How to draft your own international sale contract

The ICC Model International Sale Contract and how to use it.

Zagreb, May 22, 2014

koen.vanheusden@abh-ace.be
PROCESS

ESTABLISH CONTEXT

IDENTIFY RISKS

ASSESS RISK EVALUATE

TREAT RISKS

Communicate
Consult
Monitor Review
International Trade =

Exporting …
- delivering goods and services abroad
- … getting paid
- … and making a profit

Importing is …
- receiving goods and services from abroad
- … and being able to use them
Risk in international trade

- Risk of misunderstanding
- Risk of non-performance
  - Risk of inadequate quality
  - Risk of non-payment
  - Risk of dissolution
- Risk of damage or loss during transportation
- Confidentiality risk
- Financial risk
  - Exchange, investment ...
- Legal risk
- Administrative risk
- ...

- Contract terms and conditions
- Political and commercial
- Financial and economic
- Technical requirements
- Cultural / language / behavioral differences
- ...

IGNORANCE IS NO DEFENSE
Why does it often happen...

and if a problem rises?

Am I finding the problems?
Documentary controls (import) 2010-2011

[Bar chart showing documentary controls for various countries in 2010 and 2011.]
% physical controls – import 2010-2011
4.3 Uncollectable receivables (domestic/foreign)

Over the last six months, what percentage of the total value of your B2B receivables (domestic and foreign) were uncollectable?

<table>
<thead>
<tr>
<th>Region</th>
<th>Domestic</th>
<th>Foreign</th>
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</thead>
<tbody>
<tr>
<td>Asia-Pacific</td>
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<tr>
<td>Japan</td>
<td>2.4</td>
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</tbody>
</table>

Sample: all interviewed companies (active in domestic and foreign markets)

Source: Atradius Payment Practices Barometer • November 2012
Going international =

- Additional costs (logistics - distance, customs, packaging, labelling, marketing, technical standards & certification, ...)
- In order to have competitive prices
  - the profit margin will usually be lower than in domestic trade
- To safeguard profitability
  - The efficiency must increase
    - consolidation ➔ bigger shipments (FCL)
    - more expensive goods
- Bigger distances + shipments leads to:
  - Longer production delays ➔ prefinancing
  - Longer delivery delays
  - Longer resale delays ➔ rotation speed
  - Higher invoices ➔ higher risk
Risk management in international trade

Contract

Order (confirmation)
Framework contract
General conditions

Customs

Lex Mercatoria

Parties

International law

Port, trade, ...

National law
But the contract is only part of the answer
THE BOTTOM LINE IN CONTRACT DRAFTING =
The buyer doesn’t care about the price
all he cares about is the ‘landed cost of purchase’

- Regardless of the contractual choices regarding transfer of costs, risks, obligations etc. the buyer ALWAYS pays;
  - a seller assuming costs, liabilities or obligations will include this in his selling price together with a premium for risk and administration;
  - if the seller does not assume given costs, risks or obligations, someone else will have to assume them ... and will charge the cost to the buyer;
    - they will remain to be a cost factor for the buyer.
- The challenge is thus not to avoid costs, risks or obligations ‘at all cost’, but to allocate these factors of the ‘total cost of purchase’ at the place where they can be managed at the lowest premium.
How much does it cost?
But who believes in contracts?
Do businessmen make contracts?

OK for

- Important operations ➔ projects, joint ventures, OEM, licencing, ...
- Long term relationships ➔ agency, distributorship, ...
- ‘Easy’/standard obligations ➔ non disclosure, confidentiality, accession agreements, ...

but what about simple, small, random contracts of sale and purchase?
Why businessmen nevertheless often work without a contract

- « It is too expensive ... for small deals »
- « If we put the deal on paper ... there no longer is a deal »
- « Legal does not understand what business is about »
- « We never go to court »
- « We don’t even understand our own general conditions »
- « We solve things ‘commercially’ »
- ...
... even though in certain situations they might give in

- « for in case we have to go to court »
- credit – tax – accounting – customs – advance payment – payment transfer ...

- « to deepen the relationship with the counterpart »
- « to instruct colleagues »
The contract: main functions

- Inform/instruct colleagues
- Provide for swift solutions: allocate risks and responsibilities between the parties
- Proof
- Credit – tax – accounting – customs – advance payment – payment transfer ...
- Relationship between buyers and sellers
THE CONTRACT: HOW?
How to draft a contract?

Contract = manual

- Define your objectives
- Make a checklist (of what always goes wrong)
- Logical order - coherence
- Writing
- Verification (lawyer)

- Language?
So the challenge is: How do we

- make sure that sales/purchase knows what to ask/tell when booking the order?
- make sure that all the different departments obtain all the instruction they need to execute the transaction?
- establish some sort of routine for the sake of predictability?
- learn form our mistakes?
- avoid competition within our networks?
What about model contracts?

- Contract = manual = specific for every undertaking
- ... but nevertheless, draft your own model contract
  - Negotiating power
  - Advantages of scale
  - Competition within the company network
- Uniformity ➔
  - Choice of law
  - Dispute settlement
- ....... LAW – ......... COURTS
PROS AND CONS OF (THE ICC) MODEL CONTRACTS
International model contracts

- Models for specific parties
  - Agents, sellers, buyers, ...

- Sectorial models contracts
  - Orgalime (http://www.orgalime.org/), FIDIC (http://www.fidic.org/); GAFTA; NOFOTA; ...

- National model contracts
  - ACLA (All China Lawyers Association); Standard Business Contracts (Larcier 2013); ...

- International ‘standard’ contracts;
  - ICC (http://www.iccwbo.org)
Purpose of (good) Model Contracts:

1. harmonization of industry/sector standards ➔ contribution to ‘lex mercatoria’;
2. ‘weaker’ contracting parties looking for a ‘model of reference’ to counter contractual obligations presented by the stronger partner;
3. SME occasionally engaging in international operations and/or changing foreign partners;
4. contracting parties looking for a neutral/standard/compromise position to overcome different positions while negotiating;
Different types of model structures

1. Single models ➔ full text with fill in clauses
2. Dual models ➔
   - Short part ‘specific clauses’ (fill in boxes)
   - Lengthy part ‘general clauses’
The ICC Model International Sale Contract

An international business transaction requires a precise and detailed underlying contract. However, it can be expensive and time-consuming to draft such a contract oneself. The ICC Model International Sale Contract provides a solution in presenting a set of clear and concise standard contractual conditions for the most basic international trade agreement.

