Commercial Contracts

Contributing editors
Duncan Reid-Thomas and Doris Myles

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GETTING THE DEAL THROUGH

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Contract formation

1 Is there an obligation to use good faith when negotiating a contract?

The obligation to act in good faith is a cornerstone of Swiss private law, explicitly stated in article 2 of the Civil Code. Damage caused as a result of bad-faith negotiation may lead to liabilities of the relevant party based on the principle of culpa in contrahendo.

2 How are 'battle of the forms' disputes resolved in your jurisdiction?

There is no recent case law on the resolution of 'battle of the forms' disputes in Switzerland. According to the prevailing legal doctrine, the theory that the battle is won by the person who 'fires the last shot' is not supported in Switzerland. Rather, according to legal doctrine, a court should analyse both standard forms and apply those rules that are identical in substance. Where the forms provide for differing rules on a specific matter, the court would disregard both of them and apply the non-mandatory rules of the Code of Obligations (CO) instead.

In the rather theoretical case where the dispute would actually concern a fundamental provision of the agreement (such as, for example, the goods to be supplied or prices), a court would actually have to come to the conclusion that no agreement was validly reached and the alleged contract would be rescinded.

3 Is there a legal requirement to draft the contract in the local language?

The parties are free to draft a contract in whatever language they like. However, to enforce the rights under a contract before a Swiss court, it may be necessary to have it translated into an official language spoken at the seat of the competent court (German, French or Italian, depending on the relevant place of jurisdiction).

4 Is it possible to agree a B2B contract online?

For supply contracts, Swiss law does not require adherence to a particular form. In theory, even oral contracts are valid. From a practical perspective, it is important to be able to prove the content of the agreement. For a click-to-accept process, the relevant question would be whether the exact terms 'accepted by click' can technically be demonstrated in court, which may prove cumbersome.

Statutory controls and implied terms

5 Are there any statutory or other controls on parties' freedom to agree terms in contracts between commercial parties in your jurisdiction?

Generally speaking, the principle of freedom of contract is upheld in Switzerland for commercial contracts. There are, however, certain limitations to the parties' abilities to freely determine the content of their agreement. These limitations can be divided into two groups.

First, there are some specific provisions in the CO that are mandatorily applicable. These provisions include the right to terminate a contract or the protection of the parties against certain abusive rights such as usury and bad faith.

Second, there are limitations arising from laws other than contract law, particularly competition law, criminal law or tax law. Also, the Swiss Act against Unfair Competition sets certain limits to practices that unfairly jeopardise competition in the Swiss market.

6 Are standard form contracts treated differently?

In a B2B relationship, the rules applicable on standard form contracts are hardly different from those regarding individually negotiated contracts. However, some aspects seem noteworthy.

A counterparty may successfully argue standard terms allegedly agreed did not become part of the contract because they were not properly brought to the counterparty's attention and could therefore not have been validly accepted.

Also, a general rule states that if the wording of a particular provision allows two different interpretations, the one in favour of the party that was not responsible for the drafting will prevail if the non-drafting party has in good faith relied on the interpretation. Accordingly, the drafting party will have to bear the risk of ambiguity.

7 What terms are implied by law into the contract? Is it possible to exclude these in a commercial relationship?

With regard to the supply of goods, the rules of the CO on sales contracts would apply. According to these rules, the supplier or seller is liable to the buyer for any breach of quality warranted as well as for any defects that would negate or substantially reduce the value of the product or its fitness for the designated purpose. However, the parties are free to exclude these rules, but an exclusion would be void if the supplier or seller has in bad faith concealed the existence of the defect.

For the supply of services, the CO provides for the general rule that the service provider is liable to the principal for the diligent and faithful performance of the relevant services. This standard is obviously very vague. The required level of diligence would have to be assessed based on the facts of each case. Therefore, it is advisable to clearly define the parties' expectations regarding the service levels in a contract.

