

# Services agreements Q&A: Ireland

by Adam Finlay and Catherine Walsh, *McCann FitzGerald*

Country Q&A | Law stated as at 31-Dec-2019 | Ireland

---

Ireland specific information concerning the key legal and commercial issues to be considered when drafting a services contract.

This Q&A provides country-specific commentary on *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border*.

This Q&A forms part of *Cross-border commercial transactions*.

---

## General contract law framework

1. Which law(s) in your jurisdiction govern services contracts?

In Ireland, the following govern service contracts:

- Common law of contract.
- Supply of Goods and Supply of Services Act 1980 (SGSSA).

Where the recipient of services acts as a consumer, the following are also relevant:

- Unfair Terms in Consumer Contracts Regulations 1995 (as amended).
- Distance Selling Regulations (S.I. No. 484 of 2013).
- Consumer Protection Act 2007.

2. Does national law require that special notice be given of any contract terms for them to be incorporated in a services contract?

The general rule is that the terms of a contract must be provided before the contract is agreed, or at the point it is agreed.

Special notice of terms is required to be given if a party is seeking to rely on an unusual or onerous clause. In those circumstances, the party seeking to rely on the clause will have to show that they took special measures to bring it to the attention of the other side (see *Carroll v an Post National Lottery Co* [1996] 1 IR 443). The courts may look at how common the clause is in the sector when determining whether the clause is onerous.

## Incorporation of standard terms of business

3. How can a supplier or customer incorporate its standard terms of business into its service contracts?

Standard terms can be incorporated by signature, reasonable notice or by a course of dealing. Terms can be incorporated by reference and do not necessarily have to be set out in full in the contractual documents. However, there are limitations on the ability of parties to incorporate terms by reference. For example, it has been held that a delivery docket stating that terms and conditions were available "on request" was insufficient to incorporate them into a contract by notice or course of dealing in circumstances where:

- The counterparty had never received a copy of the terms and conditions.
- They were not identified in any shape or form by reference to any known industry-wide terms and conditions (see *Noreside Construction v Irish Asphalt* [2014] IESC 68).

When a buyer and seller argue about whose terms and conditions apply ("battle of the forms"), the Irish courts will look at which party made the offer and which accepted, just as it would for analysing the contract.

## Implied terms

4. Does national law imply any terms into business-to-business contracts for the supply of services?

Section 39 of the SGSSA implies the following terms in every contract for a supply of services where the supplier is acting in the course of a business:

- The supplier has the necessary skill to render the service.
- The supplier will supply the service with due skill, care and diligence.
- Where materials are used, they will be sound and reasonably fit for the purpose for which they are required.
- Where the goods are supplied under contract, they will be of merchantable quality (that is, they will be fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances (*section 14(3), Sale of Goods Act 1893 (as amended) (1893 Act)*)).

The SGSSA extends the common law principles in relation to misrepresentation in connection with the sale of goods and supply of services. Section 45 of the SGSSA entitles the buyer to a statutory right of damages for misrepresentation in circumstances where they entered into a contract after a misrepresentation had been made and suffered a loss as a result. The liability arises even if the misrepresentation was not made fraudulently by the trader, unless the trader proves that it has reasonable grounds to believe and did believe up to the time the contract was made that the representation was true.

In a commercial context, section 45 of the SGSSA will usually be disapplied by an entire agreement clause stating that prior oral statements do not form part of the contract.

5. Can implied terms be excluded by express terms in the contract (see *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 3 and clause 7.9*)? Are there any limitations on such exclusions?

Any term implied under section 39 of the SGSSA may be excluded or varied by:

- An express term of the contract.
- The course of dealing between the parties.
- Usage, if the usage is such to bind the parties to the contract.

(*Section 40, SGSSA.*)

An express term will not negate a term implied under the SGSSA unless it can be shown that it is inconsistent with that implied term.

If the service is being provided to a consumer, it must be shown that an express term which seeks to limit liability for a breach of a term implied under section 39 of SGSSA is fair and reasonable and has been specifically brought to the consumer's attention (see *McCarthy v JWT [1991] ILRM 99*).

## Remedies for breach of terms

6. What remedies are available for a breach of any express or implied terms of the agreement by the other party?

### Remedies available to the supplier

**Breach of express terms.** The liability for breaching an express term of a contract varies depending on the nature of that term, namely whether it is a condition, warranty or an innominate term. The main remedy for breach of contract is to sue for damages.

A condition is a fundamental term of the contract that goes to its root. Breach of a condition is known as a repudiatory breach and the innocent party is entitled to either:

- Terminate the contract (irrespective of whether it is prejudiced or not by the breach), not pay the contractual amount and/or sue for damages.
- Affirm the breach and claim for breach of contract.

A warranty is a statement about a factual matter which one party makes in the contract. Breach of a warranty does not entitle the innocent party to terminate the contract or treat it as discharged; but it gives the affected party the right to sue for damages and other remedies consistent with the contract remaining in place.

A term is considered to be an innominate term if the remedy for its breach depends on the effect of the breach at the time the breach occurred. A term is likely to be considered to be an innominate term if the contract was silent as to the nature of the term at the time the contract was formed because the consequences of the breach vary from trivial to serious. If the effect of the breach is to substantially deprive the innocent party of the whole benefit of the contract then it will be a serious breach of the innominate term and the remedy will be for breach of condition. If this is not the case, then the remedy will be for breach of warranty.

