

# MODEL CONTRACTS FOR SMALL FIRMS

LEGAL GUIDANCE FOR DOING  
INTERNATIONAL BUSINESS



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The International Trade Centre (ITC) is the joint agency of the World Trade Organization and the United Nations.

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**ABSTRACT FOR TRADE INFORMATION SERVICES**

ID=41473

2010

F-05.06 MOD

INTERNATIONAL TRADE CENTRE (ITC)

Model Contracts for Small Firms: Legal Guidance for Doing International Business

Geneva: ITC, 2010. x, 148 p.

Book containing model forms of the main international commercial contracts that small and medium-sized enterprises (SMEs) will need in their trade transactions – provides Model Contracts for key trade activities such as sale of goods, distribution, services, joint ventures, international commercial agencies, long-term supply of goods, alliance or collaboration between parties, and contract manufacture agreement.

Descriptors: **Contracts, Commercial Law, SMEs.**

English, French, Spanish (separate editions)

ITC, Palais des Nations, 1211 Geneva 10, Switzerland ([www.intracen.org](http://www.intracen.org))

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P241.E/BE-10-IV

ISBN 978-92-9137-381-9  
United Nations Sales No. E.10.III.T.1

# Foreword

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Small and medium-sized enterprises (SMEs), the backbone of many economies, did nearly all their business within national borders until just a few decades ago. Now they are exporting to and importing from all corners of the world. But most small firms do not have access to the legal advice they need at the best of times, and even less so in the current economic climate when they are under pressure to cut costs.

To meet this challenge, the International Trade Centre (ITC), a joint agency of the World Trade Organization (WTO) and the United Nations, set up a network of top trade lawyers to create a series of Model Contracts that take into account the increasing sophistication of international trade transactions, incorporate internationally recognized standards and best practices, and still try to make things as simple as they can be in a global context.

Leading law firms with trade expertise from 51 countries seconded specialists to work together at no charge to create models that – with minimal modifications – can be used for contracts in any part of the world. These Model Contracts for key trade activities such as sale of goods, distribution, services, joint ventures, etc., are a concrete, practical way to secure international deals involving small firms. They also bridge the many cultural and legal traditions that are reflected in global trade.

Equally important is making sure these Model Contracts reach small businesses in the countries where they are needed most. This is why ITC is working with its global network of national trade support institutions, such as chambers of commerce, which will make the contracts freely available to businesses in several languages through their websites and other means.

An interesting feature of this endeavour is how a much-diversified group of contracts was harmonized substantively by identifying and drafting recurring provisions common to most of them. This trend points to the increasing global convergence of views between experts and business people on how international trade is conducted. This is good news for small firms, because harmonization simplifies the understanding and practice of international trade, and lowers transaction costs.

We wish to express our sincere appreciation to the drafting team and to all the members of the ITC Pro-bono Committee on International Commercial Model Contracts for SMEs who have so ably and efficiently contributed their time and expertise in making these Model Contracts available to all.



Jean-Paul Vulli ty  
Chairman, ITC's Pro-Bono  
Committee on Model  
International Contracts for SMEs



Patricia R. Francis  
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# Acknowledgements

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These Model Contracts are the achievement of the International Trade Centre's Pro-bono Committee on International Commercial Model Contracts for Small and Medium-Sized Enterprises.

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Editorial management was conducted by Natalie Domeisen, editing by Richard Waddington and Natalie Domeisen. Layout and production management was handled by Michel Favre.



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# Introduction

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This book contains the main international commercial contracts that small and medium-sized enterprises (SMEs) will need in their trade transactions. All contracts are harmonized in structure as well as in content through the insertion in each of identical boilerplate or recurring clauses.

The nine model forms and the boilerplate clauses were selected on the basis of a worldwide survey of representative institutions of SMEs. They are intended primarily for use by SMEs for an obvious practical reason: smaller companies often have limited access to legal resources. These models will therefore be particularly useful for agreements of a limited economic value and will hopefully discourage SMEs from drafting international contracts on their own. SMEs are nevertheless encouraged to seek legal advice – whenever possible – when entering into international agreements.

The Model Contracts were drafted by a diversified and experienced group of international lawyers specialized in the field, and then screened by a committee of business lawyers and academics representing a wide diversity of legal, cultural, business and economic backgrounds (see details in the acknowledgments page). They seek to strike a fair balance between the interests of all parties involved (buyer/seller, supplier/distributor, principal/agent, etc.) without giving an undue advantage to any. They also take account of recognized and generally accepted international standards and practices.

