COMMERCIAL AGREEMENTS

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Session 7

OVERVIEW

- Elements of a contract
- General contract principles
- Using the right contract type
- Authority to sign contracts and E-signatures
- Understanding general contract clauses
- Liability and Indemnity clauses
- Force Majeure
- Dispute resolution

CONTRACTS ARE EVERYWHERE!

ELEMENTS OF A CONTRACT

WHAT ARE THE CHARACTERISTICS OF A GOOD CONTRACT?

- Clear
- Organized
- Specific and concrete
- Abstract and general
- Written
- Accurate terminology
- Correct grammar, punctuation, usage

- Long and detailed
- Easy to read
- A short summary of agreed terms
- Use of legal terminology
- Complex
- Favours the party whose lawyer prepared it

LAW OF OBLIGATIONS

- When the parties possess contractual capacity and in the eyes of the law agree that there is an agreement there is a contract.
- An expression of the will of the parties
- *Article 960 (Civil Code)* - A contract is an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved.
- Bilateral/Unilateral
- Onerous/Gratuitous

LEGAL PRINCIPLES ON CONTRACT

Art. 966. The following are the conditions **essential** to the validity of a contract:

(a) **capacity** of the parties to contract;

(b) the **consent** of the party who binds himself;

(c) a certain thing which constitutes the **subject-matter** of the contract;

(d) a lawful **consideration**.

CAPACITY

Everyone can enter into a contract, unless you are incapable of contracting:

(a) minors;

(b) persons interdicted or incapacitated; and

(c) generally, all those to whom the law forbids certain contracts.

CAPACITY

- A contract by a minor under the age of 7 is NULL
- A contract by a minor under the age of 14 is also null, BUT if the child is 9+, then obligations undertaken in the child's favour are valid
- A contract by a minor between 14-18, under parental authority or curator is null, BUT obligations undertaken in the child's favour are valid
- A contract by a minor between 14-18, who is not under parental authority/curator, may not sell/hypothecate immovable property without authority of Court. The minor may however enter into other obligations
- 16+ may open bank accounts, deposit and withdraw
- Nullity may only be claimed by the person who is incapable of contracting

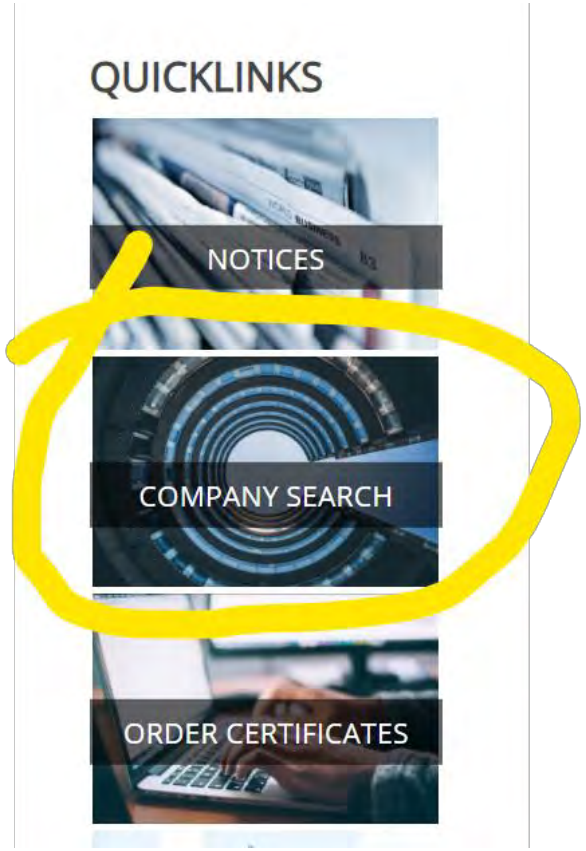
CAPACITY

- Interdiction or Incapacitation is done by means of a procedure before the local courts, for persons who have a mental disorder or other condition, which renders them incapable of managing their own affairs, or who are insane or prodigal
- A curator is appointed for a maximum of 3 yrs
- Incapacitation – the person is prevented from doing certain things without the aid of a curator: borrowing any money, receiving capital, giving a discharge, transferring or hypothecating property, or performing any act other than an act of mere administration.
- Interdiction – goes a step further and the person so interdicted will not be able to carry out even acts of mere administration without a curator.
- Decree is published in the Gazette and included in the Register of Interdicted and Incapacitated Persons.

