

Commercial Contracts

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NDS Avocat



Summary

Introduction

Types of commercial contracts

Negotiation and formalization of a commercial contract

Key points of a commercial contract

Performance of a commercial contract : claims and litigation

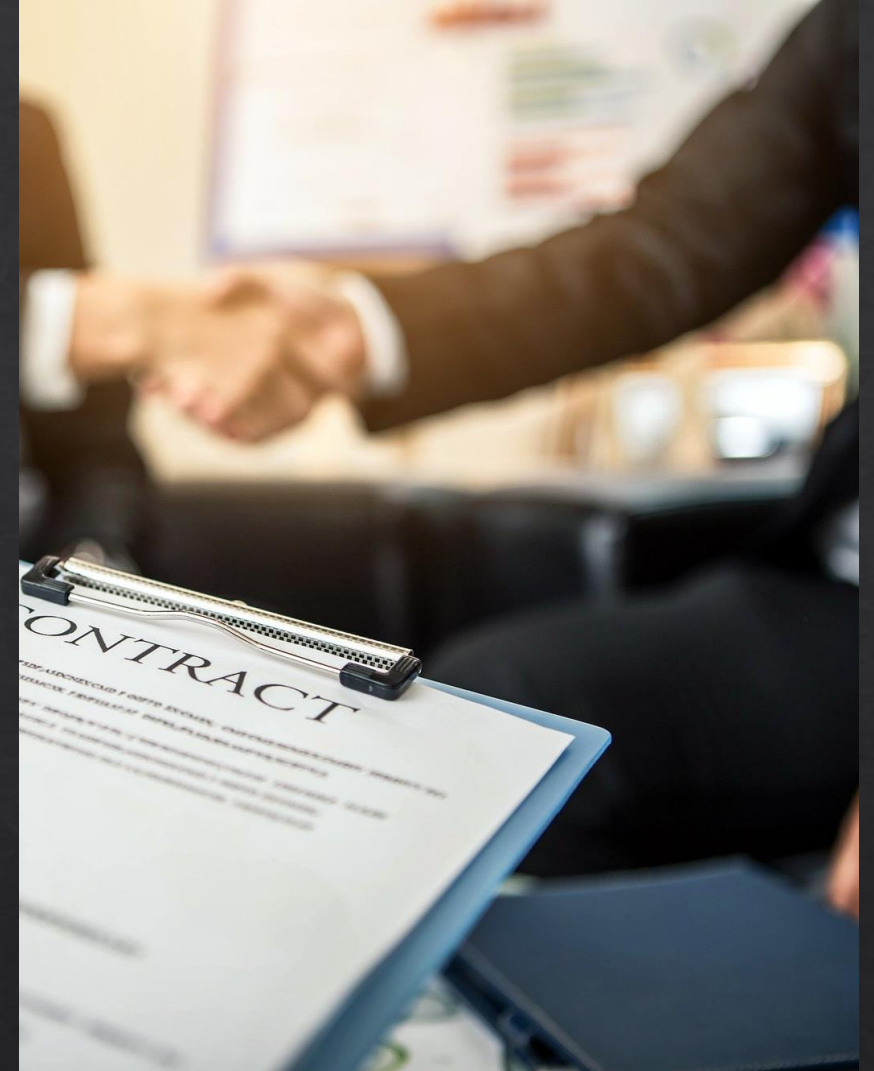
An illustration of a woman with brown hair in a bun, wearing a red blazer over a black top. She is holding a large, light gray rectangular sign with a wooden stick. On the sign is a large green circle containing a white question mark. The background is a solid dark blue.

INTRODUCTION

What is a contract ?

Introduction: Definition

- ✓ Contract = meeting of mutual agreement from two or more parties that creates, modifies, assigns or discharges obligations.
- ✓ Contract = binding document representing the « law of the Parties ». In case of litigation, a court is also bound by the terms of a contract.
- ✓ Governed by the « *freedom of contract* » principle but with strict limitation : **compliance with mandatory law** (e.g. antitrust law).