**Breach of implied terms.** Statutory terms are generally implied in favour of the customer, but if any terms were implied in favour of the supplier by the court, the remedy would depend on the classification of the term as a condition, warranty or innominate term, as in the case of express terms.

### Remedies available to the customer

**Breach of express terms.** The same remedies above are available to the customer.

**Breach of implied terms.** Breach of an implied term is a breach of the contract for which the consumer will have both a statutory and common law remedy. The SGSSA implies a number of terms into a contract for the supply of services (see [Question 5](#)). The remedies available for breach of such an implied term will depend on whether that term is a condition, warranty or innominate term. While the implied terms in respect of goods are treated as conditions

under Irish law, the implied terms under section 39 of the SGSSA are treated as innominate terms. This is with the following exceptions:

- Warranties as to implied encumbrances and charges in respect of the goods provided for in section 12 of the 1893.
- Warranties with respect to spare parts and servicing in section 12 of the SGSSA.

Therefore, if there is a serious breach of an implied innominate term, the remedy will be treated as a condition and if there is a more trivial breach it will be treated as a warranty.

## Supplier obligations

7. Does national law imply any supplier obligations into a supply of services agreement? For example, the following terms or please provide alternative wording:

- The supplier will carry out services with reasonable care and skill?
- The supplier will comply with all reasonable instructions of the customer?
- The supplier will carry out the services within a reasonable time, where no dates for performance have been stated in the contract?

### Reasonable care and skill

See [Question 4](#).

### Comply with reasonable instructions

There are no statutory implied terms relating to reasonable instructions in Irish law.

### Carry out services within a reasonable time

Although section 29 of the 1893 Act implies a term relating to delivery within a reasonable time into contracts for the sale of goods, there is no equivalent implied term applicable to service agreements.

8. Are there any other supplier obligations that would be usual to include in a services agreement in your jurisdiction?

There are no other supplier obligations that would be usual to include in a services agreement in your jurisdiction.

9. What is provided by law in relation to delivery of the services where the agreement is silent?

Although there are no statutory implied terms relating to delivery of services, a term relating to the delivery of services may be implied into the contract at common law. For example, a term may be implied based on the presumed intention of the parties, even though the term was not expressly agreed on by the parties (this is known as the "officious bystander test", see *Moorcock case (1889) 14 P.D. 64*). A term may also be implied at common law based on the nature of the contract. In commercial contracts, the courts will often apply the "business efficacy test", that is, they will imply a term into a contract to give it the business efficacy both parties must have intended it to have.

A term may also be implied into the contract by custom, if the following non-exhaustive list of requirements are fulfilled (see *Noreside Construction Ltd v Irish Asphalt Ltd [2014] IESC 68*):

- The custom must have acquired such notoriety that the parties must be taken to have known of it and intended it should form part of the contract.
- The custom must be certain.
- The custom must be reasonable, and the more unreasonable it is the harder it will be to prove that it exists.
- Until the courts take judicial notice of a custom it must be proved by clear and convincing evidence.
- The custom must not be inconsistent with the express contract.

10. Is "time is of the essence" for performance recognised in your jurisdiction? If not, what alternative wording could be used for the first sentence of *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 3.2*?

The concept of "time is of the essence" is recognised in Ireland. Time is not generally considered to be of the essence unless a contract expressly makes it so. However, where a contract does not stipulate whether or not time is of the essence, the court will consider whether there is anything in the circumstances that would make it inequitable to treat time as a non-essential element of the contract.

Where a clause making "time of the essence" is included in a contract, the Irish courts have strictly interpreted clauses of this nature. It has been held in the past that any failure to perform the relevant obligation within the time stipulated in a "time of the essence" clause can render a contract voidable (for example, see *O'Connor v Coady* [2004] 3 IR 271).

11. Is the concept of using "reasonable endeavours" recognised in your jurisdiction (see *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 3.2(b)*)? If not is there an alternative concept or wording that can be used that is more usual?

The concept of a contractual obligation to use "reasonable endeavours" has been recognised, although not defined, by the Irish courts.

In terms of the hierarchy between the steps required to be taken by a party subject to an "endeavours" clause, the Irish courts have recognised that the concept of "best endeavours" requires a higher standard than a "reasonable endeavours" obligation (see *Drocarne Ltd v Seamus Murphy Properties & Developments Ltd* [2008] IEHC 99).

Based on UK case law, best endeavours, while not an absolute obligation, is generally understood to include steps which a prudent, determined and reasonable obligee, acting in their own interests and desiring to achieve that result, would take. However, the steps that are actually required will be context-driven and specific to the particular contract.

12. Are there any compliance obligations on either party under your local laws in relation to the services agreement?

A service provider may have anti-money laundering (AML) or know your customer (KYC) requirements if it is deemed to be a "designated person" under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, as amended. A service provider may also need to have a licence from a regulatory body to carry out specified services, such as broadcasting or providing financial services.

Under the Criminal Justice (Corruption Offences) Act 2018 it is a strict liability offence where a body corporate fails to prevent corruption by one of its officers, employees or agents. It is a defence for a body corporate where it can prove that it took all reasonable steps and exercised due diligence to avoid the commission of the offence. This Act applies not only where one or more of the acts comprising the offence were committed in the state, on board an Irish ship or on an aircraft registered in Ireland, but also regarding actions outside the state where the person concerned is an Irish official acting in their capacity, an Irish citizen or any other body corporate established under Irish law.

13. What health and safety rules and regulations might the supplier need to be aware of when performing the services in your jurisdiction? What health and safety requirements may need to be considered where the services are being provided at any customer premises located in your jurisdiction?

