

**PRACTICAL GUIDE TO THE LEGAL ASPECTS  
OF INDUSTRIAL SUBCONTRACTING  
IN THE EUROPEAN COMMUNITY**

**Volume II**

**The legal framework of subcontracting in the twelve Member States**



**COMMISSION  
OF THE EUROPEAN  
COMMUNITIES**

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**PRACTICAL GUIDE TO THE LEGAL ASPECTS  
OF INDUSTRIAL SUBCONTRACTING  
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*(II)*

*The legal framework of subcontracting  
in the twelve Member States*

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## INTRODUCTION

*With a few exceptions, subcontracting agreements are not covered as such by any specific rules and therefore come under the general law of contract. Depending on the particular case and the Member States' legal systems, it comes within the category of firms' sales, supplies or works contracts.*

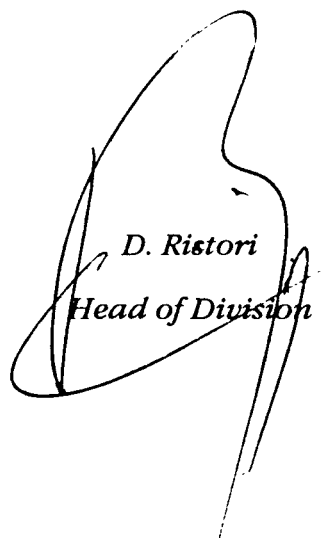
*The expansion of cross-border subcontracting, which is being boosted by the completion of the single market, means that both sides concerned must be familiar with the legal framework in which they are operating.*

*To help them better to understand and determine their rights, liabilities and obligations and thus contribute to strengthening their mutual relations, Directorate-General XXIII has decided to publish a "Practical Guide" to the essential legal aspects of industrial subcontracting.*

*The guide comprises two volumes: Part One, published in 1989-90, endeavours to list the essential information which should be included in a standard industrial sub-contract, whatever the parties' nationality or place of establishment.*

*Part Two, which is the subject of this publication, contains a comparative study of the various legal systems under which subcontracting takes place in the Community. It must be stressed, however, that this survey gives only a general view of the legal environment in each Member State. Given the diversity of, and the constant changes to, national legal systems, it cannot be guaranteed that the description of the situation in each Member State is up to date, nor does the document obviate the need to consult specialists.*

*The Commission would like to thank all those who have helped to bring this guide to fruition.*

  
D. Ristori  
Head of Division

*PRACTICAL GUIDE TO THE LEGAL ASPECTS  
OF INDUSTRIAL SUBCONTRACTING  
IN THE EUROPEAN COMMUNITY*

(Part Two)

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*SUMMARY OF THE QUESTIONS DISCUSSED FOR EACH COUNTRY*

1. Legal framework
2. What happens where the subcontractor does not negotiate a specific written agreement with the contractor?
3. Substantive legal rules
4. Technical specifications
5. Clauses excluding liability
6. Clauses restricting the rights of the subcontractor and domestic competition law
7. Clauses retaining title
8. Consequences of breach
9. Interest
10. Product liability

# BELGIUM

## 1. LEGAL FRAMEWORK

1.1. In Belgium, subcontracting agreements do not form a recognized category of contracts regulated by a specific set of rules. They are governed by the general principles of the Civil Code and by those applicable to the category of contract into which they fall: sales contracts, or contracts for the supply of goods and services (see 3. below).

1.2. There are no standard subcontracting agreements in Belgium which have been officially approved by governmental bodies.

In the private sector, however, there are standard contracts which have been drawn up by trade associations (e.g. in the metal industry) but they are not common outside the industries concerned.

1.3. Given the requirements of economic activity and the relationship between the contractor and the subcontractor, the tendency is for subcontracts to be concluded without real negotiations taking place between the parties.

## 2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?

2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by the provisions of the Civil Code.

2.2. In practice, it very often happens that the contract is drawn up to the contractor's requirements and contains his general terms, which the subcontractor accepts, sometimes expressly or sometimes merely tacitly (by performance).

2.3. Let us now consider the position in Belgian law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all of the rules governing the various types of contract are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

- 2.4. Moreover, Belgian law as it stands does not have any body of rules applicable to the general conditions of contract and intended to prevent contracts being drawn up that constitute an excessive and unjustified exploitation of one side's negotiating strength.

The rulings of the Belgian courts go some way towards rectifying these legislative shortcomings in that they subject the general conditions of contract to a minimum degree of control. In this connection, the courts are fairly stringent in applying the requirement of proving that a party accepted the other party's general conditions in full awareness of the consequences of doing so.

This does not alter the fact that a foreign subcontractor is, in any event, well advised to exercise particular caution over general conditions proposed by the other party.

### 3. THE SUBSTANTIVE LEGAL RULES

- 3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be noted, however, that Belgium has ratified the Hague Convention of 1964 relating to a uniform law on the formation of contracts for the international sale of goods but has yet to ratify the Vienna Convention of 1980. Where the appropriate conditions are met, therefore, the rules governing a subcontract should be sought primarily in the Hague Convention although it applies only to trade between the small number of countries which have ratified it.

- 3.2. On the other hand, if Belgian law governs the contract, classification of the particular contract in the relevant category must be carried out, and this will determine the rules that will be applicable.

In fact, under Belgian law, a particular contract may be classified as a sales contract or as a contract for the supply of goods and services (see 1. above). In practice, classification in one or other of these categories entails significant differences in the rules applicable (e.g. as regards transfer of title, risks, defects and the like).



Moreover, in Belgian law the distinction between sale and supply is not clear-cut and definite but is based on criteria which are relative and uncertain in their application to particular cases. An example of this is the criterion whereby classification of a contract is determined by the component which has greater economic value; if the materials supplied are of greater value than the labour involved in manufacturing the product, the relationship is one of sale and, in the opposite case, one of supply.

These uncertainties as to legal classification and hence as to the presumptive rules applicable are a further reason why a foreign subcontractor should make every endeavour to negotiate a specific contract to govern his relations with the contractor.

#### **4. TECHNICAL SPECIFICATIONS**

The Belgian standards (see Part One of the Guide, paragraph 2.8) most commonly referred to in subcontracts are available from the following bodies:

- for industrial products in general:  
Institut Belge de Normalisation,  
29 Avenue Brabançonne,  
1040 Brussels - Tel: + 32-2-7349205
- For electrical equipment:  
Comité Electrotechnique Belge,  
3 Galerie Ravenstein (Bte 11),  
1000 Brussels - Tel: + 32-2-5120028  
(It has also published a list of standards)
- For electrical installations:  
Comité d'Etudes Techniques de la Production et de la Distribution  
d'Electricité en Belgique,  
3 Galerie Ravenstein (Bte 11),  
1000 Brussels - Tel: + 32-2-5120028  
(It publishes general regulations on electrical installations)

#### **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12).

Nevertheless, it should be pointed out that, in Belgian law, the only limit to the validity of such clauses is the prohibition on excluding liability for deceit (dolus).

## **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

Belgian law does not impose any limits on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, use of know-how, dealings with third parties, etc., over and above those set out in the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

## **7. CLAUSES RETAINING TITLE**

Clauses retaining title (see Part One of the Guide, paragraph 6.9) are admissible under Belgian law where goods are sold against deferred payment: the buyer acquires title only when the full price has been paid. Nevertheless, in the absence of specific legal provisions, the clause retaining title applies only between the parties to the contract, but not to any third party.

## **8. CONSEQUENCES OF BREACH**

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (see paragraph 2.10). The general rule in Belgian law where one party to a contract for consideration fails to perform his obligations is that the other party may at his discretion: (a) require specific performance of the contract; or (b) seek to have the contract terminated through the courts; and, in any event, (c) claim compensation for the loss suffered.

In addition to these general remedies, Belgian law applies special rules to certain kinds of contracts; for example, latent defects in the case of sale, which, on notice being given in good time, entitle the injured party to claim a reduction in price or to terminate the contract and, in any event, to claim compensation for the loss suffered.

In Belgian law, compensation for loss suffered, which is always available for breach of contract, covers both consequential loss and loss of profits, provided that they are the direct and immediate consequence of the breach and were foreseeable (see Article 1160 of the Civil Code).

## **9. INTEREST**

Except where otherwise stipulated, interest is payable at the statutory rate (see Part One of the Guide, paragraph 6.8 - 8% per year in 1990) in the event of late payment of the price.

## **10. PRODUCT LIABILITY**

The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) has not yet been implemented in Belgium (1990).

In the mean time, the remedies available are those developed by the Belgian courts in order to provide the consumer with means of direct action and protection - already fairly effective - against producers marketing defective products.

# DENMARK

## 1. LEGAL FRAMEWORK

1.1. In Denmark, subcontracting agreements do not form a recognized category of contracts regulated by a specific set of rules. They are governed by the ordinary law of contract, and particularly the rules on sales contracts, with which they are usually classed (see 3. below).

1.2. There are no standard subcontracting agreements in Denmark which have been officially approved by governmental bodies.

It is not unusual, however, for firms to make use of standard model contracts recommended by trade associations. The most commonly encountered are those drawn up by STANMEK, the Scandinavian metalworking industries liaison committee, which include NL 85 (general terms of sale for plant and equipment for the mechanical and electrical engineering industries), NLS 82 (general terms of sale for standard parts), and NLG 81 (general terms of sale for foundry products).

1.3. Large contractors also frequently prepare standard subcontracting agreements and tend to impose these general terms on their own subcontractors.

## 2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?

2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by rules of law.

2.2. As already indicated, it is common in practice for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

It is worth noting that a situation should be avoided in which two sets of general terms are superimposed, each party having referred to his own, and neither having declared that, in the event of any conflict, he will accept those of the other; in such cases, the courts will tend to accept neither set of general terms and simply to apply the rules supplied by the law.

- 2.3. Let us now consider the position in Danish law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all of the rules governing contracts are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

- 2.4. Since the 1975 reform, however, the Danish Law on Contracts has contained a provision allowing review of the general terms of a contract to ensure that they do not represent excessive and unjustified exploitation of one side's negotiating strength. Under Article 36, a contract may be set aside if performance would be unreasonable or contrary to honest practice.

When this new general clause was introduced, it was expressly stated that, in applying it, special account would have to be taken of the need to protect weak contracting parties and that it was to apply to all types of contract, including commercial contracts.

The courts, however, up to and including the Supreme Court, have been reluctant to apply Article 36 outside the sphere of sales to consumers. The Supreme Court did apply Article 36 to commercial contracts in four cases in 1987 and 1988, but it is too early to say with certainty whether this will become the settled approach to the problem.

Thus, while a weak party's prospects of protection against general terms imposed by the other party are probably very much better in Denmark than in several other Community Member States, a foreign subcontractor will do well to be extremely cautious here in Denmark as elsewhere.

### 3. THE SUBSTANTIVE LEGAL RULES

- 3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be pointed out first of all that, while Denmark did not ratify the Hague Convention of 1964, it has ratified the Vienna Convention on contracts for the international sale of goods of 1980; this took effect on 1 March 1990, subject to certain restrictions (excluding Part II of the Convention, and inter-Scandinavian sales). Where the appropriate conditions are met, therefore, the rules governing a subcontract should be sought primarily in the Convention.

3.2. On the other hand, if, in a particular case, it is Danish law which applies, a subcontract will be considered to be a sales contract and, in the absence of any express or tacit terms to the contrary which have been agreed by the parties, it will be governed by the Danish Sale of Goods Law.

#### **4. TECHNICAL SPECIFICATIONS**

The standards (see Part One of the Guide, paragraph 2.8) which are most often referred to in subcontracts in Denmark are those drawn up by the Danish Standards Board (Dansk Standardiseringsråd), the Danish Electrotechnical Committee (Dansk Elektroteknisk Komité), and the Danish Association of Engineers (Dansk Ingeniørforening).

In specific fields, of course, certain minimum standards may have been laid down by national or Community law, either directly or by means of a reference to standards drawn up by competent bodies: this is the case, for example, with electricity, building and flammable liquids.

#### **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12).

There is no specific law in Denmark governing the validity of clauses excluding or limiting liability.

Article 36 of the Law on Contracts, (see paragraph 2.4 above), does represent a restriction of a general nature.

But significant restrictions have been introduced mainly by the courts. In Danish case law, clauses which exclude or limit liability are considered invalid where there is bad faith or serious fault. The courts also tend to interpret exclusion clauses strictly and to look for a very high standard of proof that both parties did indeed intend to exclude or limit liability (taking account of whether the scope of the specific clause is far-reaching or unusual).

