

Supply of goods Q&A: Ireland

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This Q&A provides country-specific commentary on *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border* and *Practice note, Supply of goods: Cross-border overview*.

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General contract law framework

1. What are the requirements under national law for a valid contract to exist? When does an agreement take effect?

For a valid contract to exist, five elements must be satisfied:

- **Capacity to enter into a contract.** A person must have a certain level of understanding and judgement. Categories party that can give rise to lack of contractual capacity include:
 - minors;
 - prisoners;
 - persons suffering from mental incapacity; and
 - intoxicated persons.
- **Offer.** It is necessary to have a clear and unambiguous statement of the terms upon which the offeror is willing to contract, should the person or persons to whom the offer is addressed decide to accept (*Clark, Contract Law in Ireland (8th edn, 2016); Allied Irish Banks Plc [2014] IEHC 221*).
- **Acceptance.** A final and unequivocal expression of agreement to the terms of the offer is required. The general rule is that there is no acceptance without the intention to accept the offer (*Parkgrange v Shandon (2 May 1991), HC (Carroll J)*).
- **Consideration.** An act or forbearance of the one party, or the promise of it, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable (*see Pollock on Contracts (13th edn), p 133; cited in Dunlop v Selfridge [1915] AC 847 at 855 by Lord Dunedin*).

- **Intention to create legal relations.** Intention may be implied from the subject matter or it may be expressed by the parties (*see Rogers v Smith (16 July 1970), SC*).

2. Are there any limitations on the legal capacity of a company to enter into a supply of goods contract?

The most common type of company in Ireland, a private company limited by shares (LTD), has full and unlimited capacity to:

- Carry on and undertake any business activity.
- Do any act.
- Enter into any transactions.

(*Section 38, Companies Act 2014.*)

Consequently, there are no legal limitations on the legal capacity of a LTD to enter into a supply of goods contract.

The objects clause of their constitutional documentation may constrain the capacity of certain other forms of companies, such as:

- Designated Activity Companies (DACs).
- Companies Limited by Guarantee (CLGs).
- Public Limited Companies (PLCs).

However, a third party dealing with a DAC, CLG or PLC will not be prejudiced if the company exceeds the capacity set out in its objects clause (*sections 973, 1183 and 1012, Companies Act*).

Statutory companies' capacity to enter into goods contracts may be constrained by the statute by which they are created.

3. Is it necessary for a contract for the sale of goods to be in writing for it to be valid? Are any formalities necessary?

Subject to certain exceptions, such as contracts for the transfer of land, the general rule in Ireland is that there is no requirement for a contract to be in writing.

A contract for the sale of goods may be:

- In written or oral form.
- In partly written and partly oral form.
- Implied from the conduct of the parties.

(Section 3, *Sale of Goods Act 1893(SGA)*.)

From an evidential perspective, it can be useful to have a written copy of a contract, as a contract for the sale of goods with a value of EUR12.70 or more cannot be enforced by legal action unless one of the following applies:

- The buyer accepts and actually receives part of the goods sold.
- The buyer gives something in earnest to bind the contract.
- The buyer has made part payment.
- There is a note or memorandum in writing of the contract and signed by the party to be charged.

(Section 4(1), *SGA*.)

The Minister for Business Enterprise and Innovation may by order provide, in relation to goods or services of a class described in the order, that a contract must be in writing where the buyer, hirer or recipient of the service deals as a consumer (section 54, *Sale of Goods and Supply of Services Act 1980 (SGSSA)*).

Where such an order has been issued, any consumer contract that is not in writing will not be enforceable. To date, however, no such order has been made.

The Electronic Commerce Act 2000 provides that an electronic contract, subject to certain exceptions, will not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, or has been concluded wholly or partly by way of an electronic communication.

Moreover, references to "writing" in other Acts must be construed "as including electronic modes of representing or reproducing words in visible form" (section 2(2), *E-Commerce Act 2000*). As a result, any statutory requirement for a document or contract to be in writing can generally be met by an electronic document.

4. How does national law treat acceptance of an offer which attempts to impose new terms?

The acceptance to an offer must be clear and unambiguous. While it may be possible to request further information while leaving the possibility of acceptance open, replying to an offer with new terms could be deemed as a counter-offer to the original offer, as opposed to an acceptance of the offer.

5. Does national law require that special notice be given of any contract terms for them to be incorporated in a 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 must be given if a party is seeking to rely on an unusual or onerous exemption clause. In those circumstances, the party seeking the exemption will have to show that they took special measures to bring it to the attention of the other side (*Carroll v An Post National Lottery Co [1996] 1 IR 443*). In determining whether the clause is onerous, the courts may look at how common the clause is in the sector.

6. Is the concept of a party acting in "good faith" recognised in your jurisdiction (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 4.2*)?

