

Checklist: Generic Contract Checklist

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Introduction and Instructions

This generic checklist highlights generic pre-contractual and contractual issues that may be encountered when drafting, reviewing and/or negotiating contracts.

To cover a broad spectrum of agreements, this checklist may highlight issues that are not applicable to all kinds of agreements. E.g. a sales contract will differ substantially from a services agreement. A confidentiality clause or a data protection clause (processing of personal data) may not be important in a standard sales agreement, but will be critical in a data processing agreement. Consequently, you should carefully consider the nature of the agreement before applying this checklist.

Because this checklist aims to be generic, it also implies that it will not provide a complete overview of all relevant issues for all kinds of agreements. For specific agreements, you may want to verify whether or not a specific checklist has been made available by us or by third parties.

Finally, this checklist is based on Belgian law. Although the issues will probably be similar irrespective of the jurisdiction in which the checklist is being used, the legal rules in relation to these issues may differ substantially from Belgian law. You should therefore always be careful when relying on this checklist for contracts that are governed by a different applicable law.

 **General**

- Title of the agreement (the title is only indicative)
- Identification of the parties
 - Name and legal form
 - Address or registered offices
 - Company identification number (0xxx.xxx.xxx) (trade register number or other unique identification number in case of foreign companies, if available)
 - Register of Legal Entities
 - VAT number (BTW BE0xxx.xxx.xxx)
- Identification of the signatory
 - Name
 - Title
 - Verify the authority of the signatory
- Preamble
 - Description of the parties
 - Description of the purposes of the parties to the agreement
- Signature
 - Verify the identity of the signatory, the signature and the date
 - Sign as many original counterparts as there are parties (mention the number of counterparts in the agreement)
 - Check the page numbering (continuous)
 - Initials on every page are not legally required, but they are useful (it confirms that each page was read and accepted and protects against exchanging pages)

 **Definitions and Interpretation**

- Definitions
 - Verify the use of the definitions
 - Are all definitions in use
 - Are capitalized terms properly used
 - Avoid making unnecessary or circular references between definitions
 - Specific definitions?
 - Definitions may validly derogate from the usual meaning of a word (e.g. a word may be given another meaning in a definition)
 - References to glossaries (e.g. ITIL definitions)
 - Verify the accuracy of the reference (e.g. which version of a glossary)
- Interpretation rules
- Hierarchy of the contract documents
 - Principle
 - Exceptions?

 **Scope of the Agreement**

- Description of the scope of the agreement
 - Services
 - Purchase/Sales
 - Distribution
 -

- Framework agreement?
 - Review mechanism in relation to the duration of the framework and the underlying orders
 - Description of ordering procedure
 - Validity period of offers
 - Manner of acceptance
 - Explicit acceptance within a specified period
 - Tacit acceptance after a specified period
 - Beneficiaries (e.g. a group of companies)?
 - Definition of beneficiaries
 - Formal adoption by each beneficiary?
 - Provisions for multijurisdictional application of the agreement?
 - Several or joint liability?
- Exclusivity and/or minimum purchase obligations?

✓ Obligations

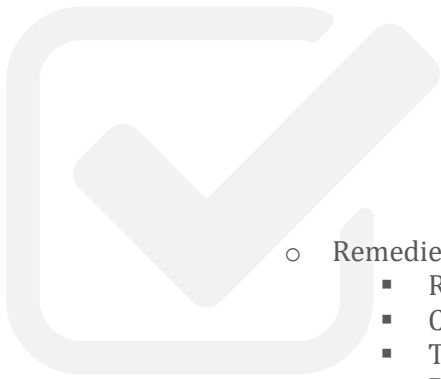
- Nature of the obligations
 - Effort based obligations ('middelenverbintenissen' / 'obligations de moyens')
 - Reasonable effort obligations
 - Best effort obligations
 - Specific description of the level of effort?
 - Result based obligations ('resultaatsverbintenissen' / 'obligations de résultat')
 - Specific interpretation rule in relation to the nature of the obligations?
- Suspension of obligations ('*exceptio non adimpleti contractus*')
 - Unilateral or reciprocal?
 - Conditions?
 - Nature of the breach
 - Material breach
 - Any obligation or specific obligations only?
 - Proportionality?
 - Prior formalities?
 - With or without notification?
 - Grace period?
 - Explicitly excluded?
 - If nothing is mentioned, common law principles apply
- Client specific obligations
 - Obligation to cooperate (reasonable assistance)?
 - Scope of the obligation
 - Weakened information duty on behalf of the supplier/service provider?
 - Provision of infrastructure / resources
 - Minimum qualifications of assigned personnel?
 - Delivery acceptance and (project) acceptance
- Supplier/service provider specific obligations
 - Obligation to inform and advise (weakened or reinforced)
 - Delivery/performance period
 - Indicative or binding?
 - Consequences of expiry?
 - Penalties
 - Termination of the agreement / order



- Provisions in relation to the assignment, replacement and availability of key personnel
- Compliance with security and access policies
 - Prior communication
 - Form of the communication
 - Provisions to mitigate cumbersome rules?
- Quality procedures
 - General / specific
 - Certification duty? E.g. ISO 9000 series?