8 Is your jurisdiction a signatory to the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention)?

Switzerland is a signatory to the Vienna Convention. In practice, however, its application is regularly excluded in clauses providing for the application of material Swiss law.

9 Is there an obligation to use good faith when entering and performing a contract?

As stated under question 1, the obligation to act in good faith is a fundamental principle of Swiss private law applicable to all stages of a contractual relationship. As part of this principle, the Civil Code explicitly states that a manifest abuse of any right will not be protected by law.

Limiting liability

10 What liabilities cannot be excluded or limited by a supplier in a contract?

According to article 100 of the CO and based on the freedom of contract, a limitation of liability is valid in principle, except for damage caused by wilful intent or gross negligence, for which a waiver would be null and void.

Exceptions may apply if the business conducted by the supplier is licensed by the state (for example, in the case of the supply of energy), in which case a judge is free to regard an agreed exclusion for ordinary or slight negligence to be void.

Similarly, for the supply of goods, an exclusion of liability is not valid if the supplier at the time of delivery was aware of any defect of the delivered goods.

11 Are there any statutory controls on using financial caps to limit liability for breach of contract?

If and (only) to the extent it is lawful to waive liability entirely (see question 10), it is also possible to agree on financial caps. With regard to liquidated damages, see question 13.

12 Are there any statutory controls on indemnities used to cover liability risks in contracts?

Swiss law provides no general statutory controls for indemnification clauses to cover liability risks in contracts.

However, in analogy to article 100 of the CO (see question 10), such an indemnification clause would not be considered applicable in the case of gross negligence or wilful intent of the indemnified party.

13 Are liquidated damages clauses enforceable and commonly used in your jurisdiction?

The CO does not explicitly provide for the possibility of liquidated damages, but, in articles 160 to 163, it regulates the principles applicable to contractual penalties. In practice, liquidated damages and contractual penalties are treated similarly.

The difference between the two concepts is that a contractual penalty does have a punitive function. Consequently, it is not a requirement that the party entitled to receive a penalty payment has actually suffered damage at all. If the entitled party can prove that the actual damage suffered is higher than the amount of the agreed penalty and if the debtor is at fault, the creditor will be allowed to claim the excess amount.

Liquidated damages have no punitive function. Their purpose is to compensate for anticipated damage. The creditor must prove the existence of actual damage, but not its amount. Typically, liquidated damages clauses also function as a contractual limitation of liability (financial caps). Therefore, the creditor will only be able to claim additional damages in cases of unlawful intent or gross negligence (see questions 10 and 11).

Both liquidated damages and contractual penalties are commonly used under Swiss law. However, pursuant to article 163, paragraph 3, of the CO, a judge may at his or her discretion reduce the amount of a contractual penalty or of liquidated damages if he or she considers such amount to be excessive.

Payment terms

14 Are there statutory time limits for paying invoices? Is it possible to agree a different payment period?

Pursuant to article 75 of the CO (which is the general rule), the parties are free to agree the time limit for payment, in line with the freedom of contract. Where no time for payment is stated in the contract or evident from the nature of the legal relationship, the obligation may be discharged or called in immediately. Courts interpret the legal concept 'immediately' in each case individually and under the principle of good faith.

As a general rule, a party to a bilateral contract may not demand performance (ie, payment) until it has discharged or offered to discharge its own obligation, unless the terms or nature of the contract allow it to do so at a later date.

15 Is statutory interest charged on late payments? Is it possible to agree a different rate of interest?

The CO provides for a default interest rate of 5 per cent. Again, based on the freedom of contract, the parties are free to agree on differing rates. However, an agreement on higher interest rates may be void if the agreed rate is considered excessive. The CO does not explicitly define at what threshold an interest rate is excessive. According to case law and legal doctrine and by way of analogy to the regulation applicable to interest rates for consumer credits, the relevant limit, however, lies somewhere around 15 per cent. Excessive interest rates may even constitute a criminal offence (usury).

Moreover, where the value of the damage suffered by the creditor exceeds the default interest, the debtor is liable for this additional damage unless it can prove that it is not at fault.