It has been held by the Court of Appeal that there is no general principle of "good faith" in Irish contract law (*Flynn v Breccia [2017] IECA 74*). As a consequence, a term that parties will act in good faith generally will not be implied into contracts, beyond recognised circumstances where good faith can be implied, such as partnerships and insurance law.

However, parties to contracts can expressly agree that they will act in good faith, as is done in *Standard document, Supply of goods agreement: Cross-border: clause 4.2*.

7. Is the concept of using "best endeavours" recognised in your jurisdiction (see *Standard document, Supply of goods agreement (with contract details cover sheet)*: Cross-border: clause 5.2)?

The concept of a contractual obligation to use "best endeavours" has been recognised, although not defined, by the Irish courts. Based on UK case law, best endeavours, while not an absolute obligation, is generally understood to include steps which would be taken by a prudent, determined and reasonable obligee, acting in their own interests and desiring to achieve that result. However, the steps that are actually required will be context-driven and specific to the particular contract.

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, accepting that "a 'reasonable endeavours' obligation must be at least one step down from a 'best endeavours' obligation" (*Drocarne Ltd v Seamus Murphy Properties & Developments Ltd* [2008] IEHC 99).

8. Is the concept of "material breach" recognised in your jurisdiction (see *Standard document, Supply of goods agreement (with contract details cover sheet)*: Cross-border: clause 16.1(a))?

While the concept of "material breach" is recognised in Ireland, and is frequently listed as a termination event in contracts, there is limited Irish case law on the concept. In *HSBC v Garvelli* [2015] IEHC 609, a breach of personal undertakings given by the defendants as collateral to an agreement for the purchase of debt was held to be a "serious and material breach and one from which the defendants derived commercial benefit" and was described as "not accidental, or unintentional, or nominal".

While the various tests adopted by the UK courts for material breach of a contract (which would be persuasive in the Irish courts) are not always consistent or easily reconcilable, a number of general principles can be extracted from the case law. It appears that materiality may depend on the following factors:

- The facts of the particular case.
- The circumstances of the breach.
- The reasons behind the breach.
- The consequences of the breach for the innocent party.

Best practice would be to define "material breach" within the contract, to avoid any doubt. The definition as set out in *Standard document, Supply of goods agreement: Cross-border: clause 16.1(a)* would be permissible under Irish law.

Incorporation of standard terms of business

9. How can a seller or buyer incorporate its standard terms of business in its contracts?

Standard terms can be incorporated by

- Signature.
- Reasonable notice.
- 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 parties' ability 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, and where they were not identified in any shape or form by reference to any known industry-wide terms and conditions (*Noreside Construction v Irish Asphalt* [2014] IESC 68).

When a buyer and seller argue about whose terms and conditions apply (a "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.

10. If the seller's standard terms of business are being used, is it acceptable to limit the seller's liability for late delivery and/or non-delivery to the costs and expenses incurred by the buyer in obtaining substitute goods on the open market as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: Cross-border: clause 7.5?

In commercial contracts, the seller's liability for late delivery or non-delivery could be limited to the costs and expenses incurred by the buyer in obtaining substitute goods on the open market. However, under the *contra proferentum* rule, any ambiguity in standard terms and conditions will be construed against the offeror. A clause seeking to limit liability in this way should therefore be drafted clearly in order to be effective (as is the case in *Standard document, Supply of goods agreement: Cross-border: clause 7.5*).

Pre-contractual misrepresentation

11. Can a seller be held liable for pre-contractual misrepresentation?

A misrepresentation occurs when one party presents a statement which is not true, which is intended to induce the other to enter into a contract.

If the trader makes a pre-contractual statement or misrepresents any fact through its conduct in relation to the contract before it is entered into, a misrepresentation may occur. Such a representation may or may not be intended to form part of the contract. If it is not so intended, it is treated as a mere representation. If it is intended to form part of the contract, it will be treated as a contractual term. The consumer's remedies vary, depending on whether the representation is a mere representation or a contractual term.

Mere representation

If the representation induced the counterparty to enter into the contract, but it does not form part of the contract, the counterparty may be entitled to the following remedies:

- To recover damages for misrepresentation under common law or statute.
- To rescind the contract if there was a defect in the formation of the contract.

If the claim is successful, the counterparty is treating the contract as if it never existed and the contract would be considered to have been void from the start. As the contract is treated as if it never existed, the counterparty loses the right to claim for damages for breach.

Contractual term

If the contractual term has been incorporated into the contract, the counterparty may be entitled to the following remedies:

- Damages for breach of contract.
- Rescission for breach of contract.

In respect of damages for breach of contract, this differs from the right to damages for mere representation, as there is no need to prove fraud or negligence.

In respect of rescission, this involves an allegation that there was a defect in the performance of the contract and the existence of that type of defect does not lead to the conclusion that the contract should be treated as if it never existed. As such, a counterparty who rescinds for breach may also recover damages.