Delivery, Acceptance and Warranty

- Delivery
 - On-site inspection prior to delivery / inspection samples
 - Risk and cost of delivery
 - Specific rule or INCOTERMS
 - Mechanism in case of refusal of delivery
 - Accessory issues concerning delivery
 - Accompanying documents
 - Packaging requirements
 - Consequences of non-conformity
 - Right of the client to change the delivery parameters
 - Delivery location
 - (Partially) Postponing deliveries
 - Cost?
 - Notice period
 - Compensation by the client in case of unjust refusal of deliveries or failure to deliver due to a fault attributable to the client?
- Acceptance
 - Description of the acceptance procedure
 - Testing procedure
 - Provisional / final acceptance
 - Acceptance period
 - Consequences of expiry of the acceptance period
 - Formal acceptance only or tacit acceptance
 - Use of deliverable in a production environment
 - Sale of a deliverable
 - Starting point of warranty?
- Warranty
 - Duration
 - Starting point?
 - Period
 - Suspension or prolongation of the warranty period
 - Scope
 - Specifications
 - Functionalities
 - Defects
 - Exclusions?



- Remedies
 - Repair / replacement
 - Compensation?
 - Termination of the agreement / order
 - Refund?
 - 'Sole remedy'?
- Starting point of maintenance?
- Warranty for hidden / latent defects
- Product liability

Price and Payment

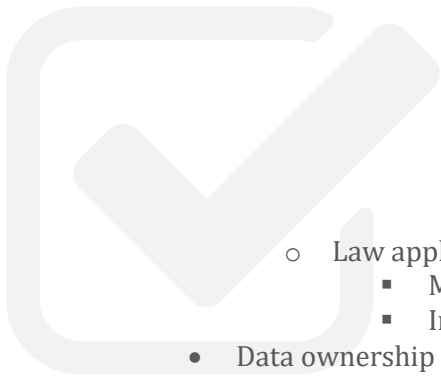
- Price criteria
 - Fixed price (scope!)
 - Time & Materials
 - Timesheet
 - Verification of timesheet (period?)
 - Chargeable costs
 - (Prior) approval or acceptance procedure in relation to costs?
 - Evidence?
 - Charged 'at cost' or with a mark-up?
 - Fixed costs?
 - Cost+
 - Definition of scope
 - Definition of cost parameters
- Taxes
- Invoicing modalities
 - Additional obligatory mentions (e.g. PO number)?
 - Sanctions in case of missing information
 - Electronic invoicing
- Payment modalities
 - Manner of payment
 - Payment period
 - Sanctions in case of late payment
 - Late payment interest
 - Damages
 - Suspension of the agreement?
 - Which formalities?
- Price evolution
 - Unilateral modification by the supplier/service provider (with termination option)?
 - Price review mechanism (e.g. indexation?)
 - Benchmarking
- Securities
- Ownership
- Retention rights

✓ Duration and termination

- Duration of the agreement
 - Signature date vs. effective date
 - Determined vs. undetermined duration
 - Specific rules for frame agreement and work/purchase orders
- Conditions precedent / conditions subsequent
- Termination modalities
 - Termination for convenience
 - By the customer
 - Indemnity
 - Notice Period
 - By the supplier/service provider
 - Indemnity
 - Notice Period
 - Termination for breach / cause
 - By the customer
 - Which causes?
 - Which conditions?
 - Which formalities?
 - By the supplier/service provider
 - Which causes?
 - Which conditions?
 - Which formalities?
- Consequences of termination
 - Usually no impact on rights and obligation accrued prior to termination
 - Continuing obligations?
 - Ongoing tasks or orders
 - Invoicing?
 - “Last purchase option”?
 - Termination assistance / Re-transition?

✓ Data Security, Confidential Information and Personal Data

- Confidentiality
 - Confidentiality and purpose limitation with regards to the use of confidential information
 - Security obligation
 - Data breach notification obligation
 - Rules regarding onward internal and/or external disclosure of confidential information
 - Confidential information must remain property of the discloser
- Specific Data Security rules for specific information?
- Data Protection
 - Limitation of data processing by data processor
 - Choice of data processor
 - Security obligations
 - Data breach notification obligation
 - International data flows



- Law applicable to the data processing activity
 - May differ from the law applicable to the contract
 - Impact?
- Data ownership and restitution obligation

☑ Risk and Ownership

- Transfer of risk
- Transfer of ownership
- Obligation to use with due care
- Insurance obligations

☑ 'Step-in'-Rights

- Nature of breach
- Remedy period for the supplier/service provider?
- Formalities?
- Scope of the obligation to assist
- Costs?
- Phasing-out of the 'step-in'?