For default interest to become due, the creditor generally must send a reminder to the debtor, even if the agreed payment term has expired. An exception applies if the parties have agreed on a specific date of payment or performance (rather than a period) in which case the debtor will automatically be in default as of that date.

16 What are the civil penalties for failing to comply with statutory interest rate or late payment of invoices?

The CO provides for a set of rules that apply unless the parties have agreed to other procedures in the agreement and in addition to the obligation to pay default interest.

Once the debtor is in default, either after having received a reminder from the creditor or because a specific date of performance having been agreed (see question 15), the creditor may set an appropriate time limit for subsequent performance or to ask the court to set a time limit.

If performance has not been rendered by the end of that time, the creditor may compel performance in addition to suing for damage suffered due to the delay; under the contract, forgo subsequent performance and claim damages for non-performance; or withdraw from the contract altogether. The second option is only possible provided that the creditor makes an immediate declaration to this effect.

The creditor can then proceed with a debt enforcement proceeding or claim the payment before the court.

Under Swiss law, compound interest is prohibited (default interest is never payable on default interest).

Termination

17 Do special rules apply to termination of a supply contract that will be implied by law into a contract? Can these terms be excluded or limited by including appropriate language in the contract?

Supply contracts are not specifically provided for in the CO. Supply contracts are governed by the general terms of the CO as well as, by analogy, the specific provisions of the CO relating to types contracts that are specifically defined in the CO (sales agreements, service agreements, agency agreements, etc) and that are, depending on the overall construction and concept of the supply agreement, deemed comparable to the supply contract in question.

Given the lack of clear provisions, it is recommended specifically addressing the conditions of the termination of the supply contract in the agreement to avoid legal insecurity. Subject to the principle of good faith, the parties are generally free to agree on the applicable rules relating to termination. However, some limitations are noteworthy.

Most importantly, with regard to the supply of services, the mandatory provision of article 404 of the CO states that a service agreement can be terminated at any time with immediate effect, unless the notice of termination is mistimed. Accordingly, a clause providing for a fixed or minimum term of the contract for the supply of services would be considered to be null and void.

Also, the Swiss Civil Code prohibits the entering into agreements for an excessively long fixed term. Whether the duration of a supply agreement would be deemed excessive depends on the specific circumstances, but the maximum can reasonably be assumed to lay somewhere in the range of 10 to 20 years.

18 If a contract does not include a notice period to terminate a contract, how is it calculated?

If the notice period is not agreed in the contract, the court will look for rules of the CO applicable to contracts that are similar to the supply contract in question by analogy (see question 17). To avoid legal uncertainty, properly drafted termination clauses are advisable.

For example, for distribution agreements, two different provisions have been applied: the rules relating to agency agreements (article 418q, paragraph 1 CO) provides for a notice period of one month applicable in the first year of the contract. If the contractual relationship has

been maintained for longer, courts are more likely to apply the provisions relating to a simple partnership (article 546, paragraph 1 CO), namely a notice period of six months.

Where a contract has been concluded for an indefinite period, the prevailing legal doctrine suggests that a contract can be terminated with notice of six months.

19 Will a commercial contract terminate automatically on insolvency of the other party?

As a general rule, the insolvency of or the opening of a bankruptcy proceedings over a contractual party does not automatically lead to the termination of a contract. However, certain kinds of contracts (eg, service agreements, contracts for the transport of goods or agency agreements) automatically terminate with the opening of the bankruptcy proceedings. Whether automatic termination also applies by analogy to a specific supply contract has to be evaluated based on the characteristics of the specific case (see also question 17).

The consequences of the opening of bankruptcy proceedings are manifold. Among other things, an assembly of creditors may resolve to continue the business of the debtor and to maintain the existing contractual relationships (to the extent not automatically terminated) or to liquidate the business and terminate all relating agreements.