Although this Model is designated a ‘sale’ contract, it is equally appropriate for use by buyers as it balances the interests of exporters (sellers) and importers (buyers), it may thus also be used for a so-called ‘purchase’ agreement.

The Model contract is divided into two parts:
Specific Conditions, which allow the parties to use the Model directly by filling in the blanks in the form; and General Conditions, which provide a platform of standard legal terms and thus a reference tool for contract drafting or negotiation. These General Conditions may be used together with the Specific Conditions, or independently.

The introductory section explains the scope of the contract, how it should be used, and contains helpful tips and reminders. In addition, the new interactive digital version of the model allows users to input the specific Conditions to their transaction easily, with relevant guidance appearing on the screen as users make particular choices.

The ICC Model International Sale Contract is specifically adopted for transactions governed by the UN Convention for the International Sale of Goods (CISG) that is added in the annex and applies to an increasingly large volume of international sales.

The International Chamber of Commerce, the World Business Organization, based in Paris, is the global leader in the development of standards, rules and reference guides for international trade.

ICC's International Contracts Series
- ICC Guide to Export/Import
- ICC Model International Financing Contract
- ICC Model International Transfer of Technology Contract
- ICC Model Turnkey Contract for Major Projects
- ICC Model Services Indemnity Contract
- ICC Model Commercial Agency Contract
- ICC Model International Sale Contract

Drafting and Negotiating International Commercial Contracts
- ICC Model Subcontract
- ICC Model International Trademark Licence
- ICC Model Confidentiality Agreement
- ICC Model Distributorship Contract
- ICC Model Occasional Intermediary Contract

ICC Publication: 738E

The world's business organization
HOW WAS THE MODEL DRAFTED?
Working process

- E-mail - Common platform
- Kick off Istanbul CLP 12/11/2010
- Paris 16/02/2011
- Gütersloh 3-4/05/2011 (partial)
- Amsterdam 15/06/2011
- Brussels 10/10/2011
- Paris 18/11/2011
- London 19/04/2012 (informal)
- Venice 17/05/2012
- Lisbon 14/09/2012
- Executive Board 27-28/09/2012
HOW DOES THE MODEL WORK?
EXW

+ invoice
+ packing list

- transport document
- Buyer = shipper
- certificate of origin
- insurance certificate

EXW

+ open account
+ advance payment

- documentary collection
- letter of credit

with back up guarantee, stand by L/C or credit insurance

delivery when 'ready for collection' is incompatible with payment upon collection of documents at destination

as no shipping documents are to be presented, it is difficult to organize payment upon presentation of a 'delivery document'
# ICC International Sale Contract

## CONTRACT

**Seller's reference Number ABCDE**  
**Buyer's reference Number 12345**

### SELLER

<table>
<thead>
<tr>
<th>Name</th>
<th>The Selling Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address</td>
<td>Sales Boulevard 21</td>
</tr>
<tr>
<td>City</td>
<td>12345 Paris</td>
</tr>
<tr>
<td>Country</td>
<td>France</td>
</tr>
<tr>
<td>Tax Identification code/Other registration code</td>
<td>FR 123456789</td>
</tr>
</tbody>
</table>

**CONTACT PERSON**

<table>
<thead>
<tr>
<th>Name</th>
<th>Jean Louis Dupont</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telephone</td>
<td>+33 (1) 1234567</td>
</tr>
<tr>
<td>E-mail</td>
<td><a href="mailto:jdupont@sales.com">jdupont@sales.com</a></td>
</tr>
<tr>
<td>Title</td>
<td>Sales Manager</td>
</tr>
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</table>

### BUYER

<table>
<thead>
<tr>
<th>Name</th>
<th>The Buying Company</th>
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</thead>
<tbody>
<tr>
<td>Address</td>
<td>Buyer's Boulevard 12</td>
</tr>
<tr>
<td>City</td>
<td>84321 New York</td>
</tr>
<tr>
<td>Country</td>
<td>USA</td>
</tr>
<tr>
<td>Tax Identification code/Other registration code</td>
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**CONTACT PERSON**

<table>
<thead>
<tr>
<th>Name</th>
<th>Jim Smith</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telephone</td>
<td>+1 (212) 1234567</td>
</tr>
<tr>
<td>E-mail</td>
<td><a href="mailto:jsmith@buyer.com">jsmith@buyer.com</a></td>
</tr>
<tr>
<td>Title</td>
<td>Purchasing Manager</td>
</tr>
</tbody>
</table>

### GOODS SOLD

A1  
100 Laptops ABCXYZ Made in EC BE 840512

### CONTRACT PRICE

A2  
Currency: EUR  
Amount: 10,000

### DELIVERY TERMS

A3  
Mode of transport: FCA  
Nameplace: Air France Paris Charles de Gaulle
## ICC International Sale Contract

### CONTRACT

**Seller's reference Number ABCDE**  
**Buyer's reference Number 12345**

<table>
<thead>
<tr>
<th>SELLER</th>
<th>BUYER</th>
</tr>
</thead>
</table>
| **Name:** The Selling Company  
Address: 32 Rue du Commerce  
City: Paris  
Country: France  
Tax registration code: FR 124467890 | **Name:** The Buying Company  
Address: Buyer’s Office, 12  
City: New York  
Country: USA  
Tax registration code: 987654 |

**CONTACT PERSON**  
Name: Jean-Louis Dubois  
Telephone: +33 12 24 86 05  
Email: jld@theseller.co.uk  
Title: Sales Manager