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 person 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.

Section 45 of the SGSSA can be disapplied, provided that it is fair and reasonable to do so (if not, the relevant provision will be unenforceable).

12. Can statements made by sales staff or in promotional literature be construed as terms of a contract for which a seller may be held liable?

Pre-contractual statements which are not recorded in the contract will often be excluded by virtue of the parol evidence rule (which states that extrinsic evidence cannot be used to vary the terms of a written contract). However, the application of this rule is a rebuttable presumption of fact, and as such the court may decide that an exception to the parol evidence rule applies if there has been a misrepresentation, and that the parties intended for the statements made to be incorporated into the contract for sale.

Based on previous cases, a buyer may have a claim in misrepresentation where they have relied on representations made by sales staff (*Lutton v Saville Tractors [1986] NI 327*), and may also have a claim where they have relied on statements in promotional literature.

13. Are parties entering into a contract under any legal obligation of disclosure? Can silence constitute misrepresentation?

A duty to disclose can arise in certain circumstances; for example:

- Where silence would distort a positive representation that has been made.
- Where material facts come to the notice of the party which falsify a representation previously made.

As to whether silence can constitute misrepresentation, the general view in Ireland is that silence or failure to disclose a material fact may constitute a misrepresentation only in exceptional circumstances.

Main terms of a supply contract

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

The SGA and the SGSSA imply a number of terms into a contract for the sale of goods, including:

- **Title.** It is an implied 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 shall enjoy quiet possession of the goods (*section 12(1), SGA*).
- **Description.** It is an implied condition that goods shall correspond with the description provided. If goods are sold by description and sample, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description (*section 13, SGA*).
- **Merchantable quality.** It is an implied condition that the goods shall be of merchantable quality, unless:
 - defects have been specifically brought to the buyer's attention before the contract has been made; or
 - the buyer examines the goods before the contract has been made as regards defects which that examination ought to have revealed (*section 14(2), SGA*).
- **Fit for purpose.** 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 those 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 them to rely, on the seller's skill or judgement (*section 14(4), SGA*).
- **Spare parts and servicing.** There is an implied warranty that spare parts and an adequate after sale service will be made available by the seller in such circumstances, and such period, as are stated in an offer, description or advertisement by the seller (whether on the manufacturer's or the seller's own behalf). If no period is stated, then it must be for a reasonable period (*section 12, SGSSA*).

- **Sale of motor vehicles.** 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 to persons travelling in the vehicle (*section 13, SGSSA*).

15. In your jurisdiction, what terms may be implied by law in relation to a sale of goods by sample?

There is an implied condition that if goods are sold by description and sample, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description (*section 13, SGA*). If this condition is breached, the purchaser may reject the goods and seek the purchase price back.

16. What liability exists for breach of an express term of a contract?

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.

Conditions

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 either to:

- 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.

Warranties

A warranty is a contractual term which is less important than a condition. 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: rather, it only has the right to sue for damages and other remedies consistent with the contract remaining in place.

Innominate terms

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. It is generally considered to be a type of "no man's land" between a condition and a warranty.

A term is likely to be considered to be innominate 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 would vary from trivial to serious. If the effect of the breach is substantially to 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.

17. What liability exists for breach of an implied term of a contract?

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 SGA and the SGSSA imply a number of terms into a contract for the sale of goods (see *Question 14*).

The remedies available for breach of such an implied term will depend on whether that term is a condition or a warranty (see *Question 16*). All of these implied terms are treated as conditions under Irish law, except:

- The warranties as to implied encumbrances and charges in respect of the goods (*section 12, SGA*).
- The warranty with respect to spare parts and servicing (*section 12, SGSSA*).

Breach of a condition may give the consumer the right to terminate the contract, reject the goods and sue for damages. Section 53 of the SGA makes it clear that breach of a warranty gives the consumer the right to sue for damages, but not the right to reject the goods and treat the contract as repudiated.

Performance obligations

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

The price in a contract for sale 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, SGA*.)

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 circumstances of each case.

Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller (*section 29(5), SGA*). It is therefore important for a supplier to have an express provision in its terms and conditions which sets out what items are covered in the price.

A party to an agreement will only be able to amend the price after the contract has been made if the agreed contract contains a provision allowing them to make such an amendment, or if the contract is amended by agreement between the parties, in accordance with its terms.

19. What import licences or other consents may be required when:

- **importing goods into your jurisdiction; and**
- **exporting goods from your jurisdiction?**
- **Which party usually bears the costs of obtaining these (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 6.8*)?**

Importing

A customs declaration must be completed for the Revenue Commissioners (Revenue) in respect of goods imported from outside the EU. Some goods may also require an import licence due to EU import restrictions such as quantitative restrictions.