If on bankruptcy a contract (that is not automatically terminated) has not yet been performed in full by the bankrupt party, the bankruptcy receiver may perform the obligations under the contract in lieu of the bankrupt party. However, the right of subrogation of the bankruptcy receiver only exists to the extent the other party has no rightful interest in the individual performance of the contract by the bankrupt party and only if the parties have not agreed otherwise. Moreover, the non-bankrupt party can request that the performance by the bankruptcy receiver be guaranteed.

20 Are there restrictions on terminating a contract if the other party is in financial distress?

Where the insolvency of a party jeopardises the claim of the other party under the contract, the other party may withhold performance until security has been provided for the consideration.

The solvent party may withdraw from the contract if, on request, no security is provided within a reasonable time.

21 Is force majeure recognised in your jurisdiction? What are the consequences of a force majeure event?

Generally, a debtor under a contract governed by Swiss law is liable for damage caused by the non-performance of its obligations under the contract, unless it can prove that the non-performance was due to reasons beyond its responsibility. In accordance with article 119 of the CO, an obligation is deemed to be extinguished where its performance is made impossible by circumstances not attributable to the obligor.

However, article 119 of the CO only applies in cases of acts of God, which are by nature completely beyond the control of the debtor (eg, earthquakes, flooding and war). Therefore, if the parties wish to extend the application of the rules regarding force majeure events to matters falling into a broader sphere of influence of the parties (eg, strikes), including a specific clause in the agreement is advisable.

The debtor released under article 119 of the CO loses its counterclaim and is liable for the repayment of any consideration already received.

Also, in a sales contract, unless otherwise agreed, the benefit and risks relating to sold goods pass to the buyer on conclusion of the contract, typically before delivery. As a result, if goods to be delivered to a specific buyer are destroyed before their delivery for reasons not attributable to the seller, the seller will be released of the obligation to deliver and will still have a claim for compensation.

Subcontracting, assignment and third-party rights

22 May a supplier subcontract its obligations under the contract without seeking consent from the other party?

Regarding the supply of goods, the supplier is free to subcontract its obligations to third parties, except for very special circumstances in which the person actually performing these obligations is of particular significance. In B2B relationships, these circumstances would not typically apply. Rather, the supplier will guarantee a certain quality of the supplied goods only, while the party actually producing these goods is of less relevance.

Relating to the supply of services, the CO provides that the supplier must (in the absence of an agreement to the contrary) perform services in person unless substitution is compelled by the circumstances or in cases where such delegation is common.

23 Are there any statutory rules that apply to subcontracting in your jurisdiction?

The most relevant rules on subcontracting under Swiss law apply to the liability of the supplier for any damage caused by the subcontractor.

The CO contains in its general part the basic rule that an obligor shall be fully liable for all damage caused to its counterparty by any third party assisting the obligor with the fulfilment of its obligations. This general rule applies to all sorts of contract for which no specific provision to the contrary is provided by law. As the CO does not contain any such differing rule relating to the sale of goods, a supplier of goods will be fully responsible for all damage caused by its subcontractor. However, it is possible to limit or exclude such liability in advance.

On the other hand, as for the supply of services, the CO provides for a special rule that, if the supplier was entitled to subcontract the services to the third party (see question 22), it shall only be liable for damage caused by the subcontractor if it did not apply the necessary diligence in selecting and instructing the subcontractor. In practice, it can therefore be said that if the supplier is allowed to subcontract the supply of services and if the relevant subcontractor is a reliable and experienced party, recognised in the market for the relevant services, the subcontractor will not be liable for any damage caused by this subcontractor.

24 May a party assign its rights and obligations under the contract without seeking the other party's consent?

Subject to a few rights that are considered non-assignable under Swiss law, specific rights (and, particularly, claims) arising from a supply contract can be assigned to a third party without the consent of the other party. The other party (ie, the debtor) need not be notified of the assignment for it to be valid. However, a debtor that has not been notified of the assignment of a claim against it may validly discharge its obligations by making payments or performing any other acts of fulfilment to the assignor. Moreover, a debtor of an assigned claim may raise with the assignee any objection against the assigned claim that is based on grounds that already existed at the time the debtor first learned about the assignment.