CAPACITY

https://registry.mbr.mt/ROC/

- In the case of non-natural persons, e.g. companies, the capacity to enter into a contract depends on the formalities usually prescribed in the creation of that non-natural person
- In the case of a company, it is usually one or more Directors who has capacity to bind the company – i.e. has **legal representation**
- It is important to look at the Memorandum and Articles of Association
- The Board of Directors may also by resolution appoint others to bind the company for certain matters



CONSENT

Consent needs to be free and wilful. It is vitiated if it is procured by:

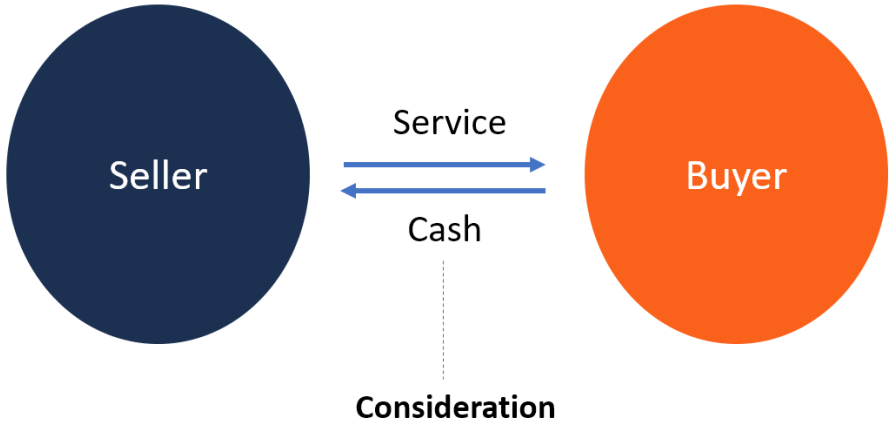
Error	Violence	Fraud
• Of Fact - only if it effects the Subject Matter (essential feature) • Error or law only if it was the sole reason	• Violence (physical/moral) to produce an impression on a reasonable person and to create in such person the fear of having his person or property unjustly exposed to serious injury • Threatened/perceived • Age, sex and condition of the victim is taken into account • Reverential fear is not a cause to invalidate a contract	• Fraud must be the cause of contracting • Must be proven

SUBJECT MATTER

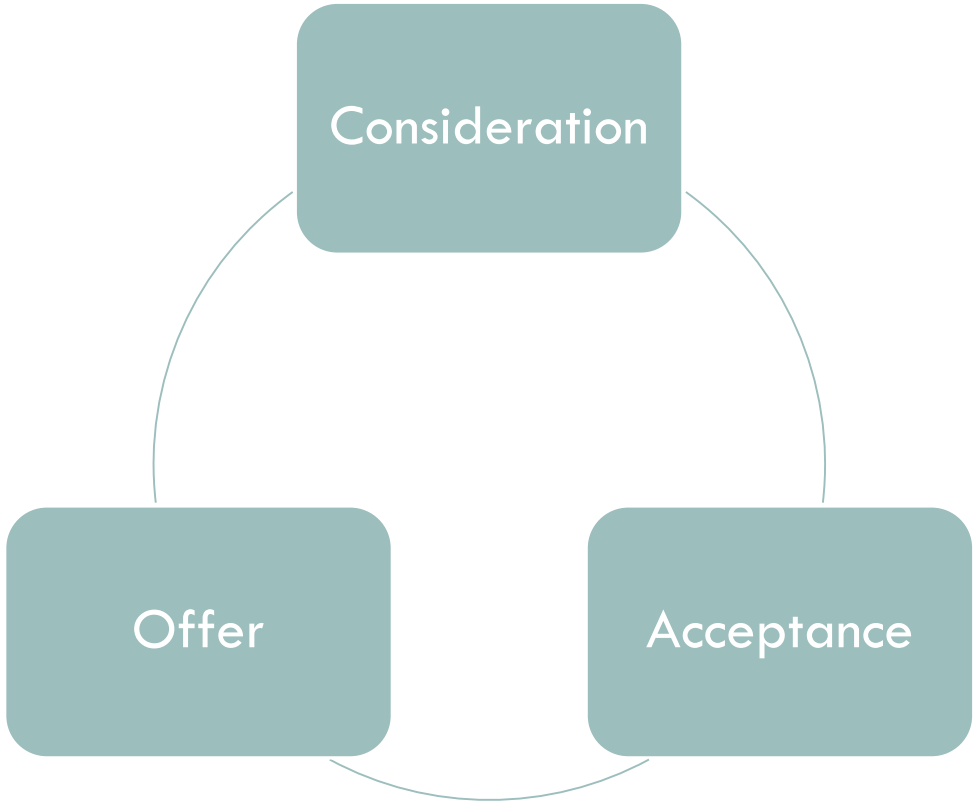
- Things which are “extra commercium” cannot be the subject matter of a contract
- Subject matter must be a thing determinate, the portion or quantity may not be known but it should able to be ascertained
- Even future things can form part of a contract (but you cannot renounce to a future succession)
- Things which are impossible, or prohibited by law, or contrary to morality, or to public policy, may not be the subject-matter of a contract

CONSIDERATION (CAUSA)

- Reason/purpose in a contract
- An obligation without a consideration, or founded on a false or an unlawful consideration, shall have no effect.
- Consideration may not be stated, but founded on a sufficient consideration
- Consideration may not be prohibited by law or contrary to morality/public policy.
- If consideration is unlawful for both parties, neither party may recover the item given (unless one is a minor). If thing promised it unlawful, any thing given maybe recovered.