## General health & safety legislation

The main Irish legislation in relation to health and safety is the Safety, Health and Welfare at Work Act 2005 (as amended) (2005 Act). The 2005 Act sets out the general obligation on employers to:

- Ensure the safety, health and welfare at work of its employees.
- Provide information to its employees on matters relating to safety, health and welfare at work.
- Provide instruction, training and supervision to its employees in a manner that is appropriate, and which uses language which is reasonably likely to be understood by the employees concerned.

Other generally relevant (as opposed to sector-specific) acts and regulations include the:

- Safety, Health and Welfare at Work (General Application) Regulations 2007.
- Terms of Employment (Information) Acts 1994 and 2012.
- Employment Equality Acts 1998 to 2015.

## Health and safety legislation where services performed at customer premises

Health and safety legislation applies where services are performed at a customer's premises as employers must do whatever is "reasonable practicable" to ensure the safety, health and welfare of their employees (*section 8(1), 2005 Act*).

14. Could the parties also include service levels in the agreement? If so, could the parties make provision for service credits or liquidated damages to the benefit of the customer if the service levels are not achieved?

## Service levels

Service levels can be included in an agreement.

## Service credits

Service credits can be included in an agreement, but parties must ensure that the provisions make a genuine pre-estimate of the innocent party's loss if the relevant service levels are not met. Otherwise, it may be deemed to be a penalty clause and therefore unenforceable.

## Liquidated damages

Liquidated damages are enforceable under Irish law provided that they are based on a genuine pre-estimate of the innocent party's loss. If such a provision is held to be a penalty clause, it will be unenforceable. The Irish courts have adopted the principles from the House of Lords decision in *Dunlop Pneumatic Tyre Co v New Garage Motor Co Ltd* [1915] AC 79. (see *Pat O'Donnell & Co Ltd v Truck and Machinery Sales Ltd* [1998] 4 IR 191; *Launceston Property Finance Ltd v Burke* [2017] IR 798) in relation to penalty clauses:

- A presumption that a clause is a penalty when a single lump sum is payable by way of compensation on the occurrence of one or more or all of several events, where the nature of the damage could be different for each event.
- The difficulty of precise pre-estimation of loss will not be a bar to a clause being a valid liquidated damages clause. It may be difficult to calculate the financial consequences of a breach.
- The essence of a penalty is that the payment is so large as to punish the paying party whereas a liquidated damages clause is a genuine pre-estimate of loss.
- The nature of the clause depends on the circumstances of each contract at the time of formation (not at the time of breach).
- If the sum is extravagant and unconscionable, it will be a penalty clause.
- The description of the clause is irrelevant.

The UK Supreme Court decisions in *Cavendish Square Holding BV v Makdessi* and *Parking Eye Ltd v Beavis (Consumers' Association intervening)* have been considered in recent Irish case law but have not been expressly followed. However, the Irish Supreme Court in June 2019 granted an order for leave to appeal in *Sheehan v Breccia* [2019] IESCDET 118 on the basis that the traditional penalty rule principles in *Dunlop* should be reconsidered in light of the refinement of the rule by the UK Supreme Court in *Cavendish*.

## Customer obligations

15. Does national law imply any obligations on the customer in a services agreement (see *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier)*): Cross-

*border: clause 4 and Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 4)?*

Irish law does not imply any obligations on the customer in a services agreement.

16. In your jurisdiction, if the supplier is prevented or delayed from performing its obligations due to the customer, is the supplier permitted to exclude any liability to the customer that arises as a result and recover certain sums as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 4.2?*

It is permissible under Irish law to exclude liability to the customer where the supplier is prevented or delayed from performing its obligations due to the customer. It is also permissible to provide that a sum may be recovered from the customer in such circumstances, as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 4.2.*

17. Can the customer restrict the supplier's ability to excuse poor performance by referring to a long-past failure by the customer as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 4.2?*

It is permissible under Irish law to agree on the instances in which the supplier will be relieved of liability on the part of the customer to perform its obligations as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 4.2.*

## **Deliverables**

18. In your jurisdiction, are any terms implied by law in relation to the quality and fitness for purpose of any goods:

- Transferred to the customer by the supplier which are not the Deliverables?
- Which are developed as part of the services (that is, the Deliverables)?

## Implied terms as to quality and fitness for purpose for goods:

### Transferred to the customer which are not the Deliverables

The 1893 Act and the SGSSA imply the following terms as to quality and fitness in relation to the sale of goods:

- **Merchantable quality (section 14(2), 1893 Act).** It is an implied condition that the goods will be of merchantable quality unless:
  - defects have been specifically brought to the buyer's attention before the contract has been made;
  - buyer examines the goods before the contract has been made as regards defects which that examination ought to have revealed.
- **Fit for purpose (section 14(4), 1893 Act).** Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller a particular purpose for which the goods are being purchased, there is an implied condition that the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied. This condition is not implied where the circumstances show that the buyer does not rely, or that it is unreasonable for the buyer to rely, on the seller's skill or judgement.
- **Spare parts and servicing (section 12, SGSSA).** There is an implied warranty that spare parts and an adequate after sale service will be made available by the seller in such circumstances as are stated in an offer, description or advertisement by the seller on behalf of the manufacturer or on its own behalf and for such period as is stated. If no period is stated, then it must be for a reasonable period.
- **Sale of motor vehicles (section 13, SGSSA).** Subject to certain exclusions, in every contract for the sale of a motor vehicle (except where the buyer is a person whose business it is to deal in motor vehicles) there is an implied condition that at the time the vehicle is delivered under the contract it is free from any defect which would render it a danger to the public, including persons travelling in the vehicle.