Exporting

A customs declaration must be completed for Revenue in respect of goods exported outside the EU.

An export licence may also be required, depending on what goods are being supplied, and where and to whom they are supplied.

An end-use certificate is sometimes required as part of the export licence, most notably where the potential exports are to EU-sanctioned countries or to military/security related end-users, or where the exports fall within the scope of the EU military list.

The bearer of costs for obtaining any import or export documentation is a matter for negotiation between the parties.

20. In the absence of a specific clause in the contract, will the price of goods be inclusive or exclusive of any VAT or service tax, see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 11.2?*

If there is no specific clause in the contract, the price of goods may be deemed to be inclusive of any VAT or service tax.

21. Can the parties include a clause in the contract that provides for the seller to be able to invoice the buyer at any time after the seller is ready and willing to deliver the goods as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 11.3?*

Parties can include a clause which sets out the procedures for invoicing, payment and delivery of goods, as set out in *Standard document, Supply of goods agreement: Cross-border: clause 11.3*.

However, the default position is that, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions (that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods) (*section 28, SGA*).

22. Does national law imply any obligations into a supply of goods agreement in relation to payment by the buyer?

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods (*section 28, SGA*) (*see Question 21*).

23. Does national law permit a seller to charge interest on late payment as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 11.5(a)?*

Under the European Communities (Late Payments in Commercial Transactions) Regulation (580/2012), interest is generally payable on late payments made under contracts for the supply of goods. Broadly, interest runs from:

- The day after the agreed date of payment.
- If no date has been agreed, from 30 days after the later of:
 - the date when the service was rendered or the goods were delivered; and
 - the date when the buyer was notified of the contract price.

The rate of interest should not be so high that it falls foul of the common law rules on penal contractual provisions (these are that, if the rate amounts to a penalty for non-payment it will be void). The courts will look at whether the clause was commercially justifiable, and whether its dominant purpose was to compensate the innocent party for a breach or deter the buyer from committing that breach (*ACC Bank plc v Friends First Managed Pensions Funds [2012] IEHC 435*).

24. Does the seller have the right under national law to sue the buyer for the price of the goods if they are not paid for by the payment date specified in the contract (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 11.4?*)

Where the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may take an action against the buyer for the price of the goods.

The seller may also take an action against the buyer for the price of the goods where, under the contract for sale, the price is payable on a certain day irrespective of delivery, and the buyer wrongfully neglects or refuses to pay that price (*section 49, SGA*).

25. Is set-off permitted in your jurisdiction (see *Standard document, Supply of goods agreement: Cross-border (with contract details cover sheet): clause 11.6*)? If not, is there any concept which is broadly similar or equivalent and could be referred to in the contract?

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.
- 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 the one without taking the other into account. The sum need not be liquidated, but merely a claim for loss and damage.

Parties may wish to incorporate contractually a right to set off a debt against monies owing to them. Alternatively, a party may also restrict the counterparty's right to set-off within the terms of the contract. The exclusion of a right of set-off is legal and not contrary to public policy, provided that clear wording is used.

26. Please state how delivery is defined under the laws of your jurisdiction?

There is no definition of delivery in Irish law. However, as noted in *Question 21*, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. The seller must therefore be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods (*section 28, SGA*).

27. Does national law imply any obligations into a supply of goods agreement in relation to delivery of the goods by the seller?

The parties to a goods contract will generally agree terms for delivery. In default of contractually agreed terms, the following provisions apply:

- **Place of delivery.** Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer depends on the express or implied terms of the contract. In default of an agreement, the place of delivery is generally the seller's place of business (or their residence, if they do not have a place of business).
- **Time of delivery.** Where the contract does not fix a time for delivering the goods, the seller must send the goods within a reasonable time. A reasonable time is a question of fact.
- **Cost of delivery.** Unless otherwise agreed, the expenses of, and incidental to, delivery must be borne by the seller.

(*Section 29, SGA*.)

The following additional provisions apply in relation to the delivery of goods:

- **Third party possession.** Where the goods are in the possession of a third party at the time of sale, there is no delivery by the seller to the buyer until the third party acknowledges to the buyer that they hold the goods on the buyer's behalf.
- **Reasonable hour.** Delivery by the seller may be treated as ineffectual unless it is made at a reasonable hour. What constitutes a reasonable hour is a question of fact.

(*Section 29, SGA*.)

Where the goods delivered have not been previously examined by the buyer, the buyer is not deemed to have accepted them unless and until the buyer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Unless otherwise agreed, the goods remain at the seller's risk until they are transferred to the buyer; however, after they have been transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not (*section 20, SGA*).

28. Please set out what laws in your jurisdiction may apply to the sale and supply of goods with delivery by instalments (see *Standard document, Supply of goods agreement (with contract details cover sheet)*): Cross-border: clause 7.8).