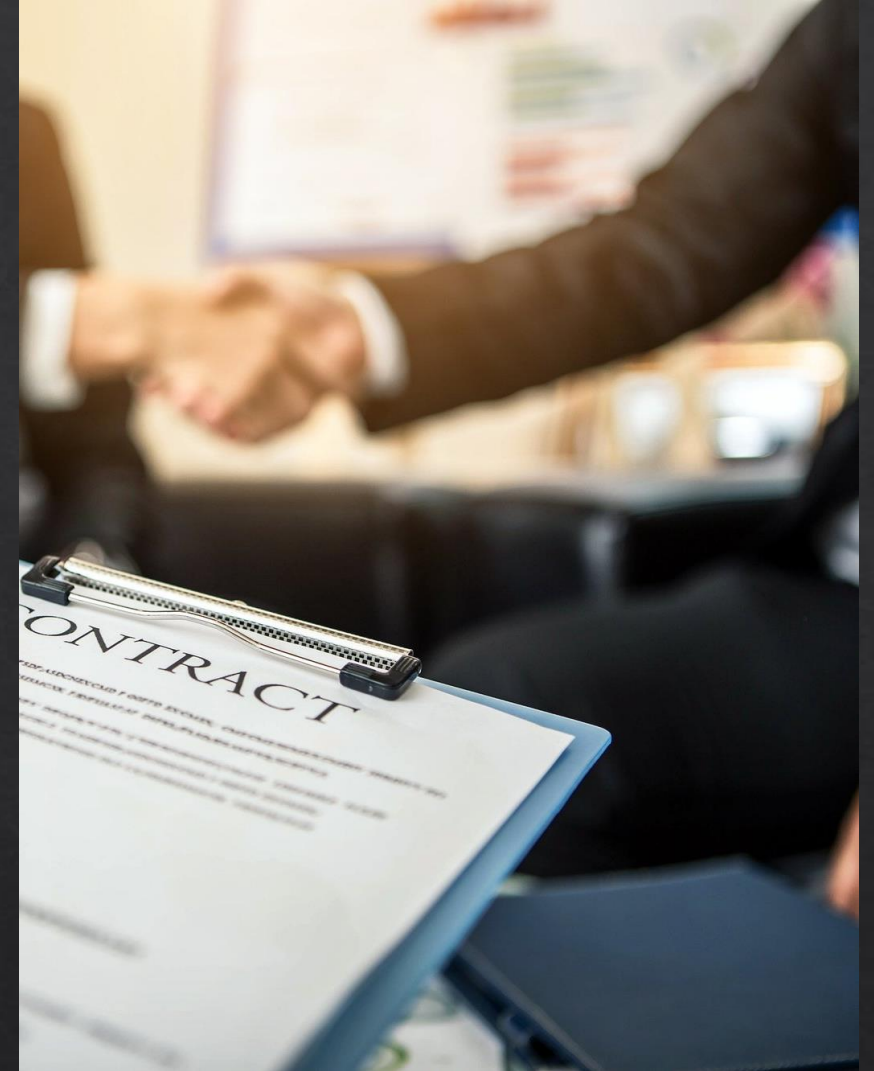


Introduction :

What is a contract ?

- ✓ Plenty of documents may be considered as a contract:
 - Offer and acceptance (email, verbal etc.)
 - Order
 - Written « stand-alone » contract
 - Frame agreements
 - Memorandum of Understanding, LOIs and preliminary contracts

→ ALL OF THOSE EXAMPLES ARE BINDING CONTRACTS TO BE PERFORMED !

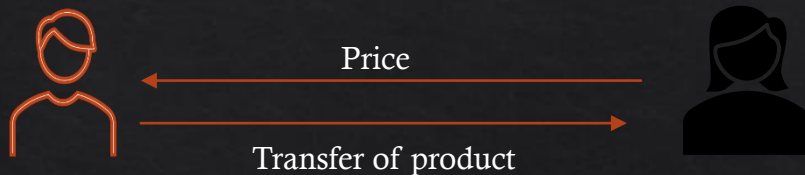


TYPES OF COMMERCIAL CONTRACTS

Types of commercial contracts :

Sale / Purchase

- ✓ A sale/purchase is based on the exchange of product/service for money.
- ✓ Necessary to clearly define product/service and the related price. Even more important for the buyer.
- ✓ Consequences of such contract :
 - Transfer of title/property of product/service;
 - Payment of the price/conditions of payment;
 - Obligation to deliver in accordance with the contract terms;
 - Warranty of peaceful possession;
 - Warranty for hidden defects.



Types of commercial contracts : Services

- ✓ Performance of defined services in consideration of money.
- ✓ The service provider is considered as a proper independent party = full control on the performance.
- ✓ Issue of the unlawful supply/subcontracting of labour.