### Deliverables

The above implied terms will only apply to a contract for the sale of goods. Whether they apply to Deliverables will turn on whether the Deliverables (that is, the documents, products and materials developed by the supplier in relation to the services) can properly be classified as goods (that is, tangible items) or are more appropriately classified as services. Goods and services are not clearly defined in the legislation, but if the products and materials are physical items, then the above terms are likely to apply.

19. Does *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 3.3(h)* extend the implied terms as to quality of the Deliverables under the laws of your jurisdiction?

These provisions go beyond the terms implied at law, and therefore, to the extent that the implied terms apply to the Deliverables, they extend the implied terms as to quality of Deliverables implied under the law of Ireland.

20. In your jurisdiction, are there any terms implied by law in relation to title in the Deliverables and any other goods that are provided to the customer by the supplier under the services agreement (see *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 5.1*)?

## Implied terms relating to title in the Deliverables

The implied terms below will only apply to a contract for the sale of goods. The extent to which they apply to the Deliverables will depend on how "Deliverables" is defined and how the contract is construed and interpreted.

## Implied terms relating to title in other goods transferred

**Title.** Section 12(1) of the 1893 Act implies the condition that the seller has the right to sell the goods and an implied warranty that the goods are free from any charge or encumbrance not disclosed to the buyer and that the buyer will enjoy quiet possession of the goods. This implied term cannot be exempted where the buyer acts as a consumer and can only be exempted in business-to-business contracts where the exemption is fair and reasonable (*section 55(4), 1893 Act*).

**Passing of title.** Title generally passes once payment has been made in full for the goods. Section 20 of the 1893 Act provides that unless otherwise agreed between the parties, the goods remain at the supplier's risk until title in the goods has been transferred. Where delivery has been delayed through the fault of either the buyer or seller, the goods are at the risk of the party at fault as regards to any loss which may not have occurred but for such fault.

These provisions do not apply where the seller dispatches the goods to the buyer. Instead, the goods remain at the seller's risk until the buyer, or person indicated by the buyer for this purpose, acquires the physical possession of the goods. This provision is also excluded in the case where the goods are delivered to a carrier who was commissioned by the buyer for the purpose of carrying the goods and was not proposed by the seller. In this case, the goods are at the buyer's risk on delivery to the carrier.

21. Is *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer)*: *Cross-border: clause 5.1* stating that title in the Deliverables will pass free of "all liens and encumbrances" recognised in your jurisdiction? If not, what other wording would be used?

The wording that title will pass free of "all liens and encumbrances" is recognised in Irish law.

## Intellectual property

22. In your jurisdiction, in relation to the Intellectual Property Rights (IPR) in the Deliverables, can the supplier:

- Assign that IPR to the customer?
- Enter into a perpetual licence with the customer?
- Licence and/or assign any moral rights?

### Assignment

Under Irish law, parties can agree for the supplier to assign the IPR in the Deliverables to the customer. Assignments of copyright, trade marks and design rights must be in writing. While assignment of patents and patent applications are not required to be in writing, best practice is for the assignment to be in writing since a legal instrument will need to be produced to the relevant patent registry in order to have the transfer in title reflected on the register.

### Perpetual licence

Under Irish law, the supplier can grant a perpetual licence to the customer to use the IPR.

### Moral rights

Chapter 7 of the Copyright and Related Rights Act 2000 (Chapter 7) sets out certain moral rights that apply under Irish law. For example the author of a work has the right to be identified as the author (known as the paternity right). This right extends to any adaptation of the work. The rights set out in Chapter 7 cannot be assigned or alienated. However, an author may waive their moral rights, and when moral rights are waived in favour of the prospective or current owner of the copyright in the relevant work, this waiver is presumed to extend to their licensees, successors in title or other persons claiming under them unless a contrary intention is expressed.

23. In relation to the indemnities for claims brought for infringement of a third party's rights in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clauses 5.4 and 5.5*:

- Are these indemnities valid and enforceable in your jurisdiction?
- Are any other indemnities implied by law?
- Is there any issue with the supplier's liability being capped under the agreement but the customer's liability is not?

*Clause 5.4 and 5.5* are valid and enforceable under Irish law.

No indemnities are implied by Irish law into service agreements.

It is permissible under Irish law to include a cap on the supplier's liability, without including a cap on the customer's liability.

24. In relation to the indemnity in *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 6.5*:

- Is this indemnity valid and enforceable in your jurisdiction?
- Are any other indemnities implied by law?
- Do any issues arise with the supplier's liability for breach of this indemnity being uncapped as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 8.1*?

*Clause 6.5* is valid and enforceable under Irish law.

No indemnities are implied by Irish law into service agreements.

Parties are free to agree terms in relation to uncapped liability for the supplier.

## Charges and payment

25. Does national law imply any terms into a services contract in relation to price? Can a supplier increase the price after the contract has been made?

### Implied terms in relation to price

Irish legislation does not imply any terms into a services contract in relation to price, except where a service contract involves a sale of goods and the contract is silent on price, in which case terms are implied by the 1893 Act regarding the price of the goods.

The price in a contract for sale of goods may be:

- Fixed by the contract.
- Fixed at a later date in a manner agreed in the contract.
- Determined by the course of dealing between the parties.

*(Section 8, 1893 Act)*

In cases where the price is not determined in any of those three ways, the buyer must pay a "reasonable price". A reasonable price is a question of fact dependent on the circumstance of each case.