The boilerplate provisions cover clauses such as “notices”, “hardship”, “*force majeure*”, “applicable law” and “dispute resolution”. For purposes of consistency and harmonization, they were identified at the outset by the drafting committee, approved, and then re-introduced in a unified language in each specific contract inasmuch as this was possible. Most contracts contain some optional clauses reflecting standard choices to be made by the parties during the negotiation process. The drafters limited themselves to providing only the most standard options. A number of useful but complex options, that would certainly have appealed to the specialist but which would have overburdened the contracts, have been purposely left out.

This brings us to the concern for simplicity, which has imbued the drafting process. Legal security has not been sacrificed on the altar of over-simplicity. However, the contracts are designed for use by non-specialists, as is very often the case when SMEs are involved.

Each Model Contract indicates the basic elements that a non-specialist should fill in or should consider when entering into an agreement. Users will note that none of the Model Contracts are split into two parts (special provisions and general provisions). In this way, parties may be confident that the contract, with (where applicable) its annexes, is not based on a set of general terms and

conditions contained in another document and incorporated “by reference”. In some cases, the Model Contracts may be even more detailed in certain respects than some templates used by seasoned specialists, with their own specific trade standards, general conditions and dispute resolution schemes. This being said, all Model Contracts avoid complexity whenever it can be safely and realistically avoided.

Companies using these Model Contracts are strongly recommended to seek legal advice whenever they can, due to the wide range of options, trade practices, and legal uncertainties that stem from any international transaction.

The Model Contracts will be supplemented in due course with training material developed by ITC.

Model Contracts included in this publication are:

- ❑ ITC Model Contract for an **International Contractual Alliance**:<sup>1</sup> A framework for an alliance or collaboration between parties.
- ❑ ITC Model Contract for an **International Corporate Joint Venture** (short form):<sup>2</sup> A framework for a joint venture between two parties to establish a jointly owned company.
- ❑ ITC Model Contract for the **International Commercial Sale of Goods** (short version): An agreement for the sale of manufactured goods between a seller and a buyer.
- ❑ ITC Model Contract for the **International Commercial Sale of Goods** (standard version): An agreement for the sale of manufactured goods<sup>3</sup> between a seller and a buyer. It contains added specifications and explanations on issues such as lack of conformity and limitation of the sellers’ liability.
- ❑ ITC Model Contract for the **International Long-Term Supply of Goods**: An agreement for the long-term supply of manufactured goods between a supplier and a customer.
- ❑ ITC Model **International Contract Manufacture Agreement**: An agreement under which the client wants the manufacturer to design, manufacture and deliver certain goods, which the client intends to integrate into its own final products or its services.
- ❑ ITC Model Contract for the **International Distribution of Goods**: An agreement for the distribution of manufactured goods, between a supplier and a distributor, whether or not the supplier is the manufacturer of the goods.
- ❑ ITC Model Contract for an **International Commercial Agency**: An agreement under which a commercial agent negotiates the sale or purchase of goods on behalf of another person (the principal).
- ❑ ITC Model Contract for the **International Supply of Services**: An agreement under which a service provider provides certain services to a client.

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1 For a more detailed version, the reader may refer to: “ITC Contractual Joint Venture Model Agreements”, ITC, Geneva, 2004.

2 For a more detailed version, please refer to: “ITC Incorporated Joint Venture Model Agreements”, ITC, Geneva, 2005.

3 For the sale of perishable goods, please refer to “International Commercial Sale of Perishable Goods: Model Contract and Users’ Guide”, ITC, Geneva, 1999.

## Chapter 1

# International Contractual Alliance

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## Introduction

This Model Contract is a framework for **an Alliance or collaboration between two Parties where no separate jointly owned corporate entity is created**. The Alliance is based solely on the contract between the Parties. (It is sometimes also called a contractual joint venture.)