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Types of commercial contracts:

Distributorship (1/2)

- ✓ A company is allowed to sell another company's products or services to customers.
- ✓ Three main kinds of distributorship agreements:
 - *EXCLUSIVE DISTRIBUTORSHIP AGREEMENT:*
 - ❑ Supplier supplies defined products to a sole reseller on a specific territory.
 - *SELECTIVE DISTRIBUTORSHIP AGREEMENT:*
 - ❑ Supplier supplies products only to shortlisted distributors, with no transfer of know-how;
 - ❑ Need to define quality, quantity and non-discriminatory criterion.
 - *FRANCHISE AGREEMENT:*
 - ❑ Franchisor gives right to Franchisee to operate, sell products or perform services by using his know-how, trademarks or brand.
 - ❑ Franchisor commits to give technical and commercial assistance.

Types of commercial contracts:

Distributorship (2/2)

- ✓ Legal requirements on precontractual information, drafting and performance of the contract:
 - ***PRECONTRACTUAL INFORMATION:***
 - ❑ Obligation to submit a detailed precontractual information to distributor at least 20 days before signature (e.g. corporate information, network, financial statements etc.).
 - ***DRAFTING OF THE CONTRACT:***
 - ❑ **Exclusivity** : maximum period of ten years;
 - ❑ « *Not-to-compete* » **clauses**: based on safeguarding supplier's know-how + limitation on locations and time (1 year max).
 - ***PERFORMANCE OF THE CONTRACT :***
 - ❑ Manufacturer and reseller: need to conclude a new contract on a yearly basis + communication of GTCs;
 - ❑ Timeframe to reply to any request of the Manufacturer on the performance of the contract.



NEGOTIATION & FORMALIZATION OF A CONTRACT

Focus on general terms and conditions, tenders and negotiation process

Negotiation & Formalization: General Terms and Conditions (GTCs)

- ✓ GTCs = set of contractual rules that a company submits to another company or an individual for a type of transaction (sale, purchase, use etc.)
- ✓ Proper form of contract with the aim to simplify the negotiation process as much as possible.
- ✓ Issue of the bargaining power and the full acceptance of the GTCs (e.g. issue of the « significant imbalance » in rights and obligations, obligation to communicate).

TERMS AND
CONDITIONS



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Negotiation & Formalization: Tenders

- ✓ Process launched by a company (state-owned or not) to purchase products and/or services and requests tenderers to submit their best offers.
- ✓ Tenders are usually set up with a full contract documentation:
 - Form of contract and/or contractual conditions;
 - Technical specifications;
 - Invitation to tender.
- ✓ Necessity to submit a financial and technical offer.
- ✓ Negotiation process with the client and possibility to request for a BAFO (« Best and final offer »).



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Negotiation & Formalization:

The negotiation process

- ✓ Issue of the base document to start the negotiation process (e.g. GTCs in distribution relationship);
- ✓ Signature of preliminary contracts;
- ✓ Liability incurred in case of breaking of contractual negotiations.