Section 29(5) of the 1893 Act states that unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller. As such, it is important for a supplier to have an express provision in its terms and conditions which sets out what items are covered in the price.

### Price increase by supplier

In any contract a supplier would only be able to increase the price after the contract was signed if such an increase (or the right to implement an increase) had been agreed by the supplier and the customer(s) in the contract or by mutual agreement, or if the contract is amended by agreement between the parties in accordance with its terms.

26. Is the "time and materials basis" for charging for services recognised in your jurisdiction, that is charges based on the actual time spent by the supplier and for materials used? Please provide some suggested wording for this or a common alternative in your jurisdiction (see [Standard document](#),

*Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 6)?*

The parties can agree on how the performance of services is charged and there is nothing to prevent parties agreeing to charge work on a "time and materials" basis under Irish law.

In consideration for the provision of services, the customer must pay the supplier for the time properly spent by the supplier in providing the services at the hourly charge rate as agreed by the parties and for the materials used by the supplier in providing those services at the rates agreed by the parties.

Another common charging basis would be a monthly fixed fee basis. The wording would depend on the nature of services being provided and the requirements of both parties.

27. What sales/services taxes may be applicable on the fees paid under the agreement?

Value added tax (VAT) may be applicable to fees paid under the agreement.

28. In the absence of a specific clause in the contract, will the price of the services be inclusive or exclusive of value added tax (VAT)/goods and services tax (GST) or any other sales/services taxes?

In the absence of a specific clause in the contract, the price of services will generally be assumed to have been intended by the parties to be exclusive of any VAT or service tax. However, it would be prudent and standard practice to address this point expressly.

29. Does national law imply any terms into a services contract in relation to payment by the customer?

Irish legislation does not imply any terms into a services contract in relation to payment by the customer. Where there is no express provision included in the agreement, the obligation to pay will be assumed to arise once the work is completed or services rendered (*Coburn v Colledge* [1897] 1 Q.B. 702).

30. Is the supplier permitted to charge interest on late payment as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 6.5* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 7.5*?

The supplier is permitted to charge interest on late payment as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 6.5* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 7.5*

Under the European Communities (Late Payments in Commercial Transactions) Regulations 2012 interest is generally payable on late payments made under contracts for the supply of goods and services. Broadly, interest runs from the day after the agreed date of payment, or if no date has been agreed, from 30 days after the later of the date when the service was rendered or goods were delivered, and the date when the buyer was notified of the contract price.

If no rate of interest is specified, a default rate determined by these Regulations will apply. It is important that any specified rate of interest should not be so high that it falls foul of the common law rules on penal contractual provisions. The courts will look at whether the clause was commercially justifiable and whether the dominant purpose of the clause was to compensate the innocent party for a breach or deter the buyer from committing that breach (see *ACC Bank plc v Friends First Managed Pensions Funds [2012] IEHC 435*).

31. Does *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 7.6* extend the customer's set-off rights under the laws of your jurisdiction? Would this clause be permitted in your jurisdiction?

Legal and equitable set-off are both permitted in Ireland.

Legal set-off must be pleaded or arise from contract, and can arise where debts are due and payable, liquidated and ascertainable with some certainty.

Equitable set-off arises where one party's claim and the other party's cross claim in an action are so closely connected that it would be manifestly unjust to enforce one without taking the other into account. The sum need not be liquidated but merely a claim for loss and damage.

*Clause 7.6* extends the set-off rights at law, and parties are free to negotiate and agree such a term as *clause 7.6*.

32. Can the customer's set-off rights be excluded as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 6.6*? If so does this give rise to any potential issues under the laws of your jurisdiction?

A party may restrict the counterparty's right to set-off within the terms of the contract. The exclusion of set-off is legal and not contrary to public policy provided that clear wording is used.

## Limitation of liability

33. How can a supplier of services limit its liability under the laws of your jurisdictions?

Liability of the supplier of services may be limited by express terms within the agreement.

It is common to set a cap on liability. However, if the clause effectively excludes all liability it may not be upheld. If the clause is ambiguous and is contained in standard terms and conditions then it may be construed against the party seeking to rely on it under the *contra proferentum* rule.

34. What liabilities cannot be limited under the laws of your jurisdiction (see *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 7.3* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 8.2*)?

**Misrepresentation.** Exclusions or restrictions of liability for misrepresentation are not enforceable unless it is shown that they are fair and reasonable (*section 44, SGSSA*).

**Death or personal injury.** Under the Unfair Terms in Consumer Contracts Regulations 1995 (as amended), in a business-to-consumer contract a term which has the object or effect of excluding or limiting the legal liability of a seller or supplier in the event of the death of or personal injury to a consumer resulting from an act or omission of that seller or supplier is unenforceable against the consumer. However, there is no equivalent legislative provision that applies in the case of business-to-business contracts. In general, parties do not seek to exclude or limit liability

for death or personal injury caused by negligence. It is possible that if they purported to do so, then a court would not uphold such an exclusion or limitation on public policy grounds.

35. In your jurisdiction, are limitation of liability clauses more likely to be upheld if they are reasonable? Are there any other requirements or factors taken into account in relation to such clauses?

As a practical matter limitation of liability clauses are more likely to be upheld if they are reasonable, however as a matter of law there is no general legislative requirement that limitation of liability provisions in business to business contracts must be reasonable in order to be enforceable. Under section 44 of the SGSSA an exclusion or limitation on liability for misrepresentation must be fair and reasonable.