CONSIDERATION



- An offer without consideration is not valid
- Need not be money – property/shares/services
- Barter agreements are common
- Some contracts also allow nominal exchange - €1
- In a unilateral contract, there is still a valid consideration

GENERAL CONTRACT PRINCIPLES

GENERAL CONTRACT PRINCIPLES

- A contract is a promise or set of promises which the law will enforce.
- Upon signature, a contract has the force of law for the parties.
- Contracts can be revoked by consent of both parties, or on grounds allowed by law
- Must be carried out in good faith
- A contract is binding only on the matter therein expressed (scope) + anything incidental to it.
- Ownership may be transferred upon consent but thing is not yet delivered. Risk lies with the buyer. If thing is uncertain, then risk is with the seller.

GENERAL CONTRACT PRINCIPLES

A verbal agreement is still valid at law.

However, in certain situations, the law requires that contracts are made in writing

- In the case of immovable property (the law requires that the contracts are made before a notary and are registered with the Public Registry)
- Some conditions of employment need to be given to the employee in writing
- Transfer of shares (in writing and submitted to the Malta Business Registry)

Contracts can have 2, or more contracting parties – important that whoever is undertaking an obligation, is a signatory.

Contracts shall only be operative as between the contracting parties, and shall not be of prejudice or advantage to third parties except in the cases established by law.

- *Res inter alios acta*/ "privity of contract"

GENERAL CONTRACT PRINCIPLES

Make sure you are clear about what parts the contract must include and what situations the contract must cover.

Know what the parties in fact want.

Outline the contract to make sure that all the needed pieces are included and are organized logically.

Use clear, simple language.

Make each clause do one thing, not more.

USING THE RIGHT CONTRACT TYPES

USING THE RIGHT CONTRACT TYPE

- Agreement (ftehim) and Contract (kuntratt) are terms which are used interchangeably, but strictly speaking when we speak of legally enforceable document, then it is a “contract”.
- Main Agreement/Schedules/Appendices
- Memorandum of Understanding (MOU)/Heads of Agreement
- Non-Disclosure Agreement (NDAs)
- Promise of Sale (Konvenju)/Deed of Sale
- Standard Terms and Conditions/Terms of Use

Samples found online maybe useful BUT can be tricky if not used by a person versed in the law

USING THE RIGHT CONTRACT TYPE

Correspondence over email can amount to an agreement, and many times is relied on by the parties to proceed with a transaction.

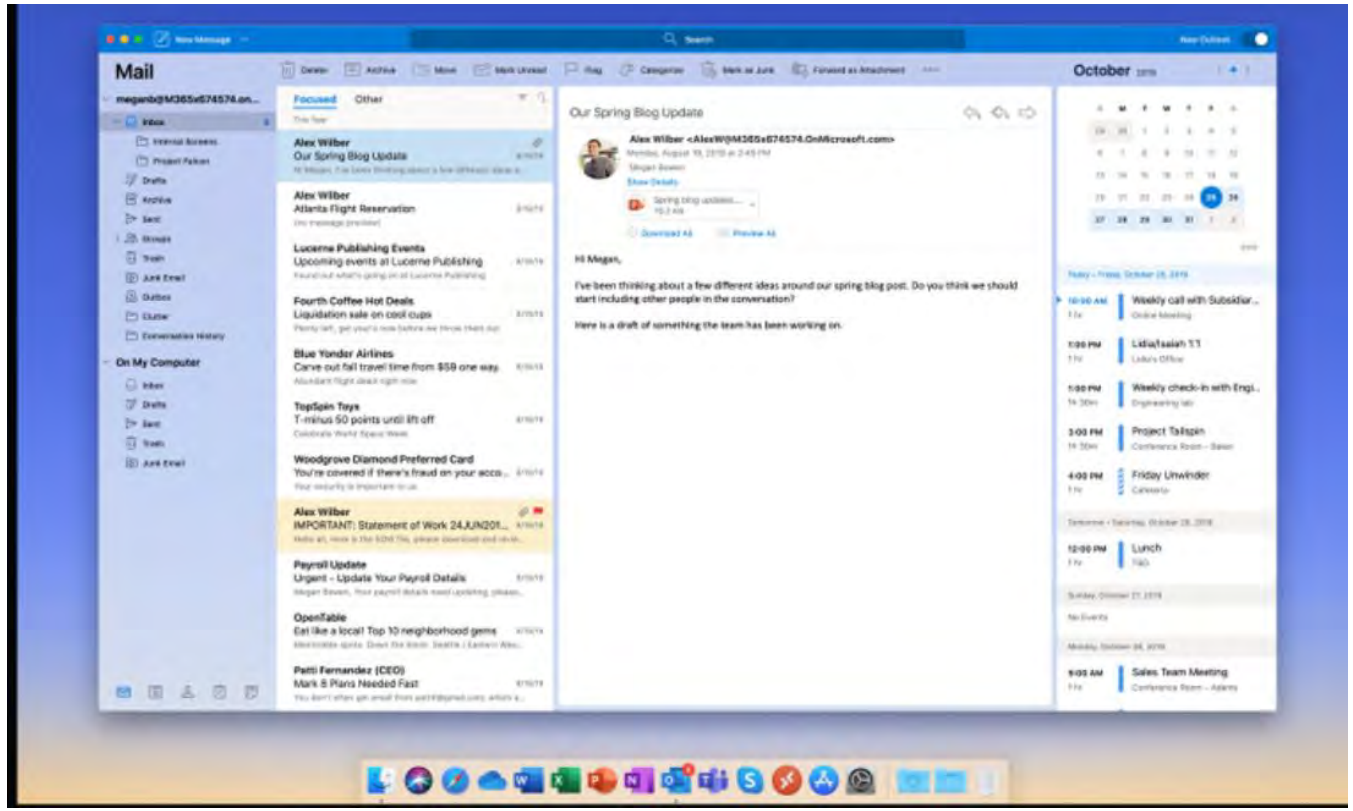
But it can be risky:

- If certain details are missing/not stipulated/unclear

- The person you are interacting with does not have authority

- Persons you deal with leave the company

- Enforcement



SIGNATURES/E-SIGNATURES

SIGNATURES

- Section on “Capacity” would stipulate “who” is to sign the document
- Natural Person v. Legal Person (Legal Representative)
- Certain bodies which have no separate legal personality (ex. Associations) would be regulated by their Statute.
- All parties agreeing to a contract need to sign to signify “consent”
- Traditionally this was and still is done primarily by all parties physically signing on the same document
- Signature need not be simultaneous (clauses can cater for this)
  - *The Parties may execute this Agreement in one or more counterparts, each of which will be deemed an original and all of which, when taken together, will be deemed to constitute one and the same agreement.*

SIGNATURES

Usually found at the end of the contract

Sometimes a contract includes a "signature page"

Typically you only need 1 signature but depending on the format, subject matter or complexity, some contracts require more signatures (ex.Service Schedules/SLAs)

Advisable not to use a "black" pen

SIGNATURES

Signatures may not always be required

When transacting online, we typically use a “sign-in” mechanism to verify and accept the purchase. Identity is validated through different steps, and specially regulated

In these scenarios, usually contracts are standard form, and do not allow negotiation. Acceptance is done by means of a positive action, by clicking “I accept” or “Buy”

When a contract is negotiated between parties, then the conclusion of the agreement is expressed by the signature/execution

In the past in in-person signing would be difficult with contracts between entities located in different countries

COVID-19 has made this problem worse

E-SIGNATURES

Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identificatior and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ('eIDAS')

eIDAS repealed and replaced the Electronic Signatures Directive 1999/93/EC on the use of eSignatures in electronic contracts within the EU

Electronic Commerce Act (Chapter 426 of the Laws of Malta) – administered by the Malta Communications Authority

Prior consent of the parties to a transaction signed electronically must be obtained for the validity of a contract concluded via electronic signatures.

E-SIGNATURES

Article 25 eIDAS - Legal effects of electronic signatures

1. An electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.

2. A qualified electronic signature shall have the equivalent legal effect of a handwritten signature.

3. A qualified electronic signature based on a qualified certificate issued in one Member State shall be recognised as a qualified electronic signature in all other Member States. (mutual recognition)

E-SIGNATURES

E-Commerce Act

Article 4: the Act and eIDAS do not apply to those activities/areas listed in the Fifth Schedule – some examples below:

- - matters in relation to information society services covered by any laws relating to data protection
- - contracts that create or transfer rights over immovable property other than leasing rights;
- - contracts of suretyship granted and on collateral security furnished by persons acting for purposes outside their trade, business or profession;
- - the law governing the creation, execution, amendment, variation or revocation of:(i) a will or any other testamentary instrument;(ii) a trust; or(iii) a power of attorney;
- - any contracts governed by family law.

E-SIGNATURES

The difference between the 3 types of signature is:

- the level of security,
- the complexity of the signer identity verification system they each use.