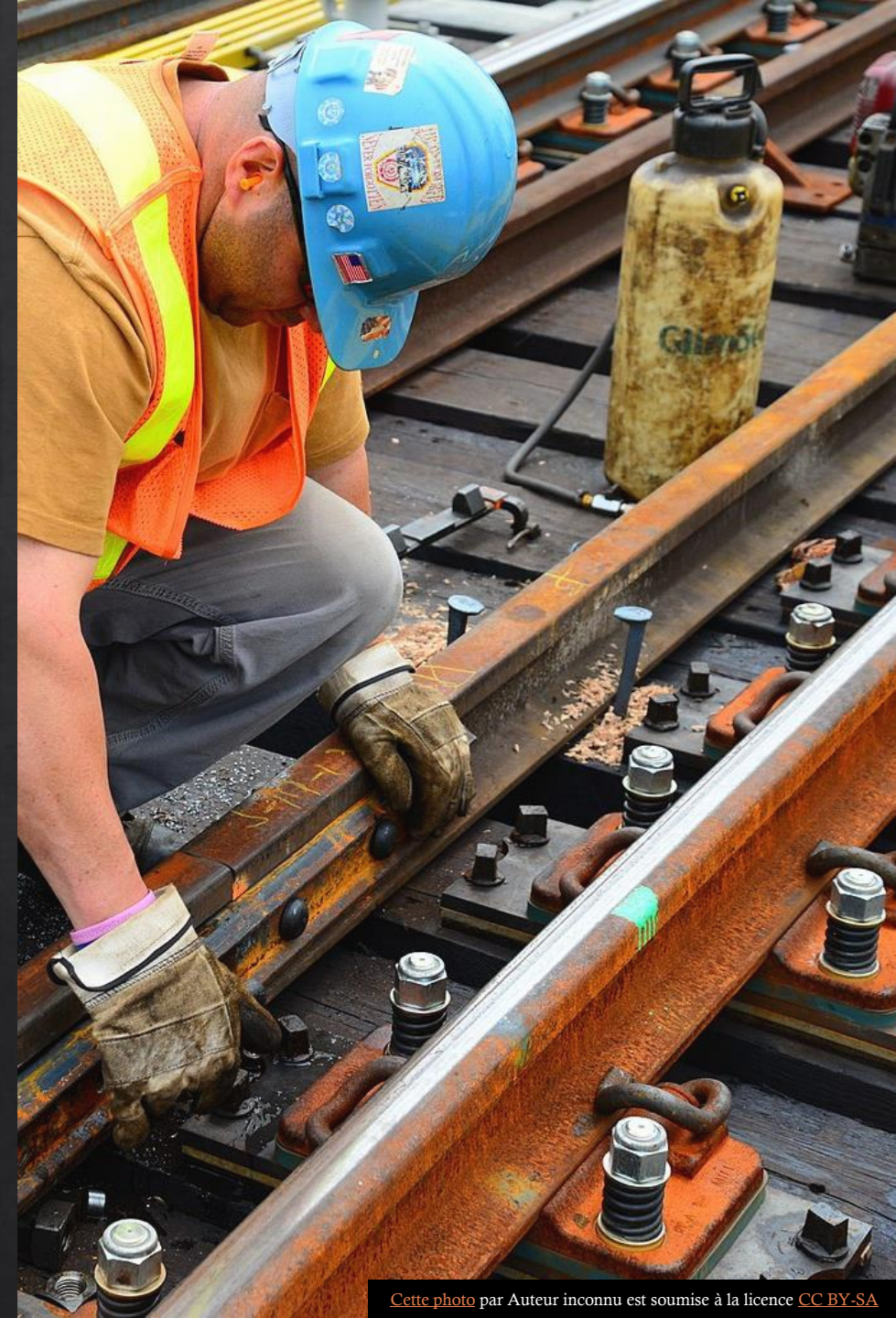


A hand holding a magnifying glass over a document, symbolizing scrutiny or investigation. The background is a solid light gray.

THE KEY POINTS OF A COMMERCIAL CONTRACT

Key points of a contract: Scope of Work

- ✓ Definition of the scope of work (also named scope or SoW) is of utmost importance.
- ✓ Implies a full verification of:
 - all contract documents (main contract, appendices, GTCs, technical specifications, etc.)
 - The applicable order of precedence.
- ✓ Aim to clearly define the nature of the supply/services/works to be delivered under the contract (e.g. concepts of back-to-back, turnkey etc.)



Key points of a contract : Price, Invoicing & Payment

✓ *PRICE:*

- Need to be determined or to state elements to fix it.

✓ *INVOICING PROCESS & PAYMENT:*

- Terms of payment and relation to milestones;
- Time limit for payment:
 - ❑ **30 days** from delivery/service performance if no specific provision.
 - ❑ Maximum time limit: **60 days from invoice date or 45 days from the end of the month.**
- Delay: payment of delay interest + recovering indemnity (€40).



Key points of a contract :

Transfer of risks/Ownership

✓ *PRINCIPLES :*

- Transfer of ownership (« title ») occurs upon mutual agreement on the product/service and the related price.
- Transfer of risks (loss and deterioration of the goods) occurs at the same time,

✓ *ADAPTATION OF SUCH PRINCIPLES:*

- Retention of title clause;
- Adaptation of the transfer of risks (e.g. Incoterms).

Key points of a contract: Milestones and Liquidated Damages

✓ *MILESTONES:*

- Importance to state milestones in contracts with continuing/sequential performance (e.g. SLA, EPC contracts etc.)
- Principle of « Time is of the essence ».

✓ *LIQUIDATED DAMAGES (LDs):*

- Fixed amount of money that a defaulting party will pay to the non-defaulting party in the event the default occurs.
- Focus on the « cap », LDs amount and principle of « full and exclusive remedy ».
- Court's power to decrease liquidated damages.



Key points of a contract : Warranty obligations

- ✓ Focus on warranties stated by law
- ✓ Adaptation of warranties and relation to the scope of work:
 - Factory warranty;
 - System warranty;
 - Obsolescence issue.