- The Schedule to the SGSSA sets out a test for what is a fair and reasonable term for the purpose of section 44 of the SGSSA and for the purposes of restrictions regarding the exclusion of implied terms (see [Question 5](#) and [Question 20](#) above). Regard should be had to the circumstances which were, or ought reasonably to have been, known to or in contemplation of the parties when the contract was made, and in particular to any of the below which appear to be relevant:
- The strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met.
- Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term.
- Whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties).
- Where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable.

36. Can liability be capped as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clauses 7.4/7.5* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 8.3/8.4* and *clauses 8.6/8.7*? Are there any other ways in which it is common to cap liability in your jurisdiction?

### **Single cap for supplier's liability, fixed amount (*clause 7.4 (pro-supplier) / clause 8.3 (pro-customer)*)**

It is possible to cap for supplier's liability in this way subject to the restrictions mentioned in *Question 34*.

### **Annual cap for supplier's liability, variable amount (*clause 7.5 (pro-supplier) / clause 8.4 (pro-customer)*)**

It is possible to cap for supplier's liability in this way subject to the restrictions mentioned in *Question 34*.

### **Single cap for customer's liability, fixed amount (*clause 8.6 (pro-customer)*)**

It is possible to cap for customer's liability in this way subject to the restrictions mentioned in *Question 34*.

### **Annual cap for customer's liability, variable amount (*clause 8.7 (pro-customer)*)**

It is possible to cap for customer's liability in this way subject to the restrictions mentioned in *Question 34*.

### **Other common ways to cap liability**

Liability is generally capped in the manner of the above clauses (that is, as a fixed amount or a percentage of the annual charges payable).

37. Can certain amounts be excluded from any cap on liability as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 7.7* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clauses 8.9 and 8.10*?

Parties can agree on certain amounts to be excluded from any cap on liability.

38. Is the specified heads of loss clause in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 7.8* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 8.11* permitted in your jurisdiction? Specifically, can *sub-clause (d)* take precedence over *sub-clause (c)*, as stated in *sub-clause (b)*?

These clauses would be permitted under Irish law.

39. Are indirect and consequential losses recognised in your jurisdiction and if so what do they include? If so, can they be effectively excluded as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 7.8(c)(vii)* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 8.11(c)(vii)*?

## Indirect and consequential losses defined

Irish law recognises the concepts of indirect and consequential losses. Direct loss means loss which may fairly and reasonably be considered as naturally arising from the breach. In contrast, indirect loss means losses that are not the natural results of the breach in the usual course of things.

Whether loss of profits is a direct or indirect loss, depends on the contract and whether such a loss was naturally arising from the breach.

## Exclusion of indirect and consequential losses

A contract may be worded so as to exclude liability for indirect and/or consequential losses.

40. In your jurisdiction, would a requirement which provides that the supplier has no liability unless the customer notifies the supplier of a claim in a notice period be valid and enforceable? If so, when would the start of the notice period usually run from?(see *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 7.11* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 8.13*)?

Parties to business-to-business contracts are free to agree that there will be no liability without the customer notifying the supplier of a claim within a certain period of time.

The commencement of the notice period would depend on the wording of the contract.

## Insurance

41. Is it common in your jurisdiction for the supplier to obtain insurance as set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 7.1* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 9*?

It is reasonably common for the supplier to be required to obtain insurance.

The type of insurance that may be required to be taken out by either party will depend on the nature of the services agreement. For example, providers of professional services may be required to hold professional indemnity insurance. Other service providers may be required to hold employers' liability or public liability insurance.

## Termination

42. In your jurisdiction can the parties terminate the agreement for all the reasons set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 8* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 10*?

All the clauses set out in *clause 8 (pro-supplier)* and *clause 10 (pro-customer)* would be valid and enforceable. Ideally, *clauses 8.1(b)* and *10.2(b)* would be amended to reflect the recognised insolvency events in Ireland (see *Question 44*).

43. In relation to the definition of "control" or "change of control", is this defined under any legislation in your jurisdiction? If not is the alternative definition set out in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: Interpretation* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: Interpretation* acceptable?

## Legislation defining "control"

Section 432 of the Taxes Consolidation Act 1997 (as amended) defines control by reference to whether the person exercises, or is able to exercise or is entitled to acquire, control, whether direct or indirect, over the company's affairs, including via the possession or entitlement to acquire any of the following:

The greater part of the share capital or issued share capital of the company or of the voting power in the company.

Such part of the issued share capital of the company as would, if the whole of the income of the company were distributed among the participators, entitle such person to receive the greater part of the amount so distributed.

Such rights as would, in the event of the winding up of the company or in any other circumstances, entitle such person to receive the greater part of the assets of the company which would then be available for distribution among the participators.

## **Definition in agreements permitted**

The alternative definition set out in these provisions is also acceptable.

44. Are the insolvency related events in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 8.1(b)* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 10.2(b)* recognised in your jurisdiction? Is there any equivalent insolvency wording, triggers or processes that are commonly included instead?

## **Insolvency related events recognised:**

### **Entering administration**

Administration is not an insolvency process under Irish law. The closest Irish equivalent is examinership.

### **Provisional liquidation**

Provisional liquidation is recognised in Ireland.

### **Composition or arrangement with creditors**

Composition or arrangement with creditors is recognised in Ireland.

### **Solvent restructuring**

Solvent restructuring is recognised in Ireland.

### **Voluntary winding up**

Voluntary winding up is recognised in Ireland.