By contrast, the assignment or assumption of an obligation in lieu of and under discharge of the former obligor requires the consent of the counterparty.

Also, the transfer of the assignee's position as a party to the contract as a whole (including all rights and obligations relating thereto) is subject to the consent of all parties involved.

25 What statutory controls apply to the assignment of rights or obligations under a supply contract?

Any assignment of claims must be made in writing to be valid. Furthermore, while rights are in general assignable under Swiss law, the assignability of certain rights may be excluded by statutory restrictions or the nature of the underlying legal relationship. From a practical perspective, these restrictions are, however, unlikely to be relevant in the context of a supply contract. Also, the assignability of rights can validly be excluded in the supply contract.

With regard to the assignment of receivables, it should be noted that the assignment of claims is permissible if these claims are sufficiently specified or specifiable. It is, therefore, generally considered to be possible to assign all present and future receivables arising under a specific supply contract. However, according to Swiss case law, the assignment of future claims is not enforceable in the case of the assignor's insolvency or bankruptcy with respect to claims that have only arisen (rather than matured) after the assignor has lost the capacity to dispose of its claims pursuant to applicable insolvency and bankruptcy laws.

The assumption of obligations, on the other hand, is not subject to any formal requirement but requires the consent of the contractual party (see question 24).

26 How may a third party enforce a term of the contract?

A third party may only enforce a term of a contract to the extent such contract is structured as a true contract in favour of third parties' providing the third party with its own right of claim. The granting of such third-party right can be based on law, agreement or customary practice. However, the existence of an enforceable third-party right is not presumed and the burden of proof in respect to the existence of such right lies with the third party claiming such direct right of enforcement.

Disputes

27 What are the limitation periods for breach of contract claims? Is it possible to agree a shorter limitation period?

Under Swiss law, limitation periods are considered to be an issue of substantive law.

Limitation periods depend on the nature of the claim and the legal qualification of the relevant contract. Generally, claims (particularly claims for receivables under supply contracts) are time-barred after 10 years (article 127 of the CO) while a shorter period of five years applies to claims for periodic payments or claims arising in connection with certain services (article 128 of the CO).

For claims arising from a breach of warranty under sales contracts and work contracts, the applicable limitation period is two years, or alternatively five years if the supplied good was intended for and became part of immoveable property. However, the seller or supplier may not invoke the statutory limitation period if it wilfully misled the purchaser. In this event, a 10-year limitation period applies.

A claim for breach of warranty is considered to be timely made if the supplier has been notified before the expiry of the limitation period, although a buyer is (unless otherwise agreed in the contract) bound to examine any delivered goods swiftly after their receipt and to notify the supplier of any defects detected. Failure to timely make such a notification would be considered an approval of any defects that could have been detected on a reasonable examination, which would result in the respective claims for breach of warranty being forfeited even if they are made before the expiry of the applicable limitation period of two or five years.

While the parties cannot agree on shorter limitation periods in respect to the general statute of limitation as per articles 127 and 128 of the CO, they are free to shorten the limitation period for warranty rights under B2B sales contracts and work contracts.

28 Do your courts recognise and respect choice-of-law clauses stipulating a foreign law?

Swiss law recognises the choice of foreign law by the parties in respect to supply contracts for goods and services (article 116 of the Swiss Private International Law Act (PILA)). Such choice of law must be express or result with certainty from the provisions of the contract or from the circumstances; its permissibility is further governed by the chosen law.

Swiss courts will not apply foreign law if and to the extent it violates Swiss public policy or infringes Swiss mandatory law (articles 17 and 18 of the PILA). Vice versa, a Swiss court may apply mandatory foreign law if one of the parties has a legitimate and predominant interest or if there is a close factual interest in connection with that foreign law. In proceedings before a Swiss court, the parties, in accordance with the general rules on the burden of proof, may be requested to prove the rules applying under the foreign law. If it is not possible to establish the content of the foreign law, Swiss law shall apply (article 16 of the PILA).