**CONTACT PERSON**  
Name: Jim Smith  
Telephone: +1 212 245 8907  
Email: js@thebuyer.com  
Title: Purchasing Manager

### A1  
**GOODS SOLD**

100 Laptops: ABCXYZ Made in EC 86512

### A2  
**CONTRACT PRICE**

Contract: EUR  
Amount: 100,000  
Amount in words: Ten thousand

### A3  
**DELIVERY TERMS**

1. **FCA**  
2. **freight carrier**  
3. **at free cost**  
4. **All France Paris Charles de Gaulle**

### A4  
**TIME OF DELIVERY**

28-9-2012

### A6  
**RETENTION OF TITLE**

YEARS

### A7  
**PAYMENT CONDITIONS**

Payment on open account (sight)

**Seller’s Bank Details**

IBAN/bank account number FR19 2007 10100 2006 5874 1005 T15  
BIC/Swift code BRAN

### B.  
**GENERAL CONDITIONS**

the General Conditions of the ICC Model International Sale Contract (Manufactured Goods) which constitute part B of this document.

**Parts 18-9-2012**

The Seller  
The Buyer

Jean-Louis Dubois  
Selling Manager

Jim Smith  
Purchasing Manager

ICC International Sale Contract

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30/07/2012 10:45
1. As a condition precedent to the completion of the sale, the Buyer shall deliver to the Seller a clear title to the property, free and clear of any liens, encumbrances, or other restrictions.

2. The Buyer shall be responsible for all taxes and governmental fees associated with the sale.

3. The Buyer shall be responsible for all costs associated with the transportation of the property.

4. The Buyer shall be responsible for all costs associated with the installation of any fixtures or equipment.

5. The Buyer shall be responsible for all costs associated with the removal of any hazardous materials.

6. The Buyer shall be responsible for all costs associated with the repair of any defects.

7. The Buyer shall be responsible for all costs associated with the acquisition of any permits or licenses.

8. The Buyer shall be responsible for all costs associated with the insurance of the property.

9. The Buyer shall be responsible for all costs associated with the financing of the property.

10. The Buyer shall be responsible for all costs associated with the legal fees of the transaction.

11. The Buyer shall be responsible for all costs associated with the environmental study of the property.

12. The Buyer shall be responsible for all costs associated with the engineering of the property.

13. The Buyer shall be responsible for all costs associated with the architectural design of the property.

14. The Buyer shall be responsible for all costs associated with the construction of the property.

15. The Buyer shall be responsible for all costs associated with the operation and maintenance of the property.

16. The Buyer shall be responsible for all costs associated with the disposal of any waste materials.

17. The Buyer shall be responsible for all costs associated with the remediation of any contaminated areas.

18. The Buyer shall be responsible for all costs associated with the preservation of any historic elements.

19. The Buyer shall be responsible for all costs associated with the preservation of any natural resources.

20. The Buyer shall be responsible for all costs associated with the preservation of any archaeological sites.

21. The Buyer shall be responsible for all costs associated with the preservation of any cultural sites.

22. The Buyer shall be responsible for all costs associated with the preservation of any scenic sites.

23. The Buyer shall be responsible for all costs associated with the preservation of any wetlands.

24. The Buyer shall be responsible for all costs associated with the preservation of any watersheds.

25. The Buyer shall be responsible for all costs associated with the preservation of any wildlife habitats.

26. The Buyer shall be responsible for all costs associated with the preservation of any riparian areas.

27. The Buyer shall be responsible for all costs associated with the preservation of any floodplains.

28. The Buyer shall be responsible for all costs associated with the preservation of any coastal areas.

29. The Buyer shall be responsible for all costs associated with the preservation of any dune areas.

30. The Buyer shall be responsible for all costs associated with the preservation of any seashore areas.

31. The Buyer shall be responsible for all costs associated with the preservation of any inland water areas.

32. The Buyer shall be responsible for all costs associated with the preservation of any wetland areas.

33. The Buyer shall be responsible for all costs associated with the preservation of any coastal wetland areas.

34. The Buyer shall be responsible for all costs associated with the preservation of any estuarine areas.

35. The Buyer shall be responsible for all costs associated with the preservation of any tidal areas.

36. The Buyer shall be responsible for all costs associated with the preservation of any nontidal areas.

37. The Buyer shall be responsible for all costs associated with the preservation of any bentic areas.

38. The Buyer shall be responsible for all costs associated with the preservation of any pelagic areas.

39. The Buyer shall be responsible for all costs associated with the preservation of any coastal pelagic areas.

40. The Buyer shall be responsible for all costs associated with the preservation of any freshwater areas.

41. The Buyer shall be responsible for all costs associated with the preservation of any saline areas.

42. The Buyer shall be responsible for all costs associated with the preservation of any brackish areas.

43. The Buyer shall be responsible for all costs associated with the preservation of any anoxic areas.

44. The Buyer shall be responsible for all costs associated with the preservation of any Oxygenated areas.

45. The Buyer shall be responsible for all costs associated with the preservation of any eutrophic areas.

46. The Buyer shall be responsible for all costs associated with the preservation of any oligotrophic areas.

47. The Buyer shall be responsible for all costs associated with the preservation of any euxinic areas.

48. The Buyer shall be responsible for all costs associated with the preservation of any euphotic areas.

49. The Buyer shall be responsible for all costs associated with the preservation of any dystrophic areas.

50. The Buyer shall be responsible for all costs associated with the preservation of any hypoxic areas.

51. The Buyer shall be responsible for all costs associated with the preservation of any blackwater areas.
DRAFT YOUR OWN CONTRACT OF SALE
1. Sale of design garden furniture to a German retail chain

2. Purchase of drilling equipment with a Japanese supplier
WHERE DID IT (ALMOST) GO WRONG?
THE RIGHTS AND OBLIGATIONS
Rights and obligations

- Communication
  - E-agreement; confirmation; conditions; form ...
- Description of the goods and/or services
  - Conformity (detailed – general, ...)
  - Inspection – technical standards
  - Licenses and certificates (who – cost)
  - Warranties
  - Product liability – consumer liability
- Price
  - When (revision) – currency (conversion) - ...
  - Payment – cost – payment technique - ...
  - Securities (Retention of title - consignment)
Rights and obligations

