dispute resolution. We advise Russian as well as international companies and provide legal services according to the highest international standards. Westside law firm is included into Russian as well as international law firm rating lists. Our office is located in Moscow, Russia. In the case of international intersections, we work with our colleagues from The Law Firm Network.

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SINGAPORE

1. Introduction

This article provides a brief write-up on 2 major types of international business contracts under Singapore law – contracts for provision of goods, and contracts for provisions of services.

The law in Singapore is derived from statutes and the common law.

Statutes are enacted by Parliament as Acts of Parliament and are the paramount source of law in Singapore. Statutes may be supplemented by subsidiary legislation and occasionally by guidance notes or practice directions issued by various ministries. The courts are required to adopt a purposive approach towards interpreting statutes.

Singapore has also inherited the English common law tradition, where the body of law is developed incrementally based on previous judicial decisions, and the judgments of higher courts are binding on those lower in the judicial hierarchy.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Contracting parties have the freedom to choose the governing law of the contract, provided the choice is made in good faith. The choice of an unconnected governing law is not in itself objectionable. Singapore serves as a popular third party state of choice for international business con-tracts in Asia due to its clear and easily accessible law.

If the choice of governing law is not expressly stated, the court may infer a choice from the contract and the surrounding circumstances, or apply default rules of private international law to determine the appropriate law that should govern the contract.

2.2 Inclusion of the UN Sales Convention

Singapore has 2 possible default regimes for international sale of goods contracts. The first regime, which applies to international sales contracts by default, is the regime set out in the United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980 (the "CISG"). However, parties to the contract may expressly agree to exclude the application of the CISG.

If the CISG is expressly excluded from applying to a con-tract, then the applicable regime is the common law as modified and supplemented by the Sale of Goods Act ("SOGA"). The rights, duties, and liabilities created under the SOGA may also be excluded by express agreement.

3. Allocation and transfer of risk

3.1 General rule

The allocation of risk in an international sale of goods or services contract under Singapore law is as follows:

a) If expressly set out in the contract, risk is borne in accordance with the terms stated in the contract.

b) If not expressly set out in the contract, a court will look into whether there are any terms which may be implied into the contract. Terms may be implied by previous course of dealings between parties, or by law.

c) If there are no implied terms setting out allocation of risk, risk will be passed in accordance with the relevant default law. In international sale of goods contracts, the default law depends on the regime under which the agreement is made. In international provision of services contracts, by default risk will be borne by the party who is providing the services.

3.2 Advice for contract drafting

Parties should discuss and agree on who is to bear the risk in any arrangement, and expressly state it in the contract. Incoterms may be used and modified to conveniently arrange this.

4. Liability for defects

4.1 General rule

Liability for defects in goods under Singapore law generally lies with the seller, except in the following situations:

a) if the contract expressly or impliedly provides other-wise;

b) if goods are sold on an “as-is” basis; or

c) if the defect is known or should have been known by the purchaser before or at the time the contract is made.

A defect in goods may constitute a contractual default, which would be actionable accordingly.

In the event of a defect in goods purchased, purchasers buying goods as consumers (i.e. under business-to-consumer contracts) may also require the seller to:

a) repair or replace the goods in question at the seller’s own cost and expense;

b) reduce the amount to be paid to the seller for the goods in question by an appropriate amount; or

c) rescind the contract with regards to those goods.

4.2 Advice for contract drafting

The purchaser generally will not accept liability for defects and require the seller to be liable for them. The seller can address this by having the purchaser provide a definitive list of criteria to meet so that a defect can be objectively determined. Sellers selling products not manufactured by them should ensure that the contract with their supplier makes the supplier liable for any defects (whether directly or indirectly) and if possible, direct all claim for defects directly to the supplier.

5. Liability for default

5.1 General rule

In the absence of any contractual term or provision to the contrary, the party who defaults on performing an obligation is liable to the other party who would otherwise derive a benefit from such obligation. In contracts involving more than 2 parties, several parties may be jointly and/or severally liable for certain defaults.

In the event of such a default, the general remedies available under Singapore law are:

a) Damages – monetary compensation that the defaulting party pays to the aggrieved party, measured in accordance with the losses that the aggrieved party may have suffered as a result of the breach. Liquidated damages may also be claimable if such is agreed on in the con-tract. Damages may be subject to interest.

b) Specific performance – An equitable remedy when the court compels the defaulting party to perform its obligations under the agreement.

c) Termination of the contract – only available in certain situations, such as when (1) it is expressly agreed that such remedy is available to the aggrieved party; or (2) when the defaulting party's breach deprives the ag-grieved party of the whole or substantially the whole of the benefit of the contract.

In addition to the abovementioned remedies, the following remedies are also available to the aggrieved party in con-tracts under the CISG regime:

a) Suspension of performance of obligations – The ag-grieved party may suspend performance of his obligations if the defaulting party will not perform a substantial part of his obligations;

b) Extension of timelines – The aggrieved party may fix a reasonable length of additional time for performance by the defaulting party of his obligations without his con-sent. If the defaulting party fails to perform at the end of the extended time period, the aggrieved party may avoid the contract without having to prove that the breach of the contract is fundamental.

c) Reduction in price – If goods delivered do not conform to the contract, the buyer may reduce the price paid for the goods in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

5.2 Advice for contract drafting

Issues relating to default of contract are fertile grounds for disputes to arise. It is therefore important for the types of default and the consequences thereof to be clearly spelled out in the contract in order to minimise the risk of litigation.

6. General liability and its limitation

6.1 General rule

Parties may agree to exclude or limit liability for default. This is generally done by limiting (1) the maximum sum a party can be liable for, (2) the minimum standard of default required for liability to arise (commonly by reference to culpability or quantum of damages),

or (3) the heads of losses recoverable. Importantly, the restrictions in the Unfair Contract Terms Act do not apply to international supply contracts.

6.2 Advice for contract drafting

Limitation of liability clauses are usually construed strictly against the party which they are in favor of. These clauses must therefore be carefully drafted to ensure that they are free from any ambiguity and are sufficiently broad to cover all conceivable circumstances in which liability could arise.

7. Retention of title/payment protection

7.1 General rule

Retention of title clauses are recognized under Singapore law. Under such a clause, the purchaser obtains possession of the contract item but the title to the goods remains with the seller. A retention of title is usually expressed to be effective until specific conditions are met, most commonly, the seller's receipt of the full payment of price for the goods.

The seller can claim rights to the proceeds arising from the sale of the goods or any re-sultant products made from such goods. Any sale proceeds arising from such sales is held on behalf of the seller by the buyer.

In situations where the goods being sold are of a high value and payment is to be made in tranches or by instalments, the purchaser may sometimes be required to provide a banker's guarantee for the whole of the outstanding debt, or to have a third party provide a guarantee to secure the purchaser's obligations.

7.2 Advice for contract drafting

Retention of title clauses can provide protection against a buyer's insolvency in situations where the seller releases goods on credit. It is advisable that a retention of title clause be fully incorporated into the contract that exists between the seller and buyer, and not just appear on the back of an invoice. The seller should also consider whether to require the buyer to ensure that all of the goods supplied are al-ways kept separate from those of other suppliers and that they can always be easily identifiable to the buyer. In certain instances, the seller may go a step further and stipulate that it has the contractual right to enter the buyer's premises and retrieve the goods if the buyer defaults on payment.

8. Use of General Terms and conditions/Incoterms

(Including rules regarding unfair, unreasonable or uncon-scionable contract terms in B2B or B2C contracts)

8.1 General rule

It is fairly common practice that international business con-tracts, particularly contracts for the purchase of goods, are executed on one party's general terms and conditions. Such general terms and conditions are enforceable in accordance with the general laws of con-tract. However, the general terms and conditions would be subject to the common law rule of contra proferentum, which construes any inherent ambiguity in the interpretation of a clause against the interests of the party who provided the wording of the clause, unless the term or phrasing is mandated by law.

Incoterms are also recognized under Singapore law and may be incorporated into a contract as an express term of the contract, or implied by way of prior dealing.

In international business contracts, an “unfair” or “unreasonable” (implying onerous) obligation undertaken by a par-ty to a contract does not affect the contract’s validity per se. The courts’ view is that contracting parties should care-fully scrutinize the terms of a contract they are entering in-to, and the courts will seldom intervene to invalidate or re-strict the scope of such terms.

The courts will, however, invalidate and void the terms of a contract or clauses which are illegal or which require the performance of an illegal act. Clauses which restrain trade are also prima facie void, unless the courts find that such restraints are reasonable. A contract as a whole is also voidable if it is entered into in one of the following circumstances:

a) Duress – when a party enters into a contract as a result of another persons’ coercion, which may include actual or threatened harm to him, his property, or (in certain circumstances) economic interests.

b) Undue influence – when a party enters into a contract as a result of an unduly dominant position of another party, or when there is a relationship of trust and confidence between the party and the other contracting party.

c) Unconscionability – when there is some extortion or un-due advantage taken of the inequality of a party’s circumstances that “shocks the conscience of the court”.

8.2 Advice for contract drafting

In order to minimise the possibility of allegations of duress, undue influence or unconscionability being raised, it is good practice to stipulate a clause that all parties to the contract have been given an opportunity to seek and obtain independent legal advice prior to execution of the contract and have consulted their respective advisors respecting the le-gal effects of the contract. The execution of the contract should be witnessed by a solicitor or an independent third party and sufficient details of such witness kept so they may be called to testify on the circumstances of signing, if necessary.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Singapore judiciary is internationally renowned for the clarity and strength of its judgments, incorruptibility and ability to arrive at a quick resolution. Parties may expressly agree to have a dispute heard by the Singapore courts. In the absence of such an agreement, the Singapore court will determine if it is an appropriate forum to determine a dispute by tests set out in Singapore law.

Singapore has ratified the 2005 Hague Convention on Choice of Court Agreements. Under such convention, if parties choose a court under an exclusive choice of court agreement, such court will have sole jurisdiction to decide the dispute unless the agreement is null and void. The selected court generally may not decline jurisdiction on the ground of *forum non conveniens*. If parties choose the court of another contracting state, a Singapore court must stay or dismiss the matter if any such party attempts to bring the matter before the Singapore courts, and must also recognize and enforce a judgment of the foreign chosen court.

Singapore is also home to the Singapore International Commercial Court ("SICC"), which offers litigants the option of having international disputes adjudicated by a panel of specialist commercial judges from Singapore and inter-national judges from both the civil and common law traditions. The SICC enables parties to avoid common problems encountered in international arbitration, such as the overformalisation of, delay in, and rising costs of arbitration, concerns about the legitimacy of and ethical issues in arbitration, the lack of consistency of decisions and absence of developed jurisprudence, the absence of appeals, and the inability to join third parties to arbitration. It also allows advocates from various jurisdictions to appear and argue be-fore the same court.