#### **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

Danish legislation does not impose any limits on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc., over and above those set out by the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

## **7. CLAUSES RETAINING TITLE**

Clauses retaining title (see Part One of the Guide, paragraph 6.9) are admissible in Danish law where goods are sold against deferred payment: the buyer acquires title only when the full price has been paid.

Retention of title may be invoked against the buyer's creditors, e.g. in the event of a buyer's insolvency, and against third parties to whom the buyer has improperly sold the goods in which title is retained.

The rules governing retention of title are to be found in case law as well as in legislation.

Taking both sources together, we can say that retention of title is valid in Denmark on the following conditions:

- (a) the relevant agreement must be clear and explicit;
- (b) the agreement must have been concluded no later than the delivery of the goods;
- (c) retention of title must serve as a guarantee of the payment of the price only of the goods to which it applies (and not, for example, of earlier deliveries);
- (d) retention of title must relate to goods specifically identified.

This last requirement is the one of greatest interest to subcontractors: if the goods supplied have been mixed with other fungible goods in the contractor's stocks with the result that it is no longer possible to identify them, the retention of title loses its effect.

There are two more rules governing the applicability of retention of title in subcontracting. Firstly, retention of title has no effect where the goods sold (semi-finished goods, for example) have been worked or processed in such a way that the increase in value due to processing cannot be separated from the goods themselves. Secondly, retention of title has no effect if the goods sold have been joined with other goods or incorporated into other goods in such a way that separation would cause damage or expense out of proportion to the value of the goods themselves.

It can be concluded that, in Danish law, retention of title will be of practical importance as a concrete guarantee to a subcontractor only while the goods are still stored unprocessed in the contractor's stocks.

## **8. CONSEQUENCES OF BREACH**

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (see paragraph 2.10).

The general rule in Danish law where a party to a contract fails to perform his obligations is that, unless it has been agreed otherwise, the other party may at his discretion: (a) require specific performance of the contract; or (b) if there is a fundamental breach of contract, rescind the contract; and, in any event, (c) claim compensation for the loss suffered.

There are more specific rules laid down in the Danish Sale of Goods Law.

In the event of delay in delivery, the rule holds that the contractor has the choice between requiring specific performance or rescinding the contract and is, in any event, entitled to compensation for any loss caused by the delay, including lost production, lost profits and other indirect losses. In this last respect, the extent of a seller's liability and hence of a subcontractor's liability will depend on the type of goods sold: if the goods are specific goods, the seller will have to compensate for any loss due to delay unless he can show that the delay was due to no fault on his part (a test of fault with reversal of burden of proof); if the goods are generic goods, the seller will still have to compensate for loss, unless the delay was due to force majeure.

In the event of a defect in the product supplied, the contractor can always secure a reduction in price (or, if the goods are generic goods, have them replaced). If the defect constitutes a fundamental breach of contract, he may also choose to rescind the contract. In addition, he may always require compensation for the loss including loss of production, loss of profits or other "indirect" losses: regardless of fault, and unless the breach was the result of force majeure, if the goods are generic goods; only by showing that the seller was at fault or had given him an express or implied warranty, if the goods are specific goods.

It is worth noting that in no case does the Danish Sale of Goods Law entitle the buyer to require that the goods be repaired in order to remove the defect.

## **9. INTEREST**

In the event of late payment of the purchase price, Danish law lays down that, unless the parties agree otherwise, interest will be payable (see Part One, paragraph 6.8) at the official discount rate plus 5% (giving an annual rate of 14.5% as at 9 January 1991).

## **10. PRODUCT LIABILITY**

10.1. The Community Directive of 1985 (see Part One, paragraphs 8.5.5. et seq.) was implemented in Denmark by Law No 371/1989, which entered into force on 10 June 1989 and which transposes the Directive fully into Danish law. Denmark has not exercised its option to apply any of the derogations provided for (Articles 15 and 16): thus, no exception is made to the rule that the producer is not liable if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered ("development risk"); and no ceilings are set on the producer's total liability.



As regards the position of subcontractors in particular, Danish law faithfully takes over both the definition of "producer" and the exclusion of liability in the case of a manufacturer or supplier of a component or raw material if the defect is attributable entirely to the design of the product into which it was incorporated or to the instructions given by the manufacturer who used it (Article 7(f) of the Directive).

- 10.2. Where a subcontractor finds that he is jointly and severally liable, along with the final producer, for damage caused to a third party by a defective product, the further problem arises as to how the burden of the compensation owed to the third party is to be apportioned between the parties jointly and severally liable (see Part One, paragraphs 8.3, 8.8 and 8.9). Under the Directive (Article 5), the rights of contribution or recourse continue to be governed by national law: in Danish law, the courts will make an apportionment between those jointly and severally liable, taking account of the cause of the defect, the possibility of checking and testing the product which was open to each of them, any insurance against civil liability held, and other circumstances. In any event, the courts will generally accept contractual clauses between the parties which lay the burden of compensating an injured third party on one of them.

## FRANCE

### **1. LEGAL FRAMEWORK**

- 1.1. In France, industrial subcontracting agreements do not form a recognized category of contracts regulated by a specific set of rules. They are governed by the general principles of the Civil Code and by those applicable to the category of contract into which they fall: sales contract, or contract for the supply of goods and services.

It should be noted that Law No 1334 of 31 December 1975 refers to "subcontracting" but understands by this something completely different, namely the situation where, under contracts for services in connection with public works, the contractor allocates to other parties all or part of the execution of the work).

- 1.2. There are no standard subcontracting agreements in France which have been officially approved by governmental bodies, except for public works contracts.

However, there are standard contracts which have been drawn up by trade associations.

- 1.3. Large contractors frequently prepare standard subcontracting agreements and tend to impose these general terms on their own subcontractors.

### **2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE ON A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?**

- 2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by the provisions of ordinary law.

- 2.2. As already indicated, it is common practice in France for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

It is worth noting that a situation should be avoided in which two sets of general terms are superimposed, each party having referred to its own, and neither having declared that, in the event of any conflict, he will accept those of the other; in such cases, the court will probably accept neither set of terms and simply apply the rules laid down in the Civil Code.

- 2.3. Let us now consider the position in French law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all of the rules governing the various types of contract are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

- 2.4. Moreover, French law as it stands does not provide for any control as to substance of the general terms of contract, either in the form of a prior examination or of scrutiny by the courts, intended to prevent contracts being drawn up that constitute an excessive and unjustified exploitation of one side's negotiating strength in the case of contracts concluded between enterprises. The Law of 10 January 1978 and the Law of 5 January 1988 do indeed prescribe an in-depth examination of "abusive clauses", but only in the case of contracts between enterprises, on the one hand, and consumers or parties other than enterprises, on the other. In general, Article 1134 of the Civil Code remains applicable.

### 3. THE SUBSTANTIVE LEGAL RULES

- 3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the provisions of ordinary law apply.

It should though be noted that, while France has not ratified the 1964 Hague Convention, it has ratified the Vienna Convention on contracts for the international sale of goods. Where the appropriate conditions are met, therefore, the rules governing a subcontract should be sought primarily in the latter Convention.

- 3.2. On the other hand, if French law governs the contract, the not insignificant drawback of the lack of special rules adapted to the particular features of subcontracts, especially as regards the need for protection of the weaker party, is compounded by the difficulties in deciding on the category to which a particular subcontract belongs and hence on the rules that will be applicable. In fact, the distinction between the categories of contract referred to above - sales contracts and contracts for the supply of goods and services (see 1. above) - remains somewhat uncertain in French law, although court rulings have gone a long way towards clarifying matters.

In practical terms, the uncertainty in particular cases as to whether a subcontract should be classified as a sales contract or a contract for the supply of goods and services is of considerable importance. In fact, the differences between the rules applicable to sales contracts and those applicable to contracts for the supply of goods and services are considerable, particularly with regard to liability. For example, where latent defects are concerned, the rules governing sales contracts are more stringent than those governing contracts for the supply of services. Restrictions on liability are permitted in the latter case but not in the case of sales contracts, except where concluded between enterprises (reducing the importance of this rule in relation to subcontracts).

On the other hand, as has been indicated, the distinction between sales contracts and contracts for the supply of goods and services, albeit of great practical significance, is not clear-cut and definite in French law. As regards contracts concerning movable property, the specialist literature and the case law apply two criteria: an "economic" criterion relating to the value of the materials and of the work carried out, and a criterion of "design", which takes as the key determinant in classifying an agreement as a contract for the supply of goods and services the fact that the product is supplied by the subcontractor on the basis of technical specifications, plans and purposes indicated by the contractor.

In practice, application of the above-mentioned criteria to industrial subcontracts will almost invariably result in their being classified as contracts for the supply of goods and services (except in the case of catalogue sales or where the product has actually been designed by the subcontractor). However, the relative uncertainty that may exist in this area and that may, therefore, attach to the legal rules applicable is a further reason why a foreign subcontractor should make every endeavour to negotiate a specific contract to govern his relations with the contractor.

#### 4. TECHNICAL SPECIFICATIONS

The French standards (see Part One of the Guide, paragraph 2.8) most commonly referred to in subcontracts are the AFNOR standards. However, it is not unusual for reference to be made to the better-known foreign (DIN, BSI) or Community standards.

Information on the French standards in question can be obtained from the AFNOR, Tour Europe, Cédex 7, 92080 Paris-La Défense, Telephone (1) 42.91.55.55, Telex AFNOR 611974F, Fax (1) 42.91.56.56.

## **5. CLAUSES EXCLUDING LIABILITY**

Before the validity of clauses excluding or limiting liability are examined, it should be briefly pointed out that, according to case law, manufacturers selling their products are liable vis-à-vis the buyer and may not introduce any exclusion or limitation of their liability. In fact, they are deemed to be aware of the defects in products they have manufactured and sold. This constitutes strict liability, a standard which is now generally applicable in Europe pursuant to the Community Directive of 25 July 1985 (see 10. below).

There is no doubt that among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12). Nevertheless, as has been explained above, in French law clauses limiting liability in contracts for sale are valid only if the contract is concluded between enterprises (although liability for deceit (*dolus*) or serious fault cannot be excluded). On the other hand, such clauses remain valid, irrespective of who the contracting parties are, when they are incorporated in contracts for the supply of goods and services. It is very common practice in France for such clauses to be inserted in contracts for the supply of goods and services where the supplier's liability is usually confined to the replacement of products not conforming to the contract.

## **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

French law does not impose any limits on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, use of know-how, dealings with third parties, etc., over and above those set out in the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

## **7. CLAUSES RETAINING TITLE**

Clauses retaining title in goods sold (see Part One of the Guide, paragraph 6.9) are admissible under French law; the buyer acquires title only when the full price has been paid. Nevertheless, this is of relative practical importance in relation to subcontracting, as we shall now see.

Clauses retaining title are governed by the Law of 25 January 1985 (Articles 121 and 122).

The validity of such clauses depends on four conditions being met:

- (a) the agreement in question must be a sales contract (with the result that the clause is not applicable to contracts for the supply of goods and services);
- (b) the clause must be in writing;
- (c) the clause must have been accepted, even tacitly, by the other party;
- (d) the clause must have been accepted not later than the time of delivery.

The courts have ruled that, in order to be valid, such clauses must be clear, readily legible and such as to attract the attention of the other party. They have further ruled that, even though such a clause cannot be deemed to have been accepted tacitly where the buyer has not waived his own general conditions which do not contain such a clause, the general conditions of the seller override those of the buyer where the latter has confirmed an order containing a clause retaining title.

With regard to the effects of the clause, it should be borne in mind first of all that, where there is a clause retaining title under French law, the risk is borne by the seller until the price has been paid in full and title transferred. It is therefore advisable for a subcontractor to include a clause to the effect that the risk passes to the buyer on delivery (or an obligation on the buyer to take out appropriate insurance).

It should also be pointed out that, under the 1985 Law, a clause retaining title has effect in the event of bankruptcy or winding-up proceedings being instituted against the buyer. Nevertheless, it is a necessary condition that the goods should physically form part of the buyer's assets on the date when proceedings are instituted. Until now, the courts have interpreted this condition in a fairly strict manner, requiring that the goods should be identifiable (e.g. by a mark or identification number), should be in the state in which they were at the time of sale (i.e. they should not have been worked, processed, etc.) and should not have been incorporated into other goods (i.e. they should be separable). Finally, a claim to the goods must be submitted within a short time (within three months of the proceedings being instituted).