Ultimately it is about the degree of confidence it provides as to the **identification** of the signer and in the proof that the document is indeed the **signed one** (non-tampering).

E-SIGNATURES

Standard Electronic Signature

"data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign"

Ex: writing your name on an email, tick-box, scanned (digitised) signatures can be regarded as a standard electronic signature

E-SIGNATURES

Advanced Electronic Signature

An advanced electronic signature is an electronic signature which is additionally:

- uniquely linked to and capable of identifying the signatory;
- created in a way that allows the signatory to retain control;
- linked to the document in a way that any subsequent change of the data is detectable.

The most commonly used technology able to provide these features is the use of a public-key infrastructure (PKI), which involves the use of certificates and cryptographic keys.

E-SIGNATURES

Qualified Electronic Signature

A qualified electronic signature is an advanced electronic signature which is additionally:

- created by a qualified signature creation device;
- and is based on a qualified certificate for electronic signatures.

The QSCD has to be issued by a qualified EU Trust Service Provider on the European Union Trust List

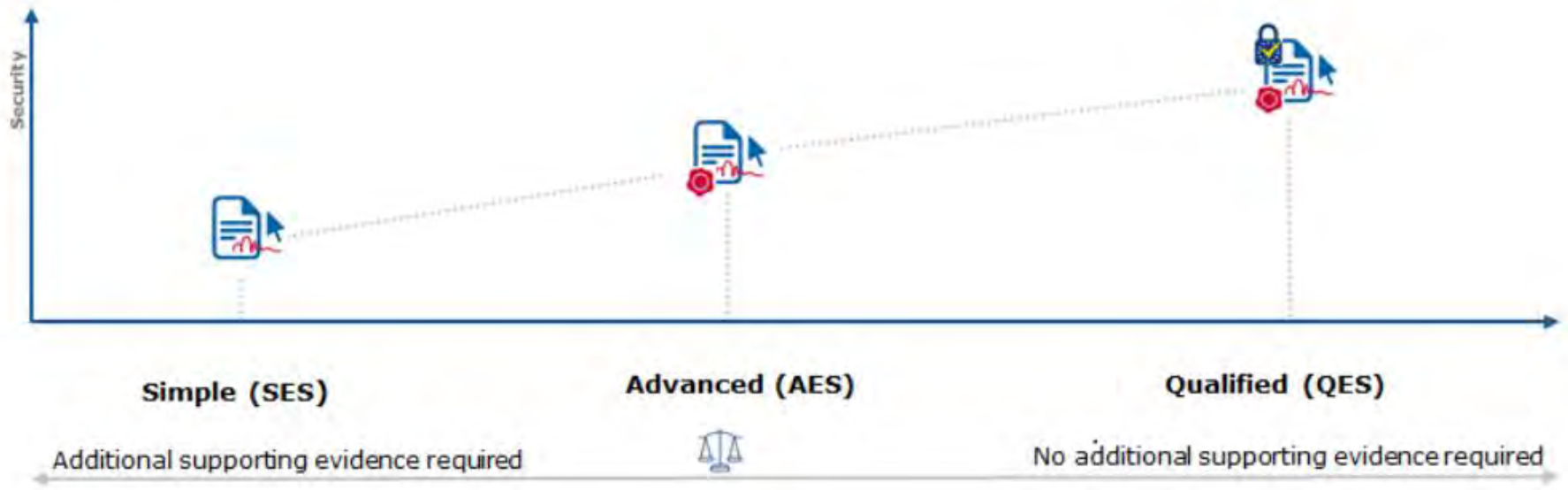
"Remote signature creation devices" can also be used where the device is not in the physical possession of the signatory, but managed by a provider (docusign).

Has the same legal value as a handwritten signature

E-SIGNATURE

DocuSign®

Adobe



UNDERSTANDING GENERAL CONTRACT CLAUSES

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GENERAL CONTRACT CLAUSES

Title – to identify the type of document

Parties – to identify the parties

Preamble (recitals) – to identify the purpose of the document and describe the transaction, the intent of the parties and any assumed facts underlying the transaction. In many contracts, this appear as the “whereas” section, in which all of the statements begin with that term.

Definitions - The use of defined terms helps (in text or as a schedule). While the number and extent of the definition section depend upon the nature of the agreement, virtually all contracts will include some defined terms.

GENERAL CONTRACT CLAUSES

Scope – to identify what the contract covers, and what it excludes

Obligations (Sale/Service/License) – to outline the operative part of the contract, what each party is providing to the other. In a software procurement agreement, you would have a "procurement" clause including the terms of what is being procured, and a Grant of License clause including the term/conditions of the license to the software. The software license agreement may sometimes be found as a separate document appended to the contract.