The buyer of goods is not bound to accept delivery of goods by instalments, unless it has been agreed that delivery will be made in that way (*section 31(1), SGA*).

Where it has been agreed that delivery will take place in instalments to be separately paid for, and where there is a breach of this agreement (either by the buyer for failing to pay for the goods or to take delivery, or by the seller to fail to deliver the goods on time), it will depend on the terms of the agreement and the circumstances of the case whether the breach is:

- A repudiation of the whole contract.
- A severable breach giving rise to a claim for compensation, but not a right to treat the whole contract as repudiated.

(*Section 31(2), SGA*.)

29. Is the concept of "time is of the essence" understood in your jurisdiction? Please also consider the validity of *Standard document, Supply of goods agreement (with contract details cover sheet)*: Cross-border: clauses 7.4, 11.4 and 16.2 in relation to this question.

The concept of "time is of the essence" is understood in Ireland. Time is not generally considered to be of the essence unless a contract 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 (see, for example, *O'Connor v Coady* [2004] 3 IR 271).

30. In relation to contractual obligations (that is, the buyer paying for the goods and the seller delivering the goods) even if the contract does not expressly state it:

- **Is time for performance normally considered to be fundamental to the contract?**
- **Can a party terminate the contract for failure of the other party to perform the obligations within a specified time?**

Unless otherwise agreed, time of performance is not generally considered to be fundamental to a contract.

Where a contract does not specifically provide for a termination right due to delayed performance, it is possible that failure to perform obligations within a specified time could lead to termination for the following reasons:

- **Repudiatory breach.** Where one of the parties to a contract breaches a term that deprives the other party of the benefit of the contract, they may be considered to have repudiated the contract, giving the other party a right to terminate. This right may be triggered if a delivery of goods or payment of a price is so delayed as to deprive the other party of the benefit of the contract. However, this would depend on the circumstances of each case, and there is no specified time after which any goods contract would be considered to have been repudiated.
- **Breach of implied condition.** Where a condition is implied into a contract, by virtue of the SGA, the SGSSA or otherwise, its breach may be considered to be a fundamental breach, giving the other party a right to terminate. It has previously been held that failure to deliver on an implied contractual obligation within a reasonable time was a fundamental breach, allowing for a right of termination (*Dundalk Shopping Centre v Roof Spray Ltd* (21 March 1979), HC).
- **Implied right of termination.** Rights to terminate by notice or for fundamental breach may be implied in a contract (*Clarke v Kiltarnan Motor Co Ltd* [1996] IEHC 39). Therefore, even if there was no express termination right for delayed performance, a right to terminate by notice could be implied into the contract. This would assist the buyer in terminating the contract even where there was no express termination right.

31. What remedies are available to a seller where the buyer fails to accept delivery under the laws of your jurisdiction? Would Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clauses 7.6 and 11.3 be permitted in your jurisdiction?

A buyer may be liable for any recoverable loss caused by their failure to accept delivery, and for reasonable charges for the care and custody of the goods (section 37, SGA). The seller may take an action against them in damages for non-acceptance (section 50(1), SGA).

If the failure to accept delivery amounts to a repudiation of the contract, the seller would also be entitled to terminate the contract and dispose of the goods elsewhere.

Standard document, Supply of goods agreement: Cross-border: clauses 7.6 and 11.3 are permissible in Irish law.

32. Under the laws of your jurisdiction what remedies are available to a buyer against a seller for any delay in delivery? Would Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 7.5 be permitted in your jurisdiction?

If a seller wrongfully neglects, or refuses, to deliver the goods to the buyer, the buyer may take an action against the seller for damages for non-delivery (section 51, SGA). If a delay in delivery caused loss to the buyer, the buyer could also take an action in damages for the loss suffered.

In addition to, or instead of, seeking damages, the buyer could also seek the following equitable remedies:

- Specific performance for the delivery of the goods.
- A mandatory injunction requiring delivery.
- Rescission, which "rewinds" the contract, seeking to put the parties back in the positions they were before the contract was made.
- Restitution of any money paid for the delivery of goods.

Standard document, Supply of goods agreement: Cross-border: clause 7.5 is permissible under Irish law.

33. Under what circumstances does national law permit a buyer to reject goods? Can the right to reject be lost?

A buyer may reject goods and treat the contract as repudiated where there has been a breach of a condition of the contract, but not where there has been a breach of a warranty (section 53(1), SGA) (see Question 16).