1. Each contractual Alliance or collaboration is different. This Model Contract provides a series or a “menu” of possibilities depending on the purpose of the Alliance. Provisions that are not relevant to the particular Alliance should be deleted.
2. The Model Contract contemplates the formation of a Management Committee on which the two Parties are jointly represented. It may be appropriate in some cases (i) to spell out the authority of particular individuals or subcommittees and/or (ii) to ensure that certain “reserved matters” require unanimous decision.
3. The Model Contract contemplates that the two Parties will *share 50-50 in costs* of the Alliance. It is important to establish what types of costs are to be shared. If a party is to be paid for its work or other contribution, the basis for remuneration should be clearly established – either at the outset or through the Management Committee.
4. Article 3 contemplates that *each party will have areas of responsibility* to contribute towards the success of the Alliance. In some cases these will be expressed in general terms – and not involve formal legal commitment. In other cases, specific legally binding commitment will be appropriate.
5. Article 6 sets out provisions for a relatively straightforward *sharing of knowhow and technical development*. In some cases (e.g. where Intellectual Property rights are of vital importance), more detailed license or other contracts will be necessary.
6. Establish the *duration* of the Alliance. Will it have a specific term with subsequent renewal requiring mutual agreement? Or will it continue indefinitely subject to a party’s right to terminate – either unilaterally by notice or in specified circumstances?
7. *A contractual Alliance does not usually involve the creation of a separate profit-making business* in which the Parties share profits as well as costs. If the arrangements do involve income or profit-sharing, be aware of (i) the

need for advice on the tax implications and (ii) the danger that, in many jurisdictions, each party could become jointly liable to third Parties for any claims (caused by whichever party) arising out of activities of either party connected with the Alliance.

8. If the venture does involve a separate profit-making business, this will normally require a more formal “partnership” agreement or the creation of a corporate joint venture.

This Model Contract is a general framework only – and must be tailored to the circumstances of the particular Alliance or collaboration.

## ITC MODEL CONTRACT FOR AN INTERNATIONAL CONTRACTUAL ALLIANCE

---

***PARTIES:***

Name (name of company)

.....

Legal form (e.g. limited liability company)

.....

Country of incorporation and (if appropriate) trade register number

.....

Address (place of business, phone, fax, e-mail)

.....

.....

Represented by (name, position, address)

.....

.....

***Referred to as “ABC”***

Name (name of company)

.....

Legal form (e.g. limited liability company)

.....

Country of incorporation and (if appropriate) trade register number

.....

Address (place of business, phone, fax, e-mail)

.....

.....

Represented by (name, position, address)

.....

.....

***Referred to as “XYZ”***

ABC and XYZ are together referred to as “the Parties” and individually as a “party”.

*[Add any further information required e.g. the Parties’ fiscal identities]*

---

## Background

- A. ABC is primarily based in *[specify]* and has particular technical expertise in the field of *[specify]*.
- B. XYZ is primarily based in *[specify]* and is engaged principally in the field of *[specify]*.
- C. The Parties believe that there are mutual benefits to be achieved by working together and have agreed to establish a collaborative Alliance in the field of *[specify]* on the terms of this contract.

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## Operative provisions

### 1. Objectives and key principles

1.1 The Parties agree to establish a collaborative Alliance (the “Alliance”) whose primary objectives are:

Specify primary objectives of the Alliance. The following are examples only:

- 1.1.1 To make ABC’s technical expertise in the field of . . . . . available to XYZ in order to develop its business in . . . . . ;
- 1.1.2 To explore the various synergies which may be obtained by working together, particularly in the field of . . . . . ;
- 1.1.3 To undertake joint research Projects as may be agreed from time to time *[and to consider the joint commercial exploitation of any new technology or products resulting from their joint research]*;
- 1.1.4 Generally, to explore commercial arrangements that will be for the mutual benefit of both Parties.

1.2 Each party acknowledges that the success of the Alliance will require a cooperative working relationship established upon good communications and team working between the Parties at all levels.

1.3 The Parties confirm their intention to establish and develop the Alliance in accordance with the principles set out in this contract with a view to achieving the success of the Alliance in their mutual best interests *[Option, add where appropriate: “Including the milestone targets and other goals set out in the Alliance plan annexed to this contract”]*.

### 2. Management Committee

2.1 The Parties shall establish a committee (“Management Committee”) responsible for overall organization, direction and management of the Alliance. The role of the Management Committee shall primarily be:

*[specify role of the Management Committee. The following is an example only:*

- 2.1.1 *To give strategic and operational direction to the Alliance;*



- 2.1.2 *To approve particular Projects to be carried out through the Alliance, including any funding commitments of the Parties for those approved Projects;*
- 2.1.3 *To develop targets and milestones in order that progress of the Alliance can be measured;*
- 2.1.4 *To identify resources required to support the Alliance and agree the responsibilities of each party to provide those resources;*
- 2.1.5 *To ensure that communications between the Parties are maintained actively and in a coordinated manner;*
- 2.1.6 *To provide a forum in which any problems can be addressed constructively and resolved.]*

2.2 Each party shall appoint two (2) representatives [*vary number as appropriate*] to be members of the Management Committee (and shall consult with the other party before any such appointment or any change in representation). Each member shall have one vote. Decisions shall be made by simple majority vote (provided that at least one (1) representative of each party is included in that majority vote).