An agreement entered into on or after 1 October 2016 to submit to the jurisdiction of the Singapore High Court automatically includes submission to the jurisdiction of the SICC.

9.2 Arbitration

Arbitration agreements are widely used in international agreements. When there is an international arbitration agreement, the International Arbitration Act requires courts to stay any court proceeding over such dispute in favor of an arbitration. The procedure for commencing the arbitration depends on the rules which parties adopt, which is generally provided by an arbitration institution in the jurisdiction chosen as the seat of arbitration. As Singapore is a par-ty to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"), the Singapore courts will generally recognize and enforce foreign arbitral judgments of contracting states, subject to relevant defences available.

The Singapore International Arbitration Centre ("**SIAC**") is the only arbitration institution in Singapore and is frequently chosen as the seat of arbitration in international contracts involving parties which are domiciled in Asia or Australia.

Mediation is an alternative means of dispute resolution which involves a facilitated negotiation between parties to a dispute. International mediation in Singapore is generally conducted by the Singapore International Mediation Centre ("**SIMC**").

An increasingly popular dispute resolution clause is the SI-AC "Arb-Med-Arb" Model Clause, in which a dispute referred to arbitration with the SIAC is firstly mediated by the SIMC before the arbitration hearing. Should parties settle their dispute through mediation, their settlement may be recorded as a consent arbitral award, which will in turn be accepted as enforceable arbitral award in contracting states to the New York Convention.

10. About the Author

10.1 Law Firm Profile

Engelin Teh Practice LLC is an established Singapore law corporation headed by Senior Counsel Engelin Teh. We are well positioned to support business in Singapore and provide a full range of legal services, including litigation, business law advice, intellectual property management, employment law advice, corporate secretarial services, and incorporation and registration of business entities. For inter-national matters, we work with our esteemed colleagues from The Law Firm Network.

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SPAIN

1. Introduction

The Spanish legal system is a civil legal system of Roman tradition. Private law consists mainly of the Spanish Civil Code of 1889, based on Napoleonic Code, and the Spanish Trade Code of 1885, both the result of several amendments. In some regions of the Country, private law provisions coexist with customary local law (so called "foral law"). Spanish legal order is largely influenced by EU law and several sources of international law. Spain has a rigid Constitution dated from 1978 and a Constitutional Court entrusted of enforcement. The Spanish Constitution shapes the Country as a Regional State, in which territories own a relevant degree of competences enlisted in their respective Statutes. Spanish jurisdiction is quite a differentiated system consisting of many Courts with general and special competences.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Spanish law, parties of a contractual relationship are free to determine the material law applicable to their obligations regarding rights which are "available" at participants' will. Such rights do not include, for instance, real estate regime, or public order principles, which are submitted to Spanish law as the law of the land. Freedom of law clauses apply fully in most of international business contracts, as service providing and movable goods sales. Parties involved in a cross border transaction are suggested to explicitly and clearly indicate the substantive law they want to apply in order to minimize interpretation, conflicts of laws and clauses. The regulation in force is highly influenced by EU law sources on the matter, especially Regulation 593/2008 (Rome I Regulation).

2.2 Inclusion of the UN Sales Convention

Spain is one of the states which ratified the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980, CISG). CISG allows merchants whose places of trade are in different countries to avoid choice of law issues, in cases of trans-border commerce offering a general pattern of rights and obligations. As long as parties have their place of business in signatory countries and relationship is governed by Spanish law, CISG applies automatically as a body of Spanish international private law system. CISG also applies, regardless of nationality requirements, when rules of international private law or the parties will, lead to the application of Spanish law. In this respect, a mandatory reference is to be made to EU Regulation 593/2008 (Regulation Rome I), as the main legal act governing international private law within the EU. Apart from that, parties can, by agreement, derogate from virtually any CISG rule, or can exclude the applicability of the CISG entirely in favour of Spanish or any other law. Nevertheless, CISG is a well-known corpus for Spanish Courts and, unless specific reasons made it convenient, it is advisable to maintain its applicability in international transactions.

3. Allocation and transfer of risk

3.1 General rule

General rule on risk transfer is that risk is with the owner (*res perit domino)*. It is important to remember that under Spanish law, purchase contracts entail obligatory effects only.

Ownership rights transfer to the buyer only when he/she achieves material possession of the goods, or when those were put at his/her disposal at a convened time and place, and buyer refused the consign unjustifiably. Courier or freight, unless parties agreed on the contrary, are seen as auxiliaries to the seller, who clearly bears the risk until final delivery. Following the described rules, if merchandise perishes due to neutral, independent or unforeseeable reasons, before delivery was performed, the seller still remains bound to performance. Nevertheless if contract relates to a specified good (i.e. a painting or a stamp of special value) which are not replaceable, contract is rescinded and no further consequences arise; if seller was given a price in advance such price must be restituted.

3.2 Advice for contract drafting

Rules governing the matter are not peremptory. Contractors are suggested to define explicitly the terms of risk allocation according to their specific purpose and needs.

4. Liability for defects

4.1 General rule

Goods shall be suitable at any time for the specific use inherent to them, and must be of the quality parties agreed in the contract. In B2B transactions, Spanish private law distinguishes among hidden defects (i.e. malfunctions) and visible defects. Hidden defects make the seller responsible as soon as such defects are discovered. Buyer must inform without delay and in any case no longer than 30 days from delivery. An exception to this rule applies for *per se* risky sales (ventas *aleatorias*, e.g. insurance contracts) or if parties agreed not to bind the seller for hidden defects. In such event the risk is deemed to be inherent to the object of the agreement and its substantiation may not deem responsibility on the seller, on condition that he acted in good faith and was unaware of lamented defects.

For visible defects, a different rule applies, shaped on certainty in commercial transaction. In the case of buyer inspected items, he/she has a short time lapse of 4 days in order to send a notice of complaint. If inspection was performed and no claim arose thereof, it cannot be pursued further. Seller can also compel buyer to inspect the goods, in order to set transaction and reach legal stability.

If any defect was found, buyer may choose between *subsequent execution, price reduction or contract rescission*, depending on incompliance gravity and buyer's interest in accepting a partial performance. An *action for damages* is also suitable as long as party noncompliance led to further injurious affection.

4.2 Advice for contract drafting

Spanish legal system on liability for defects is quite a good compromise between legitimate expectations of the buyer, which aims to receive prospected goods, and the interest of the seller to set transaction in a short period of time. Further criticism is to be addressed to the determination of damages and the reduction of prices. Both elements involve expertise and lead to complex and costly disputes in court. In such matters, it is suitable to include *penalty clauses* which fix in advance the amount of compensation. A further penalty clause *in duplum* may also be included if a claim under a penalty clause has been risen and found inconsistent by the Court. Certain customary alteration addresses questions such as the term for notice of visible and hidden defects, the guarantee for hidden defects, and limitation for liability of the seller. Further separation from the legal scheme can be included depending on circumstances as legal provisions governing the matter are largely permissive.

5. Liability for default

5.1 General rule

Liability for default shapes differently, depending on whether it relates to the performance of the seller or the buyer. If it was for the seller, the failure of delivery at convened term determines the allocation of risk upon him. Seller shall be deemed responsible in case of items perishing for independent causes, even if non-replaceable, and even if such responsibility was contractually excluded. Seller shall thereby deliver goods of same quality as agreed or return what received in payment. In any case he/she shall make good for damages. Such burden may be conveniently reduced if no bad faith acted.

If default relates to the buyer, in addition to making good for damages, the price of default interests will be increased at the rate agreed by parties or, in case of lack of agreement or convened rate is abnormally low, special interest rate of Directive 2000/35/CE (8% approximate).

5.2 Advice for contract drafting

In order to avoid default it is customary to set a system of *penalty clauses* which aims at coaxing due compliance of contractual obligations. For concerns related to delivery, it is also possible to state the passage of property right prior to consign. This allows buyer to put forward all kind of actions *in rem* or *in personam* in order to recover possession of the merchandise. Other commonly accepted alterations relate to reminder requirements and evidences for fulfilment of obligations.

6. General liability and its limitation

6.1 General rule

Under Spanish law in cases where either of the parties fails to perform its contractual undertakings, the non-breaching party may accept the in part compliance, require subsequent performance or seek for the rescission of the contract, in addition to damages. Damages shall cover emerging injuries as well as future expected revenues which were directly linked to the obligation. Spanish law does not provide for punitive damages, and responsibility for damages can be altered at parties will. Nevertheless if infringer party acted in bad faith, its responsibility cannot be mitigated. In such case, damages shall not limit to direct consequences only, but will cover all economic injuries even if unforeseen at the time bargain was concluded.

6.2 Advice for contract drafting

It is possible, by mutual agreement, to differentiate the liability regime, strengthening or mitigating statutory provisions. Relating to the first, introduction of penalty clauses is of common practice. Relating to the last one, parties can set a cap or floor, within boundaries of good faith principle. If cap-floor option is pursued special attention shall be devoted to the drafting of contract text since such clauses may alternatively be seen as liability limitation clauses, or clauses defining the object of the contract. Difference is substantive: only for the first case Courts may declare nullity of clause under good faith criterion. Diligence shall strengthen if contract is concluded upon General Terms and Conditions, since legal order tendency bends on non-drafting party protection if clause was unclear.

7. Retention of title/payment protection

7.1 General rule

The acquisition of property under the Spanish law entails the delivery of the goods and their material possession by the purchaser (***traditio***). If buyer refuses with no reason to accept delivery, a *fictio* operates considering delivery performed and possession achieved in order to free the seller. When "retention of title clause" is inserted, property transfer is delayed to later date, normally when full payment is performed with automatic effect from the settlement. In pendency purchaser may dispose of his possession and prospected rights; he can also sell the items, but those will still stay charged with retention obligations. Nevertheless, if a third party, purchased in good faith, a different regime prevails in order to balance contrasting interests. In non-B2B transaction, seller can usually recover contended goods on condition to reimburse final buyer, and has a legal action for damages against the first. On the contrary, in case of B2B selling, Spanish law offers better protection to the final buyer, who makes safe all of his rights as *a non domino* ownership. Seller can only prospect an action for damages to first buyer but loses property.