### **Wound up by order of the court**

Winding up by order of the court is recognised in Ireland.

### **Appointment of a receiver**

Appointment by a receiver is recognised in Ireland.

### **Other insolvency wording**

A reference to examinership should be added.

### **Insolvency triggers**

"Entering examinership" should be added to the list of triggers above.

### **Insolvency processes**

**Examinership.** Examinership is a mechanism to seek to return a failing company to its former good health. A potentially viable company applying for examinership must have a reasonable prospect of survival. The duration of protection from the court is generally 70 days from the date of the presentation of the petition to the court.

45. What other rights of termination could the parties be entitled to in your jurisdiction by law?

Other rights of termination under Irish law include:

- **Breach of a condition.** This is where a condition expressly agreed between parties or implied by statute has been breached, and a party has the right to end the contract.
- **Fundamental breach.** This is a breach that goes to the root of the contract so as to deprive the innocent party of the commercial benefits envisaged.
- **Repudiatory breach.** This is similar to a fundamental breach but involves the decision by one party that it will not perform its contractual obligations.
- **Doctrine of frustration.** This is where a contract has been frustrated (parties can no longer fulfil their contractual obligations as a result of unforeseen circumstances) and a party will be able to terminate a contract. The doctrine arises in circumstances where performance of a contract in the manner envisaged by the parties is rendered impossible because of some supervening event not within the contemplation of the parties (see *Ringsend Property Ltd v Donatex Ltd*).
- **Termination by agreement.** The parties may expressly reserve the right to terminate the contract within the agreement and decide on which grounds this can arise.

46. If the agreement does not expressly exclude or include any other rights of termination that the parties are entitled to in your jurisdiction, will the rights in *Question 45* be retained?

The rights of termination will be retained.

47. Are the survival of provisions after termination clauses in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 8.3(b)* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 10.3* valid and enforceable in your jurisdiction?

The survival of provisions after termination clause would be valid and enforceable.

48. Are the preservation of rights clauses in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 8.3(c)* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 10.4* valid and enforceable in your jurisdiction?

The preservation of rights clauses would be valid and enforceable.

## **Assignment and other dealings**

49. Is *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 12* permitted in your jurisdiction such that the supplier can be prevented from sub-contracting without the customer's consent? Can the supplier remain responsible for all acts and omissions of its subcontractors as if they were its own as stated in this clause?

This clause is permitted such that the supplier can be prevented from sub-contracting without the customer's consent. The supplier remains responsible for all acts and omissions of its subcontractors as if they were its own as stated in this clause.

50. As the sub-contracting clause, *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border: clause 12* is silent on whether the parties can assign the benefit of the contract or transfer it, would the parties be able to assign or transfer it?

Where the contract is silent, and no clause prohibits it, the parties will have the right to assign the benefit of the contract.

51. Is the one-way assignment and other dealings *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border: clause 9.2* permitted in your jurisdiction? Specifically, is it permitted for the contract to state that the supplier may assign and otherwise deal with the contract but the customer may not?

*Clause 9.2* would be permitted under Irish law. It is permitted for a contract to state that the supplier may assign and otherwise deal with the contract but the customer may not.

## Transfer of employees

52. In your jurisdiction, is there any legislation which could result in the automatic transfer of an employee's employment in the following scenarios:

- In an outsourcing arrangement, where the employees who were performing the services in-house automatically transfer to the new outsourced service provider?
- There is a change of service provider, where the employees employed by the old service provider automatically transfer to the new service provider?
- The service is brought back in-house by the customer, where the employees of the old service provider automatically transfer to the customer?

The employee's employment could automatically transfer in all of the scenarios for the reasons set out below.

### **New outsourcing arrangement**

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003, which transpose the Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive) into Irish law, apply to any transfer of an undertaking, business, or part of an undertaking or business from one employer to another employer as a result of a legal transfer or merger.

The outsourcing of a service may constitute a transfer under the 2003 Regulations (see *Rask and Christensen v ISS Kantineservice A/S Case C-209/91, [1992] ECR 5755*) and as such the transferor's rights and obligations arising from a contract of employment existing on the date of transfer will, by reason of such transfer, be transferred to the transferee (see *Regulation 4(1) of the 2003 Regulations*).

### **Change of service provider**

The changing or replacing of a service provider by an undertaking may also constitute a "transfer" under the 2003 Regulations once the identity of the entity transferred is maintained (see *Süzen Case C-13/95, [1997] ECR I 1259*).

### **Services are brought back in-house**

Bringing services back in-house may also constitute a transfer' under the 2003 Regulations. However, this will not inevitably be the case (since bringing services back in house might not entail a "transfer" as defined (see *the UK Employment Appeal Tribunal decision Seawell Ltd v Ceva Freight (UK) Ltd v Moffat [2012] WL 1684757*).

53. As a consequence of any legislation referred to in [Question 52](#), what potential employee liabilities could arise on commencement or termination of the agreement, for:

- The supplier?
- The customer?

### **Supplier**

In a new outsourcing arrangement, potential employee liabilities will depend on a variety factors such as the nature of the services provided and the agreement between the supplier (the transferee) and customer (the transferor). If there is a transfer under the 2003 Regulations (whether on commencement or on termination of an agreement) then

the transferor's rights and obligations arising from a contract of employment existing on the date of transfer will, by reason of such transfer, be transferred to the transferee.

## Customer

On commencement of an agreement, the supplier may take on the customer's obligations (or those of an existing service provider to the customer who is being replaced) arising from a contract of employment if there is a "transfer" under the 2003 Regulations. Similarly, on termination of the agreement the customer (or a succeeding new supplier) may take on the supplier's obligations arising from a contract of employment if there is a "transfer" under the 2003 Regulations.