2.3 The first members of the Management Committee shall be: [*specify names*] (appointed by ABC) and [*specify names*] (appointed by XYZ).

2.4 The chairman of the Management Committee shall be nominated by [*specify ABC or XYZ as appropriate*] but shall not have any casting vote.

2.5 The Management Committee shall meet regularly (either telephonically, by video conference or in person) and, unless otherwise agreed, not less than quarterly. Unless otherwise agreed, the venue (if the meeting is in person) shall alternate between the Parties. Communication on a regular basis shall be encouraged between members of the Management Committee.

2.6 Any decision made by the Management Committee in relation to the Alliance shall be binding and, where requiring action by the Parties, shall be carried into effect by the Parties. A failure by a party to comply shall be a breach of this contract.

### **3. Contributions of the Parties**

*[Comment: This Article may be appropriate as a framework to set out principal responsibilities or contributions of each party towards the Alliance. What does each party expect the other to contribute to the Alliance?]*

3.1 It is intended that each party shall contribute particular knowledge, skills or services to assist the establishment and success of the Alliance. The general responsibilities of each party are set out in this Article 3.

3.2 The general contributions of ABC towards the Alliance shall be:

*[These are examples only. Tailor description to each Alliance.]*

3.2.1 *[To provide technical assistance (including through the provision of training) in the field of . . . . . on reasonable terms to be agreed between the Parties through the Management Committee (such technical assistance to be given under the terms of a technical assistance contract)];*

3.2.2 *[. . . . .].*

3.3 The general contributions of XYZ towards the Alliance shall be:

3.3.1 *[To use its contacts, knowledge and distribution network in [country] to assist the promotion of [ABC's products]];*

3.3.2 *[To assist with the recruitment of local staff, facilities and resources for the operations of the Alliance];*

3.3.3 *[ . . . . . ].*

3.4 Each party shall use all reasonable efforts to provide its contribution to promote the success of the Alliance. Each party shall be responsible for ensuring that it provides its contribution towards the Alliance using all such diligence and skill as is reasonable in the circumstances.

*[Alternative: If this is intended as a general statement of goodwill without legal liability, delete the above Article 3.4 and replace with the following:*

*“3.4 Each party shall use all reasonable efforts to provide its contribution to promote the success of the Alliance. The Alliance will, however, be built on trust between the Parties and neither party shall (unless otherwise specified in this contract) have any legal liability to the other in respect of the standard, adequacy or performance of its contribution.”]*

## 4. Joint Projects

*[Comment: An Article of this kind may be appropriate where a joint research or other technical Project is to be undertaken. The provisions will need to be tailored to the circumstances of each Alliance.]*

4.1 A particular objective of the Alliance is to identify appropriate Projects for joint research or other collaboration between the Parties, particularly in the field of *[specify field]*. These Projects will be aimed at developments where the results will be of benefit to both Parties. These Projects may lead, in appropriate cases, to arrangements for joint commercial exploitation.

4.2 Joint research or other Projects to be undertaken by the Alliance will be agreed and directed by the Management Committee who shall:

4.2.1 Establish financial resources for the Project (including any minimum financial commitments of the Parties) and allocate personnel to research Projects approved by the Management Committee including the appointment of a Project Manager to lead a Project team;

4.2.2 Approve specific research plans; and

4.2.3 Develop specific performance targets and periodically review progress.

4.3 After the Management Committee has approved plans for a particular Project, the Project team shall coordinate and implement all day-to-day activities of the Parties. The Project team shall work openly and cooperatively and shall meet periodically, as the Project Manager determines to be necessary, to coordinate their activities. Each party shall, through the Project Manager, periodically submit to the Management Committee progress reports in relation to its activities under each joint research Project.

4.4 A more detailed Project contract shall, where considered appropriate by the Parties, be entered into in relation to a particular joint research or other collaborative Project to be funded by the Parties.