7.2 Advice for contract drafting

The retention of title is not regulated under the Spanish Legislation. Nevertheless, Courts and Tribunals agree on its legality referring to the principle of *"The Freedom of Contract".* Notwithstanding parties are invited to define expressly consequences of lack of compliance of buyer's performance, i.e. if contract has to be deemed in force after item vindication is pursued or rescinded, and in that last case, what happens with pro rata fees already paid. In order to prevent losses due to *a non domino* ownership, parties may agree on penalty clauses establishing a higher value fee for contract breach. Endorsement by financial entities or pledges on buyer's properties, are also suitable.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Contracting with General Terms and Conditions GTC, is quite popular in Spanish business, especially when a deal involves big companies and financial entities. There is not a minimum threshold of use of drafts in order to address relevance as GTC. Spanish legislation is silent on the matter, expressing in general terms that GTC are agreements not negotiated individually and suitable for repetition. The first sample of a draft is also considered contracting under GTC if such draft was intended to regulate in uniformity virtually all business relations included in that scheme. Often GTC contracts entail impairment between parties, nonetheless no control of fairness and proportionality is admitted by Courts. Unless special provisions so deny, Spanish law considers all kind of business in equal position regarding the freedom to make contracts and capacity to look after one's own interest. Nullity can be claimed only for those clauses that non-drafting party had no possibility to know in advance (i.e. because contained on separated documents he/she was not notified of), or are set in such obscure and ambiguous terms that impede a fair interpretation. In that last case, an exception relates to obscure and unclear clauses which are common to the business endeavour. Incoterm conditions are considered as of common use in commerce and normally do not entitle invalidity.

If contracting with consumers more diligence shall be pursued on drafting, since in addition to the previous, further checks arise such as: increased transparency on clause's legal-economic consequences and proportionality test for non-core obligations.

8.2 Advice for contract drafting

Since judicial interference in B2B contracting under general terms is limited to pure formal contentions, drafting on clear terms or employing clauses and terms of generally accepted use in commerce, is a strong guarantee against undue claims. Nonetheless legal advice is always recommended in order to clarify what Courts deem to consider a "clear term" and knowledge requirements of attached documents and their proof under Spanish law.

If GTC addresses consumers, higher burden of diligence is needed, requiring qualified legal assistance in order to make contracts consistent with EU and national Courts jurisprudence.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The civil law order governs business and commercial transactions. Commerce Code rules private relations amongst merchants, trade, business entities (companies), commercial contracts and other negotiable instruments. Civil Code is applicable for all not regulated by Commerce Code. Litigation relating to commercial transactions may be brought before the Civil Courts and any liability will be controlled by the provisions of the Commercial Code or the Civil Code. Rules on competence define District Courts jurisdiction per territory on venues as the place of the conclusion of the contract, the place where obligation has to be fulfilled or the place of business of defendants. Parties are free to determine a different District Court but cannot refer their dispute to a Tribunal higher or lower than provided by the law, nor to a Court which lacks jurisdiction on the matter.

9.2 Arbitration

Apart from the Spanish Courts jurisdiction, parties in commercial transactions may also include in their contracts an arbitral clause to settle disputes before an arbitral Court. Such institutions as the Spanish Court of Arbitration are competent to conduct national and international commercial arbitrations which are submitted to in B2B transactions. The Spanish Court of Arbitration is a pioneer in this field. It also provides a second instance in appeal for parties that expressly so agreed. For further info see http://corteespanolaarbitraje.es/?lang=en. Instead of any Court, parties may also agree to have their dispute settled by a sole arbitrator. In both cases procedure assures confidentiality and rapidity on award drafting. Later enforcement may be pursued under 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in each of its member States.

10. About the Author

10.1 Law Firm Profile

Law Firm Profile THOMAS DE CARRANZA ABOGADOS is an independent law firm, founded in 2003 dedicated to the delivery of legal services to national and international companies and individuals, with the agility and effectiveness demanded nowadays. The firm provides its services with the aim of offering its clients the highest levels of professionalism quality and competence. The firm's tenacious commitment to excellence has enabled the firm to acquire a

highly qualified team of professionals at the forefront of legal practice, which allows it to meet, securely and effectively, the client's needs in national and international business.

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SRI LANKA

1. Introduction

The Sri Lankan legal system is a hybrid system enriched by the principles of Roman-Dutch Law and English common law. The Roman-Dutch Law is the residuary law, which applies primarily for civil matters with the exception of customary personal laws covered by legislation. Commercial matters are fundamentally governed by statutes founded on English legislation and common law. The Constitution of Sri Lanka of 1978 serves as the supreme law of the land entrenching the sovereignty of the people exercised through the supremacy of parliament. As per the constitution, the judicial power of the people of Sri Lanka is exercised through the judiciary comprising a specialized and designated court system including the Supreme Court, Court of Appeal, Provincial High Courts, High Courts of the Provinces, District Courts and Magistrate's Courts.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Sri Lankan law the parties of a cross-border contract are free to determine the substantive law under which the contract is to be governed and construed. However, should any Sri Lankan legislation or regulation/directive made thereunder relate to and/or apply to the subject matter of the underlying contract, the contracting parties cannot contract out of such provisions which will prevail by inference (i.e. a contract for employment). However, in such cross-border contracts it is common for the contracting parties to adopt a neutral governing law familiar to both parties with a neutral dispute resolution forum.

2.2 Inclusion of the UN Sales Convention

Sri Lanka is not a signatory for the UN Convention on Con-tracts for the International Sale of Goods and therefore contracts governed by Sri Lankan law generally do not pro-vide for incorporation of the provisions of the said convention.

3. Allocation and transfer of risk

3.1 General rule

Under Sri Lankan law, the risk is transferred along with title to the goods. However, the contracting parties can decide and contractually specify when risk is to pass irrespective of who is vested with title to the goods. Where the contract does not expressly provide for the vesting/transfer of risk and the underlying contract is governed by the laws of Sri Lanka, then risk will pass as per the Sale of Goods Ordinance of Sri Lanka.

3.2 Advice for contract drafting

As the parties are at liberty to determine the vesting/transfer of risk, it is recommended that the contract expressly pro-vide for such risk allocation/transfer, especially in relation to where the contractual object is lost, destroyed or damaged. Alternatively, the contract can provide for the applicability and reference to standardised terms such as the INCO terms which Sri Lankan dispute resolution forums are accustomed to.

4. Liability for defects

4.1 General rule

As a general rule the Parties are at liberty to provide for the standards and procedure relating to defective products, which generally include a default/defects curability process and the remedies available/consequent liability for defective goods. In the absence of such express provisions, a party's right to seek damages and/or repudiation of the contract will depend on whether such defects are tantamount to a breach of a fundamental term warranting termination of the Contract. Additionally, the Sale of Goods Ordinance incorporates implied terms in relation to merchantability, fitness for purpose and correspondence with description or sample, the exclusion of which will depend on the test of reasonableness.

4.2 Advice for contract drafting

The contract should specifically provide for and reflect the negotiated terms in relation to liability for defects, including limitation of the quantum of damages payable for default, the enforceability of which will be subject to the application of the Sri Lankan Unfair Contract Terms Act.

5. Liability for default

5.1 General rule

A party in default will be exposed to a claim for damages for loss and/or damage suffered on account of its breach or non-performance of the terms and conditions set out in the contract and where such breach or non-performance is tantamount to a fundamental breach then the contract will be liable for termination in addition to a claim for damages. It is common for contracts to limit the exposure of such liability by excluding any indirect and consequential losses suffered whilst putting a ceiling on the maximum exposure for a claim in certain circumstances.

5.2 Advice for contract drafting

The contract should provide for clear and unambiguous provisions in relation to the liability for default and preferably a default remedy process. For better clarity, we recommend specific reference to breaches which warrant termination.

6. General liability and its limitation

6.1 General rule

Sri Lankan law does not provide for or restrict the quantum of damages that can be claimed. Accordingly, the quantum of damages claimable will be largely governed by the provisions of the Contract, including the exclusion and limitation of liability. Sri Lankan law also provides for the equitable remedy of Specific Performance in limited instances where damages are not an adequate remedy and are awarded at the discretion of court.

6.2 Advice for contract drafting

The contract should provide for clear and unambiguous provisions in relation to the liability for non-performance or breach and its exclusion/limitation.

7. Retention of title/payment protection

7.1 General rule

Under Sri Lankan law, title in goods pass when the parties intend title to pass. It is only where there is no provision in a contract for the passing of title does the Sri Lankan Sale of Goods Ordinance imply terms in the contract for the passing of title. It is common in supply contracts for title to be retained by the supplier/seller even though there is delivery of the goods until payment in full is effected or where other specified conditions are fulfilled.

7.2 Advice for contract drafting

Inclusion of express provisions relating to the retention of title until payment in full is received by the seller/supplier, including the right to take re-delivery of the goods where payment is not made in full. We further recommend supplementary provisions restricting disposal of the goods to 3rd parties by the buyer pending payment in full being made to the seller/supplier.

8. Use of General Terms and Conditions/Incoterms

8.1 General rule

The Sri Lankan Unfair Contract Terms Act of 1997 governs the rules regarding unfair and unreasonable terms in a contract in Sri Lanka. It is not uncommon for the adoption of Incoterms and other universal standard/general terms in contracts governed by Sri Lanka law.

8.2 Advice for contract drafting

As the contracting parties are at liberty to choose the terms and conditions of the contract, including its governing law, we recommend that the parties include provisions to comprehensively cover all aspects envisaged in the course of the contractual relationship of the parties with at a minimum including a clearly defined scope of the rights and obligations of the parties, default remedy process and remedies on breach, dispute resolution process and the incorporation of the standardised general terms, depending on the nature and value of the contract.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Sri Lankan judicial system comprises specialised courts covering the administration of law and order and dispute resolution by way of empowering legislation. Contractual disputes are heard before District Courts appointed for each District. The jurisdiction of a District Court can be invoked where a party Defendant resides or the contract sought to be enforced was entered into or the cause of action arose or where land is the subject matter of the dispute and is situated within the local limits of the jurisdiction of such court. There is also a specialised Commercial High Court to determine commercial disputes in the Western Province which meet a value threshold of LKR 5 Million.

Whilst the court process is comprehensive and effective from an enforcement perspective, the process is still affected by delays associated with the litigation process.

9.2 Arbitration

Sri Lanka is a party to the New York Convention of Arbitration and the provisions of the convention have been incorporated into the Arbitration Act No.11 of 1995. Apart from setting out the procedural rules for Arbitration in Sri Lanka, the Act also provides for the process on the enforceability of Arbitral Awards, including foreign Arbitral Awards. The limited grounds for refusal for such enforcement in the Act as manifested in the Convention have made Arbitration an effective alternative dispute resolution mechanism to the regular court process.