Buyers should be aware that section 11(3) SGA provides that where a contract is not severable, and the buyer has accepted the goods, or part of them, a breach of a condition may only be treated as a breach of a warranty and not as a ground for rejecting the goods (unless there is an express or implied term of the contract to the contrary). Some specific circumstances in which goods may be rejected are also set out in section 30 of the SGA, which states that:

- Where the seller delivers a quantity of goods less than the seller contracted to sell, the buyer may reject them. However, if the buyer accepts the goods as delivered, the buyer must pay for them at the contract rate.
- Where the seller delivers a larger quantity of goods than the seller is contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or may reject all of the goods, but if the buyer accepts the whole of the goods delivered they must pay for them at the contract rate.
- Where the seller delivers the goods that the seller contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or they may reject the whole.

The right of rejection outlined above is subject to any usage of trade, special agreement or course of dealing between the parties.

34. Does national law allow a seller to provide tolerance limits, permitting the seller to deliver less (or more) than the contract quantity?

This is permitted under Irish law.

Section 30 of the SGA, details of which are set out in Question 33, specifies the consequences of delivering a quantity above or below the quantity for which the parties contracted, but does not set out any tolerance limits.

However, these limits could be contractually agreed between the parties, or implied through a course of dealing between the parties. While there is no specific percentage excess or shortfall that would not be permitted under Irish law, the percentage should be reasonable, to ensure that it would not exempt the seller from their duty to perform the contract; if the percentage was so unreasonable as to deprive the buyer of the benefit of the contract, it might not be upheld by the courts.

Title

35. When does national law provide that title to and risk in goods will pass? Is a seller able to separate the passing of title and the passing of risks in the goods as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clauses 9.1 and 9.2*?

Title generally passes once payment has been made in full for the goods.

Unless otherwise agreed between the parties, the goods remain at the supplier's risk until title in the goods has been transferred (*section 20, SGA*). Where delivery has been delayed through the fault of either the buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for that 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) takes 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.

Separation of the passing of title and the passing of risks in the goods as set out in *Standard document, Supply of goods agreement: Cross-border: clauses 9.1 and 9.2* is permitted in Irish law.

36. Can a seller elect to transfer title in the goods as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 9.5* so that the seller may sue the buyer where title has passed or the date for payment has passed but no payment has been made by the buyer?

The parties are free to agree this type of clause under Irish law.

37. To what extent is a retention of title clause as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clauses 9.2 and 9.3* (which seeks to provide protection to the seller for the price of the goods) valid under national law?

Retention of title clauses can give sellers an effective remedy to reclaim goods in the event of non-payment or insolvency. A standard retention of title clause seeks to provide that a seller will retain title until it has received full payment for the goods. This clause should be supplemented with provisions which create the mechanics of repossession. Agreements sometimes also contain an "all monies clause", in which the seller maintains ownership of the goods supplied until the buyer has paid all outstanding debts owed to the seller.

Retention of title clauses must be drafted carefully, as an incorrectly worded clause can give rise to issues of whether security is created and needs registration. Key considerations include:

- Whether it is clearly set out what a buyer can do with the goods before their retrieval.
- Whether the goods must be stored in any particular way.

A retention of title clause as set out in *Standard document, Supply of goods agreement: Cross-border: clauses 9.2 and 9.3* would be valid under Irish law.

38. Can the parties include a clause in the contract such that the seller is granted a licence to enter the buyer's premises to recover the goods where the buyer has not paid for them as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 9.4*?

Yes, a clause of this nature can be included. It would be important to include it to allow the seller to enter the buyer's premises to obtain the benefit of the retention of title clause and recover the goods without committing trespass.

39. Would the seller still be able to obtain possession of the goods from the buyer as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 9.4* if the buyer was in financial difficulties or became insolvent?

In principle, the seller would still be able to obtain possession of any goods subject to a valid retention of title clause even if the buyer was in financial difficulties or became insolvent, as set out in *Standard document, Supply of goods agreement: Cross-border: clause 9.4*, as those goods would not be beneficially owned by the buyer. However, depending on the circumstances, there may be restrictions on taking court cases to retrieve possession of the goods from a company in financial difficulties. For example, section 520 of the Companies Act sets out broad restrictions that prevent cases being taken against companies in examinership.

Termination

40. In your jurisdiction, can the parties terminate the agreement for all the reasons set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 16*?

While there is no automatic legal right to terminate a contract for the reasons set out in *Standard document, Supply of goods agreement: Cross-border: clause 16*, there is nothing to prevent parties from contractually agreeing termination rights for the reasons set out in that clause.

41. What other rights of termination, if any, could the parties have under the laws of your jurisdiction in addition to those set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 16*?

Other rights of termination under Irish law include:

- **Breach of a condition.** Where a condition expressly agreed between parties or implied by statute has been breached, 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. In these circumstances, the innocent party has the right to end the contract.
- **Repudiatory breach.** This is almost identical to a fundamental breach but involves the decision by one party that they will not perform their contractual obligations. In these circumstances, the other party has the right to end the contract.