As regards third parties acquiring goods, the effect of the clause retaining title is that they are required not to return the goods, but merely to pay the balance of the price. However, that holds only if the goods have not yet been processed or incorporated into other goods, and any rights against a third party must fail if he has already paid the price and is acting in good faith.

In practice, a notable advantage conferred by a clause retaining title is that, in bankruptcy or winding-up proceedings, a trustee who continues to run the business on a temporary basis may not use goods which physically form part of the assets and which are covered by the clause unless he guarantees payment of the price in full.

For further, very useful information, foreign subcontractors should consult the *Guide pour l'utilisation des clauses de réserve de propriété*, ("Guide to the application of clauses retaining title") published in February 1987 by the *Commission technique de la Sous-traitance* of the Ministry for Industry.

## **8. CONSEQUENCES OF BREACH**

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (see paragraph 2.10). Under French law, if goods supplied do not conform to the contract, the buyer may, depending on the circumstances of the case, be entitled to have the defective product replaced or repaired, the price reduced or the contract simply terminated, and in any event he is entitled to compensation for the loss suffered.

## **9. INTEREST**

Except where otherwise stipulated, interest is payable at the statutory rate in the event of late payment of the price (see Part One of the Guide, paragraph 6.8). It is calculated in accordance with the criterion laid down in the Law of 23 June 1989 (linkage to fixed-rate treasury bonds) and determined each year by decree (for 1990, 9.36%). The interest is increased by five points if not paid within two months of an enforceable decision of the courts.

However, the current inconsistencies in court judgments mean that, on the basis of commercial practice and tacit acceptance by the other party, subcontractors cannot rely on obtaining interest at more than the statutory rate (e.g. bank interest).

On the other hand, a creditor can always obtain, in addition to interest at the statutory rate, compensation for additional damage caused by the debtor's bad faith (such compensation may, for example, make up for the difference between interest at the statutory rate and bank interest).

## **10. PRODUCT LIABILITY**

The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) has not yet been implemented in France.

In the mean time, the remedies available are those developed by the French courts in order to provide the consumer with means of direct action and effective protection (based on a form of objective liability) against producers marketing defective products.

# GERMANY

## **1. LEGAL FRAMEWORK**

- 1.1. In Germany, subcontracting agreements do not form a recognized category of contracts regulated by a specific set of rules. They are governed by the ordinary law of contract and by the rules on the category to which they belong (see 3. below): sales contract ("Kaufvertrag") or contract for the supply of goods and services ("Werkvertrag" or "Werklieferungsvertrag").
- 1.2. There are no standard subcontracting agreements in Germany which have been officially approved by governmental bodies.  
Standard subcontracting agreements have been drawn up by trade associations, a particularly important example being the general terms applied by the "Verband der Deutschen Automobilindustrie" (The Union of German Car Manufacturers) and known as the "VDA-Bedingungen".
- 1.3. On the other hand, large contractors frequently prepare standard subcontracting agreements and tend to impose these general terms on their own subcontractors.

## **2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?**

- 2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by the rules of the German Civil Code (BGB) and the German Commercial Code (HGB).

- 2.2. As already indicated, it is common in practice in Germany for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

It is worth noting that the subcontractor may also have his own general terms, which naturally differ from those of the contractor. In that case, an attempt should be made to avoid an unclear situation in which two sets of general terms are superimposed, each party having referred to his own. In these circumstances, the general terms of both parties are disregarded where they are in conflict and the general rules of law then apply.



2.3. Let us now consider the position in German law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all of the rules governing contracts are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

2.4. Then there is the question as to the existence of controls on the validity of the general rules of contract intended to prevent contracts being drawn up that constitute an excessive and unjustified exploitation of one side's negotiating strength.

The 1976 Law ("AGB-Gesetz") governing the general terms of contract is essentially aimed at regulating contracts agreed between enterprises and consumers (Sections 10 and 11 of this Law apply only to these contracts, for example, and contain respectively a list of clauses which are invalid unless considered otherwise by the courts, and a list of clauses which are automatically invalid).

Some of the Law's provisions are, however, applicable to contracts between enterprises, and in particular Section 9, which contains a general clause to the effect that the general terms of a contract are null and void if, contrary to the principle of good faith, they place the other party at a disproportionate disadvantage. Disadvantage is deemed disproportionate where a clause is incompatible with the fundamental legal rules from which it has departed or if it places limits on fundamental rights or obligations resulting from the type of contract that are such as to jeopardize performance of the contract.

Application of these rules by German courts guarantees the weaker party one of the highest levels of protection within the Community. Nevertheless, the foreign subcontractor should always exercise particular caution over the contractor's general terms of contract.

Where subcontracts are specifically concerned, it should be noted in particular that, under German law, a clause may not be deemed valid which allows the price to be revised in contracts that have to be performed within four months of being signed. The same applies to clauses limiting liability or guarantees of quality (see 5. below).

### **3. THE SUBSTANTIVE LEGAL RULES**

3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be pointed out, however, that Germany has ratified the Hague Convention of 1964 on the international sale of goods and the Vienna Convention of 1980. Where the appropriate conditions are met, therefore, the rules governing a subcontract should be sought primarily in the relevant Convention.

- 3.2. On the other hand, if, in a particular case, it is German law which applies, the particular law applicable depends on the classification of that contract (see 1. above).

For a sales contract ("Kaufvertrag"), Sections 433 et seq. of the Civil Code (BGB) and Sections 373 et seq. of the Commercial Code (HGB) apply. Where a contract for the supply of goods and services is involved, Sections 631 et seq. BGB apply if it ranks as a "Werkvertrag". However, if it ranks as a "Werklieferungsvertrag" (where the subcontractor uses his own materials), Section 651 BGB applies. Determination of the type of subcontract in question is though of little practical importance in German law. In most cases, a contract ranks as a "Werklieferungsvertrag" concerning fungible items, and this type of contract is governed exclusively by the rules on sales contracts (pursuant to Section 651 BGB). Some uncertainty may exist in the (rare) cases where the contract involves non-fungible items; here, pursuant to Section 651 BGB, some of the rules on sales contracts and some of the rules on contracts for the supply of services ("Werkvertrag") will apply.

This uncertainty, should the necessary circumstances exist, is a further reason why foreign subcontractors should make every effort to negotiate specific agreements covering the relationships between the partners to the subcontract.

#### 4. TECHNICAL SPECIFICATIONS

- 4.1. The most commonly employed German standards (see Part One of the Guide, paragraph 2.8) are the DIN standards drawn up by the German Standards Institute (Deutsches Institut für Normung). The German language version of these standards can be obtained inter alia from Beuth Vertrieb GmbH (Burggrafenstr. 6, 1000 Berlin 30, tel.: + 49-30-26011).
- 4.2. It should also be noted that an enterprise wishing to enter the German market nowadays as a subcontractor has increasingly to undergo a check by the contractor concerning its ability to supply high-quality goods.

Neutral bodies exist which can supply interested firms with attestations concerning the existence and effectiveness of their quality-assurance systems, e.g. the "Deutsche Gesellschaft zur Zertifizierung von Qualitätssicherungssystemen" (Kurhessenstr.95, 6000 Frankfurt a.M., Tel.: + 49-69-75701).

The Union of German Car Manufacturers ("Verband der Deutschen Automobilindustrie") has drawn up its own directives for guaranteeing quality, and these can be obtained from the Union at the address given below (Westendstr.61, 6000 Frankfurt a.M., Tel.: + 49-69-75701).

## 5. CLAUSES EXCLUDING LIABILITY

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12).

Under German law, clauses excluding or limiting the liability of the debtor (or legal representative in the case of companies) for deceit (*dolus*) or serious fault are definitely null and void. Where contracts between enterprises are concerned, it is still a matter of contention as to whether the clause is valid in the case of deceit or serious fault on the part of third parties used by the debtor in the performance of the contract ("*Erfüllungsgehilfen*"); this is not so with persons employed directly, where the clause has been deemed to be null and void. The above-mentioned clauses limiting liability are also considered invalid when they relate to obligations the non-performance of which would result in a risk to a person's life or well-being.

Similarly, the total exclusion of liability for quality guarantees in respect of the product covered by the contract is unlawful and invalid.

Where similar limitations of liability regarding quality are contained in the general terms of contract, their validity is accepted by German courts only in very tightly drawn circumstances.

However, clauses giving a contractor the exclusive right to seek the repair or replacement of the defective product (but without a right to any further claim for damages) have been deemed admissible by German courts. Where such recourse proves fruitless, the contractor may only exercise his right to have the contract rescinded or the price reduced.

Furthermore, clauses which only allow the contractor to rescind a contract but not to seek a reduction in price are generally admissible, as are clauses which do not allow the contractor to claim damages but which give him the right to seek a price reduction or to rescind the contract (in so far as this is practical).

Clauses are also permitted which (a) simply exclude compensation for certain types of damage (e.g. consequential damage, that is, damage caused not to the object of the contract but to other items belonging to the claimant, or unforeseeable damage), or (b) set a ceiling on the amount of compensation to be paid.

However, clauses are deemed invalid which do not allow the contractors sufficient time for notifying defects in the item or which impose too short a time bar on his rights.

Clauses are also inadmissible which transfer responsibility for guaranteeing quality entirely to the subcontractor, thereby releasing the contractor from the need to carry out any quality controls on receipt of the goods or from the requirement to notify defects within a reasonable time.

It is worthwhile noting that reasonably equitable solutions to this whole issue are contained in the general VDA terms ("*VDA-Bedingungen*") applicable in the motor vehicle industry (see paragraph 1.2. above).

## **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

In addition to the limits set out in the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.) on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc., account should be taken of the limits imposed by German legislation concerning competition (Section 1 GWB).

## **7. CLAUSES RETAINING TITLE**

Clauses retaining title in the goods sold (see Part One of the Guide, paragraph 6.9) are admissible under German law: the buyer acquires title only when the full price has been paid.

In the case of subcontracts, however, for the clause retaining title to be effective in practice, the subcontractor must extend the clause by adding new provisions. For example, if a part is produced for fitting to, or incorporation into, a final product, once such fitting or incorporation has been carried out, the final producer becomes the owner under existing rules. A conventional - and legally admissible - clause is therefore required so that the subcontractor is recognized as part-owner of the final product, such ownership being in proportion to the value of the goods supplied. It frequently happens that, prior to processing or incorporation, the product which is the object of the subcontract (and the corresponding title) is sold on by the contractor to a third party. To guard himself against such an eventuality, the subcontractor must take care to ensure that the clause retaining title provides for preventive transfer to him of any proceeds resulting from the sale of the product.

Another practical way of extending title is to secure not only the price of the goods covered by the clause retaining title but also all of the owner's claims on the other party.

Retention of title can also be relied upon where the buyer goes bankrupt; if the goods are still in the buyer's hands, the supplier has the right to recover his property; alternatively, he retains the right to any proceeds accruing from their sale.

## **8. CONSEQUENCES OF BREACH**

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (paragraph 2.10). As mentioned above, the general rule in German law where a party to a contract fails to perform his obligations is that the other party may choose between (a) repair or replacement of the item; (b) a reduction in its price; or (c) termination of the contract.

Where defects in the quality of the product supplied are concerned, however, there is a specific onus on the contractor to examine goods upon delivery in so far as this is possible under normal commercial operating conditions and to give notification of the defect without delay.

## **9. INTEREST**

In the event of late payment of the purchase price, German law lays down that, unless the parties agree otherwise, interest will be payable at the statutory rate (see Part One of the Guide, paragraph 6.8).

## **10. PRODUCT LIABILITY**

- 10.1. The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) entered into force in Germany on 1 January 1990 pursuant to the Law of 15 December 1989, which reproduces the Directive in full. Germany has not exercised its option to derogate from the rule that the producer is not liable if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered ("development risk"). However, the option was taken up to set a ceiling (DM 160 million) on damages resulting from identical items with the same defect.

As regards the position of subcontractors in particular, German law faithfully takes over both the definition of "producer" (Section 4) and the exclusion of liability in the case of a manufacturer or supplier of a component or raw material if the defect is attributable entirely to the design of the product into which it was incorporated or to the instructions given by the manufacturer who used it (Section 1.3, which corresponds to (Article 7(f) of the Directive).

- 10.2. Where a subcontractor finds that he is jointly and severally liable, along with the final producer, for damage caused to a third party by a defective product, the further problem arises as to how the burden of the compensation owed to the third party is to be apportioned between the parties jointly and severally liable (see Part One of the Guide, paragraphs 8.3, 8.8 and 8.9). Under the Directive (Article 5), the rights of contribution or recourse continue to be governed by national law: in German law, the courts will make an apportionment between those jointly and severally liable, taking particular account of the relative responsibility of each of the parties as regards the damage caused. Various clauses have, however, been explicitly declared valid. Thus, clauses will be considered valid where the relations between the parties are expressed in such a way as to place full responsibility on one of the contracting parties (e.g. the subcontractor, who is usually the weaker party) to compensate a third party for damages.