- Delivery
  - Delay
  - Place
  - Insurance
  - Packaging and marking
  - Taking reception - installation
  - Documents

- Taxes

- Confidentiality

- ...
Contracting parties

<table>
<thead>
<tr>
<th>SELLER</th>
<th>CONTACT PERSON</th>
<th>BUYER</th>
<th>CONTACT PERSON</th>
</tr>
</thead>
<tbody>
<tr>
<td>Continental Export plc</td>
<td>Alan Bell</td>
<td>VERONESE spa</td>
<td>Stefano Romani</td>
</tr>
<tr>
<td>7 Smithfield Terrace</td>
<td>7 Smithfield Terrace</td>
<td>Via Borgia 15</td>
<td>Via Borgia 15</td>
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<tr>
<td>London EC34RP UK</td>
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<td>Torino</td>
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- Contract reference
- Identity
- Authority – presumed authority
- L/C – customer databases
<table>
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<tbody>
<tr>
<td>Name, corporate form and address</td>
<td>CONTACT PERSON</td>
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</table>
Evaluation of the client risk

☐ Client risk
  - ! the only due diligence is payment in full in advance
  - [http://www.kvk.nl/over-de-kvk/over-het-handelsregister/buitenlandse-handelsregisters/handelsregisters-in-europa/](http://www.kvk.nl/over-de-kvk/over-het-handelsregister/buitenlandse-handelsregisters/handelsregisters-in-europa/)

☐ Country risk
  - [http://www.cofacerating.com](http://www.cofacerating.com);
  - [http://www.doingbusiness.org](http://www.doingbusiness.org);
  - [http://www.transparency.org/](http://www.transparency.org/); ...

48
Description of goods or services

A-1 GOODS SOLD
DESCRIPTION OF THE GOODS

1500 English widgets; Model: classic
Size 13
Colour: dark blue

If there is insufficient space parties may use an annex:

- Detailed – general?
- E&OE
- Quality – quantity criteria
  - (CIF outturn weights – ca. ...)

49
<table>
<thead>
<tr>
<th>A-1</th>
<th>GOODS SOLD</th>
</tr>
</thead>
<tbody>
<tr>
<td>ITEM/PACKAGES</td>
<td>ITEM DESCRIPTION</td>
</tr>
</tbody>
</table>

*If there is insufficient space parties may use an annex*
Codes

- **Goods: HS (GS) – CN (GN) - Taric**
  - Harmonised Commodity Description Coding System (6 – HS) – Combined Nomenclature (8) – Taric (10) - user tariff (up to 22)
  - PRODCOM (Industrial products – statistics)
  - UN n° (dangerous goods)
  - ECCN n° (double use) - AL
  - IENECS N° (European Inventory of Existing Commercial Chemical Substances)
  - CASRN (Chemical Abstracts Service Registry Number)

- **Services: NACE**
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<thead>
<tr>
<th>Chapter</th>
<th>Tariff post</th>
<th>HS</th>
<th>CN</th>
<th>TARIC</th>
<th>1st additional TARIC</th>
<th>2nd additional TARIC</th>
<th>additional national code</th>
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<td></td>
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<tr>
<td>CN</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>TARIC</td>
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</tr>
</tbody>
</table>

BLEU Tariff
Conformity

• Quantity, quality, description, packing (documents)
  • Technical standards?
• At delivery
  = risk transfer
• Inspection: as soon as is practicable
• Notice (what – how – when)
  • Reasonable delay after discovery (1 month)
  • Within 2 years from date of delivery
1. **Goods**

1.1 Subject to the terms agreed in this contract, the Seller shall deliver the following good(s) (hereinafter: “the Goods”) to the Buyer.

1.2 Description of the Goods (details necessary to define/specify the Goods which are the object of the sale, including required quality, description, certificates, country of origin, other details).

1.3 Quantity of the Goods (including unit of measurement).

   1.3.1 Total quantity .................................................................

   1.3.2 Per delivery instalment ................................. (if appropriate)

   1.3.3 Tolerance percentage: Plus or minus ................. % (if appropriate)

1.4 Inspection of the Goods (where an inspection is required, specify, as appropriate, details of organization responsible for inspecting quality and/or quantity, place and date and/or period of inspection, responsibility for inspection costs).

1.5 Packaging.................................................................

1.6 Other specification............................................
### INSPECTION OF THE GOODS (ART. 3)

- [ ] Upon shipment
- [ ] Before shipment
- [ ] Surveyor
- [ ] Inspection fee on Seller’s account
- [ ] Inspection fee on Buyer’s account
- [ ] Other: ........................................

### PLACE OF EXAMINATION AT ARRIVAL (ART 11.1)

*TO BE COMPLETED ONLY IF THE PARTIES WISH TO MODIFY ART. 11.1.*

The goods delivered will have to be examined after their arrival at the following place:

- [ ] Place of business of the consignee to which the goods are sent or redirected
- [ ] Other: .................................................................
11. Inspection and examination

In international trade, parties often agree to have the goods inspected prior to shipment. In doing so, they avoid payment on the one hand (and the issue of a refund) and shipment (and the issue of a return shipment) on the other hand, should the goods not answer to specific features, stated in the inspection mandate.

The seller’s obligation to deliver goods in conformity however not only refers to the specific characteristics, verified in the preshipment inspection report, but to all the features of the goods delivered (quantity, quality, description, packaging, fitness for purpose …) (art. 35 CISG). The buyer must examine conformity of the goods regarding issues that have not already been inspected prior to shipment, either because no preshipment inspection was agreed upon, or because the issue fell out of the scope of the preshipment inspection, as soon as buyer can do so, i.e. when the goods arrive at buyer’s place of business (even if delivery may occur earlier). If the goods should be examined elsewhere (for instance because they are shipped directly to a customer), parties may change the place of examination by completing clause A-12. Clause A-12 would thus help the parties settle the situations covered by Art. 38 (2) (deferral of examination until arrival at final destination) and Art. 38(3) CISG (redirection in transit or re-dispatching by the buyer).
10. Warranty to consumers

Manufacturers of the type of goods for which this model contract is primarily intended typically grant a warranty (for repair and/or replacement as the case may be) to the ultimate purchaser (consumer) and may even be under a legal obligation to do so. In such a case, the manufacturer’s warranty to the final user may overlap with the obligations of the seller under the sale contract. In fact, where the goods are defective, the final purchaser may, in principle, make a claim against its seller under the sale contract or directly against the manufacturer under the warranty given by it or provided by law.