10. About the Author

10.1 Law Firm Profile

D. L. & F. de Saram is one of the oldest and largest law firms in Sri Lanka, founded in 1898. The Firm has been consistently ranked as a top tier legal firm by IFLR 1000, Legal 500, Chambers Global and Chambers Asia Pacific. The Firm provides cross border legal services to major international firms in, inter alia, the United Kingdom, the United States, China, Europe and Australia. It's highly qualified, versatile and experienced legal team comprises of specialists in infrastructure project development (including ports, power and energy, highways, etc.), with special emphasis on PPPs and cross border financing. Acted as local counsel to the US$ 1.5 billion Port City Project, the largest infrastructure project undertaken in Sri Lanka. The Firm's M&A team has been involved in three of the largest M&A transactions in Sri Lanka, namely, the acquisition of Aviva NDB Insurance PLC by AIA Company (transaction value US$ 100 million), the merger of the Lafarge and Holcim entities in Sri Lanka pursuant to the global merger of these entities, and the sale by Lafarge Holcim of its shares in Holcim Lanka Limited (transaction value US$ 373 million). The M&A team recently advised GE Transportation on its purchase of supply chain software provider ShipXpress in Sri Lanka.

The Firm also advised on the antitrust implications of the Lafarge and Holcim merger under Sri Lankan Law.

The Firm has considerable experience in advising clients on Sri Lankan anti-bribery and corruption laws as well as assisting as Sri Lankan counsel in FCPA investigations. It has extensive involvement in cross border banking and finance transactions. Recently advised ADB, Axis Bank, Mashreq Bank. China Development Bank, HSBC, Standard Chartered Bank, Bank of Tokyo-Mitsubishi UFJ Limited and Global Climate Partnership Fund on financing and restructuring transactions in Sri Lanka, with particular emphasis on Sri Lankan exchange control law.

Assisted KPMG in preparation of an analysis of Sri Lankan law governing cross border financing, including a detailed study of exchange control law, foreign ownership restrictions in certain industries and structuring finance and security documents in line with Sri Lankan exchange control and banking regulations. Provides legal service to leading multinational corporations and international and domestic and banking institutions.

The firm undertakes company incorporations (including incorporations with the approval of the Board of Investment of Sri Lanka) and establishment of branch, representative and liaison

Offices. The firm provides company secretarial to over 500 domestic companies, many of which are listed on the Colombo Stock Exchange.

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TAIWAN

1. Introduction

The Civil Code of Taiwan, basically modelled after the German Civil Code in Mainland China in 1929, consists of 5 parts, namely, General Principles, Obligations, Rights in Rem, Family and Succession. It has been in force in Taiwan since 1945. The laws governing the contracts are mainly contained in Part 2 (Obligations) which not only dealt with the contracts made between merchants for commercial transactions, but also with those among ordinary people in their daily life. In addition, there are four separate codes dealt with special commercial affairs, e.g. Company, Insurance, Maritime, and Negotiable Instruments.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

The Taiwan legal mechanism identifies the general principle of party autonomy in choice of the governing law by agreement. Pursuant to the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements of Republic of China (Taiwan), the parties to the foreign-related contract are in general free to select the applicable law to the contract in disputes. However, certain aspects, such as the competence of the parties, certain rules concerning real estate and family relations and the like shall have exclusive application of laws. It is advisable when a contract dispute is to be dealt via judicial procedure, the selection of competent court may be in the same legal jurisdiction as the governing law for purposes of effectiveness and efficiency of dispute resolution.

2.2 Inclusion of the UN Sales Convention

Taiwan is not a member of the UN Sales Convention (United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980). Therefore, it is not automatically applicable under the Taiwan legal system. Nevertheless, if the parties to the foreign-related contract are willing to include or exclude the UN Sales Convention in the contract, there is no laws or ordinances to place restrictions on its application.

3. Allocation and transfer of risk

3.1 General rule

In the sales transaction, under the Civil Code of Taiwan, the profits and risks of the goods sold pass to the buyer at the time of delivery. If the buyer requests that the goods sold to be delivered at a place other than the place of performance under the contract, the risks pass to the buyer at the time when the seller delivers the goods to the carriers or forwarding agents. However, the parties may change the rule of allocation and transfer of risks by agreement.

3.2 Advice for contract drafting

In international trading transactions, varied risks are inevitably involved. The aforesaid rule for transfer of risks may be easy to understand but rough. It is advisable to identify the related risks and the transfer timing of them and try to specify them in the contract. The trade terms provided in the Incoterms (International Commercial Terms of the International Chamber of Commerce) are frequently adopted in Taiwan.

4. Liability for defects

4.1 General rule

In a sales transaction, pursuant to the Civil Code of Taiwan, the seller shall warrant that the goods sold is, at the time when the risk passes to the buyer, free from any defect in quality which may destroy or impair its value, and its fitness for ordinary efficacy, or its fitness for the efficacy of the contract of sale. However, if the extent of the impairment is trivial, such impairment shall not be deemed to be a defect. The seller shall also warrant that, at the time the risk passes, the goods has the guaranteed qualities.

4.2 Advice for contract drafting

For avoidance of doubt, the guaranteed standard of quantity, quality, fitness or functionality of the goods are recommended to be precisely elaborated in the contract. It is also advised that the degree of defect be specified in the contract. When different defect may lead to different handling process, a reasonable claim can be identified and all or partial dispute may be removed or confirmed forthwith. For example, as the defect is small and can be corrected, the correction period may be specified if the parties think fit. If the defect is too big to be removed, the buyer may have rights to damages, to reduce the price, or to rescind the contract.

5. Liability for default

5.1 General rule

Under the Civil Code of Taiwan, the creditor is entitled to claim compensation for any damage resulting from delayed performance, part performance, or failure of performance by the debtor, while the debtor is imputable for the default. The creditor may also rescind the contract. In case of rescission, unless otherwise provided by law or by the contract, the debtor bound to make compensation for the damage shall restore the creditor to the status quo before the injury. When the restoration of the status quo ante shall be paid in money, interest shall be added from the time of the injury, which is calculated at the statutory rate of 5%, unless otherwise specified, either in a B2C or B2B transaction.

5.2 Advice for contract drafting

Delay or suspension of shipments or of any other performance can be the rights of the seller by reason of the event which the buyer is imputed, such as the buyer fails to perform his obligation, unable to pay his debts, or the like. General Terms and Conditions, which forms an integral part of an international sales contract, may specify certain default events by agreement.

6. General liability and its limitation

6.1 General rule

Under the Civil Code of Taiwan, the compensation shall be limited to the actual damages suffered and the profits which have been lost. The profits which could have been normally expected are deemed to be the profits which have been lost in the ordinary course of events, the determined project, and equipment, or other particular circumstances, unless otherwise provided by statutes or by agreement. In addition, a provision of punitive damage is optional in a business contract. If a provision of punitive damage is agreed upon, the injured party still has the right to actual damages.

6.2 Advice for contract drafting

It is possible that in an international sales contract that a claim arising out of the contract could be restricted to be made at a specific time, an action completed, or within a fixed period of time. For example, if the quality or quantity of the goods is in dispute, the buyer does not execute the claims, the buyer will be deemed to have accepted the goods without qualification and waived any claims with respect to the goods. Moreover, the limit of liability can be for the actual damages directly sustained by a party and set up an upper limit, such as not exceeding the price of the goods, exclusion of some sort of damages (e.g. indirect damages, consequential damages), etc.

7. Retention of title/payment protection

7.1 General rule

Under the Civil Code of Taiwan, the transfer of title of the goods sold will not take place until the goods sold has been delivered, and the delivery of the good sold and the payment of the price shall take place simultaneously. Therefore, the seller may refuse to deliver the goods sold until the buyer has paid his price, In addition, the parties may agree upon the retention of the title for the payment protection purpose. Under such circumstance, the buyer would be bound to make the payment first.

7.2 Advice for contract drafting

The seller may ask the buyers to use L/C as the payment method, or make the payment in installment and retain the title of the goods sold until having collected agreed percentage of the total price. In the event that the parties enter into a master sales agreement and the actual amount and price of goods sold will depend on the PO within the term of the master sales agreement, the seller may add the term that if the buyer delayed to pay the price of one PO, the seller may refuse to accept the buyer's POs in the future until the buyer settled all the unpaid price.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

In B2B contracts, one of the parties may use general terms prevailing in a specific business, and unless being against public policy or public interest, the other party has not right to claim those terms to be void. However, in B2C contracts, under the Consumer Protection Act of Taiwan, Traders are required to express or use other methods to publish the standard terms and conditions in full, and such terms and conditions shall constitute a part of the contract only upon consumer's consent. A contract with part or full of standard terms would be deemed as a standard contract. The Traders shall provide a reasonable period of time (cooling time), not longer than 30 days or other appropriate time allowed by the competent authority, for consumers to review all contract clauses, before the standard contract signed can be effective. Any standard term or condition deemed in violation of the good faith are unconscionable to consumers, and shall be rendered null and void. The standard terms under the following situations would be deemed as unconscionable to consumers: 1. those in violation of the principle of equality and reciprocity;

2. those are excluded by the suppletory rules are obviously contradicted to legislative intent; 3. where the purposes of the contracts cannot be achieved due to the major rights or obligations of the contracts are restricted by those terms.

8.2 Advice for contract drafting

Giving the reasonable cooling time to the customers may prevent the customers to claim he/she would not be bounded by the standard terms, and may further prove the standard terms are not unconscionable to consumers. Therefore, Traders may add the term in the standard contract to let the customers sign and declare that the Traders did provide the reasonable period to the customers to review all contract terms.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The Taiwan judiciary system allow the parties to agree on the jurisdiction of the contract in writing unless the disputes are in related to the right in rem of real estate. However, the parties could only agree on jurisdiction for specific contract instead for all disputes between the parties, and the jurisdiction agreement shall let each of the parties to follow its terms to file a law suit in one specific court.

9.2 Arbitration

The parties may also agree to solve their dispute arising from a contract by arbitration, and agree on the rule and place of the arbitration. Although Taiwan is not a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”), the arbitration award made by the arbitral authority in Taiwan still could be recognized by the courts of other jurisdictions if Taiwan also recognized the arbitration awards made by the arbitral authority of such jurisdictions. Nowadays, arbitration awards made by the arbitral authority of Taiwan has been recognized by the United States and the most EU and Asia countries or jurisdictions including Mainland China.