## GREECE

### **1. LEGAL FRAMEWORK**

- 1.1. In Greece, subcontracting agreements do not form a recognized category of contracts regulated by a specific set of rules. They are governed by ordinary law and by the rules on the category to which they belong (see 3. below): sales contract, or contract for the supply of goods and services.
- 1.2. There are no standard subcontracting agreements in Greece which have been officially approved by governmental bodies or drawn up by trade associations.
- 1.3. On the other hand, large contractors frequently prepare standard subcontracting agreements and tend to impose these general terms on their own subcontractors.

### **2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?**

- 2.1 Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by rules of law.

- 2.2. As already indicated, it is common in practice for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

It is worth noting that a situation should be avoided in which two sets of general terms are superimposed, each party having referred to his own, and neither having declared that, in the event of any conflict, he will accept those of the other; in such cases, the courts will probably accept neither set of general terms and simply apply the rules supplied by the law.

- 2.3. Let us now consider the position in Greek law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all of the rules governing contracts are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

- 2.4. Furthermore, Greek law does not currently impose restrictions on the general terms of contract with a view to preventing excessive and unjustified exploitation of one side's negotiating strength. Therefore, a foreign subcontractor should always exercise particular caution over the contractor's general terms of contract.

### 3. THE SUBSTANTIVE LEGAL RULES

- 3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be pointed out, however, that Greece has ratified neither the Hague Convention of 1964 on the international sale of goods nor the Vienna Convention of 1980. As a result, Greek law is the sole regulator of contracts for the sale of goods.

- 3.2. In Greek law, the not insignificant drawback of the lack of special rules adapted to the particular features of subcontracts is compounded by the difficulties in deciding on the category to which a particular subcontract belongs and hence on the rules that will be applicable.

In practice, a subcontract will be considered (see 1. above) to be a sales contract or a contract for the supply of goods and services. There are significant differences between the rules governing each type of contract (e.g. as regards transfer of title, risks, etc.).

Furthermore, there is no definite and neat dividing line in Greek law between sales contracts and contracts for the supply of goods and services; in practice, relative criteria are applied, but not in any clear-cut manner.

The resulting uncertainty as to legal classification and hence the provisions applicable is a further reason, however, why foreign subcontractors should make every effort to negotiate specific agreements covering the relationship between the parties to the subcontract.

#### **4. TECHNICAL SPECIFICATIONS**

In Greece, the standards most frequently referred to in subcontracts are the better-known Community or international standards (DIN, AFNOR, BSI).

#### **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12).

Furthermore, it should be pointed out that, under Greek law, no significant restrictions exist on the validity of clauses excluding or limiting liability.

#### **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

Greek legislation does not impose any limits on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc., over and above those set out in the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

#### **7. CLAUSES RETAINING TITLE**

Clauses retaining title (see Part One of the Guide, paragraph 6.9) are admissible in Dutch law where goods are sold against deferred payment: the buyer acquires title only when the full price has been paid.

#### **8. CONSEQUENCES OF BREACH**

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (paragraph 2.10). The general rule in Greek law where a party to a contract fails to perform his obligations is that the other party may at his discretion: (a) require specific performance of the contract; or (b) seek to have the contract terminated; and, in any event, (c) claim compensation for the loss suffered.



## **9. INTEREST**

In the event of late payment of the purchase price, interest will be payable (see Part One of the Guide, paragraph 6.8) unless the parties agree otherwise.

## **10. PRODUCT LIABILITY**

- 10.1. The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) recently entered into force in Greece.

As regards the position of subcontractors in particular, Greek law faithfully takes over both the definition of "producer" and the exclusion of liability in the case of a manufacturer or supplier of a component or raw material if the defect is attributable entirely to the design of the product into which it was fitted or to the instructions given by the manufacturer who used it (Article 7(f) of the Directive).

## IRELAND

### **1. LEGAL FRAMEWORK**

1.1. In Ireland, subcontracting agreements are not regulated by any specific set of rules. They are governed by the general principles applicable to commercial contracts and by those applicable to the category of contract into which they fall: sales contract, or contract for the supply of goods and services (see 3. below).

1.2. There are no standard subcontracting agreements in Ireland which have been officially approved by governmental bodies.

Standard contracts prepared by trade associations are also rare. The ORGALIME model contract is, however, adapted for use in some cases (Organisme de Liaison des Industries Métalliques Européennes).

1.3. On the other hand, large contractors often prepare standard subcontracting agreements and tend to impose these general terms on their own subcontractors (this is particularly common, for example, in the information technology industry).

### **2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?**

2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by the rules of contract law.

2.2. As already indicated, it is common in practice in Ireland for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

It is worth noting that the subcontractor may also have his own general terms, which naturally differ from those of the contractor. In that case, an attempt should be made to avoid an unclear situation in which two sets of general terms are superimposed, each party having referred to his own. In these circumstances, the general terms of both parties are disregarded where they are in conflict, and the general rules of law then apply.

- 2.3. Let us now consider the position in Irish law of a subcontractor who is obliged to accept the general terms of the contractor.  
Almost all of the rules governing contracts are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.
- 2.4. Furthermore, Irish law accepts the validity of such general terms of contract and does not impose sufficient restrictions to prevent excessive and unjustified exploitation of one side's negotiating strength (for the clauses excluding liability, see 5. below in particular).  
Therefore, a foreign subcontractor should always exercise particular caution over the contractor's general terms of contract.

### **3. THE SUBSTANTIVE LEGAL RULES**

- 3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be noted that Ireland has ratified neither the Hague Convention of 1964 on the international sale of goods nor the Vienna Convention of 1980; these Conventions do not, therefore, form an integral part of Irish law.

- 3.2. The rules applicable depends on the classification of the contract (see 1. above).

If a sales contract is involved, the Sale of Goods Act 1983 and the Sale of Goods and Supply of Services Act 1980 apply; only the latter Act applies where services are supplied.

The large majority of subcontracts clearly rank as sales contracts. Only certain types of contract for work can be classified as contracts for the supply of services. Since the 1980 Act, however, the legal distinction between the two types of contract has lost much of its significance.

In general, for the sale of goods, the Acts specify certain fundamental ("implied") obligations. In particular, the goods delivered should correspond to their description in the contract, they should be of merchantable quality and they should be reasonably fit for the specific purpose expressly stipulated by the buyer.

For the supply of services, the relevant Act considers the contractual term "implied" to mean that the services are provided with due care and skill, the materials used are reasonably fit for the purpose and any goods supplied under the contract are of merchantable quality.

For cases where these implied terms are usually excluded, see 5. below.

#### **4. TECHNICAL SPECIFICATIONS**

In Ireland, the Institute for Industrial Research and Standards draws up technical standards. However, North American, Community, British (BSI) and ISO Standards are the ones most commonly employed for contracts.

#### **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12).

Such clauses are generally valid under Irish law.

Where the sale of goods is concerned, derogations from the above-mentioned implied terms (conformity, merchantable quality, etc.) are void in law, except in contracts between enterprises, where the clause may be deemed fair and reasonable.

In the case of contracts between enterprises, however, this protection does not extend to the supply of services.

#### **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

In Ireland, the Restrictive Practices Act 1972 operates alongside the Community rules on competition. However, application of the Act has not as yet resulted in limits being placed on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc., over and above those set out in the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

## **7. CLAUSES RETAINING TITLE**

Clauses retaining title (see Part One of the Guide, paragraph 6.9) are admissible under Irish law where goods are sold against deferred payment: the buyer acquires title only when the full price has been paid. The clause is used quite often in practice.

In the case of subcontracts, the problem is that the goods in respect of which title is retained are usually processed or incorporated and then resold. The solution is to include in an appropriate manner in the contract an intrinsic but very carefully drafted clause allowing title to be extended to the price received on resale (it is, however, a matter of some debate as to whether such a clause should be registered at the Companies Office for it to be valid).

## **8. CONSEQUENCES OF BREACH**

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (paragraph 2.10). Under the law applicable in Ireland, the purchaser has the right to repudiate the contract if a fundamental breach of contract is involved, i.e. where there is a failure to perform any material condition; minor breaches of contract (in relation to warranties) confer entitlement to damages only.

## **9. INTEREST**

Unless otherwise agreed, interest is payable at the statutory rate in the event of late payment of the price (see Part One of the Guide, paragraph 6.8). The rate currently applying (1990) is 8%, although this can be periodically adjusted by the competent ministry.

## **10. PRODUCT LIABILITY**

The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) has not yet been implemented in Ireland. Its transposition is expected shortly.

# ITALY

## **1. LEGAL FRAMEWORK**

- 1.1. In Italy, subcontracting agreements do not form a recognized category of contracts regulated by a specific set of rules. They are governed by the ordinary rules of the Civil Code and by the rules on the category to which they belong (see 3. below): sales contract (Articles 1470 et seq. of the Civil Code), contract for the supply of services (Articles 1559 et seq. of the Civil Code), an independent contract (Article 1665 of the Civil Code) or an independent labour contract (Article 2222 of the Civil Code).
- 1.2. There are no standard subcontracting agreements in Italy which have been officially approved by governmental bodies.

The only standard subcontracting agreements in existence are: (a) those drawn up in 1973 by the Confederazione Generale dell'Industria Italiana (CONFINDUSTRIA) following a "basic agreement reached in the headquarters of the Confederation between interested contracting and subcontracting enterprises and intended to standardize reciprocal contracting relations" (taken from the Introduction), and (b) the one drawn up in 1974 between CONFINDUSTRIA and FINMECCANICA (belonging to the IRI group - enterprises partly owned by the State). However it must be pointed out that, in practice, such standard contracts never seem to be applied or considered.

- 1.3. On the other hand, large contractors frequently prepare standard subcontracting agreements and tend to impose these general terms on their own subcontractors.

## **2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?**

- 2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by the rules contained in the Civil Code.

- 2.2. As already indicated, it is common in practice in Italy for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

In Italy, oral subcontracting agreements are rare; contracts are more frequently concluded on the basis of general contract terms written down by the contractor and accepted by the subcontractor, sometimes expressly and sometimes only implicitly (by way of performance). It quite often happens that the subcontractor limits himself to carrying out the order, without returning to the contractor the general terms signed by him. A common form of defence for subcontractors is thereby put into effect: the general terms contained in the forms prepared by the contractor are deemed to be tacitly accepted, but the more oppressive clauses cannot be said to have been specifically approved in writing and are, therefore, null and void under the second paragraph of Article 1341 of the Civil Code (see 2.4 below).

It is worth noting that a situation should be avoided in which two sets of general terms are superimposed, each party having referred to his own, and neither having declared that, in the event of any conflict, he will accept those of the other; in such cases, the courts will probably accept neither set of general terms and simply apply the rules supplied by the law.

- 2.3. Let us now consider the position in Italian law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all of the rules governing contracts are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

- 2.4. Moreover, Italian law as it stands does not provide for any control as to substance of the general terms of a contract, either in the form of a prior examination or of scrutiny by the courts, intended to prevent contracts being drawn up that constitute an excessive and unjustified exploitation of one side's negotiating strength. The only limit on the excessive power of the stronger contracting party is prescribed in Articles 1341 and 1342 of the Italian Civil Code; this limit is only formal and of very little practical relevance. The second paragraph of Article 1341 states that "In any case conditions are ineffective, unless specifically approved in writing," - i.e. in substance, if the pure formalism of the double signature is not applied - "which establish, in favour of him who has prepared them in advance, limitations on liability, the power of withdrawing from the contract or of suspending its performance, or which impose time-limits involving forfeitures on the other party, limitations on the power to raise defences, restrictions on contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitration clauses or derogations from the competence of courts" (it should also be noted that, for international contracts, arbitration clauses are excluded from the scope of Article 1341 of the Italian Civil Code on the basis of the 1958 New York Convention, and the indication of the competent forum is similarly treated on the basis of Article 17 of the 1968 Brussels Convention). The first paragraph of Article 1342 stipulates that "In contracts made by subscribing to forms or formularies prepared for the purpose of regulating certain contractual relationships in a uniform manner, clauses added to such forms or formularies prevail over the original clauses of said forms or formularies when they are incompatible with them, even though the latter have not been struck out". Article 1370 adds that "Provisions contained in the standard

conditions of a contract or in forms or formularies [...] are interpreted, in case of doubt, in favour of the other".