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Key points of a commercial contract:

Liability

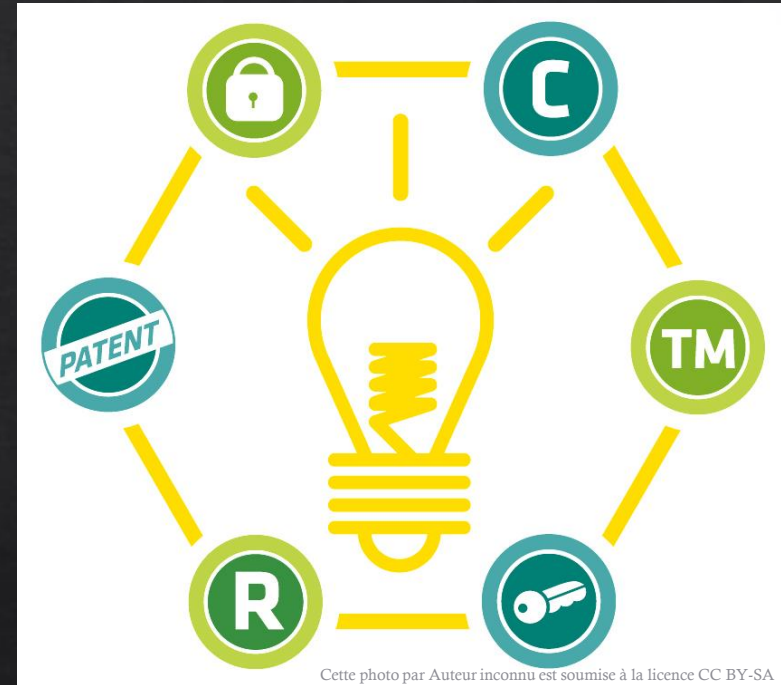
- ✓ A defaulting party is liable for the direct damage caused to the other party.
- ✓ Liability may be limited in amount but this will not apply when :
 - Damage is related to a breach of a material obligation (e.g. refusal of delivery);
 - Wrongful misconduct;
 - Gross negligence.
- ✓ Calculation of the limitation and drafting of the clause.
- ✓ Limitation may be also extended / Indemnity clause.



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Key points of a contract : Intellectual Property

- ✓ Strict definition of « *background* » and « *foreground* » IP.
- ✓ Protection of IP rights and regulation of IPR:
 - Issue of infringement of IP rights;
 - Escrow deposit.



Key points of a contract : Sureties and Bank guarantees

- ✓ Creditor's possibility to require the delivery of a surety:
 - Personal Guarantee
 - Parent company guarantee (« PCG »)
 - On-demand bank guarantee

- ✓ Major points to check on those sureties:
 - Nature of the issuing bank;
 - Amount of the surety (e.g. revolving guarantee);
 - Possibility to challenge;
 - Duration.



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Key points of a contract :

Changes in contract

- ✓ **Principle:** no change on contract without a mutual agreement.
- ✓ Change in law issues.
- ✓ Definition of a clear change process: pay attention to relevant conditions and timeframes!
- ✓ Hardship theory and implementation. |



Key points of a contract : Suspension, Force Majeure & Termination

✓ *SUSPENSION & FORCE MAJEURE:*

- Attention on the causes of suspension;
- Force majeure events (e.g. COVID-19 pandemic);
- Regulation of the suspension consequences and compensation.

✓ *TERMINATION:*

- Termination cases;
- Issue of termination « for convenience » and compensation.
- Issue of unlawful termination of long-standing business relationships.



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Key points of a contract :

Duration

- ✓ Distinction fixed-term / open-ended contracts and consequences.
- ✓ Difference between extension and renewal of a contract.



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Key points of a contract : Applicable Law & Dispute Resolution

- ✓ ***APPLICABLE LAW:***
 - Ensure to have an appropriate applicable law to enforce decisions.

- ✓ ***DISPUTE RESOLUTION:***
 - Competent national courts;
 - Arbitration;
 - Mediation and amicable settlement.



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PERFORMANCE OF A CONTRACT

Focus on claims and dispute resolution

Performance of contract: Focus on claims and dispute resolution

- ✓ *Principle:* 5 years to file a claim before competent court from the time on which the person has known (or should have known) he could exercise his right (e.g. due date).
- ✓ Possibility to adapt this time limitation and conditions to submit a claim:
 - Supporting documents and justifications;
 - Applicable time limitations;
 - Form of notices;
 - Mediation issues.
- ✓ Court claim process and possibility to settle.





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ANY QUESTIONS?



Thank you for your attention!

Do not hesitate to contact me for any question!

The logo for NDS Avocat is displayed on a solid orange square background. The text "NDS Avocat" is written in a white, bold, serif font. A thin, light-colored diagonal line is positioned behind the text, extending from the top right towards the bottom left.

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