10. About the Author

10.1 Law Firm Profile

GuoJu Law Firm, associated with GuoJu CPA Firm and GuoJu Consultants Co., is founded to integrate diversified experts so as to provide professional legal services critical to the success of clients' business operations worldwide without being tripped by complexity and diversity of expertise. We are consisted of lawyers with multi-backgrounds and highly-experienced practices. All of our lawyers own Master of Laws or higher degrees. Some lawyers are also admitted to other jurisdictions ("China, U.S., Canada") and with other professional qualifications. We have firm and stable team members to provide professional services to clients. In particular, investment, merger and acquisition, tax, human resource and labor relations, e-commerce, information technology and litigations. Furthermore, we have a good sense of the core of business and are able to provide professional solutions for your business whether it is expansion or mature stage.

10.2 Contact person(s)

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THAILAND

1. Introduction

The Thai legal system is a civil law system, influenced by the civil law systems of Western Europe, but in some areas influenced by English law (e.g. company law) or by the law of the United States (e.g. the corporate reorganization sections of the Bankruptcy Act are based on US federal law). Thailand's fundamental laws consist of the Civil and Commercial Code ("CCC"), the Criminal Code, the Civil Procedure Code, the Criminal Procedure Code and the Revenue Code. Thailand also has specific Acts (for example, in relation to land, employment, patents, copyright, trademarks, and foreign business ownership), and regulations to supplement these Acts. The CCC was first issued in the 1920s. It has been periodically amended since then. However, during the past 30-40 years, the legislature has found it easier in practice to issue specific Acts concerning particular matters, which prevail where they conflict with the CCC. The law of Thailand prevails throughout the country. This is except for family and inheritance cases in the four predominantly Muslim southern states of Yala, Satun, Pattani and Narathiwat, where the Thai judge will sit with Muslim assessors in such cases. The Thai courts will recognise foreign law as the jurisdictional law of a contract provided it does not violate public order or the good morality of the Thai people.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under Thai law, foreign law will be recognized by the Thai courts as the jurisdictional law of a contract, provided that it is not contrary to public order or the good morality of the Thai people. So for example in a contract of employment, the parties may choose that a foreign law applies. But if that law confers lesser benefits than Thailand's Labour Protection Act, then the Thai courts will apply Thai law. In addition, if a contract specifies that foreign law applies to it, then in any court proceedings, the party asserting such foreign law bears the cost of adducing evidence of its provisions, to the satisfaction of the Thai court.

Thailand has not entered into any treaties with any other country for the mutual recognition of civil judgments or orders. If it is necessary to enforce such a judgment in Thailand, then fresh proceedings must be issued in the Thai courts. The previous foreign judgment may be adduced in evidence, subject to its being translated into Thai, but the Thai court is entitled to give a judgment based on the merits. The position is different regarding foreign arbitration awards. Thailand is a signatory to the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958). Subject to compliance with the Convention, and to the defences afforded under Thailand's Arbitration Act (2001), such foreign arbitration awards are recognised and enforceable in Thailand.

2.2 Inclusion of the UN Sales Convention

Thailand is not a member of the UN Sales Convention (United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980). The parties are free to declare that Thai law applies to such a contract, or a foreign law subject to the conditions in the last section.

3. Allocation and transfer of risk

3.1 General rule

The allocation of risk in an international sales contract under Thai law depends on whether under the CCC, the contract is for the sale of goods, or whether it is a contract for hire of work where the seller has to make the goods first. In the first case, title passes when the contract is entered into. If the sale is subject to conditions, ownership is not transferred until the conditions are fulfilled. Special rules apply where the property is specific or unascertained. Special rules apply to delivery, liability for defects, and clauses excluding liability. The contract may be subject to scrutiny under the Unfair Contract Terms Act (1997) which applies to all contracts in a standard form, and is not merely to protect consumers in B2C transactions.

3.2 Advice for contract drafting

If the terms of the CCC are not acceptable, it is in order to specify that the Incoterms (International Commercial Terms of the International Chamber of Commerce) shall apply to the transaction.

4. Liability for defects

4.1 General rule

Regarding any defect in the property sold which impairs either its value or its fitness for ordinary purposes, or for the purposes of the contract, the seller is liable. This applies whether the seller knew or did not know of the existence of the defect. The seller is not liable if:

→ the buyer knew of the defect at the time of sale, or would have known of it if he had exercised such care as might be expected from a person of ordinary prudence,

→ the defect was apparent at the time of delivery and the buyer accepts the property without reservation, or

→ the property was sold at as public auction.

Special rules may apply regarding unsafe products under the Unsafe Products Liability Act (2008).

4.2 Advice for contract drafting

The rules governing liability for defects are generally more friendly to the purchaser, but can be altered by mutual consent. In commercial transactions, it is customary to modify the general rules in favour of the seller. Particularly, it is customary to limit the requirements for liability, or impose a time limit for bringing claims, or to limit the maximum damages claimable.

5. Liability for default

5.1 General rule

If the debtor is in default, then the creditor can claim the unpaid price and consequential losses. Interest may be claimed at up to 15% per year in the contract, or if no interest clause is inserted, at 7.5% from the moment court proceedings are issued.

5.2 Advice for contract drafting

The rules governing legal consequences of delay in performance can be altered by consent. This is commonly done to limit the time to make claims, to limit the damages claimable, or otherwise. Where default relates to specific contractual performance (e. g. delivery), commercial contracts generally include penalty clauses, e.g. a specific daily amount of damages is payable in a case of delay. In proceedings, the court may strike down such a provision deemed to be excessive.

6. General liability and its limitation

6.1 General rule

The CCC provides that any award of damages must be reasonable and is based on actual provable loss suffered. This is except in the case of specific liabilities under certain statutes which may specify that in certain cases the court may award a multiple of the basic damages, as an additional award.

6.2 Advice for contract drafting

It is common practice to limit the scope of liability for both parties, particularly for the supplier/work contractor. Where the parties individually negotiate a contract, including the liability clause, modifications of the general law are possible, limited by the principle of good faith. However, where General Terms and Conditions come into play, deviations from the general rule are only possible within a narrow scope.

7. Retention of title/payment protection

7.1 General rule

A retention of title clause can be contractually agreed. Technically, the purchaser obtains possession of the contract item, but the transfer of title of the contract item is subject to complete payment of the purchase price by the purchaser (simple retention of title). It can also be agreed that the purchaser himself is permitted to a further resale of the contract item with the provision that this resale must also be done under retention of title (extended retention of title). However, if any purchaser of the item under retention of title processes the item (e. g. in a manufacturing process), then the initial seller can lose his title and thereby his security.

7.2 Advice for contract drafting

The seller retains title in the sold item until all payments by the purchaser have been made. In the case of purchaser's default, seller may rescind the agreement and reclaim the item. The purchaser may resell the item after a court judgment and try to recover his losses in this way.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

The use of standard form contracts or standard contract clauses is subject to the provisions of the Unfair Contract Terms Act (1997). Clauses that are based on an inequality of

bargaining power which excludes or reduces liability may be ruled unenforceable by the Court.

8.2 Advice for contract drafting

As Thailand is a civil law country, without a concept of binding judicial precedent, it is hard to advise when a court might rule that a contract term is an unreasonable term. Perhaps the best guidance is to observe the practices of commercial competitors as a guideline, and take these into account when drafting a contract.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

Thailand does have a special court called the IPITC, the Intellectual Property and International Trade Court. Cases within this court's jurisdiction may be issued in this court rather than the Civil Court. Two particular advantages of litigating in this court, are that with permission of the court, the proceedings may be conducted in English language, and only one appeal is permitted, direct to the Supreme Court.

9.2 Arbitration

Thailand has its own Arbitration Act (2001). Thailand will also respect foreign arbitral awards as it is a signatory to the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958). In practice, arbitration is seldom used in Thailand to solve disputes, parties prefer to litigate in court.

10. About the Author

10.1 Law Firm Profile

Bangkok International Associates has been established for nearly 30 years. We deal with corporate and commercial law, contract drafting, commercial and residential property, banking and security, employment, intellectual property, taxation and general litigation. In the case of international transactions, we work with law firms all over the world.

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UNITED KINGDOM

1. Introduction

The United Kingdom has three separate legal systems; one each for England and Wales, Scotland and Northern Ireland. Those qualified in England & Wales are not qualified to advise on either Scottish or Northern Irish law as they retained their own legal systems and traditions under the Acts of Union 1707 and 1800.

The judiciary (the justice system), the executive (the government) and the legislature (Parliament) are the three branches of state. They have roles and functions that are defined within written constitutions (rather uniquely there is no one written constitutional instrument), preventing the concentration of power in any one branch and enabling each branch to serve as a check on the other two branches. This is known as the separation of powers.

There are four principal sources of UK law: legislation (created by UK Parliament), common law (the decisions of the senior appellate courts become law), European Union law (Employment law, Data Protection etc.) and the European Convention on Human Rights.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

Under the laws of England & Wales, the parties are able to specify the system of law that will apply to the interpretation of an agreement and its effect if a dispute arises. It is important for parties to consider including both clear governing law and jurisdiction clauses in the contract. A failure to include clear provisions can lead to lengthy and costly disputes over which court should determine a dispute arising out of a contract and which substantive law will be applied to determine the parties' rights and obligations under the contract. In the case of cross-border transaction, it is common to agree on the laws of England & Wales as an established and fair regime.

2.2 Inclusion of the UN Sales Convention

The UK has not adopted the UN Sales Convention (*United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980)*. Legal opinion is that choosing the laws of England and Wales should be sufficient to exclude the Convention, but extra provision in a cross-border agreement expressly excluding the Convention should be included in order to exclude the Convention explicitly.

3. Allocation and transfer of risk

3.1 General rule

Generally the contract will specify when title (ownership) and risk in the products will pass to the customer. The starting point for the sale of specific or ascertained goods is that property is transferred when the parties intended it to be transferred. Most commercial parties set out in the agreement when property passes and choose to connect the transfer of title to the transfer of possession or payment of the price. A customer will prefer to link the transfer of property to the earlier of payment and delivery and a supplier to payment. If products are destroyed before the risk in them passes to the customer, the supplier will remain liable to deliver the equivalent quantity of products. Conversely, if the goods are

destroyed after risk has passed to the customer, the customer will remain liable for the price of the products. Risk and title are tied together by the Sale of Goods Act, which provides that unless otherwise agreed, the risk in goods passes to the customer when the property in the goods are transferred to it.

3.2 Advice for contract drafting

The seller will wish to pass the risk to the customer as soon as the goods leave its possession, but equally will not wish to pass title in the goods until payment has taken place. Conversely a customer will wish to put off the moment when risk passes for as long as possible, and for title to pass at the earliest moment. Most commercial parties in their contracts agree to sever the statutory connection between the passing of risk and title and to connect the transfer of risk to delivery**.**

4. Liability for defects

4.1 General rule

Where goods are sold in the course of a business, the following terms are implied into the relevant contract:

- The goods are of satisfactory quality.
- The goods are fit for purpose.