It is evident that Italian law affords inadequate protection to the weaker party against general terms imposed by the other party: a foreign subcontractor should therefore exercise particular caution over these general terms of contract.

### 3. THE SUBSTANTIVE LEGAL RULES

- 3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be pointed out, however, that Italy has ratified the Hague Convention of 1964 on the international sale of goods and the Vienna Convention of 1980. Where the appropriate conditions are met, therefore, the rules governing a subcontract should be sought primarily in the relevant Convention.

- 3.2. On the other hand, if it is Italian law which applies, the not insignificant drawback of the lack of special rules adapted to subcontracts (especially as regards the need for protection of the weaker party) is compounded by the difficulties in deciding to which category a particular subcontract belongs and hence on the rules that will be applicable. In fact, the distinction between the categories of contract referred to above - sales contract, independent contract, supply contract and independent labour contract (see 1. above) - is rather uncertain and sometimes blurred.

In practical terms, the uncertainty in particular cases as to whether a subcontract should be considered as a sales contract (perhaps "staggered delivery") or a supply contract (under Article 1559 of the Civil Code, "a supply contract is one by which a party binds itself to supply another with things continuously or periodically, in return for a price") may be of relative importance: on the one hand, because of the reference contained in Article 1570 of the Civil Code, viz. "To the extent that they are compatible with the provisions of the preceding articles, the provisions governing the type of contract to which single instalments of performance correspond apply to a supply contract" (which, in such a case, could indeed be the sale of goods); on the other hand, some of the specialist literature and case law seem more and more inclined to apply even to "staggered delivery" sales contracts (being a long-term contract) at least some of the most important specific rules on supply contracts (e.g. Article 1564, which states that "In case of non-performance of a single instalment by one of the parties, the other can request resolution of the contract if the default is significant and is such as to reduce confidence in the punctuality of subsequent performances.").

The matter is more delicate when it comes to deciding whether a contract should be classified as a sales contract (to which particular rules on supply contracts may have been added) or an independent contract (under Article 1655 of the Civil Code, an independent contract is a contract by which a party undertakes to perform a piece of work or render services, organizing the necessary means and operating at his own risk, in return for compensation in money). In this case, differences in the rules are significant: e.g. with regard to determining the moment of transfer of ownership of the items being supplied and the associated risk (see



Articles 1470 and 1472 of the Civil Code for sales contracts, and Articles 1665, 1666 and 1673 for independent contracts); with regard to the guarantee in respect of latent defects or on the lack of essential quality (Articles 1490 et seq. of the Civil Code, and in particular Article 1495, which relates to the time-limits for notification and the conditions of action for sales contracts; see Articles 1667 and 1668 for independent contracts); with regard to certain rules peculiar to independent contracts (see, for example, Articles 1659 et seq. for variations agreed upon with respect to plans, Article 1662 for inspection of work in progress, Article 1664 for revision of the price, and Article 1671 for unilateral withdrawal from contract).

On the other hand, the distinction between sales contracts and independent contracts, albeit of great practical significance, is not clear-cut and definite in Italian law. The specialist literature and case law take as the decisive criterion a point of uncertain practical application, viz. that of predominance ("prevalenza"), in the intentions of the parties, of the work necessary for the production of the goods ("appalto") or of the acquisition of the goods by the buyer without regard to the details of the production process ("vendita").

It should also be noted that, under Italian law, a distinction may be drawn between supply contracts and independent contracts only where the supply of goods is involved; where it concerns the supply of services, it is always an independent contract ("appalto") (Article 1677 of the Civil Code, which also refers in this case to the concurrent application - where compatible - of the rules governing independent contracts and those governing supply contracts).

Another point to remember is that, under Italian law, when the person who "binds himself to perform a piece of work or render a service for compensation" is a "small entrepreneur" within the meaning of Article 2083 of the Civil Code, that is to say someone who carries on activities "primarily by his own effort" (Article 2222 of the Civil Code), then the contract is an independent labour contract and not an independent contract; in this case, some of the rules applicable differ quite significantly from those for independent contracts (see, for example, Article 2226 on latent defects).

In practice, the above-mentioned difficulties create uncertainty as to the true content of the relevant law; all the more reason, therefore, why a foreign subcontractor who finds himself caught between accepting general terms (often binding) prepared by the other party and applying rather uncertain (although more balanced) existing rules should seek in any event to negotiate a specific contract to govern the subcontracting relationship.

#### 4. TECHNICAL SPECIFICATIONS

The standards (see Part One of the Guide, paragraph 2.8) which are most often referred to in subcontracts in Italy are those drawn up by UNI (Ente Nazionale Italiano di Unificazione), Via Campania 31, Rome, and by CEI (Comitato Elettronico Italiano), Viale Monza 259, Milan. It is also not unusual to find references to the better-known Community or foreign standards (DIN, AFNOR, DSI).

In specific fields, of course, certain minimum standards are laid down by national or Community law (either directly or by reference to standards drawn up by the competent bodies).

## **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12). However, it must be pointed out that, under Article 1229 of the Civil Code, "Any agreement which, in advance, excludes or limits the liability of the debtor for fraud, malice or gross negligence" (or which, under the second paragraph of the Article, actually constitutes "a violation of a duty arising from rules of public policy": second paragraph) is void. Clauses excluding liability for negligence are therefore quite valid under Italian law (except for the formal limitation under the second paragraph of Article 1341). Furthermore, Italian case law has not as yet introduced in practice more clearly defined forms of control over such clauses for the protection of the weaker party.

## **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

Italian legislation does not impose any limits on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc., over and above those set out by the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

## **7. CLAUSES RETAINING TITLE**

Clauses retaining title (see Part One of the Guide, paragraph 6.9) are admissible in Italian law where goods are sold against deferred payment (Article 1523 of the Civil Code). As a result, the buyer acquires title only when the full price has been paid, but he assumes all the risks in respect of the goods sold from the time of delivery.

A clause retaining title can be relied upon against the buyer's creditors only if it arises from a written document bearing a certain date prior to the date of attachment (first paragraph of Article 1524 of the Civil Code); by "certain date" is meant the date of registration (or transcription) of the document (or - and here the assumption is of little practical relevance - the date upon which the requirements of Article 2704 of the Civil Code are satisfied).

A clause retaining title can also be relied upon against a third party if the sale concerns machinery and the price exceeds LIT 30 000 (a sum of money rendered insignificant by inflation), provided that the clause in question has been recorded in a special register. If machinery is not involved in the sale, the clause cannot be relied upon against a third party who acquired the buyer's rights in good faith (Article 1153 of the Civil Code).

On the other hand, Italian law does not deal adequately with the case in which the goods sold with retention of title are intended for incorporation into another product, this being the most relevant case where subcontracting is concerned. From this point of view, the clause retaining title can, in practice, provide the

subcontractor with a minimum guarantee only for as long as the goods in question have not been incorporated into the final product (or, if separation can take place without notable damage, for as long as the final product has not been marketed) and are still identifiable to the contractor (i.e. they have not been mixed with other fungible items).

## 8. CONSEQUENCES OF BREACH

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (paragraph 2.10). The general rule in Italian law (Article 1453 of the Civil Code) where a party to a contract fails to perform his obligations is that the other party may, at his discretion: (a) require specific performance of the contract; or (b) seek to have the contract terminated through the courts; and, in any event, (c) claim compensation for the loss suffered.

It should be noted that a request to have the contract terminated can be made only when the breach of contract is of more than "slight importance"; under Italian law, this can be achieved as a rule only by taking proper legal action. The need to do so can only be avoided if the contract contains an express cancellation clause or, where faced with the breach of contract, the other party gives notice in writing to perform within an appropriate time: both these mechanisms result in dissolution of the contract.

In addition to the above general solutions, the Italian Civil Code also includes special regulations for particular contracts.

With a sales contract, for example, the seller is liable for latent defects in the item sold which render it unfit for the use for which it was intended, which appreciably diminish its value or which could not be known or could not be easily detected by the buyer, while an agreement excluding or limiting such warranty has no effect if the seller has, in bad faith, omitted to mention such defects to the buyer (Articles 1490 and 1491 of the Civil Code). In the event of a latent defect, the buyer can seek to have the contract terminated or the price reduced, and in all cases he has a right to compensation for damages (Articles 1492 and 1494 of the Civil Code). The buyer, however, forfeits all rights if he fails to notify the seller of the defects within eight days of their discovery (unless a different time-limit is established by the parties concerned) and, in all cases, no action can be taken after one year from delivery (Article 1495 of the Civil Code). Finally, in a sales contract, the buyer does not generally have the right to require that goods having latent defects be repaired or replaced; this is permitted only where a specific warranty of proper functioning ("garanzia di buon funzionamento") (for a specific period) has been included in the contract (Article 1512 of the Civil Code).

In an independent contract, however, the independent subcontractor is liable for non-conformity or defects in the work, except where the customer has accepted the work and the changes or defects were known to him or were detectable; however, in order to enforce the subcontractor's liability, the customer must, under penalty of forfeiture, notify the contractor of the problems within sixty days, and no further action can be taken against the contractor after two years from the date of delivery (Article 1667 of the Civil Code). Where the conditions exist for the subcontractor's liability to be ascertained, the customer can choose (without affecting compensation for damages) not only to have the price reduced or the contract terminated (although only where the non-conformity or defects in the work are such as to render it totally inadequate for

its purpose), but also to have the non-conformity or defects eliminated at the contractor's expense (Article 1668 of the Civil Code).

With regard to compensation for damages, which invariably follows a breach of contract (if the debtor does not prove that non-performance was due to impossibility of performance for reasons not imputable to him - Article 1218 of the Civil Code), the measure of damages includes resulting losses and lost profits, in so far as they are a "direct and immediate consequence" of non-performance (Article 1223 of the Civil Code) and are damages that could have been foreseen (Article 1225 of the Civil Code).

## 9. INTEREST

In the event of late payment of the purchase price, Italian law lays down that interest will be payable (see Part One of the Guide, paragraph 6.8) at an annual rate of 10% (from 1991). Where further damage can be shown, then additional compensation is allowed over and above the interest payable (second paragraph of Article 1224 of the Civil Code). In the last few years, Italian case law has tended more and more to admit not only that such further damage may take the form of a fall in the value of money but also that the damage caused by such a fall is presumed to exist where the creditor is a businessman (which means, in practice, that the businessman in Italy, if well represented in law, can succeed in obtaining full cover against the effects of inflation on what he is owed).

## 10. PRODUCT LIABILITY

10.1. The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) was implemented in Italy by Presidential Decree No 224 of 24 May 1988, which transposes the Directive fully into Italian law. In general, the option to apply any of the derogations provided for (Articles 15 and 16) has not been exercised: thus, no exception is made to the rule that the producer is not liable if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered ("development risk"); and no ceilings are set on the producer's total liability.

As regards the position of subcontractors in particular, Italian law faithfully takes over the definition of "producer" (Article 3 in both instruments and the exclusion of liability in the case of a manufacturer or supplier of a component or raw material if the defect is attributable entirely to the design of the product into which it was incorporated or to the instructions given by the manufacturer who used it (Article 6(f) of the Italian Decree, corresponding to Article 7(f) of the Directive).

10.2. Where a subcontractor finds that he is jointly and severally liable, along with the final producer, for damage caused to a third party by a defective product, the further problem arises as to how the burden of the compensation owed to the third party is to be apportioned between the parties jointly and severally liable (see Part One of the Guide, paragraphs 8.3, 8.8 and 8.9). Under the Directive (Article 5), the rights of contribution or recourse continue to be governed by national law: in

Italian law, the courts will apportion between those jointly and severally liable the measure of risk attributable to each party, the seriousness of any fault and the resulting consequences (where doubt exists, the apportionment will be of equal measure). For the reasons given above (see 5.), Italian case law may deem to be valid contractual clauses between the parties which lay the burden of compensating an injured third party on one of them (for example, on the subcontractor, usually the weaker contracting party).

## LUXEMBOURG

### 1. LEGAL FRAMEWORK

- 1.1. In Luxembourg, subcontracting agreements are not regulated by any specific set of rules (\*). They are governed by the general principles applicable to commercial contracts and by those applicable to the category of contract into which they fall: sales contract, or contract for the supply of goods and services.
- 1.2. There are no standard subcontracting agreements in the Netherlands which have been officially approved by governmental bodies or drawn up by trade associations.
- 1.3. On the other hand, large contractors frequently prepare standard subcontracting agreements and tend to impose these general terms on their own subcontractors.