☑ Liability and Insurance

- Liability regime
 - No clause concerning (limitation of) liability = unlimited liability
 - Unilateral or reciprocal
 - Limitation (identical or not) applicable to both parties?
- Limitation of liability
 - Nature of the breach
 - Amount of damages
 - Nature of the damages
- Exclusion of 'indirect and consequential damages'?
 - Definition
 - List
 - List of damages that are qualified as direct damages
- Cases of unlimited liability?
 - Infringement of confidentiality obligations
 - Infringement of intellectual property rights
 - Infringement of data protection obligations
 - Other?
- Expiry period for claims ("barred")?
 - Unilateral or reciprocal
- Indemnity for third party claims

- Insurance obligation
 - Minimum amount or unspecified “reasonable” amount
 - Quality requirements with regards to the insurance company
 - Copy of insurance certificate (to be made available upon first request)
 - Notification of changes to the insurance coverage
 - Waiver of recourse from the insurance company?

☑ Unforeseeable Circumstances

- Force Majeure
 - Scope
 - Definition, list or reference to law or case law?
 - Large or restricted notion
 - Notification obligation
 - Termination option
 - Period
 - Which party?
 - Duty to mitigate consequences
- ‘Hardship’ clause

☑ Intellectual Property Rights

- Rules regarding pre-existing intellectual property rights
- Transfer of ownership or licence on deliverables
- Restrictions on re-use of know-how gained in the course of the performance of the agreement?
- Intellectual property rights indemnification
 - Restrictions in scope
 - All intellectual property rights vs. listed intellectual property rights
 - Validity of the intellectual property rights
 - Territory of use or registration vs. worldwide
 - Indemnification duty
 - Procedure
 - Obligation to remedy breach
 - Obtain the required licence rights
 - Replace the infringing object
 - Free choice vs. equivalent functionalities
 - Return and refund?
 - Final remedy?
 - Limitation of the refund in function of an amortisation period?
 - ‘Sole remedy’?

☑ General Warranties

- Supplier/Service provider
 - Fitness for purpose
 - Document client specifications?
 - Legal and/or technical specifications and/or standards?
 - Compliance with tax and social law obligations (LIMOSA, ...)
 - Compliance with applicable law and regulations
 - Ownership or licence of tools / equipment used for the provision of the services
 - Absence of harmful code (virus, Trojan horse, time-bomb ...)
 - Explicit limitations or exclusions?
- Client
 - Use of the service in a manner compliant with applicable law
 - Use compliant with reasonable expectations
 - Use compliant with 'Acceptable Use Policy'
 - Contents of AUP?
 - Is the AUP compatible with the legal obligations of the client?
 - Warranty in relation to data protection
 - Warranty in relation to the absence of harmful code
- Remedies?
 - Repair
 - Absolute duty?
 - Relative duty ('substantially conforming to')
 - Reimbursement
 - Termination of the agreement
 - 'Sole remedy' or other remedies?

☑ Notifications

- Form
- Language
- Recipients
- Evidence rules?

☑ Ethical Codes / Green Codes / Fraud / Export Control

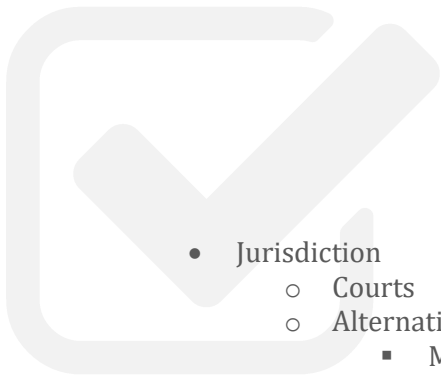
- Scope of the duties
 - Reference to foreign law?
 - Compatible with applicable law, existing obligations and restrictions?
 - Data protection law imposes limitation with regards to employee screening and surveillance!
- Sanctions
 - Suspension
 - (Immediate) Termination
 - Penalties
- Audit rights

☑ 'Boilerplate' Clauses

- Non-solicitation
 - Unilateral or reciprocal
 - Scope
 - Duration
 - Penalty
 - Exceptions?
- Severability clause
 - Consequences of invalid or unenforceable clauses?
 - Negotiation obligation?
 - Replacement obligation?
- Personal nature of the agreement (*'intuitu personae'*)?
- Assignment and subcontracting
 - Permitted?
 - Formalities
 - Joint liability in case of assignment or subcontracting
 - Specific regime for intra-group transactions
 - Specific rules for M&A related transactions
- Publicity and references
 - Permitted?
 - Formalities?
 - Use of logos and trademarks
- Capacity of the parties
- Entire agreement clause
 - General conditions?
 - Pre-contractual documents?
 - Enforceability is largely dependent on applicable law and jurisdiction
- No waiver
- Amendments

☑ Dispute Resolution, Applicable Law and Jurisdiction

- Dispute resolution
 - Escalation procedure for disputes
 - Possibility to initiate proceedings pending dispute resolution?
- Binding third party decision (financial and/or technical issues)
- Applicable law



- Jurisdiction
 - Courts
 - Alternative dispute resolution
 - Mediation
 - Arbitration

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