Consideration (**Fees and Payment**)– may be expressed as an exchange of money for goods/services, or an exchange of mutual promises. In some agreements, there may also be a payment clause outlining the terms of payment, any interest due in case of delay and taxes payable

Term – the duration of the contract (fixed term/renewable)

Termination – sometimes you find it standalone or amalgamated with the Term. This section should identify under what circumstances the parties can terminate the agreement and the procedures for termination.

GENERAL CONTRACT CLAUSES

Orders – if you have a Framework Contract, some services may be requested over time, thus requiring a system of how orders are made.

Acceptance/Testing – where a contract is for software or complex equipment, you would usually have a clause stipulating the methods for Acceptance and Testing. This is very relevant in bespoke software systems, which include several project deliverables over time

Delays – in high value contracts where time of delivery is of the essence, parties would include clauses stipulating pre-liquidated damages for delays.

Representations and Warranties – Representations and warranties identify the assumed facts underlying the agreement. These sections represent the real heart of the deal and tend to be heavily negotiated. An example would be a representation and warranty that the goods to be sold are in working order. In a contract for the lease of a building, the lessor would warrant that he is entitled and able to enter into the contract for the lease of such premises. In case of IP licensing, the licensor would warrant that he holds all IP on the product and that use of the software would not prejudice third party rights

GENERAL CONTRACT CLAUSES

Support and Maintenance – common in software licensing agreements, outlining any support and maintenance given by the licensor/seller. May be found also in a separate schedule to the main contract

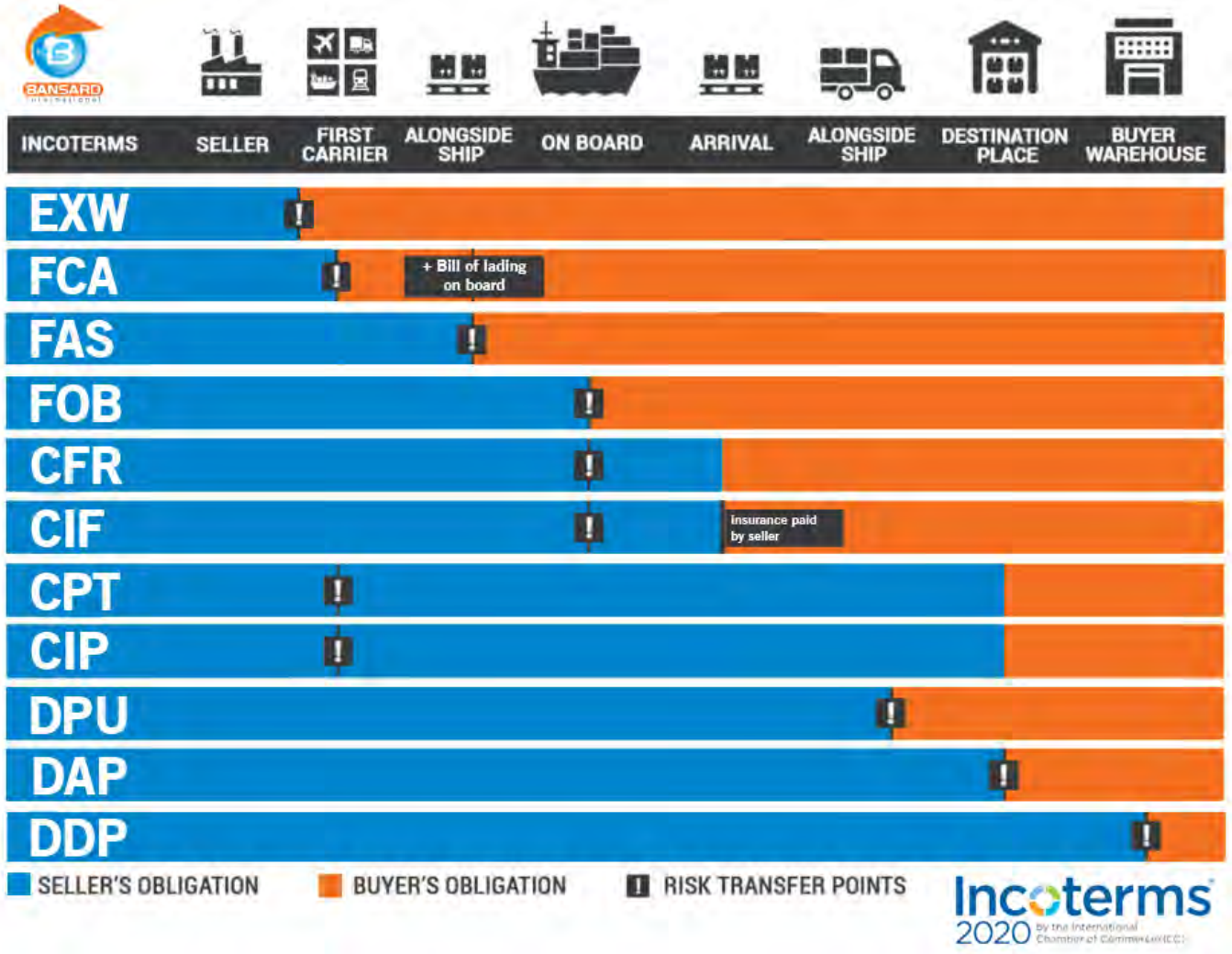
Confidentiality – this clause would provide the general rules governing confidentiality between the parties. The more delicate the subject matter, the more complex and detailed this clause wold be.