Where the goods are to correspond with a sample, they will be free from any defect, making their quality unsatisfactory, that would not be apparent on a reasonable examination of the sample.

The above implied terms are conditions. A breach of a condition entitles the buyer to reject the goods and reclaim the purchase price (if paid). The saving provision is that where the breach is so slight that it would be unreasonable for the buyer to reject the goods, the breach only gives rise to a right to damages. In a B2B contract a term excluding or restricting liability for any of the above implied terms is enforceable only to the extent that it satisfies the reasonableness test.

4.2 Advice for contract drafting

Generally the desired position of the seller is to prevent the buyer from seeking to escape the contract by claiming that the goods have not been accepted and rejecting them. The seller can approach this by:

- Specifying a time limit after which the right to reject will be lost.
- Entitling the seller to repair or replace any defective goods.
- Providing that the goods cannot be rejected if the buyer has altered or damaged them.

B2B contracts can also specify a point at which the buyer will be treated as having intimated acceptance of the goods.

5. Liability for default

5.1 General rule

In the English system there are equitable remedies (developed by the courts and awarded at the discretion of the courts) and legal remedies (which are available, as a right, to a successful claimant). Equitable remedies (such as specific performance and injunctions) will normally be granted only if compensatory damages (the main legal remedy in English law) would not be an adequate remedy for the claimant.

Parties to a contract may have a right to interest on overdue sums, whether or not litigation has commenced. This right may arise under an express term of the contract or be an implied term under Late Payment legislation.

5.2 Advice for contract drafting

Termination is the most likely result of non-performance of a contract. Consider which party is most likely to be in breach and if it is your client include saving provisions, such as al-lowing the defaulting party to remedy the breach, if possible in the circumstances, within a set period of time.

6. General liability and its limitation

6.1 General rule

The English legal system does not generally provide for punitive damages unless there has been a criminal element in the breach. In English law, the purpose of an award of damages for breach of contract is to compensate the injured party for loss rather than to punish the wrongdoer. The general rule is that damages should (so far as a monetary award can do it) place the claimant in the same position as if the contract had been performed.

6.2 Advice for contract drafting

In the absence of a limitation clause, there is no financial limit on the damages a claiming party can recover. There are practical limits and legal limits under the general law of damages but ultimately a party wishing to reduce its exposure needs an express limitation of liability. Limitation clauses should set out what risks each party is willing to accept without limit (e.g. those liabilities that a party cannot limit, such as fraud or death and injury caused by negligence), what risks a party wholly excludes (e.g. specific losses) and what limits the parties place on other risk (e.g. an overall cap on liability).

7. Retention of title/payment protection

7.1 General rule

A retention of title clause can be contractually agreed. The basic position is that title to the goods is retained by the seller until it has received full payment for the goods. Decisions of the courts have severely restricted the effectiveness of mixed goods and proceeds of sale clauses. The most that a well drafted retention of title clause is likely to achieve is the right to enter without trespassing, the ability to recover goods stored and identified appropriately and a possible action for damages against a receiver/liquidator who sells goods which were identifiably the seller's.

7.2 Advice for contract drafting

When drafting it is important to ensure that both legal and beneficial title are retained. A basic clause should be supplemented by standard clauses containing:

- A right for the seller to enter the buyer's premises in order to repossess the goods.
- An obligation on the buyer to:
  – Store the goods separately; and
  – Mark them as the seller's property.

A list of insolvency related events which will trigger the seller's right to demand payment for the goods and to repose them.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

B2C Contracts: The recent Consumer Rights Act 2015 (CRA) reformed and consolidated the unfair contract terms in the consumer contracts regime. As a general rule consumer contract terms and notices must be fair. An unfair term or notice will not be binding on the consumer unless the consumer chooses to be bound by it. A term will be unfair if, contrary to good faith requirements, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Written terms in consumer contracts and notices must be transparent (in plain and intelligible language and legible if written). Where a clause is not binding as a result of being unfair the rest of the contract will take effect as far as practicable. Where a term can have more than one meaning, the interpretation most favourable to the consumer will prevail. It is ultimately up to the courts to decide if a term in the contract or wording in the notice is unfair.

B2B Contracts: It remains the case, under the Unfair Contract Terms Act as amended by the CRA, that a standard business contract will be unfair if it tries to limit liability for death or personal injury, losses causes by negligence (unless to do so is 'reasonable') and defective or poor quality goods (unless to do so is 'reasonable'). It is once again up to the courts to decide what is reasonable and they will consider the parties' bargaining positions, whether the contract was negotiated and what information was available to the parties when the contract was drafted.

8.2 Advice for contract drafting

The rules on unfairness and unreasonableness are well established in English contract law. Case law on this subject changes the position almost yearly however to remain within the law parties should attempt to be as reasonable and fair as possible and to always carefully consider what liability they are attempting to limit.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The judicial system of England & Wales is world renowned and has a reputation for fairness and quality. It is divided into two divisions, criminal and civil. The civil courts are capable of handling complex corporate and commercial matters.

The common position is for the parties to explicitly agree a jurisdiction clause however, if there is no agreed jurisdiction clause, the court which will be able to settle any dispute arising from the contract will be determined by the rules of private international law. The basic rule is that, in the absence of party choice, the applicable law is the law of the place where the party which has to perform the main obligations of the contract is normally resident.

9.2 Arbitration

Parties can explicitly agree that if there is a dispute, that it will only be dealt with by arbitration. An **arbitration** agreement may be a free-standing agreement or, more commonly, a clause within a wider agreement. Such a clause constitutes a self-contained contract, collateral or ancillary to the underlying or main contract and will not be regarded as invalid, non-existent or ineffective simply because the main agreement suffers from those defects. **Arbitration** agreements frequently incorporate institutional **arbitration** rules. Arbitral institutions (such as the *International Chamber of Commerce* (ICC) and the *London Court of International Arbitration* (LCIA)) have well-established rules of **arbitration** that are often incorporated by adopting their standard **arbitration** clause. There are several different sets of **arbitration** rules, each slightly different.

10. About the Author

10.1 Law Firm Profile

Blandy & Blandy LLP is one of the Thames Valley's leading solicitors firms, with offices in Reading, Henley-on-Thames and London.

The firm advises, often high net worth, clients on all aspects of their personal and family lives, including residential property and conveyancing, family law and divorce and wills, probate, tax and trusts.

Commercially, the firm provides a full range of legal services to organisations ranging from national and multinational companies through to banks and lenders, SMEs and owner-managed businesses, charities and educational institutions, landowners and developers and venue and event operators.

Blandy & Blandy LLP is ranked as a top tier firm of solicitors in both Chambers UK Guide and The Legal 500 and the majority of the firm’s partners and associate solicitors are also individually recommended as experts.

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UNITED STATES OF AMERICA

1. Introduction

The US legal system is a common law system, relying on court precedent in formal adjudications. The defining principle of common law is the requirement that courts follow decisions of higher level courts within the same jurisdiction. The term "jurisdiction" has two meanings in US law. One refers to the formal power of a court to exercise judicial authority over a particular subject matter and person, and the second one refers to the federal court system, based on a system of "jurisdictions," the geographic distribution of courts of particular levels. The jurisdiction in which a case arose will determine which courts' decisions will be binding precedents.

The US Constitution, (adopted in 1789 and last amended in 1992) is the highest law of the land and establishes a federal system of government. The constitution gives specific powers to the federal government. Powers not delegated to the federal government remain with the states. Each of the 50 states has its own state constitution, governmental structure, legal codes, and judiciary.

The Uniform Commercial Code (UCC), published in 1952, provides legal rules and regulations governing commercial or business dealings and transactions. The UCC regulates the transfer or sale of personal property, negotiable instruments and secured transactions in personal property. The UCC does not address dealings in real property. The code is a recommendation of laws that can be (and has been) adopted by all 50 states of the US although with variations. It been revised numerous times throughout the years.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

As a general principle, under US law, the parties are free to choose the governing law of their agreements. However, there are mandatory public policy laws that apply regardless of choice of governing law (i.e., dealer termination, consumer protection, antitrust).

Courts generally respect the choice of law agreed to by the parties in their contracts. Section 187 of the Restatement (Second) of the Conflicts of Laws is widely followed and provides that a court will follow the law of the state chosen by the parties "to govern their contractual rights and duties … unless either (a) the chosen state has no substantial relationship to the parties or to the transaction or there is no other reasonable basis for the parties' choice; or (b) application of the law of the chosen state would be contrary to fundamental policy of a state which has a materially greater interest than the chosen state in the determination of a particular issue and which … would be the state of applicable law in the absence of an effective choice of law by the parties." Some states have enacted rules whereby such substantial relationship is presumed if some requirements are met, e.g., New York General Obligations Law § 5-1401 provides that parties to any contract, relating to any obligation arising out of a transaction covering in the aggregate not less than $ 250,000, may agree that New York law governs their rights and duties, whether or not such contract bears a reasonable relation to New York.

To determine whether the choice of law clause encompasses extra-contractual claims, US courts rely on its wording to conclude whether it is a narrow or broad choice of law clause. Courts will usually apply the law of the forum state to discern whether the clause is a

narrow or a broad clause. That will determine whether the dispute is within the scope of the choice of law provision.

2.2 Inclusion of the UN Sales Convention

The US is a member of the UN Sales Convention (United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980) and it entered into effect on January 1, 1988. The US built in its own reservation that requires that the UN Sales Convention only apply when a transaction is between parties in the US and another signatory country. If the parties to a transaction governed by the UN Sales Convention do not want it to apply, they must expressly opt out of its application.

3. Allocation and transfer of risk

3.1 General rule

The risk of loss and transfer of title in sale of goods contract under US law can be allocated under the terms of the contract. Where contract terms do not specify, the applicable sections of the UCC will control. Under the UCC, when there is no breach of contract, risk of loss depends on if the contract requires the seller to deliver the goods to a specific destination or not. If the goods must be delivered to a destination, then the risk of loss passes when the common carrier tendered delivery at the destination. If there is no requirement for delivery to a destination, then the risk of loss passes when the seller delivers the goods to the common carrier. If the contract lacks these terms, the contract is presumed to be a shipment contract and the risk of loss will pass upon delivery to the common carrier.

3.2 Advice for contract drafting

The parties may arrange for risk of loss of the goods to pass at the same point that title to the goods passes if a title transfer point may be identified. Risk of loss provisions in the contract should state a specific time and place. This will avoid confusion and circumvent the UCC provisions. A seller of goods should consider limiting its liability by transferring risk of loss as soon as possible under the contract terms, while a buyer of goods should negotiate to not accept risk of loss until the goods are in its physical possession. Under the UCC, there are different rules for sellers who are merchants in the goods. Additionally, specific state law may override certain provisions of the UCC.