In these cases, it may be appropriate for the parties to the international sale contract specifically to agree that the buyer will co-operate with the seller, who might itself be the manufacturer, in managing the warranty, for example by confirming the date of the on-sale to the ultimate consumer, normally the commencement date of the manufacturer's warranty. The parties may also agree that the buyer will perform on the manufacturer's behalf certain obligations under the warranty, for example the duties of repair or replacement of non-conforming goods.

Elements of desirable co-operation between the parties are provided for in article 12 of Part B of the model contract. Parties may wish to stipulate for other aspects of co-operation by appropriate stipulation in A-17 of Part A of the model contract.
12. Non-infringement of intellectual property rights as element of conformity

In current international trade, intellectual property rights have become an increasingly complicated issue as goods delivered may incorporate parts, software applications and know-how from different suppliers that may be protected by registered trademarks, patents or other IP rights in one country but not in another. The matter becomes even more complex when some of these rights have been licenced for use but regarding only a limited number of territories or applications.

This makes it difficult for a seller to guarantee that its goods do not infringe any intellectual property right of third parties in any country.

The absence of a formal clause in the model contract regarding the seller’s liability for infringement of any intellectual property rights of third parties does not, however, absolve the seller from any liability in this regard as Article 42 of the CISG provides for a balanced solution that imposes on the seller the obligation, to some extent, to deliver goods free from third-party claims based on a patent or other industrial or intellectual property.

Under the Vienna Convention, and thus under the model contract, the seller is liable for third-party claims and rights based on industrial or intellectual property of which it knew or could not have been unaware at the time of the conclusion of the contract.

But the seller is not liable merely on the ground that there may exist a patent or other right based on industrial property anywhere in the world; rather, the seller can only be held liable if such a right exists or is claimed under the law of the State where the goods are to be used, whether by resale or otherwise or, if this State is not apparent from the contract, under the law of the State where the buyer has its place of business.
Contract Price

- Amount / When – Price revision clauses – conversion clauses
- Costs of international payments – exchange permits ...
- Cash discounts
- Currency - which
  - [http://www.unece.org/cefact/rec/rec09en.htm](http://www.unece.org/cefact/rec/rec09en.htm)
Price revision

Should any change occur in the cost of the relevant materials and/or wages during the performance of the contract, the agreed prices shall be subject to revision on the basis of the following formula:

\[ P1 = \frac{Po}{100} (a + b \frac{M1}{Mo} + c \frac{S1}{So}) \]

where:

\( P1 \) = final price of invoicing.

\( Po \) = initial price as stipulated in the contract and as prevailing at the date of ____________.

\( M1 \) = prices (or price indices) for (type of materials concerned) ___________ over the period ____________.

\( Mo \) = prices (or price indices) for the same materials at the date stipulated above for \( Po \).

\( S1 \) = wages (including social charges) or relevant indices in respect of ____________ (specify categories of labour and social charges) over the period ____________.

\( So \) = wages (including social charges) or relevant indices\(^8\) in respect of the same categories at the date stipulated above for \( Po \).

\( a, b, c, \) represent the contractually agreed percentage of the individual elements of the initial price, which adds up to 100. \((a + b + c = 100)\)

\( a = \) fixed proportion = ____________.

\( b = \) percentage proportion of materials = ____________.

\( c = \) percentage proportion of wages (including social charges) = ____________.
Delivery

Time of essence

Time is of the essence of this Agreement, both with regard to times, dates and periods specified in the Agreement and to any times, dates or periods that may be substituted for any of them by Agreement in writing between the parties.

A-4 TIME OF DELIVERY

Indicate here the date or period (e.g. week or month) at which or within which the Seller must perform his delivery obligations according to clause A.4 of the respective Incoterms. (see Introduction, § 6)

FOURTH WEEK OF MARCH 1998

- Time of essence - indicative
- UN/LOCODE
  - [Link to UN/LOCODE]
- FOB/FCA-contracts ➔ 5 days pre-advice
5. Shipment and delivery conditions

The parties are invited to choose the appropriate trade term\textsuperscript{3} under the Incoterms® 2010 rules\textsuperscript{4} and to specify the relevant place or port, and point within that place or port as precisely as possible. Although Part A of the model contract lists all current Incoterms® rules in A-3, the Task Force recommends that the parties should seriously consider avoiding the use of Incoterms® rules providing for delivery to or on a vessel, such as FAS, FOB, CFR and CIF. Manufactured goods are often shipped ‘door-to-door’ or handed over for carriage at terminals, whether within the port precincts or at an inland depot and the use of Incoterms® rules that provide for delivery ‘on the ship’ might consequently be inappropriate to the type of goods for which the model contract is intended. Moreover, manufactured goods are rarely sold or pledged in transit and consequently rarely require the use of a transferable transport document. Likewise, parties ought to think carefully before using, in conjunction with this model contract, the EXW and DDP Incoterms® 2010 rules as EXW is usually only suitable for domestic transactions and DDP may pose complications for a seller who, for example, may not be in a position to arrange import clearance in a foreign country.