Personal Data/GDPR – if a contract is concerning with the processing of data, in particular between a controller and processor, then you would include a specific clause on the processing of personal data. Very often, the Data Processing Agreement would be included in a separate schedule to the main contract.

GENERAL CONTRACT CLAUSES

Ownership/Title – you may wish to include a clause outlining the moment when ownership and title is transferred. This is done in order to allocate "risk".

Delivery – where hardware is delivered, contract would include the agreed terms of delivery as per INCOTERMS (2020)



GENERAL CONTRACT CLAUSES

Default/Breach and Cure: In contracts, defaults often include failure of a representation/warranty, failure to perform any obligation, insolvency or bankruptcy, as well as other listed situations tailored to the specific circumstances of the contract. When a default occurs under a contract, sometimes, the person performing the obligation may have a certain period of time to cure the default before the other party is allowed to exercise certain remedies (suspension/termination). Sometimes you are required to give notice before the time begins to run ("notice/cure periods").

A. Either Party may - immediately by serving written notice - terminate this Agreement in the event of:

(a) a breach by the other Party of a material term of this Agreement and the other Party has not cured such breach within thirty (30) days after receipt of an earlier written notice specifying such breach and requesting it to be remedied; or

(b) the other party has been declared bankrupt, has petitioned for suspension of payments or makes an assignment for the benefit of its creditors or a receiver, liquidator, trustee or a similar officer is appointed over a material part or all of its property or the other party is wound up, dissolved or reorganised (other than a bona fide reconstruction for internal group restructuring purposes while the other party is still solvent), or the other party suffers an execution or distress over its assets or ceases to carry on business or becomes insolvent or signs any petition, action for relief or application under any insolvency law or admits in writing that it is unable to pay its debts when they fall due.

B. Notwithstanding the foregoing provisions, Supplier may terminate this Agreement immediately upon serving written notice if, without being liable for any costs or damages whatsoever and without prejudice to other remedies, if: [a, b, c, …]

GENERAL CONTRACT CLAUSES

Notice: This clauses lists the name and address of who needs to be notified on the contract to carry out termination or to notify breach.

Insurance: Certain contracts require one/both parties to have insurance as an obligation

Miscellaneous: In a simple contract, you may wish to amalgamate several conditions in one clause

Schedules/Appendices: If a clause is lengthy or subject to regular modification it would be better to include it in a separate Schedule/Appendix.

Example (NDA, Software License Agreement, DPA, Scope of Works, Payment Schedule, Project Timeline/Deliverables)

LIABILITY AND INDEMNITY

INDEMNITY

- An indemnity is a promise by one party to take financial responsibility for damages that the other party may suffer as a result of the first party's breach of its warranties under the agreement.
- Where contracts include representations and warranties, an indemnification clause should also be included.
- Pursuant to such indemnities, each party would agree to pay any damages and costs of litigation involved from a breach of its warranties. Since both parties should be willing to bear the cost for problems resulting from breach of their warranties (especially damages to third parties resulting from a breach of a party's warranties), an indemnity clause serves as a mechanism for allocating the risk of loss from certain problems.

EXAMPLE

A: The Supplier and the Customer agree to indemnify and hold each other harmless from and against all damage or injury to property or person (including death) resulting from the intentional or grossly negligent acts or omissions from their respective officers, employees, agents, contractors or subcontractors in connection with the performance of this Agreement.

B: Supplier shall indemnify and hold Customer harmless from and against any costs and damages awarded against Customer by a court in a final judgment or settlement approved in writing in advance by Supplier, as a result of, and defend Customer against any third party claim that the normal anticipated use of the Software infringes such third party‟s IPR. Such obligation is subject to: (i) Customer promptly notifying Supplier in writing of any such claim; (ii) Supplier having sole control of the defense and/or settlement thereof; (iii) Customer furnishing to Supplier on request all information available to Customer for such defense; (iv) Customer cooperating with Supplier, at Supplier‘s cost and expense, in the defense or settlement thereof; and (v) Customer not admitting any such claim and/or making any payments or concessions with respect to such claim without the prior written consent of Supplier.