Once the parties have agreed to transferable and risk of loss, it is standard practice to acquire insurance.

4. Liability for defects

4.1 General rule

Warranties are created by the operation of law, custom, or conduct regardless of the terms of the contract. Express warranties can be created by affirmation of fact about the goods, promise about the goods, description of the goods, and sample or model of the goods. Under the UCC, express warranties do not require the parties to have intent to create the warranty. The UCC also does not require reliance by the other side, formal words or guarantees, or precise timing with the contractual formation. All contracts include certain implied warranties (merchantability, fitness for a particular purpose and title).

4.2 Advice for contract drafting

The UCC permits disclaimer of both express and implied warranties. The disclaimer must be conspicuous and use specific language mentioning the warranty. While the UCC does not require the disclaimer to be in writing, in practice, it almost always is. Sellers will want to disclaim for all warranties to limit future claims. However, a general disclaimer by the seller of "all warranties, express or implied" is not effective to negate an express warranty. A seller should also consider language that limits the duration of the warranties. State laws may determine the duration and override any contract terms.

5. Liability for default

5.1 General rule

Under the UCC, a seller may reclaim accepted goods from a buyer that defaults on payment in a cash sale, subject to a ten-day limitations period. A seller may reclaim accepted goods from an insolvent buyer in a credit sale, subject also to a ten-day limitations period unless there was a misrepresentation of solvency, in which there is no limitation. Remedies for enforcing a secured party's right are usually equitable in nature. Courts will enforce the transfer of the collateral to the security party following an uncured event of default. Courts will also protect the secured party's rights before default.

5.2 Advice for contract drafting

Parities may want to add a clause that extends the period to cure a default to avoid automatic actions such as increased interest rate or acceleration of the indebtedness. The non-defaulting party can also waive any penalties or the parties can renegotiate the terms to prevent default. Care should be taken when attempting to foreclose on the secured asset due to default. States have enacted strong protections in favour of debtors. Failure to follow state law during a foreclosure may result in damages against the foreclosing party.

6. General liability and its limitation

6.1 General rule

Remedies for breach of contract can be in the form of money damages or equitable relief. Money damages are paid to put the non-breaching party in the position it would have been had the contract been performed (expectation damages) or the position had the promises never been made (reliance damages). Damages can be limited by foreseeability and ability to mitigate harm, as well as contractual limitations such as waiver, restrictions, caps, and liquidated damages clauses. Punitive damages are generally not available for breach of contract. Attorney fees are not recoverable unless specifically allowed under the contract. Federal and state laws can limit damages. Under Massachusetts law, treble damages are allowed under certain circumstances. Equitable remedies for breach of contract include specific performance (an order for the parties to perform the contract) or an injunction (an order to stop performing).

6.2 Advice for contract drafting

The enforceability and scope of liquidated damages clauses depend on the applicable state law. Parties may negotiate a liquidated damages provision to limit liability and gain certainty in breach. These clauses provide money damages in lieu of judicial proceedings. Care should be taken to ensure the provision is enforceable. Waivers and limits of liability

can be negotiated but some liability cannot be waived. A general prohibition on equitable remedies is common in commercial contracts, though the parties often carve out one or more specific provisions to which they intend equitable remedies to apply. Specific performance is not generally allowed under a contract for services.

7. Retention of title/payment protection

7.1 General rule

Retention of title, called consignment contracts under US law, occurs when a seller (known as a consignor) delivers goods to a consignee without receiving payment until the consignee either resells the goods to a third party or uses the goods itself. The consignee only pays for the goods if and when it sells or uses the goods. The consignee has the right to return the goods if it cannot sell or use them, even if the goods conform to the contract. Title and risk of loss remain with the consignor until the goods are either sold or used by the consignee, at which point title and risk of loss pass to either the third party buyer, or the consignee who uses the goods. However, the consignor's security interest in the goods is subordinate to a perfected security interest by the consignee's creditors or bankruptcy trustee.

7.2 Advice for contract drafting

The seller retains title in the goods until it receives payment. However, to retain this interest in the goods, the consignor must follow the necessary steps to obtain a perfected security interest in the consigned goods under the UCC. If the interest is not perfected, the seller risks losing title to the goods to creditors of the consignee or the bankruptcy trustee administering the consignee's bankruptcy estate. Legal risk may be increased with non-US consignors who enter into consignment contracts with a US consignee under an agreement governed by non-US law. Contractual terms that specify consignor retain title until payment and non-US governing law may be inadequate to secure the consignor's rights under the UCC.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

Although contract law varies from state to state in the US and there is no Federal contract law, transactions involving the sale of goods have become highly standardized nationwide through widespread adoption of the UCC. Statutory law supersedes common law where they conflict. The UCC, however, does not replace common law completely, but instead includes common law principles relating to: capacity to contract; principal and agent; estoppel; fraud; misrepresentation; duress; coercion; mistake; bankruptcy, and other "validating or invalidating cause".

General Terms and Conditions are enforceable contracts unless they are found to have been entered into under fraud, misrepresentation, duress, coercion, mistake, bankruptcy, unconscionability, etc. There is no clear definition of unconscionability in either the UCC or the Restatement. The origin of the concept is primarily in equity, and it has been adopted in common law partly through the merger of equity and common law and through section 2-302 of the UCC which sets out an explicit rule on unconscionability not

limited to equity, allowing courts to police bargains without make believe reasoning about consideration, fraud, duress or mutual assent.

Several INCOTERMS terms such as FOB, CIF and so on are defined within the UCC. The UCC covers many aspects of commercial contracts and contains shipment and delivery provisions that have similar aims to those of the INCOTERMS rules. Some UCC expressions have the same three-letter abbreviations as those within the INCOTERMS system but their definitions are totally different. Other terms definitions commonly used in domestic sale transactions in the US derive from the National Motor Freight Classification (NMFC) and industry usage.

8.2 Advice for contract drafting

Nowadays, the INCOTERMS are recommended for contracts in the US for use in both domestic and cross-border transactions. INCOTERMS are not law, except for being a part of the contract. The contractual parties can modify the terms but do so at their own risk. Different jurisdictions in the US rule differently about whether the site of delivery is also the site where title passes to the buyer or the site of legal jurisdiction.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

Commercial disputes are usually adjudicated in the adversarial US civil court system. The basic framework for litigation is consistent throughout the US. Commercial lawsuits in the US courts are typically expensive and time consuming. US companies usually prefer to resolve any dispute under US law before its local courts.

9.2 Arbitration

The US is a contracting state to the following multilateral conventions:1) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), effective 29 December 1970 and codified in the Federal Arbitration Act (FAA); 2) the Inter-American Convention on International Commercial Arbitration (Panama Convention), effective 27 October 1990, and codified in the FAA; and 3) the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), effective 14 October 1966, and codified in part at 22 USC section 1650a.

There is in the US a strong policy in favour of arbitration and the enforceability of arbitration agreements. Chapter 1 of the FAA governs domestic arbitration agreements and awards, and applies to international arbitration to the extent it does not conflict with the New York Convention. Chapters 2 and 3 of the FAA govern arbitrations under the New York Convention and the Panama Convention, respectively.

US courts have held that arbitral tribunals are bound by the parties' agreement. As a general rule, the parties' choice of substantive law is enforceable and binding, and arbitral tribunals must generally apply the substantive law chosen by the parties to govern their dispute. Under the FAA (section 2), arbitration agreements are valid, irrevocable and enforceable unless grounds "exist at law or in equity for the revocation of any contract."

The most prominent arbitral institutions in the United States are: 1) American Arbitration Association (AAA); 2) International Centre for Dispute Resolution (ICDR); 3) Judicial Arbitration and Mediation Services (JAMS); 4) International Institute for Conflict Prevention and Resolution (CPR); and 5) ICC International Court of Arbitration.

10. About the Author

10.1 Law Firm Profile

With over 240 lawyers in key financial centres, including New York, London, Paris, Boston, California and Washington, DC, Brown Rudnick LLP is an international law firm designed for speed and performance. Our advice is practical and business-driven and our progressive operating model takes collaboration to a new level – benefitting like-minded clients who want muscular, integrated service, timely delivered. From major corporate restructurings, class actions and cross-border mergers, to exotic cross-border and the front lines of global climate initiatives, we are committed to your business and passionate about results.

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VIETNAM

1. Introduction

The Vietnamese legal system is a civil law system and has been largely influenced by Chinese legal traditions and the French legal system. The influence of the French legal system is found in the hierarchy of statutory laws in Vietnam, which mirrors that used in the French legal hierarchy, as does Vietnam's reliance on a civil code. In addition, like China's legal system, Vietnam's legal system may be described as a transitional legal system, as it moves from a centrally controlled system to one where the rule of law applies. The law of Vietnam is made up of more than 10,000 legal instruments, in which higher-ranking legal instruments set out more general rules, while lower-ranking legal instruments provide details for implementing the higher-ranking ones. Different bodies within the Vietnamese system have the authority to issue different legal instruments.

2. Applicable law

2.1 Choice-of-law clauses: enforceability, scope, requirements

The law of Vietnam allows the parties to choose the applicable law in cross-border contracts. Where the parties have not agreed on the applicable law, the law of the country having the closest connection with such contract applies (e.g. law of the country in which the seller/service provider resides or was established). However, there are some limitations on the choice of law. Specifically, the law applicable to the transfer of ownership rights and other rights in respect of immoveable property, lease or pledging of immoveable property are to be governed by the law of the country where the immoveable property is located. The parties may also agree to change the law, but such change must not affect the lawful rights and benefits to which a third party was entitled before such change, unless the third party agrees. In case the consequences of application of the foreign law are inconsistent with the fundamental principles of the law of Vietnam, the law of Vietnam shall be applied.

2.2 Inclusion of the UN Sales Convention

The UN Sales Convention (*United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980*) officially took effect in Vietnam from 1 January 2017. Accordingly, the UN Sales Convention automatically governs all international sales contracts between enterprises in Vietnam and those based in signatory countries, unless the parties elect not to apply the UN Sales Convention. Generally, the UN Sales Convention has a lot of similarity with the law of Vietnam. There are minor technical differences, mostly in provisions regarding breach of contract. The UN Sales Convention contains specific regulations related to time frame to make a claim, specific remedies in case of breach and common law principles. Unlike the UN Sales Convention, Vietnam has reserved provisions regarding formality of contracts that require all covered contracts to be made in writing. Overall, the UN Sales Convention supplements the legal framework of Vietnam relating to international sale of goods, expanding trade capabilities and improving efficiency by minimizing uncertainties and costs for traders in Vietnam.