Consequently, the Task Force recommends that the Incoterms® 2010 rules most appropriate for use with the model contract would normally be FCA, CPT, CIP, DAT or DAP. It is for this reason that these terms are listed first rather than in the order set out in Incoterms® 2010 rules. Contracting parties are also reminded that while the Incoterms® rules spell out the main duties of and the allocation of risk and costs as between sellers and buyers, they do not provide comprehensive answers to all the possible issues which may arise between the parties.
<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
<th>Place of Delivery/Port of Shipment</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXW</td>
<td>Ex Works</td>
<td>name place:</td>
</tr>
<tr>
<td>FCA</td>
<td>Free Carrier</td>
<td>name place:</td>
</tr>
<tr>
<td>CPT</td>
<td>Carriage Paid To</td>
<td>name place of destination:</td>
</tr>
<tr>
<td>CIP</td>
<td>Carriage And Insurance Paid To</td>
<td>name place of destination:</td>
</tr>
<tr>
<td>DAF</td>
<td>Delivered At Frontier</td>
<td>name place:</td>
</tr>
<tr>
<td>DDU</td>
<td>Delivered Duty Unpaid</td>
<td>name place of destination:</td>
</tr>
<tr>
<td>DDP</td>
<td>Delivered Duty Paid</td>
<td>name place of destination:</td>
</tr>
<tr>
<td>FAS</td>
<td>Free Alongside Ship</td>
<td>name port of shipment:</td>
</tr>
<tr>
<td>FOB</td>
<td>Free On Board</td>
<td>name port of shipment:</td>
</tr>
<tr>
<td>CFR</td>
<td>Cost And Freight</td>
<td>name port of destination:</td>
</tr>
<tr>
<td>CIF</td>
<td>Cost Insurance And Freight</td>
<td>name port of destination:</td>
</tr>
<tr>
<td>DES</td>
<td>Delivered Ex Ship</td>
<td>name port of destination:</td>
</tr>
<tr>
<td>DEQ</td>
<td>Delivered Ex Quay (duty paid)</td>
<td>name port of destination:</td>
</tr>
</tbody>
</table>

Other delivery terms

Other terms (according to Incoterms 1990): see Introduction, § 5)
Incoterms app.

http://incoterms.abh-ace.be

click to open.

**TIME OF DELIVERY**

Indicate here the date or period (e.g. week or month) at which or within which the Seller must perform its delivery obligations of the respective Incoterms® rule according to clause A.3 (‘Delivery Terms’) (see Introduction, § 6) and, when applicable, a date of shipment (see Introduction, §7).

**CANCELLATION DATE**

*TO BE COMPLETED ONLY IF THE PARTIES WISH TO MODIFY ARTICLE 10*

If the goods are not delivered for any reason whatsoever (including force majeure) by (date) ______________ the Buyer will be entitled to declare the contract avoided immediately by notification to the seller.
Payment

Payment Conditions (Art. 5)

- Payment on open account (art. 5.1)
  - Time for payment (if different from art. 5.1): 45 days
  - Open account backed by demand guarantee or

- Payment in advance (art. 5.2):
  - Date (if different from art. 5.2):

- Documentary Collection (art. 5.5)
  - D/P Documents against payment

- Irrevocable documentary credit (art. 5.3)
  - Place of issue (if applicable): TORINO, ITALY
  - Credit available:
    - By payment at sight
    - By deferred payment at: 30 days
    - By acceptance of drafts at: 30 days
    - By negotiation
  - Date on which the documentary credit must be notified to seller:

Seller’s Bank Details

IBAN⁹/bank account number

BIC/Swift code¹⁰
Documentary Collections:

1. Exporter/Drawer
2. Importer/DRAWEE
3. Remitting Bank
4. Presenting/Collecting Bank
5. Documents

GOODS
Letter of credit: issuance

1. Contract
2. Importer applies for a letter of credit.
3. Request of notification & possibly confirmation of the letter of credit.
Letter of credit

Exporter/Beneficiary

GOODS

Importer/Applicant

Issuing bank

Confirming bank

Advising bank
<table>
<thead>
<tr>
<th>A-8</th>
<th>DOCUMENTS (ART. 9)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Indicate here documents to be provided by Seller. Parties are advised to check the Incoterms® 2010 rule they have selected under A-3 of these Specific Conditions. As concerns transport documents, see also Introduction, § 8)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Commercial Invoice</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Packing list</td>
</tr>
<tr>
<td></td>
<td>Certificate of origin</td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
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<td></td>
<td></td>
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<tr>
<td></td>
<td>Transport documents:</td>
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<td></td>
<td></td>
</tr>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Insurance document:</td>
</tr>
<tr>
<td></td>
<td>Other: _____________</td>
</tr>
</tbody>
</table>
Incoterms® rules and documents at expense/risk of the seller (+ obligation to assist)

EXW  FCA A4a  FCA A4b  FAS  FOB  CFR  CIF  CPT  CIP  DAP  DAT  DAP  DDP

- Proof of delivery (CMR, ...) + export license + export declaration + EAD
- Export invoice + packing list
- FCR
- + receipt on quay
- + B/L (+ insurance certificate)
- + ISPM 15 + D/O + CMR + summary declaration + T1
- + import invoice + import license + CoO + import declaration + certificate of conformity + VAT-nr

Diagram:

- Carrier
- CY/CFS
- Export invoice + packing list
- + receipt on quay
- + B/L (+ insurance certificate)
Retention of Title

<table>
<thead>
<tr>
<th>A-6</th>
<th>RETENTION OF TITLE (ART. 7)</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐</td>
<td>YES</td>
</tr>
<tr>
<td>☐</td>
<td>NO</td>
</tr>
</tbody>
</table>

- **Scope**
  - Simple – extended – transferred
  - Capital goods – Consumption goods
- **Risk**
- **Consequences**
- **ROT vs. consignment sales?**
Sanctions

- Damages
  - + lost profit
  - Lawyer’s fees...
- Dissolution
- Price reduction
- Supplementary delay

- Penal Clause
- Force Majeure
  - Seller – Buyer
- Hardship

---

**Article 74**

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.
Art. 13  Force majeure

13.1  A party is not liable for a failure to perform any of its obligations in so far as it proves
   (a)  that the failure was due to an impediment beyond its control, and
   (b)  that it could not reasonably be expected to have taken the impediment and its effects upon its ability to perform into account at the time of the conclusion of the contract, and
   (c)  that it could not reasonably have avoided or overcome the impediment or its effects.

