

LEGAL ENGLISH COURSE

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LESSON 2



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Negotiating a Deal

An **entrepreneur** aiming at doing international business is often faced with negotiating a **contract template**.

This structured standard **instrument** is customary in international contract law (supply, agency, distribution, licensing, franchise).



Contract Structure

- Parties
- Preamble/premises
- Purpose and undertakings
- Consideration
- Liability and Indemnity
- Warranties
- Term and termination
- Boilerplate clauses

Warranty/Guarantee clause

Express **guarantee** and **warranties** in contracts generally add to the potential liabilities of the party who has to perform the contract. Sometimes these clauses provide no more than the equivalent of the parties' statutory rights.

- **Duration** of the guarantee/warranty
- **Liability** undertaken by each party
- **Exclusions/limits** to the parties' liabilities

Indemnification clause

The **indemnification clause** generally provides that one party undertakes **to indemnify and hold the other party harmless** from any liability, cost, loss or damage incurred by way of the other party's conduct or against third parties' claims.

Ex: *“Distributor hereby agrees to indemnify and hold Supplier harmless from any claim relating to the Products that may be brought against Supplier”*

Term/Duration clause

When the parties enter into a contract they generally provide a **term/duration clause**, which states the **effective date** and the **expiry date** of the contractual relationship.

- **effective date** → the contract comes into force
- **date of signature** → the parties sign the contract
- **expiry date** → the contract ceases being effective (also incorrectly referred to as “termination date”).

Termination clause

A **termination clause** usually regulates how a contract can be brought to an end before its expiry date. Contract termination is often provided in case a **breach of contract** occurs. The parties may also state that they will be free to terminate the contract by sending a **notice of termination** (usually subject to a term).

Termination clause

The parties to a contract may set forth two different types of termination clauses.

➤ **Termination by notice/for convenience/at will**

Each party may terminate the contract by sending a prior written notice of termination to the other party. No breach of contract has occurred, nevertheless each party is free to terminate the contract at any time.

Termination clause

➤ **Termination by default/for cause.**

The parties agree that if a breach occurs, the non-breaching party may terminate the contract.

Generally, a letter of termination is sent to permit the breaching party to remedy the breach within a given period of time. Failure to remedy the breach eventually leads to contract termination.

Termination clause

Termination by default/for cause: *“The non-defaulting Party may terminate this Agreement by notice in writing to the defaulting Party if the latter commits a material breach of its obligations hereunder and fails to remedy the breach within 30 business days of being specifically required to do so in writing”.*

Termination by notice/for convenience: *“Each Party, at its discretion, may terminate this Agreement at any time upon three (3) business days' written notice to the other Party”*

Governing law

The parties to a contract choose the law governing their contractual relationship, by drafting a **governing law clause**.

This clause's function is to supplement the contractual provisions or to help the parties interpret ambiguous or obscure provisions.

Ex. *“This Agreement is governed by and shall be construed in accordance with Italian law”*

Disputes

In the event of a **dispute**, and in case an attempt for **settlement out-of-court** is not successful, the parties may have it settled by the ordinary courts in a given country or by an arbitration proceeding.

In the first case, the parties will provide a **jurisdiction clause**, in the second case they will provide an **arbitration clause**.

International contracts: governing law and disputes

In the **jurisdiction clause** the parties set forth provisions about the court before which a dispute arising from the contract will be finally settled.

Ex. *“The parties agree that any and all disputes arising out of or in connection with this Agreement shall be finally settled by the courts of Italy.”*

International contracts: governing law and disputes

Standard **arbitration clause** by the International Chamber of Commerce (I.C.C. www.iccwbo.org):

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

Supply agreement

In a **supply agreement** the **seller** (or provider/supplier/vendor) agrees to sell goods and/or services to the **buyer** (or purchaser), who **undertakes** to pay a **consideration** to the seller.

General duties of seller: to deliver the goods/render the services to buyer in compliance with the contract // **General duties of buyer:** to pay the price for the goods/services

Distribution agreement

In **distribution agreements** the **distributor** buys goods from the **supplier** (or principal) in order to resell them to its own customers, generally within a given **territory**. Distribution agreements may be **exclusive** or **non-exclusive**. In an exclusive distribution agreement, the supplier will grant to the distributor exclusivity over a particular territory and/or product line and/or sales channel. The parties may also provide a **non-compete clause**.

Distribution agreement

Exclusive distribution agreement: the supplier appoints a distributor as its only distributor in a certain area, agreeing not to supply customers in the area itself → **exclusive distributor**

Sole distribution agreement: the supplier appoints a distributor as its only distributor in a certain area, reserving its rights to supply customers in the area itself → **sole distributor**

Agency agreement

An **agency agreement** establishes the contractual terms under which a **principal** appoints an **agent** to represent its goods and/or services through marketing and promotion activities in a given **territory**.

Sales agency → the agent may enter into contracts with customers on behalf of the principal

Marketing agency → the agent promotes the products but he's not authorised to act on behalf of the principal

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