- **Doctrine of frustration.** Where a contract has been frustrated (that is, the parties can no longer fulfil their contractual obligations as a result of unforeseen circumstances) a party will be able to terminate the contract (*Ringsend Property Ltd v Donatex Ltd*).
- **Termination by agreement.** The parties may expressly, in the agreement, reserve the right to terminate the contract, and decide on which grounds this can arise.

Excluding liability

42. To what extent does national law permit the use of terms which limit or exclude the liabilities of a party to a business-to-business contract for the sale of goods? Consider in particular the following and *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 14*:

- Excluding or limiting liability with respect to a breach of an express contract term.
- Excluding or limiting liability with respect to a breach of an implied contract term for example, description, quality, fitness for purpose title.
- Excluding or limiting liability for a particular type of loss, for example, death or personal injury.
- Setting out an overall cap on liability (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 14.2(b)*).
- Restricting remedies or imposing procedural and evidential restrictions.
- Excluding or limiting liability for defective products under product liability laws.
- Excluding or limiting liability for misrepresentation (if applicable).
- Excluding or limiting liability to third parties.

National law deals with these terms in the following ways:

- **Express contract term.** Liability can be limited or excluded. However, if the exclusion would negate the main purpose of the contract, it may not be upheld.
- **Implied contract term.** A contract purporting to vary the implied condition as to title set out in section 12 of the SGA is void (*section 55(3), SGA*). The terms implied into contracts by sections 13 to 15 of the SGA can be exempted in business to business contracts, provided that it is shown that the exemption is fair and reasonable (*section 55(4), SGA*) (see *Question 14*). For factors in establishing what is fair and reasonable, see *Question 43*.

- **Cap on liability.** 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 fall foul of the contra proferentum rule, under which any ambiguity in standard terms and conditions will be construed against the offeror.
- **Death or personal injury.** Under the Unfair Terms in Consumer Contracts Regulations 1995, in a business to consumer contract a term which has the object or effect of excluding or limiting the seller or supplier's legal liability in the event of a consumer's death or personal injury 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.
- **Restricting remedies or imposing procedural and evidential restrictions.** There is nothing preventing parties from restricting remedies or imposing procedural and evidential restrictions, provided that the restrictions do not have the effect of depriving the other party of the benefit of the contract.
- **Defective products.** A producer cannot limit or exclude liability for defective products that are covered by the Liability for Defective Products Act 1991 (*section 10, Liability for Defective Products Act 1991*).
- **Misrepresentation.** Exclusions or restrictions of liability for misrepresentation are not enforceable unless it is shown that they are fair and reasonable (*section 44, SGSSA*).

43. Is there any reasonableness test or other requirement for any exclusion or limitation of certain claims or liabilities under the laws of your jurisdiction as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 14*?

Any contractual attempt to exclude liability for the implied conditions as to description, merchantable quality or fitness for purpose (under sections 13 to 15 of the SGA) is not enforceable unless it is shown that it is fair and reasonable (*section 55(4), SGA*).

The Schedule to the SGSSA sets out a test for what is a fair and reasonable term. 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 following factors:

- The strength of the parties' bargaining positions 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.
- Whether any goods involved were manufactured, processed or adapted to the special order of the customer.

44. In your jurisdiction, are losses separated into (a) direct and (b) indirect or consequential losses? Can loss of profits be a direct and indirect loss (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 14.2(a)*)?

Yes, Irish law recognises direct and indirect losses:

- Direct losses are damages which may fairly and reasonably be considered as naturally arising from the breach.
- Indirect losses are damages which may reasonably be supposed to have been in the contemplation of the parties at the time of the contract.

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

45. In your jurisdiction, are there legal obligations to inform the relevant authority when a defective product has been identified (see *Standard document, Supply of goods agreement: Cross-border (with contract details cover sheet): clause 10*)?

There is a duty on producers and distributors to inform the Consumer and Competition Protection Commission where they know, or ought to know, that a product which is incompatible with safety requirements has been placed on the market.

Warranties and indemnities

46. Does national law draw a distinction between protection by warranty and protection by indemnity? How does national law control the use of indemnities in supply contracts as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 12*? Are any indemnities implied into supply of goods contracts?

A warranty is a stipulation in a contract for sale, a breach of which may give rise to a claim for damages but not the right to reject the goods and treat the contract as repudiated (see *Question 16*).

An indemnity is a promise in a contract to pay money on the happening of a specified event. The parties must define the trigger in the contract. An Irish court could construe a claim under an indemnity as one for damages, to which the rules on causation, remoteness and mitigation will apply. However, in certain cases a claim under an indemnity is a debt claim and as such the rules on causation, mitigation and remoteness do not apply.

No indemnities are implied under Irish law into supply of goods contracts.

47. Are there any laws in your jurisdiction governing indemnities in relation to the infringement of third party IP rights by a party that causes loss or damage to the other party (see *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clauses 6.2 and 12.1*)?