13.2  A party seeking relief shall, as soon as practicable after the impediment and its effects upon that party's ability to perform become known to it, give notice to the other party of such impediment and its effects on his ability to perform. Notice shall also be given when the ground of relief ceases.

     Failure to give either notice makes the party thus failing liable in damages for loss which otherwise could have been avoided.

13.3  Without prejudice to article 10.2, a ground of relief under this clause relieves the party failing to perform from liability in damages, from penalties and other contractual sanctions, from the duty to pay interest on money owing as long as and to the extent that the ground subsists.

13.4  If the grounds of relief subsist for more than three (3) months, either party shall be entitled to declare the contract to be avoided without notice.
### Cancellation Date

*TO BE COMPLETED ONLY IF THE PARTIES WISH TO MODIFY ARTICLE 10*

If the goods are not delivered for any reason whatsoever (including force majeure) by (date) ______ the Buyer will be entitled to declare the contract avoided immediately by notification to the seller.

In case of termination for delay, Seller's liability for damages for delay is limited to ___% of the price of the non-delivered goods.

### Table: Liability for Delay

<table>
<thead>
<tr>
<th>A-10</th>
<th>LIABILITY FOR DELAY (ART. 10.1, 10.4 AND 11.3)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>TO BE COMPLETED ONLY IF THE PARTIES WISH TO MODIFY ART. 10.1, 10.4 OR 11.3.</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>A-10</th>
<th>LIABILITY FOR DELAY (ART. 10.2)</th>
<th>A-11</th>
<th>LIMITATION OF LIABILITY FOR DELAY (ART. 10.4)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>TO BE COMPLETED ONLY IF THE PARTIES WISH TO MODIFY ART. 10.2.</em></td>
<td></td>
<td><em>TO BE COMPLETED ONLY IF THE PARTIES WISH TO MODIFY ART. 10.4.</em></td>
</tr>
</tbody>
</table>

Liquidated damages for delay in delivery shall be:

- ____ % (of price of delayed goods) per week, with a maximum of ____ % (of price of delayed goods);

In case of avoidance for delay, Seller's liability for damages for delay is limited to ____% of the price of the non-delivered goods.
### A-13 MAXIMUM DELAY FOR NOTIFICATION OF NON-CONFORMITY (ART 11.1)

*TO BE COMPLETED ONLY IF THE PARTIES WISH TO MODIFY ART. 11.1*

Defects must be notified to the Seller immediately upon discovery or as soon as they ought to have been discovered, but not later than … months after arrival of the goods. This shall not affect the periods of limitation (art. 11.6).

### A-14 LIMITATION OF LIABILITY FOR NON-CONFORMITY (ART 11.5)

*TO BE COMPLETED ONLY IF THE PARTIES WISH TO MODIFY ART. 11.5 LAST SENTENCE.*

Seller’s liability for damages arising from lack of conformity of the goods shall be:

limited to proven loss (including consequential loss, loss of profit, etc.) not exceeding ____% of the contract price.

OR

_________________________ (specify amount)
ENFORCING THE CONTRACT
## Dispute Settlement

<table>
<thead>
<tr>
<th>A-16</th>
<th>RESOLUTION OF DISPUTES (ART.14)</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ ARBITRATION</td>
<td>☐ LITIGATION (ordinary courts)</td>
</tr>
<tr>
<td></td>
<td>In case of dispute the courts of ______ (place),</td>
</tr>
<tr>
<td></td>
<td>shall have exclusive jurisdiction.</td>
</tr>
</tbody>
</table>

- ICC (According to art. 14.2)
- Other __________ (specify)

Place of arbitration ________________
Language of the arbitration ________________
Number of arbitrators ________________
Dealing with Disputes

- Negotiation
- Conciliation / Mediation
- Arbitration
- Litigation

ADR
### Dispute Settlement

<table>
<thead>
<tr>
<th>Negotiations</th>
<th>ADR - Mediation</th>
<th>Binding third party advice</th>
<th>Arbitration</th>
<th>Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Third party involvement</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Decision making</td>
<td>Parties</td>
<td>Parties</td>
<td>Third party</td>
<td>Third party</td>
</tr>
<tr>
<td></td>
<td>Dispute review board</td>
<td>Dispute adjudication board</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Enforceability</td>
<td>Voluntary</td>
<td>Voluntary</td>
<td>Voluntary</td>
<td>Forced execution after exequatur</td>
</tr>
<tr>
<td>Debate</td>
<td>Yes</td>
<td>Yes and no</td>
<td>Yes (and no)</td>
<td>Yes</td>
</tr>
<tr>
<td>Proof finding</td>
<td>Ad hoc</td>
<td>Ad hoc</td>
<td>Ad hoc</td>
<td>Flexible rules</td>
</tr>
<tr>
<td>Guilt question</td>
<td>Secondary</td>
<td>Tertiary</td>
<td>Secondary</td>
<td>Primary</td>
</tr>
<tr>
<td>Truth finding</td>
<td>Secondary</td>
<td>Tertiary</td>
<td>Secondary</td>
<td>Primary</td>
</tr>
<tr>
<td>Contractual basis</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Litigation - EU

- EU:
  - Defending party in the EU
  - Regulation (EC) N°44/2001 (Brussels I); March 1, 2002
  - 10.01.2015: Regulation (EU) N°1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

- Defending party outside the EU
  - National law (L. 16/07/2004)/ treaty
Litigation - EU

☐ principle:
  - Freedom – writing
  - Presumed exclusivity

☐ no choice made
  - Defending party + Place of execution
  - Sale of goods: place of delivery
    - Incoterms (ECJ 25 February 2010, Case C-381/08, Car Trim)
  - Services: place service

☐ LITIGATION (ordinary courts)

In case of dispute the courts of ________ (place),
shall have exclusive jurisdiction.
In case of dispute the courts of (place), ________ (country) shall have jurisdiction. Nevertheless the Seller/Buyer may bring any dispute before any other court that has competence according to the applicable rules of procedure.
Arbitration

- What?
  - Case heard by arbitrator / panel of arbitrators who have authority to decide the case
  - Private court
- Writing – exclusive
- Arbitration clause – Arbitration agreement
- Ad hoc arbitration – Institutional
Arbitration – Advantages / Disadvantages

- quick
- specialists
- secret, informal
- language, law
- independent, non-conflictual
- 137 countries

- no appeal?
- cost?
- provisional measures?
- Exequatur enforcement
- no jurisprudence
- exclusive competences

137 countries
WHAT ABOUT ISSUES
THE PARTIES
DIDN’T/COULDN’T
AGREE ABOUT?
15. **Applicable law and guiding principles**

15.1 Questions relating to this contract that are not settled by the provisions contained in the contract itself shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention of 1980, hereafter referred to as CISG).