29 Do your courts recognise and respect choice-of-jurisdiction clauses stipulating a foreign jurisdiction?

Switzerland has entered into various bilateral and multilateral conventions concerning the recognition of choice-of-jurisdiction clauses, the most important being the convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters entered into by Switzerland, the European Union, Denmark, Norway and Iceland of 30 October 2007 (the Lugano Convention), which is applicable if one of the parties has its domicile or seat in a member state of the Lugano Convention.

Outside the scope of the Lugano Convention and other specific conventions, the recognition of a choice of jurisdiction clause is subject to the principles set forth in the PILA. According to these rules, Swiss law allows for choice-of-jurisdiction clauses regarding matters concerning pecuniary claims and the parties to a contract can choose a foreign forum (article 5 of the PILA). The jurisdiction clause must be made in writing or by any other means of communication that evidences the terms of the agreement by text. A choice-of-jurisdiction clause is deemed to be void if one party is denied in an improper manner a court to which that party is entitled under Swiss law.

Both under the Lugano Convention and under the PILA, a Swiss court being derogated by a valid choice-of-jurisdiction clause has to accept the jurisdiction of the foreign court if a party raises the exception of the prorogated forum but it will most likely stay proceedings until the foreign court chosen by the parties has accepted jurisdiction.

30 How efficient and cost-effective is the local legal system in dealing with commercial disputes?

The Swiss legal system is comparatively efficient and cost-effective in dealing with larger commercial matters.

Switzerland is regarded as one of the leading global venues for international commercial arbitration and it is a civil law country with a well-established and well-developed court system.

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The average duration of commercial litigation before a court of first instance is between one and two years, provided that it is a straightforward case and not much evidence is to be heard. In more complex cases, the duration of the proceedings may be longer. The appellate proceedings before the Federal Supreme Court take about one year.

Four cantons (Zurich, Berne, St Gallen and Aargau) have specialised commercial courts, which form part of the respective cantonal high court and serve as courts of first instance for commercial matters. The Commercial Court of Zurich is generally regarded as the most appropriate forum in Switzerland to decide international commercial disputes at least in the German speaking part of Switzerland.

In Switzerland, litigation costs are relatively reasonable. In pecuniary disputes the court and attorneys' fees (which are regulated by the cantons individually) mainly depend on the amount in dispute. Other factors, such as the type and course of the proceedings and the complexity of the case, are also taken into consideration. Swiss courts may order a claimant to make an advance payment up to the amount of the expected court costs, and costs and attorneys' fees are to be paid by the losing party.

31 Is your jurisdiction a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Which arbitration rules are commonly used in your jurisdiction?

Switzerland is a signatory to the New York Convention. The arbitration rules commonly used in commercial arbitration in Switzerland are the Swiss Rules of International Arbitration of the Swiss Chamber of Commerce and the rules of arbitration of the International Chamber of Commerce in Paris. In addition, arbitration proceedings in Switzerland are frequently also conducted under the rules of other international arbitration institutions, such as the London Court of International Arbitration and the Stockholm Chamber of Commerce.

Certain international Chambers of Commerce domiciled in Switzerland provide their own arbitration rules and services, including the Swiss-American and the German-Swiss Chambers of Commerce.

Remedies

32 What remedies may a court or other adjudicator grant? Are punitive damages awarded for a breach of contract claim in your jurisdiction?

Under Swiss law, a court, when issuing judgments on the merits, is not limited to the grant of monetary relief. It can also issue judgments for specific performance, declaratory judgments, cease-and-desist orders, as well as judgments changing a legal right or status, and partial judgments.

Damages are compensatory only and, accordingly, rulings are limited to the amount of damages actually suffered by the claimant; with very limited exceptions (mainly in labour law) no punitive damages are available (as for liquidated damages, see question 13).

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