54. If such legislation exists for the automatic transfer of employees in your jurisdiction, what warranties or indemnities or any other provision in the agreement could the supplier include to protect itself from potential liabilities that may arise on commencement or termination of the agreement?

## Warranties

It is not possible to contract out of the 2003 Regulations, however parties to a contract in respect of which the 2003 Regulations may apply are free to agree on the allocation of any associated liabilities between them. A potential transferee will typically seek a warranty from a potential transferor that they will comply with their obligations under the 2003 Regulations, including regarding the provision of information both to the potential transferee and to the potentially transferring employees.

## Indemnities

A supplier could seek a range of indemnities, including to cover any liabilities arising from any claims relating to the period before any transferring employees transferred to the supplier and to cover any liabilities arising from any claims relating to the period after any transferring employees transfer "back" to the customer, or to a new supplier.

## Other provision

Not applicable.

## Data protection/privacy

55. If the supplier will be processing personal data on the customer's behalf as part of the services, what data protection/privacy law might the parties need to be aware of in your jurisdiction?

The Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation (GDPR)) and the Data Protection Act 2018 will be relevant in cases where personal data is being processed. The supplier will need to identify whether it will be acting as a "controller" of personal data or as a "processor", processing on behalf of the customer. Where the supplier will be acting as a processor, it will need to comply with obligations applicable to processors generally and to ensure that provisions addressing the requirements of Article 28 of the GDPR are included in a written contract with the customer. The European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 may also be relevant, depending on the nature of the services (such as, for example, if the supplier will be providing direct marketing services to the customer).

56. What clauses should be included in the agreement in relation to data protection/data privacy to protect:

- The supplier?
- The customer?

Both parties must ensure that the contract includes any mandatory provisions set out in the GDPR. If the parties have a relationship of a controller and processor (for example if the supplier is processing personal data on behalf of the customer in order to provide the services) the clauses required to be included in contracts between controllers and processors under Article 28 of the GDPR should be included in the agreement. These mandatory provisions include clauses requiring the processor to process such personal data in accordance with the instruction of the controller, to take appropriate security measures in relation to such personal data and to assist the controller with complying with key obligations under the GDPR. If the parties act as joint controllers, their relationship should be appropriately documented in the contract (see *Article 26, GDPR*). There are no mandatory requirements to include clauses in contracts between separate controllers, although parties will sometimes mutual obligations in this regard.

## Anti-bribery and corruption

57. What anti-bribery and corruption laws might the parties need to be aware of when providing services in your jurisdiction? Do your anti-bribery and corruption laws have extra territorial effect?

## Anti-bribery and corruption laws

The parties should be mindful of the Criminal Justice (Corruption Offences) Act 2018 (Corruption Act). A corruption offence is defined under section 5(1) of the Corruption Act. It is when a person who (directly or indirectly), by themselves or with another person, corruptly offers, or corruptly gives or agrees to give a gift, consideration or advantage to a person as an inducement to, or reward for, or otherwise on account of, any person doing an act in relation to their office, employment, position or business, and will be guilty of an offence.

## Extra-territorial effect of anti-bribery and corruption laws

The Corruption Act can apply to instances where corruption takes place outside the State, such as where an Irish citizen or Irish official is involved, or the corruption offence takes place on board an Irish ship.

58. What clauses should be included in the agreement to address anti-bribery and corruption issues?

The parties may wish to include an express provision that the other party will comply with all its applicable anti-bribery and corruption obligations.

## Execution and other formalities

59. Is it necessary for a contract for the supply of services to be in writing for it to be valid in your jurisdiction?

Subject to limited exceptions, there is no need under Irish law for "simple" contracts to be written, to take any particular form or to be executed in any particular manner; they can be entered into orally, electronically or otherwise, provided there is offer and acceptance, consideration, certainty of terms and an intention to be legally bound. However, it is best practice, however, for contracts to be in writing.

60. How does this agreement need to be executed in order to ensure that it is valid and enforceable? Are any other formalities necessary?

## Execution formalities

Further to the requirements set out in [Question 59](#), where a party to a contract is a body corporate, it should ensure that the execution is in accordance with the requirements of its constitutional documentation.

If the parties choose to execute the contract as a deed, formal execution requirements will apply.

## Other formalities

There are no other formalities.

## Registration formalities

Contracts for the supply of services generally do not need to be registered with any authority, assuming that they do not create any registrable security or convey any interest in land.

## General

61. Are there any clauses in *Standard document, Services agreement: short form (with contract details cover sheet; pro-supplier): Cross-border* and *Standard document, Services agreement: short form (with contract details cover sheet; pro-customer): Cross-border* that would not be legally enforceable or not standard practice in your jurisdiction?

There are no such clauses that would not be enforceable or standard practice in Ireland.

62. Are there any other clauses that would be usual to see in a services agreement and/or that are standard practice in your jurisdiction?

Typically, a "no partnership/agency" clause would be included.

**Contributor details**

**Adam Finlay, Partner**

**McCann FitzGerald**

E [adam.finlay@mccannfitzgerald.com](mailto:adam.finlay@mccannfitzgerald.com)

**Catherine Walsh, Associate**

**McCann FitzGerald**

E [catherine.walsh@mccannfitzgerald.com](mailto:catherine.walsh@mccannfitzgerald.com)

---

**END OF DOCUMENT**