### 2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?

- 2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by rules of law.

- 2.2. As already indicated, it is common in practice for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

It is worth noting that a situation should be avoided in which two sets of general terms are superimposed, each party having referred to his own, and neither having declared that, in the event of any conflict, he will accept those of the other; in such cases, the courts will probably accept neither set of general terms and simply apply the rules supplied by the law.

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(\*) The law of 23 July 1991, which regulates subcontracting activities does not cover industrial subcontracting.

- 2.3. Let us now consider the position in Luxembourg law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all of the rules governing contracts are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

- 2.4. Furthermore, Luxembourg law does not currently impose restrictions on the general terms of contract with a view to preventing excessive and unjustified exploitation of one side's negotiating strength.

Therefore, a foreign subcontractor should always exercise particular caution over the contractor's general terms of contract.

### 3. THE SUBSTANTIVE LEGAL RULES

- 3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be pointed out, however, that Luxembourg has ratified the Hague Convention of 1964 on the international sale of goods but has yet to ratify the Vienna Convention of 1980. Where the appropriate conditions are met, therefore, the rules governing a subcontract should be sought primarily in the Hague Convention, although this Convention applies only to trade between the small number of countries which have ratified it.

- 3.2. On the other hand, if, in a particular case, it is Luxembourg law which applies, the not insignificant drawback of the lack of special rules adapted to the particular features of subcontracts is compounded by the difficulties in deciding on the category to which a particular subcontract belongs and hence on the rules that will be applicable.

In fact, a particular contract may be classified as a sales contract or as a contract for the supply of goods and services (see 1. above). Classification in one or other of these categories entails significant differences in the rules applicable (e.g. as regards transfer of title, and risks).

Furthermore, in Luxembourg law the distinction between sale and supply is not clear-cut and definite but is based on criteria which are relative and uncertain in their application. An example of this is the criterion whereby classification of a contract is determined by the component which has greater economic value; if the materials supplied are of greater value than the labour involved in manufacturing the product, the relationship is one of the sale and, in the opposite case, one of supply.

These uncertainties as to the legal classification and hence as to the presumptive rules applicable are a further reason why foreign subcontractors should make every endeavour to negotiate a specific contract to govern his relations with the contractor.

#### **4. TECHNICAL SPECIFICATIONS**

Luxembourg does not apply its own standards (see Part One of the Guide, paragraph 2.8.). Those most frequently referred to in subcontracts are the better-known Community or international standards (DIN, AFNOR, BSI).

If the goods supplied are worth more than the labour used to manufacture the product, then it is a sales contract, and a contract for the supply of services in the opposite case.

#### **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12).

Furthermore, it should be pointed out that, under Luxembourg law, no significant restrictions exist on the validity of clauses excluding or limiting liability.

#### **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

Luxembourg legislation does not impose any limits on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc., over and above those set out in the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

#### **7. CLAUSES RETAINING TITLE**

Clauses retaining title (see Part One of the Guide, paragraph 6.9) are admissible in Luxembourg law where goods are sold against deferred payment: the buyer acquires title only when the full price has been paid. However, where no legal provision exists, the clause retaining title applies only to the parties involved and cannot be invoked against third parties.



## **8. CONSEQUENCES OF BREACH**

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (see paragraph 2.10). The general rule in Luxembourg law where a party to a contract fails to perform his obligations is that the other party may at his discretion: (a) require specific performance of the contract; or (b) seek to have the contract terminated; and, in any event, (c) claim compensation for the loss suffered.

## **9. INTEREST**

In the event of late payment of the purchase price, interest will be payable (see Part One of the Guide, paragraph 6.8) at a current (1990) rate of 9% per year, unless the parties agree otherwise.

## **10. PRODUCT LIABILITY**

10.1. The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) recently entered into force in Luxembourg.

As regards the position of subcontractors in particular, Luxembourg law faithfully takes over both the definition of "producer" and the exclusion of liability in the case of a manufacturer or supplier of a component or raw material if the defect is attributable entirely to the design of the product into which it was incorporated or to the instructions given by the manufacturer who used it (Article 7(f) of the Directive).

# NETHERLANDS

## **1. LEGAL FRAMEWORK**

- 1.1. In the Netherlands, subcontracting agreements do not form a recognized category of contracts regulated by a specific set of rules. They are governed by the ordinary law of contract and by the rules on the category to which they belong (see 3. below): sales contract, contract for work or contract for the supply of goods and services.
- 1.2. There are no standard subcontracting agreements in the Netherlands which have been officially approved by governmental bodies. Standard subcontracting agreements have been drawn up by trade associations, but they tend to provide just a general outline which needs to be filled in before they can serve as actual agreements.
- 1.3. On the other hand, large contractors frequently prepare standard subcontracting agreements and tend to impose these general terms on their own subcontractors.

## **2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?**

- 2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by rules of law.

- 2.2. As already indicated, it is common in practice for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

It is worth noting that a situation should be avoided in which two sets of general terms are superimposed, each party having referred to his own, and neither having declared that, in the event of any conflict, he will accept those of the other; in such cases, the courts will probably accept neither set of general terms and simply apply the rules supplied by the law.

2.3. Let us now consider the position in Dutch law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all of the rules governing contracts are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

2.4. Some time ago, the Dutch courts began to impose restrictions on the validity of general terms of contract. Court practice now is to declare such terms invalid if, in a specific case, they would produce an unreasonable result and run counter to the principle of good faith.

The new Dutch civil code - which will enter into force in 1992 - is likely to include stringent specific rules on general terms of contract: there will probably be a "black list" of terms which are considered invalid in all cases and a "grey list" of terms which are normally invalid, except where proof is provided, in a particular case, that they do not impose an unreasonable burden and are not contrary to good faith. Some prominent legal experts argue that these projected provisions, while specifically devised to cover contracts between entrepreneurs and consumers, could well have an impact on contracts between entrepreneurs who negotiate from positions of unequal strength: it is not possible at this stage to say whether this will in fact be the case.

Despite this current or forthcoming degree of protection for the weaker party, a foreign subcontractor should always exercise particular caution over the contractor's general terms of contract.

### 3. THE SUBSTANTIVE LEGAL RULES

3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be pointed out, however, that the Netherlands has ratified the Hague Convention of 1964 on the international sale of goods and the Vienna Convention of 1980. Where the appropriate conditions are met, therefore, the rules governing a subcontract should be sought primarily in the relevant Convention.

3.2. On the other hand, if, in a particular case, it is Dutch law which applies, a subcontract will be considered (see 1. above) to be a sales contract, a contract for work or a contract for the supply of goods and services or even, in some cases, a "mixed" contract (i.e. one which combines the features of various types of contract).

There are differences between the rules governing each type of contract but their practical impact is not particularly significant. The resulting uncertainty about the legal classification and hence the provisions applicable is a further reason, however, why foreign subcontractors should make every effort to negotiate specific agreements covering the relationship between the parties to the subcontract.

#### **4. TECHNICAL SPECIFICATIONS**

Most of the Dutch standards (see Part One of the Guide, paragraph 2.8) are laid down and published by the Nederlandse Normalisatie Instituut and are referred to by the letters NNI (or NEN).

At least half of those standards are Dutch transpositions of ISO, ICE, CEN or CENELEC standards.

In practice, contracts often refer to DIN standards and, in some cases, to AFNOR, BSI or American standards.

Foreign subcontractors may obtain information on Dutch standards direct from the NNI (Nederlandse Normalisatie Instituut, Kalfeslaan 2, 263 AA Delft).

#### **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12).

Under Dutch law, such clauses are in principle valid. Those, however, which completely sacrifice the interests of one party and whose application must be regarded as contrary to good faith, e.g. clauses which disclaim responsibility in the case of deceit (dolus) or serious fault, are normally declared invalid by the courts.

#### **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

Dutch legislation does not impose any limits on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc., over and above those set out in the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

#### **7. CLAUSES RETAINING TITLE**

Clauses retaining title (see Part One of the Guide, paragraph 6.9) are admissible in Dutch law where goods are sold against deferred payment: the buyer acquires title only when the full price has been paid.

Retention of title may be invoked against third-party buyers if they have not taken possession of the goods or if they have acted in bad faith.

Dutch law does not, however, deal adequately with the situation - most frequently encountered in subcontracting - in which the goods sold under a retention-of-title clause are intended for incorporation into another product. The retention-of-title clause can, in practice, provide the subcontractor with a modicum of guarantee only as long as the goods which are the subject of the subcontract have not been incorporated into the final product or are still identifiable (i.e. have not been mixed in with other fungible goods).

Current practice in the Netherlands is to use not only "simple" retention of title (which guarantees only the price of the goods covered by the clause), but also an extended or "current-account" version of that clause (covering all the buyer's debts to the seller). Extended clauses will, however, no longer be permissible under the new Dutch Civil Code (which, as stated above, will probably enter into force in 1992).

## 8. CONSEQUENCES OF BREACH

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (paragraph 2.10). The general rule in Dutch law where a party to a contract for consideration fails to perform his obligations is that the other party may at his discretion: (a) require specific performance of the contract; or (b) seek to have the contract terminated through the courts; and, in any event, (c) claim compensation for the loss suffered.

It should be noted that a contract may not be terminated when the breach is of "little importance" (the concept of "fundamental breach of contract" found in common law is not, however, recognized under Dutch law) and, above all, that under Dutch law a contract can be terminated only by taking appropriate legal action. The only exception is when the contract specifically includes a termination clause (nearly every contract now does, since taking legal action is obviously not a very practical proposition).

Under Dutch law, a party may require that the product which has been supplied be repaired if it is defective; there is, however, no provision for a reduction in price.

Compensation can cover all direct and indirect loss on condition that it was foreseeable, including loss of profits.

## 9. INTEREST

In the event of late payment of the purchase price, Dutch law lays down that, unless the parties agree otherwise, interest will be payable (see Part One of the Guide, paragraph 6.8). A variable statutory rate applies which is currently (January 1991) 10% per year. Prior notice needs to be given.

Dutch law does not take account of a fall in the value of money; the only way to guard against inflation is accordingly to insert an adjustment clause in the contract.

## 10. PRODUCT LIABILITY

- 10.1. The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) entered into force in the Netherlands in November 1990.

The Directive has been fully transposed into Dutch law. The Netherlands has not exercised its option to derogate from the rule that the producer is not liable if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered ("development risk"); and no ceilings are set on the producer's total liability.

As regards the position of subcontractors in particular, Dutch law faithfully takes over both the definition of "producer" and the exclusion of liability in the case of a manufacturer or supplier of a component or raw material if the defect is attributable entirely to the design of the product into which it was incorporated or to the instructions given by the manufacturer who used it (Article 7(f) of the Directive).

- 10.2. Where a subcontractor finds that he is jointly and severally liable, along with the final producer, for damage caused to a third party by a defective product, the further problem arises as to how the burden of the compensation owed to the third party is to be apportioned between the parties jointly and severally liable (see Part One of the Guide, paragraphs 8.3, 8.8 and 8.9). Under the Directive (Article 5), the rights of contribution or recourse continue to be governed by national law: in Dutch law, the courts will make an apportionment between those jointly and severally liable, taking account of the severity of the fault and the consequences arising therefrom. In any event, the courts will generally accept contractual clauses between the parties which lay the burden of compensating an injured third party on one of them and thus, for example, on the subcontractor, who will usually be the weaker.

## PORTUGAL

### **1. LEGAL FRAMEWORK**

- 1.1. In Portugal, subcontracting agreements do not form a recognized category of contracts regulated by a specific set of rules. They are governed by the general provisions of the Civil Code and by the rules on the category to which they belong (see 3. below): sales contract, or contract for the supply of goods or services.
- 1.2. There are no standard subcontracting agreements in Portugal which have been officially approved by governmental bodies.
- 1.3. On the other hand, large contractors frequently prepare standard subcontracting agreements and tend to impose these general terms on their own subcontractors.

### **2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?**

- 2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by rules of law contained in the Civil Code.

- 2.2. As already indicated, it is common in practice for large contractors to seek, often successfully, to impose their own general terms on subcontractors.
- 2.3. Let us now consider the position in Portuguese law of a subcontractor who is obliged to accept the general terms of the contractor.  
Almost all of the rules governing contracts are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

- 2.4. Decree Law No 446/1985 has imposed quite severe rules concerning the validity of general terms of contract; some of these rules also apply to relations between enterprises. The law lists clauses which are subject to an absolute prohibition (Article 18) and clauses which are subject to a relative prohibition (Article 19).