3. Allocation and transfer of risk

3.1 General rule

Under the law of Vietnam, in the sale of goods contract, depending on many different factors such as agreed place of delivery and shipment procedures, is that the allocation of risk in each case is not the same. The parties can basically agree on when the risk of loss or damage passes to the buyer. In general, the risk of loss may be transferred to the buyer before or on delivery. In respect of clearly identified goods, the risk passes to the buyer at the time of delivery (i.e. either when the buyer takes over the goods or when the goods are handed over to the first carrier).

3.2 Advice for contract drafting

The parties should clearly include a contractual agreement on the allocation and transfer of risk, duties and responsibilities of the parties should the object of the contract is lost, destroyed or damaged. A careful interpretation of the contract may avoid any potential dispute between the parties. The parties commonly agree on the transfer of risk by expressly incorporating into their agreement trade terms, such as the Incoterms (International Chamber of Commerce's Incoterms). The parties may also agree to the allocation of risk by incorporating the standard terms or general business conditions of the seller or buyer. In Vietnam, the Incoterms are widely used in cross-border sale of good contracts.

4. Liability for defects

4.1 General rule

Unless the parties otherwise agree, the liability for defects under the law of Vietnam is regulated as follows: (i) the seller is not liable for any defect in the goods if at the time of entering into the contract the buyer knew or should have known of such defect; (ii) during the warranty period, the seller is liable for any defect which existed prior to the time transfer to the buyer, including where such defect is discovered after the time risk is transferred; and (iii) the seller is liable for any defect arising even after the time risk is transferred if such defect results from a breach of contract by the seller.

4.2 Advice for contract drafting

The regulations on liability for defects under the law of Vietnam favour the buyer. However, the parties can freely modify the general regulations to protect the benefit of the seller. Particularly, it can stipulate the limitation on requirements for liability, e.g. by detailing which case will be considered as a defect of the goods, by excluding the right to terminate the contract, by excluding liability in case of only slight negligence or in the case of immaterial defects. Also, the parties may consider application of a compensation cap for damage caused by the defects or a period of time for checking the goods after delivery and a right to waive or modify the conditions of complaint about the defect discovered after such period of time.

5. Liability for default

5.1 General rule

The law of Vietnam provides for some kinds of liabilities for default such as specific remedies, penalty, compensation for damages, rescission, suspension of performance of contracts, etc. Among these liabilities, the liability to pay compensation for damages shall be

applied when there is an act in breach of the contract that is the direct cause of the actual damages. However, the party claiming damages for loss bears the burden of proof of the loss and of the amount of loss caused by the act of default, and direct profits which the aggrieved party would have earned in the case of the absence of such default. Meanwhile, the penalty for default is a penalty sum which is required to be stipulated explicitly in the contract. The cap of penalty shall be agreed by the parties in the contract, but shall not exceed 8% of the value of the contractual obligation which is the subject of the default.

5.2 Advice for contract drafting

The parties may freely agree that a party breaching an obligation must only be subject to a penalty for breach without having to compensate for loss and damage, or must be subject to a penalty for breach and also pay compensation for loss and damage. Due to the practice of evincing the proof of loss, the parties commonly prefer to agreement on penalty in the contract. However, in order to make the penalty provisions effective in application, the value of the penalty will often require predictions of actual future losses. Further, the parties can, at the same time, agree to many kinds of liabilities for default in the contract (i.e. in case the defaulting party fails to perform the remedy of specific performance of the contract within the time-limit fixed by the aggrieved party, the aggrieved party will apply other remedies in order to protect its legitimate rights).

6. General liability and its limitation

6.1 General rule

Unless otherwise agreed by the parties, the defaulting party being liable for damages must compensate all the losses that result from the contractual default. The value of damages for loss shall comprise the value of the actual and direct loss which the aggrieved party has borne due to the defaulting party as well as the direct profits which the aggrieved party would have earned in the absence of such breach. Technically, there is no limitation on the value of compensation. However, the prevailing law has the regulations on obligation to mitigate the loss of the party claiming damages for loss. In case the party claiming damages fails to take such action, the defaulting party has the right to require a reduction in damages equal to the amount of loss that could have been mitigated.

6.2 Advice for contract drafting

It is advisable that the scope of liability should be as detailed as possible to limit the scope of compensation for both parties, unless otherwise required under the Model Contract. The limitation on liability as agreed by the parties in good faith may reduce the potential risks for the parties and the contract may be more effective in practice.

7. Retention of title/payment protection

7.1 General rule

According to the law of Vietnam, the title of goods passes from the seller to the buyer as from the time when the goods are handed over. However, the retention of title can be altered by mutual consent of the parties. Particularly, title of goods may be reserved by the seller until the time when the obligation to make payment is fully discharged by the buyer. The buyer shall even bear risks with respect to the goods during the duration of retention of title, unless otherwise agreed by the parties.

7.2 Advice for contract drafting

The seller reserves the title of the sold goods until all payments by the buyer have been made. Where the buyer fails to make payment as agreed, then the seller shall have the right to reclaim goods. The seller shall return the amount of money paid by the buyer after deduction of the value of wear and tear of the goods resulting from its use (if any). Where the buyer causes loss of or damage to goods, then the seller shall have the right to demand compensation for loss and damage.

8. Use of General Terms and Conditions/Incoterms

(Rules regarding unfair, unreasonable or unconscionable contract terms in B2B or B2C contracts)

8.1 General rule

According to the prevailing law of Vietnam, in case of trading goods and/or services in the list of essential goods and services (e.g. supply of electricity, water for residential consumption, telephone and internet services; air and rail transport of passengers services; sale and purchase of apartments), the seller or the services supplier must register the form-based contract and general term and conditions for transactions (Model Contract) with the competent authority in Vietnam. A Model Contract may only be executed with consumers upon the completion of registration. This regulation is to protect benefits of the customers. When the contents of a Model Contract violate the law on consumer rights protection or are contrary to general principles for conclusion of the contract, the competent authority may require modification or cancellation of its contents.

8.2 Advice for contract drafting

As the Model Contract generally favours the customer and is under the strict control of the Vietnamese authorities, this is a challenge for any Vietnamese or foreign company doing business in Vietnam. Thus, the Model Contract should be drafted specifically to fulfil as closely as possible the regulations of the law on consumer rights protection and the fundamental principles of the Vietnam laws in order to pass judicial review.

9. Courts/jurisdiction agreements, Arbitration

9.1 Courts/jurisdiction agreements

The court and prosecution system is the main dispute settlement organ in Vietnam. It has a structure similar to the administrative system. At a central level, the Supreme People's Court is the highest judicial body in Vietnam. At a local level, courts exist at provincial and district levels. The courts operate in five divisions: (i) Criminal; (ii) Civil; (iii) Administrative; (iv) Economic and (v) Labour. The jurisdiction of each type of court is different, depending on the nature of the matters in dispute. The Economic Court has jurisdiction over most commercial disputes. In general, the statute of limitation for disputes relating to commercial contracts is 3 years from the date on which the party is aware that their lawful rights and interests have been infringed. For the dispute involving foreign elements, the statute of limitation shall be determined in accordance with the law applicable to such contract. In principal, the parties can mutually agree on the place of jurisdiction in their cross-border contract. However, the Vietnamese courts automatically have specific jurisdiction in cases involving rights over immovable property in Vietnam and other civil cases where the parties may select Vietnamese courts for resolution in accordance with the Vietnam law

or an international treaty to which Vietnam is a member, and the parties agreed to select a Vietnamese court. In addition, the parties in dispute should not expect a Vietnamese court to uphold the choice of foreign law governing a case brought before the Vietnamese court. Vietnamese judges may not apply foreign law as a matter of practice and have no authority to call foreign lawyers or legal experts to a hearing.

9.2 Arbitration

To supplement the court system, Vietnam has a system of independent arbitration centres. The most well-known arbitration centre in Vietnam is the Vietnam International Arbitration Centre (VIAC), see http://viac.vn, a non-governmental institutional arbitration centre established at the Chamber of Commerce and Industry of Vietnam. VIAC is run on the basis of the Law on Commercial Arbitration and VIAC's Rules of Arbitration. The arbitration agreements are widely specified in the cross-border sector because of its advantages of confidentiality and facilitated enforcement of awards. Besides, the prevailing law of Vietnam allows the enforcement of foreign arbitral awards according to the principles of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of which Vietnam is a member.

10. About the Author

10.1 Law Firm Profile

INDOCHINE COUNSEL is one of the leading commercial law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 35 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi. Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organisations, law firms to private companies, SMEs and start-up firms in Vietnam.

10.2 Contact person(s)

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THE LAW FIRM NETWORK - INTRODUCTION

1. Overview

The Law Firm Network, founded nearly 30 years ago in 1989, is a strong non-exclusive association of independent law firms from around the world whose principal lawyers have close personal and professional relationships. The Network has members in approximately 50 countries and we have an extended global network with quality law firms in over approximately 80 additional countries.

Key features of the Network include:

- Our firms are leaders in their local markets, with strong regional and international connections;
- Because of their local leadership positions, our firms are often more in tune with critical local legal, political and cultural issues as compared to the typical local offices of larger "global" firms;
- We source our member firms via personal introductions from existing members and other trusted contacts, ensuring a high level of quality and connectivity within the Network;
- Feedback from clients confirms that our firms consistently provide a more effective, responsive, value-added and personal service than larger "global" firms;
- We have extensive experience providing multi-country service to international and multinational companies;
- Our preferred model is to operate with a single member serving as principal contact and project coordinator to ensure optimal efficiency and service - but . . . clients always have direct access to the local country firms when desired; and
- Our firms are experienced in working with alternative and flexible fee structures, consistent with the demands of a global market for legal services.

2. Strategic objectives

- **Business Development**

  Encourage proactive interaction to foster business development opportunities among members. Examples include practice-focused working groups (e.g., Global Insolvency, White Collar Crime and Franchising) and Network regional meetings.

- **Regions**

  Foster interaction among member firms in key regions of the world – the Americas, Asia-Pacific, Europe and Middle East/Africa. Continue regional conference calls/working groups and establish goals for regional meetings following strong success in recent years.

- **Recruitment**

  Actively identify potential new members and continue to refresh the Network membership (while at the same time, where appropriate, actively replacing inactive members). Focus on quality versus quantity and filling gaps in key countries and regions.

3. Contact details

For more information, please contact any of the contact partners listed in the various country chapters above.

Also, please feel free to contact the Executive Director:

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