Questions not covered by the CISG shall be governed by the UNIDROIT Principles of International Commercial Contracts (hereafter referred to as UNIDROIT Principles), and to the extent that such questions are not covered by the UNIDROIT Principles, by reference to [specify the relevant national law by choosing one of the following options:]

- The applicable national law of the country where the Seller has his place of business, or
- The applicable national law of the country where the Buyer has his place of business, or
- The applicable national law of a third country (specify the country).]

15.2 This contract shall be performed in a spirit of good faith and fair dealing.

<table>
<thead>
<tr>
<th>A-15</th>
<th>APPLICABLE LAW (ART. 1.2)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Any questions not covered by CISG will be governed by the law of __________ (country).</td>
</tr>
</tbody>
</table>
CRITERIA FOR CHOOSING THE APPLICABLE LAW
Considerations

1. Maximum freedom of contract
2. Clearly defined and easily accessible content for the parties and for litigation purposes
   (1) to make a trustworthy risk analysis
   (2) to gather experience (advantages of scale)
3. Efficient application
4. Acceptable as ‘party-neutral’
   □ Not of ‘one of the parties’

- Drafted by UNCITRAL and Adopted in 1980
- Vienna Sales Convention
- As of 2014, 80 members (U.S., China, Germany, Japan etc.)

- A Treaty
  - Eliminating the Conflicts of Law
    - Chinese law of sale = Belgian law of sale
  - Supremacy → Trumping national law
  - Economies of scale
### Rome I

<table>
<thead>
<tr>
<th>Contract Type</th>
<th>Applicable Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contract of sale of goods</td>
<td>Law of the country where the seller has his habitual residence</td>
</tr>
<tr>
<td>Contract for the provision of services</td>
<td>Law of the country where the service provider has his habitual residence</td>
</tr>
<tr>
<td>Contract relating to a right in rem in immovable property or to a tenancy of immovable property</td>
<td>Law of the country where the property is situated (exception short time leases)</td>
</tr>
<tr>
<td>Franchise contract</td>
<td>Law of the country where the franchisee has his habitual residence</td>
</tr>
<tr>
<td>Distribution contract</td>
<td>Law of the country where the distributor has his habitual residence</td>
</tr>
<tr>
<td>Contract for the sale of goods by auction</td>
<td>Law of the country where the auction takes place</td>
</tr>
<tr>
<td>Contract for the carriage of goods</td>
<td>Law of the country of habitual residence of the carrier,</td>
</tr>
<tr>
<td></td>
<td>provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.</td>
</tr>
</tbody>
</table>
Compliance clause (Anti-Bribery and Corruption)

1. Supplier must not violate any Applicable Anti-Bribery Law.
2. Supplier has and must at all times implement adequate procedures designed to prevent it or any Associated Person from engaging in any activity which would constitute an offence under the Bribery Act if it were carried out in the UK, or violate any Applicable Anti-Bribery Law.
3. Supplier represents that, in connection with this Agreement, no improper financial or other advantage has been, will be or is agreed to be given to any person (whether working for or engaged by the Barclays Group or any third party) by or on behalf of Supplier or its Associated Persons.
4. Breach of any of the provisions in this clause 10 or of any Applicable Anti-Bribery Law is a material breach of this Agreement for the purpose of clause 18 and, without prejudice to any other right, relief or remedy, entitles Barclays to terminate this Agreement immediately.

Paragraph 1

Each Party hereby undertakes that, at the date of the entering into force of the Contract, itself, its directors, officers or employees have not offered, promised, given, authorized, solicited or accepted any undue pecuniary or other advantage of any kind (or implied that they will or might do any such thing at any time in the future) in any way connected with the Contract and that it has taken reasonable measures to prevent subcontractors, agents or any other third parties, subject to its control or determining influence, from doing so.

Paragraph 2

The Parties agree that, at all times in connection with and throughout the course of the Contract and thereafter, they will comply with and that they will take reasonable measures to ensure that their subcontractors, agents or other third parties, subject to their control or determining influence, will comply with Part I of the ICC Rules on Combating Corruption 2011, which is hereby incorporated by reference into the Contract, as if written out in the Contract in full.

Paragraph 3

If a Party, as a result of the exercise of a contractually-provided audit right, if any, of the other Party's accounting books and financial records, or otherwise, brings evidence that the latter Party has been engaging in material or several repeated breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011, it will notify the latter Party accordingly and require such Party to take the necessary remedial action in a reasonable time and to inform it about such action. If the latter Party fails to take the necessary remedial action, or if such remedial action is not possible, it may invoke a defence by proving that by the time the evidence of breach(es) had arisen, it had put into place adequate anti-corruption preventive measures, as described in Article 10 of the ICC Rules on Combating Corruption 2011, adapted to its particular circumstances and capable of detecting corruption and of promoting a culture of integrity in its organization. If no remedial action is taken or, as the case may be, the defence is not effectively invoked, the first Party may, at its discretion, either suspend the Contract or terminate it, it being understood that all amounts contractually due at the time of suspension or termination of the Contract will remain payable, as far as permitted by applicable law.

Paragraph 4

Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the Contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with this ICC Anti-corruption Clause.