Despite this significant degree of protection for the weaker party, a foreign subcontractor should always exercise particular caution over the contractor's general terms of contract.

### **3. THE SUBSTANTIVE LEGAL RULES**

- 3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be pointed out, however, that Portugal has ratified the Hague Convention of 1964 on the international sale of goods and the Vienna Convention of 1980. Where the appropriate conditions are met, therefore, the rules governing a subcontract should be sought primarily in the relevant Convention.

- 3.2. On the other hand, if Portuguese law governs the contract, the not insignificant drawback of the lack of special rules adapted to the particular features of subcontracts is compounded by the difficulties in deciding on the category to which a particular subcontract belongs and hence on the rules that will be applicable.

A subcontract will be considered in Portuguese law (see 1. above) to be a sales contract or a contract for the supply of goods and services or even, in some cases, a "mixed" contract (i.e. one which combines the features of various types of contract).

There are some practical differences between the rules governing each type of contract. This is the case, for example, with latent defects, where the terms specified for the expiry of one's right of remedy (Articles 917 and 1224 of the Civil Code) differ depending on whether the sale of goods or the supply of goods and services is involved. The rules governing the consequences of a breach of contract also differ as between a sales contract and a contract for the supply of goods and services (see 8. below). The resulting uncertainty about the legal classification and, hence, the provisions applicable is a further reason, however, why foreign subcontractors should make every effort to negotiate specific agreements covering the relationship between the parties to the subcontract.



#### **4. TECHNICAL SPECIFICATIONS**

The Portuguese standards (see Part One of the Guide, paragraph 2.8) which are most often referred to in subcontracts are those laid down by the Instituto Português da Qualidade (R. José Estevão 83 A-P-1199 LISBOA CODEX, Tel. 1/539891). They are published in the Institute's "Catálogo Anual das Normas".

#### **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12).

However, under Article 800(2) of the Portuguese Civil Code (to which Article 809 refers back), clauses excluding liability are valid, except where they constitute a violation of the obligations imposed by the rules of public order.

Furthermore, under Article 18(c) and (d) of Decree Law No 446/1985, clauses are prohibited which disclaim or limit, whether directly or indirectly, responsibility in the case of deceit (dolus) or serious fault.

#### **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

Portuguese legislation does not impose any limits on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc., over and above those set out in the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

#### **7. CLAUSES RETAINING TITLE**

Clauses retaining title (see Part One of the Guide, paragraph 6.9) are admissible in Portuguese law where goods are sold against deferred payment: the buyer acquires title only when the full price has been paid (Article 409 of the Civil Code).

## **8. CONSEQUENCES OF BREACH**

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (paragraph 2.10). The general rule in Portuguese law where a party to a contract fails to perform his obligations is that the other party may at his discretion: (a) require specific performance of the contract; or (b) seek to have the contract terminated through the courts; and, in any event, (c) require compensation for the loss suffered.

Alongside these general remedies, the Portuguese Civil Code contains special rules for particular contracts.

In the case of a sales contract, for example, there is provision that, where the item sold has latent defects, the buyer may request a reduction in price (Article 911 of the Civil Code) or may ask for it to be repaired or replaced (Article 914 of the Civil Code).

Similar but not identical remedies exist in respect of contracts for the supply of goods and services (see Article 1221 of the Civil Code on the rectification of defects and Article 1222 of the Civil Code on the right to have the price reduced or the contract terminated where the defects cannot be rectified).

## **9. INTEREST**

In the event of late payment of the purchase price, the law lays down that, unless the parties agree otherwise, interest will be payable (see Part One of the Guide, paragraph 6.8) at a rate fixed by the Government. That rate is currently (1990) 15% per year.

## **10. PRODUCT LIABILITY**

10.1. The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) entered into force in Portugal on 6 November 1990 (Decree Law No 383/89). It has been fully transposed into Portuguese law. However, some options available under the Directive (Articles 15 and 16) have been taken up. For example, while Portugal has not exercised its option to derogate from the rule that the producer is not liable if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered ("development risk"), a ceiling of ESC 10 million has been set as regards compensation for damages (Article 9).

As regards the position of subcontractors in particular, Portuguese law faithfully takes over both the definition of "producer" and the exclusion of liability in the case of a manufacturer or supplier of a component or raw material if the defect is attributable entirely to the design of the product into which it was fitted or to the instructions given by the manufacturer who used it (Article 7(f) of the Directive).

## SPAIN

### **1. LEGAL FRAMEWORK**

1.1. In Spain, subcontracting agreements are not regulated by any specific set of rules. They are governed by the general provisions of the Civil Code and by those applicable to the category of contract to which they belong. Normally, they are classified as a contract to perform work (contrato de ejecución de obra) or a contract for the supply of goods and services (contrato de empresa).

1.2. There are no standard subcontracting agreements in Spain which have been officially approved by governmental bodies.

However, there are standard contracts drawn up by trade associations although, in practice, no collective action is taken at sectoral level to negotiate the terms of industrial subcontracts from a position of strength.

1.3. On the other hand, large contractors often prepare standard subcontracting agreements and tend to impose these general conditions on their own subcontractors.

### **2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?**

2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by the rules laid down in the Civil Code.

2.2. As already indicated, it is common in Spain for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

Subcontracting agreements are usually in writing (and only rarely in the form of a document certified by a notary). They may comprise a single document or a set of documents (technical specifications, commercial conditions, etc.). In some cases, the contractor may simply fix his terms, which are then tacitly accepted by the subcontractor. In any event, it is usual for the contract to incorporate or refer to the contractor's general conditions.

It is worth noting that situations should be avoided in which two sets of general terms are superimposed, each party having referred to his own, and neither having declared that, in the event of any conflict, he will accept those of the other; in such cases, the courts will probably accept neither set of general terms and simply apply the rules supplied by the law.

- 2.3. Let us now consider the position in Spanish law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all the rules of the Civil Code governing the various types of contract are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

- 2.4. In Spanish law there is only a general limit, albeit an important one, on the validity of such general terms of contract. Article 1256 of the Civil Code lays down that the validity and performance of a contract may not be left to the discretion of one of the contracting parties (the only other limit concerns clauses excluding liability for deceit (dolus) - see 5. below).

In addition, possible abuse by the stronger party is dealt with in provisions of only limited practical importance, such as the rule that terms in a contract which are lacking in clarity may not be interpreted in such a way as to favour the party responsible for the lack of clarity (Article 1288 of the Civil Code).

Nevertheless, the current tendency of the courts, acting on the basis of Article 1256 of the Civil Code, is to scrutinize general conditions of contract from an equitable standpoint, the purpose being to ensure that they do not constitute excessive abuse by one party of his negotiating strength.

While the weaker party's prospects of protection against general terms imposed by the other party may appear better in Spain than in other countries, a foreign subcontractor would, in any event, be well advised to exercise particular caution.

### **3. THE SUBSTANTIVE LEGAL RULES**

- 3.1. If any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It is Spanish law alone which governs the contracts in question, since, as regards the international sale of goods, Spain has not yet ratified either the Hague Convention of 1964 or the Vienna Convention of 1980.

- 3.2. As indicated above, in the absence of relevant special rules, a subcontracting agreement is usually classified under Spanish law as a contract for the supply of goods and services (Articles 1588-1600 of the Civil Code).

A contract to perform work falls into one of two categories, depending on whether or not the material to be worked is provided by the subcontractor himself. If the subcontractor is to provide the material, the similarity of this form of contract to that of a sales contract means that some of the rules applicable to that form of contract apply to the contract to perform work. This leads to practical differences, e.g. in connection with the risk of loss or destruction of the goods (Articles 1589 and 1590 of the Civil Code).

- 3.3. In some cases, a subcontract may, of course, have to be classified as a simple sales contract, on account of the form of the agreement.

### **4. TECHNICAL SPECIFICATIONS**

The standards (see Part One of the Guide, paragraph 2.8) referred to in subcontracts in Spain are published in the Spanish Official Gazette [Boletín Oficial del Estado]. The Compendium of Legislation [Repertorio de Legislación] published by Aranzadi is useful for reference purposes.

However, it is not unusual for reference to be made to the better-known foreign (DIN, AFNOR, BSI) or Community standards.

### **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12). It should nevertheless be pointed out that, under Spanish law, clauses which exclude or limit liability are considered invalid where there is deceit (dolus).

Clauses limiting normal liability for fault are thus valid in Spanish law within the limits (see paragraph 2.4.) laid down in Article 1256 of the Civil Code.

## **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

Royal Decree No 1882 of 1986 and Law No 16 of 1989 bring national law into line with Community law, supplementing the restrictions imposed by the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.) on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc.

## **7. CLAUSES RETAINING TITLE**

Clauses retaining title (see Part One of the Guide, paragraph 6.9) are admissible in Spanish law where goods are sold against deferred payment (Law No 50 of 1965); the buyer acquires title only when the full price has been paid.

Provision is made for recording the contract in a public register.

## **8. CONSEQUENCES OF BREACH**

Part One of this Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (see paragraph 2.10).

The general rule in Spanish law where a party to a contract fails to perform his obligations is that, apart from other remedies (including the right to specific performance at the expense of the party in breach in case of an obligation to supply goods), the other party invariably acquires a right to compensation for loss caused directly and for loss of profits.

## **9. INTEREST**

In the event of late payment of the purchase price, the current (1990) position under Spanish law is that, unless the parties agree otherwise, interest will be payable (see Part One of the Guide, paragraph 6.8) at the official discount rate.

## **10. PRODUCT LIABILITY**

The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) has not yet been implemented in Spain.

## UNITED KINGDOM

### **1. LEGAL FRAMEWORK**

1.1. In the United Kingdom, subcontracting agreements are not regulated by any specific set of rules. They are governed by the general principles applicable to commercial contracts and by those applicable to the category of contract into which they fall: sales contract, or contract for the supply of goods and services (see 3. below).

1.2. There are no standard subcontracting agreements in the United Kingdom which have been officially approved by governmental bodies.

Furthermore, standard contracts of general scope are unusual and rarely encountered in practice. More significant are the standard contracts prepared for a particular sector by a trade association, for example, the contract drawn up by the British Electrical and Allied Manufacturers Association; these models were not devised with a view to subcontracting and, where the subcontract concerns non – standardized products, are simply adapted as required.

1.3. On the other hand, large contractors often prepare standard subcontracting agreements, or even more frequently, general terms of sale adapted in various ways to the requirements of a subcontract, and tend to impose these general terms on their own subcontractors.

### **2. WHAT HAPPENS WHERE THE SUBCONTRACTOR DOES NOT NEGOTIATE A SPECIFIC WRITTEN AGREEMENT WITH THE CONTRACTOR?**

2.1. Part One of the Guide explains clearly why a subcontractor will be well advised to do everything possible to negotiate a written agreement with the contractor setting out specific agreed rules governing the fundamental aspects of the relationship between them (see in particular the Introduction, paragraph 4).

If this is not done, the contract will be governed: (a) very often by the general terms imposed by the other party; or (b) in the absence of general terms or where the general terms are silent, by rules of law.

2.2. As already indicated, it is common in practice in the United Kingdom for large contractors to seek, often successfully, to impose their own general terms on subcontractors.

It is worth noting that the subcontractor may also have his own general terms, which naturally differ from those of the contractor, the result being frequently a contest between the parties to impose their own terms. In that case, an attempt should be made to avoid an unclear situation in which two sets of general terms are superimposed, each party having referred to his own. In these circumstances, the general terms of both parties are disregarded where they are in conflict and the general rules of law then apply.

- 2.3. Let us now consider the position in United Kingdom law of a subcontractor who is obliged to accept the general terms of the contractor.

Almost all of the rules governing contracts are presumptive in the sense that parties are free to contract out of them; they do not by themselves stand in the way of terms which depart from them, even if those terms are a great deal more favourable to one party than those implied by law.

- 2.4. However, the United Kingdom courts have well-established rules to ensure, in extreme cases at least, that the general terms of a contract do not represent excessive and unjustified exploitation of one side's negotiating strength. Furthermore, since the entry into force of the Unfair Contract Terms Act 1977, the courts have been empowered to declare invalid standard terms of commercial contracts if they appear unreasonable, having regard to certain factors such as normal commercial practice and the strength of the bargaining position of the contracting parties.

Despite this degree of protection afforded to the weaker party, a foreign subcontractor should always exercise particular caution over the contractor's general terms of contract.

### 3. THE SUBSTANTIVE LEGAL RULES

- 3.1. If it happens that any aspects of the subcontracting relationship have not been settled by the parties by specific agreement or by means of general terms, the legal rules apply.