There is no specific Irish law governing indemnities in relation to the infringement of IP rights. Parties are free to agree such an indemnity, which will be subject to the general rules on indemnities.

48. Does national law imply a duty on the indemnified party to mitigate their losses as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 12.3*?

Whether an indemnified party is required to mitigate its losses depends on whether the indemnity is construed to give rise to claim for damages or a claim for debt (see *Question 46*). Indemnities are generally considered to give rise to debt claims instead of damages claims, but this will turn on the court's interpretation of the wording of the indemnity.

Under Irish law, a claimant for damages, must mitigate their losses and they will be unable to recover avoidable losses (*Hyland v Dundalk Racing (1999) Ltd [2017] IECA 172*). However, claimants for debt generally are not considered to be under an implied duty to mitigate their losses.

49. Can express remedies be included in the contract for repairing or replacing the goods instead of offering a refund to the buyer for breach of warranty as set out in the first option of *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 8.2*?

Parties can introduce these terms. It should be noted that a breach of a warranty implied by statute will give rise to a right to damages unless expressly agreed otherwise by the parties.

50. Could the pre-conditions in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 8.2* and the exclusions in *clause 8.3* affect the enforceability of *clause 8* as whole?

These provisions would be permissible under Irish law. If they were found to be unenforceable for any reason, the court might be willing to sever these sub-clauses from the agreement, leaving the remainder of *Standard document, Supply of goods agreement: cross-border: clause 8* intact.

51. Does national law allow a seller to exclude their liability for failure to comply with warranties such as delivering damaged goods or for failure to deliver as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 8.3*? Can the buyer be prevented from claiming damages for breach of warranty as set out in the first option of *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 8.2*?

These clauses would be permissible under Irish law.

52. Can a seller's warranty in a contract also apply to any repaired or replacement goods supplied by the seller, as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 8.4*?

These clauses would be permissible under Irish law.

Force Majeure

53. Are there any legal controls on the use of force majeure clause in a supply contract as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 17.1*?

There are no legal controls in relation to the use of force majeure clauses in supply contracts. Parties are free to agree what constitutes a force majeure event, which is generally defined as an event that is beyond the control of both parties. However, if the force majeure event was so broad as to exclude the benefit of the contract from one of the parties, then the provisions might not be upheld by the courts.

Entire Agreement

54. Is it common to have an "entire agreement" clause (under which, typically, a seller excludes liability for any representations or warranties made during the course of negotiations that are not included in the agreement) as set out in *Standard document, Supply of goods agreement: Cross-border (with contract details cover sheet)*: *clause 17.4*? Are there any circumstances in which an entire agreement clause may be unenforceable?

It is common for contracts subject to Irish law to include an entire agreement clause. Most of these clauses will also include wording to prevent claims for misrepresentation, with the remedies being restricted to those for breach of contract, in other words, damages or rescission (*see Question 11*).

These clauses have been frequently subject of litigation, and so there will often be an express carve-out in respect of fraud.

Competition law

55. Do supply contracts give rise to any competition law issues in your jurisdiction?

Yes, supply contracts can give rise to competition law issues, such as:

- Abuse of a dominant position.
- Price fixing.
- Limiting or controlling markets.
- Applying different conditions to equivalent transactions with different trading parties.

56. Do sellers often ask for a minimum purchase commitment from the buyer as set out in *Standard document, Supply of goods agreement (with contract details cover sheet)*: *Cross-border: clause 3*?

These provisions would be unusual, but not unheard of.

General

57. Are there any compliance obligations on either party under your local laws in relation to the supply of goods?

Under the Criminal Justice (Corruption Offences) Act 2018 it is a strict liability offence for a body corporate to fail to prevent corruption by one of its officers, employees or agents.

It is a defence for a body corporate to prove that, to avoid commission of the offence, it:

- Took all reasonable steps.
- Exercised due diligence.

The Criminal Justice (Corruption Offences) Act 2018 applies where one or more of the acts comprising the offence were committed in the Irish state, on board an Irish ship or on an aircraft registered in Ireland. However, it also has an extensive extra-territorial application where the person concerned is an Irish official acting in their capacity, an Irish citizen or any other body corporate established under Irish law.

58. How does this agreement need to be executed in order to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

Execution formalities

In general, 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. However, the parties should ensure that the execution is in accordance with the requirements of their constitutional documentation (see *Question 1* and *Question 3*).

Certain contracts must be in writing, including any agreement not to be performed within one year of the making of the agreement (*section 2, Statute of Frauds 1695*). If the parties choose to execute the contract as a deed, formal execution requirements will apply.

Registration formalities

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

59. Are there any clauses in the supply of goods agreement that would not be legally enforceable or not standard practice in your jurisdiction?

No.

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

No.

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