LIMITATION OF LIABILITY

- Many contracts address the amount and kind of damages that a party will pay.
- A party can seek to limit its liability by disclaiming all warranties other than those expressly specified in the contract.
- A party can also limit its liability by including clauses that provide: a **monetary cap** on damages (or calculated on an annual amount); **exclusion** of certain kinds of damages (such as special, incidental, or consequential); **exclusion** of certain harms (such as harms resulting from defects, for example).
- The legality of such limitations of liability may vary among jurisdictions. Some exclusions are not possible

EXAMPLE

a. Notwithstanding anything to the contrary contained in this Contract, in no event shall either Party be liable to the other Party under this Contract for loss of production, loss of profit, loss of use, loss of business or market share, loss of data, revenue or any other economic loss, whether direct or indirect, or for any special, indirect, incidental or consequential damages, whether or not the possibility of such damages could have been reasonably foreseen and whether as a result of breach of contract, warranty or tort.

b. The limitation of liability provided for in Article X, shall not apply with respect to damages related to a breach of the obligations under Articles XX (License) and XXX (Confidentiality).

Suppliers' maximum liability for any claim arising out of or in any way related to this agreement (including any order hereunder), shall not exceed the following amounts:

a. For the first six (6) months from the effective date, an amount equivalent to the sum of six (6) monthly paid or payable payments due by customer to Supplier as specified in schedule c; and

b. For the period following the first six (6) months from the effective date as specified in subsection (A) above, an amount equivalent to the sum of twelve (12) monthly paid payments by customer to Supplier as specified in schedule C.

FORCE MAJEURE

FORCE MAJEURE

- Force majeure is a term used to describe a “superior force” event.
- Force majeure clauses have two purposes: they allocate risk and put the parties on notice of events that may suspend or excuse service.
- The essential requirement of force majeure is that the invoking party’s performance of a contractual obligation must be prevented by a supervening event that is unforeseen and not within the control of either party.
- Examples: “acts of God”, superseding governmental authority, civil strife and labour disputes, etc.
- It is a flexible concept that permits the parties to formulate an agreement that corresponds to their unique course of dealings and industry.
- Recent world events have increased the necessity of including additional unthinkable events, such as terrorism and the risk of biological and chemical warfare, pandemics.

EXAMPLE

Neither Party shall be responsible for any loss, damage, delay or failure of performance resulting directly or indirectly from any Force Majeure Event.

If any such Force Majeure causes an increase in the time or costs required for performance of any of its duties or obligations, the affected Party shall be entitled to an equitable extension of time for completion or performance of its duties or obligations, and in the case of the Contractor, the reasonable costs incurred as a result of a delay because of a Force Majeure.

The Party claiming a Force Majeure shall inform the other Party promptly with written notification of discovery and knowledge, of any occurrence covered under this Article and shall use its reasonable endeavor to minimize such delays and if applicable, minimize costs.

Within thirty (30) days of receipt of such a notice from Contractor, the Purchaser may provide a written response. The absence of a response shall be deemed as acceptance of Contractor's notice and request for additional costs and time.

If the consequence of such circumstances continue more than three (3) months, then each of the Parties shall has the option by giving written notice to the other Party to terminate this Contract.

APPLICABLE LAW/DISPUTE RESOLUTION

APPLICABLE LAW/DISPUTE RESOLUTION

- Parties may negotiate which laws will govern their contract. Specifically, choice of law clauses specify the legal jurisdiction under which the agreement shall be governed and construed. While there are clear advantages to the parties for inserting such clauses into their contract, there must also be a rational reason for the specified choice of law.
- Alternative dispute resolution procedures are often cost-effective and enable disputing parties to pursue their claims more quickly than traditional court litigation. You can agree if arbitration will be binding or non-binding; how the arbitration provision is to be triggered; where the arbitration would take place; which rules will govern the arbitration proceedings; and the selection of the arbitrators.

EXAMPLE

This Agreement shall be governed by and construed in all respects in accordance with the laws of Malta.

Any question or difference which may arise concerning the construction meaning or effect of this Agreement or concerning the rights and liabilities of the parties hereunder or any other matter arising out of or in connection with this Agreement or any dispute which fails to be resolved in accordance with clause X shall be referred to a single arbitrator in Malta to be agreed between the parties. Failing such agreement within 30 days of the request by one party to the other that a matter be referred to arbitration in accordance with this Clause such reference shall be to an arbitrator appointed by the Malta Arbitration Centre. The decision of such arbitrator shall be final and binding upon the parties. Any reference under this Clause shall be deemed to be a reference to arbitration within the meaning of Part IV of the Arbitration Act (Chapter 387 of the Laws of Malta).


Too Hot
Too Cold
Just Right