

DRAFTING A COMMERCIAL CONTRACT

The general advice when drafting a commercial contract is to draft a written contract that is as complete and as precise as possible. The reasons for this are twofold: firstly, there is clear proof of the written terms; and secondly, it reduces the risk of legal disputes. Disputes may be lost in court. They can also be expensive, time consuming and detrimental to the reputation of a company.

A typical structure of an international commercial contract would comprise the following:

- a heading setting out the type of contract
- the names and addresses of the parties
- a description of the goods to be delivered or services to be provided, including quality, quantity, time, etc.
- fixation of price and details of payment
- duties and rights of the parties, e.g. warranty, payment of tax/duty, etc.
- limitation of liability
- remedies in case of breach of duties
- a confidentiality clause
- the duration/termination of the contract
- a force majeure clause setting out circumstances excusing non-fulfilment in case of natural disasters, war, etc.
- a clause on the governing law of the contract
- an arbitration clause
- signatures of the parties and date of signing
- appendices containing definitions, timetables, etc.

Points to remember

- 1 For the terms to be clear, the process of drafting is not the time to negotiate matters of principle. This should be done before drafting commences.
- 2 Clarity and certainty of expression are very important, as any ambiguity of expression is often construed by a court against the person who is trying to rely on it, particularly if he is the person who has drafted the clause. This is known as the contra preferendum rule.
- 3 Never express the same idea in two different ways in the contract; it is always better to repeat the same sentence. For example, do not use the sentence 'to the best of the vendor's knowledge and belief' in one place and 'to the best of the vendor's belief' in another. Typical sources of mistakes in commercial contracts can be as basic as different date formats (for example 3/4/2010 may be interpreted as 3rd April 2010 or 4th March 2010) or when mentioning currencies (for example, \$ may be USD or AUD).
- 4 The use of standard clauses wherever possible is important, as such clauses are familiar to both sides and save valuable time, and are likely to cover the important points. However, never draft in isolation, and make sure that the standard clauses actually cover what is intended by the parties.
- 5 Also be aware of the law which can affect the contract. There are numerous sets of universal rules on contracts covering different aspects of international commerce and created by different institutions. The most important of these are the rules under the UN Convention on Contracts for the International Sale of Goods 1980 (CISG), the UNIDROIT Principles of International Commercial Contracts 2004 and the ICC Incoterms 2000. The application of these rules depends on several factors: the set of

rules in question, whether their application is automatic or determined by the parties' agreement on their application, and whether these rules are available in all states.