It should be noted, however, that the United Kingdom has ratified the Hague Convention of 1964 relating to a uniform law on the formation of contracts for the international sale of goods but has yet to ratify the Vienna Convention of 1980. Where the appropriate conditions are met, therefore, the rules governing a subcontract should be sought primarily in the Hague Convention although this Convention only applies to trade between the small number of countries which have ratified it.

- 3.2. On the other hand, if United Kingdom law governs the contract, the particular Act applicable depends on the classification of that contract (see 1. above).



If a sales contract is involved, the Sale of Goods Act 1979 applies while, if the contract is for the supply of goods, the Supply of Goods and Services Act 1982 will apply in England (but not in Scotland). However, the classification of a subcontract in the various categories of contract is not, in fact, of great importance in the United Kingdom systems; in almost all their aspects, the rules laid down in these two Acts are similar (for example, concerning liability for defective products, quality and the like), so that it is unlikely that the classification of the contract will have much practical significance for a subcontractor. Nevertheless, a foreign subcontractor would be well advised to negotiate a specific agreement covering the relationship between the parties to the subcontract.

It should be noted that, under the Sale of Goods Act, three warranties will be implied unless they are specifically excluded in the contract:

- (a) there will be an implied warranty that, if the goods have been described in the contract, they correspond to the description;
- (b) an implied warranty that the goods are of merchantable quality, that is, that they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect, having regard to any description applied to them, the price and all other relative circumstances; and
- (c) an implied warranty that the goods are fit for a specific purpose which the buyer has made known to the seller, unless the seller is able to prove that the buyer did not rely on the skill or judgment of the seller in determining suitability for such purposes.

As a rule, these warranties are not excluded in subcontracts but they may sometimes be replaced by more detailed clauses whereby the seller undertakes to satisfy himself as to the quality of the goods supplied. Generally, such a guarantee remains in effect for not less than six months.

When the subcontract is for the provision of services, the Supply of Goods and Services Act lays down that the services must be provided with reasonable care and skill. It is clearly in the interests of the subcontractor, and indeed of both parties, that the contract should substitute for this general clause provisions laying down as clearly as possible technical specifications and, in general, the obligations of the subcontractor.

It should further be pointed out that, with regard to determination of the price, it is relatively common in the United Kingdom for subcontracts to specify procedures for the review of prices (in relation to the cost of labour, materials, etc.); an example of this is the price-adjustment system adopted by the members of the British Electrical and Allied Manufacturers Association. Guidance on the drafting and implementation of these terms is given in *Contracting for Goods and Services*, published in 1986 by the Institute of Purchasing and Supply.

#### **4. TECHNICAL SPECIFICATIONS**

The standards (see Part One of the Guide, paragraph 2.8) most commonly employed in the United Kingdom for both subcontracts and contracts are those drawn up by the British Standards Institution.

It is becoming increasingly necessary for a subcontractor wishing to operate in the United Kingdom to show in advance that he is able to guarantee the good quality of his products and that he has an appropriate quality-assurance system.

The best form of guarantee is the certificate of conformity with the required standards for quality-assurance of BS 5750 (BS 9000 in the case of electrical goods).

Increasingly, in addition to a product quality certificate, a certificate relating to the firm itself is required. These certificates are issued by appropriate independent bodies, for example, the British Electrotechnical Apparatus Board, the British Approvals Board for Telecommunications, Lloyds Register Quality Assessment Ltd. and the British Standards Institution (Quality Assessment Division). In certain cases, for example the British Approvals Board for Telecommunications, it is in fact necessary for a subcontractor to obtain a certificate before he can begin operations in the United Kingdom. In any case it is probable that only a subcontractor holding a certificate would be taken into consideration for a subcontract there.

These institutions are open, on application, to foreign firms wishing to operate in the United Kingdom. If a subcontractor is approved by an institution he may be entered in the Quality Assessment Register.

#### **5. CLAUSES EXCLUDING LIABILITY**

Among the most serious of the "oppressive" clauses which a contractor may include in the general terms he imposes are those excluding or limiting his liability (see Part One of the Guide, paragraph 2.12).

In the United Kingdom, limits to the validity of such clauses are laid down in the Unfair Contract Terms Act 1977 (see 2.4 above).

In particular, clauses excluding or limiting liability for negligence resulting in death or personal injury are void while, in the case of other forms of damage, such clauses will be void unless they meet the criterion of reasonableness.

In contracts between enterprises concluded on the basis of standard forms specified by one of the parties, that party may not rely on a clause excluding or limiting his liability in case of breach of contract or purporting to confer power to require performance of something substantially different from what might be reasonably expected of him or conferring a right of non-performance unless the clause meets the criterion of reasonableness. In particular, in contracts for the sale or supply of goods, clauses excluding or limiting liability for breach of the fundamental obligations of the seller, e.g. obligations concerning conformity of the goods with the description in the contract or the quality of the goods and their fitness for a given purpose, will be void unless they meet the criterion of reasonableness.

## **6. CLAUSES RESTRICTING THE RIGHTS OF THE SUBCONTRACTOR AND DOMESTIC COMPETITION LAW**

United Kingdom legislation does not impose any significant limits on the validity of clauses restricting the rights of the subcontractor with regard to confidentiality, the use of know-how, dealings with third parties, etc., over and above those set out in the EC Commission's 1978 Notice (see Part One of the Guide, paragraphs 5.9 et seq.).

## **7. CLAUSES RETAINING TITLE**

Clauses retaining title in the goods supplied (see Part One of the Guide, paragraph 6.9) are admissible in the United Kingdom where goods are sold against deferred payment: the buyer acquires title only when the full price has been paid.

It is a condition of the validity of such clauses that they are drawn up in writing and concern specific and identifiable goods. However, a number of legal difficulties arise when it comes to securing title in respect of goods that are resold or processed.

## **8. CONSEQUENCES OF BREACH**

Part One of the Guide points out how important it is that a subcontractor should be aware of the precise extent of the possible consequences of any breach on his part (paragraph 2.10). Under the law applicable in the United Kingdom, the consequences of a subcontractor's delay in performance will vary depending on whether or not time is stipulated to be of the essence of the contract. If it is not, delay in performance will not be considered a breach unless the contractor has given specific notice to the subcontractor stipulating a reasonable period within which to discharge his obligations. However, it is becoming increasingly common in industrial subcontracting for a contractor to specify that performance in good time is an essential aspect of the contract, so that the use of a clause to that effect is becoming increasingly general. In such a case, delay in performance will automatically constitute a fundamental breach of contract entitling the injured party to reject goods offered late or to claim damages. It is clear that such a clause is very risky for a subcontractor, who should think hard before accepting it.

In addition, under the Sale of Goods Act 1979, the purchaser generally has the right to repudiate the contract and to refuse the goods if there is a failure to perform any material condition; minor breaches of contract (in relation to warranties), on the other hand, only confer entitlement to damages.

## **9. INTEREST**

Interest is payable in the event of late payment of the price only if this is stipulated (see Part One of the Guide, paragraph 6.8).

## **10. PRODUCT LIABILITY**

The Community Directive of 1985 (see Part One of the Guide, paragraphs 8.5.5 et seq.) was implemented in the United Kingdom by the Consumer Protection Act 1987, which transposes the Directive fully into United Kingdom law. The United Kingdom has not exercised the option to derogate from the rule that the producer is not liable if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered ("development risk"), and no ceilings are set on the producer's total liability.

As regards the position of subcontractors in particular, the Act faithfully takes over both the definition of "producer" and the exclusion of liability in the case of a manufacturer or supplier of a component or raw material if the defect is attributable entirely to the design of the product into which it was incorporated or to the instructions given by the manufacturer who used it.

Where a subcontractor finds that he is jointly and severally liable, along with the final producer, for damage caused to a third party by a defective product, the further problem arises as to how the burden of the compensation owed to the third party is to be apportioned between the parties jointly and severally liable (see Part One of the Guide, paragraphs 8.3, 8.8 and 8.9). Under the Directive (Article 5), the rights of contribution or recourse continue to be governed by domestic law: in the United Kingdom, the courts will make an apportionment between those jointly and severally liable, but they will accept contractual clauses between the parties which lay the burden of compensating an injured third party on one of them and thus, for example, on the subcontractor, who will usually be the weaker. The subcontractor should therefore try to insert into the contract a clause specifying that he is entitled to be fully indemnified by the contractor for damage resulting from a design defect in the final product.

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# Eastern Europe and the USSR

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## THE CHALLENGE OF FREEDOM

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GILES MERRITT



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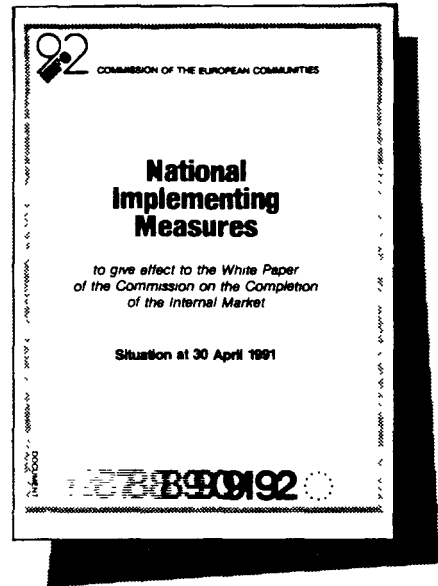
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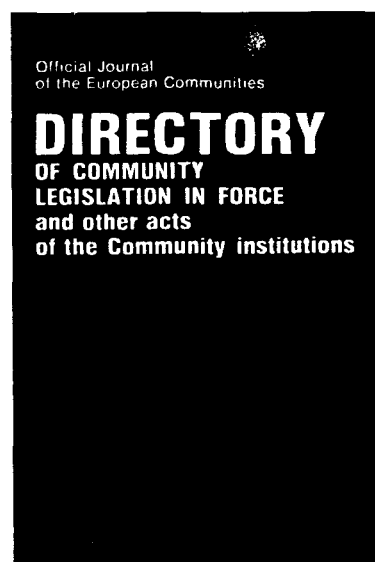
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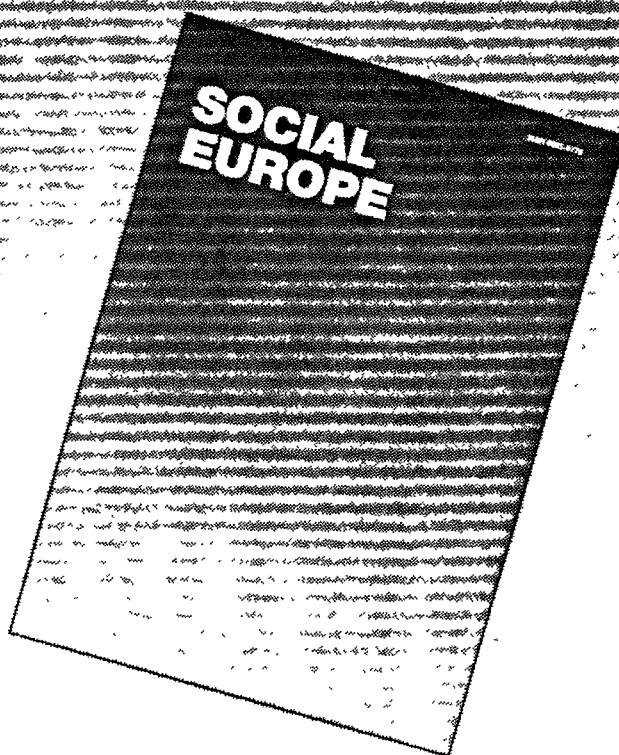
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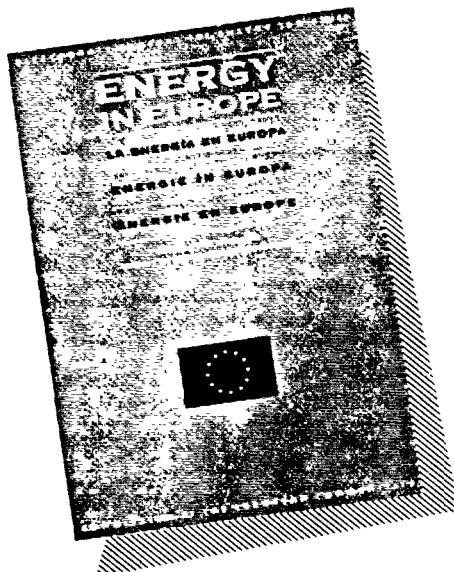
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