## 5. Alliance costs

*[Comment: This Article, or similar provisions, may be appropriate where each party is to bear costs in relation to the Alliance that are to be administered out of a central Joint Account. The concept of a limit on each party's funding commitment is optional.]*

5.1 For the purpose of this Article:

*[Delete the following definition if no limit is set]* “Aggregate Funding Commitment” means, in relation to a party, that party's maximum commitment to provide finance for the Alliance, namely:

ABC: *[specify maximum commitment]*

XYZ: *[specify maximum commitment]*

or such other amounts as shall from time to time be agreed between the Parties;

“Budget” means an annual budget for the Alliance *[or a particular Project]* approved by the Management Committee;

“Funding Share” means the share of the costs of the Alliance to be borne by each party, namely: ABC – *[specify]* percentage; XYZ – *[specify]* percentage;

“Joint Account” means account(s), in the joint names of the Parties, relating to the operations of the Alliance and to be administered by *[specify party or administrator]*;

“Project Manager” means the Project or general manager appointed by the Management Committee.

5.2 Each party shall contribute its Funding Share of the costs of the Alliance on a quarterly basis in accordance with the Budget set by the Management Committee *[Option, add if applicable: “up to, in each case, its Aggregate Funding Commitment”]*.

5.3 Not less than 30 days before the end of each quarter, the Management Committee *[or, where relevant: the Project Manager]* shall notify each party of that party's Funding Share of the costs of the Alliance due pursuant to Article 5.2 in respect of that quarter. Each party shall pay the amount due into the Joint Account on or before the last day of the quarter in question.

5.4 Not less than 60 days before the end of each year, the Management Committee shall review the future funding of the Alliance so as to establish the Budget for the following year. *[Option, add if applicable: “No party shall be obliged to provide funds in excess of its Aggregate Funding Commitment.”]*

5.5 Unless otherwise agreed between the Parties:

5.5.1 All notices for funds under this Article 5 shall be sent to the address of the relevant party as specified in or pursuant to Article 17;

5.5.2 All payments shall be made by each party in *[currency]* in cleared funds into the Joint Account;

5.5.3 (Without prejudice to Article 12) Any payment which is in default or delayed by any party shall bear interest, at the rate of *[specify]* % above the base lending rate for the time being of *[specify]* Bank, from the due date of payment until the actual date of payment.

5.6 Payments from the Joint Account shall only be made for work carried out or provided in connection with the Alliance. Invoicing and payment procedures to reimburse a party (or any member of its corporate group) for work carried out by it for the Alliance shall be as established from time to time by the Management Committee [*Alternatively: Delete “as established from time to time by the Management Committee” and replace with: “As set out in the schedule to this contract”*].

5.7 Any cheque or other payment drawing on funds from the Joint Account shall require the signature or written authorization of the Project Manager or other person authorized by the Management Committee.

5.7.1 Any cheque or other payment in excess of [*specify threshold*] (or such other amount as the Management Committee may from time to time decide) shall also require countersignature by such other person as shall be authorized by the Management Committee.

5.7.2 Any cheque or payment in excess of [*specify limit*] shall, in addition to the above signatures, require express authorization by the Management Committee.

5.8 Full and proper books of account and records relating to the Alliance shall be kept in accordance with standard accounting practice under the supervision of the Management Committee. These books and records shall be available at all times for inspection by each party or its duly authorized representative.

5.9 An audit of the Joint Account shall be undertaken every 12 months (or such other period considered appropriate by the Management Committee) by an independent auditor and a report, in a form to be established by the Management Committee, shall be prepared and submitted to each of the Parties. The audit fee shall be paid out of the funds authorized by the Budget.

5.10 If there are any surplus funds in the Joint Account on termination of the Alliance (all outstanding fees, costs and expenses of the Alliance having been met), the surplus or balance shall be distributed among the Parties pro rata to their respective Funding Shares.

## 6. Intellectual Property

*[Comment: This Article, or similar provisions, may be appropriate where the exchange and development of technical information involves Intellectual Property rights (IPR). It provides a framework of key points. It is prepared on the basis that specific IPR developed under the Alliance will be jointly owned and that “going to market” will require the consent of both Parties. Clarity is important regarding rights after termination of the Alliance. In many cases, more detailed licence agreements will be appropriate to cover the IPR arrangements, particularly where one party’s specific IPR is made available for use by the other party under the Alliance.]*

6.1 For the purposes of this Article:

“Background IPR” means the existing know-how and other Intellectual Property of a party relevant to a Project and available to be disclosed and used for the purposes of the Alliance.

“Intellectual Property” means any patent, copyright, design right or other Intellectual Property protection including rights in any secret process, technical know-how or other confidential information (together with any application for such protection).

“Project” means a particular Project approved by the Management Committee and to be carried out through the Alliance.

“Project IPR” means any specific technical know-how, confidential information or other Intellectual Property developed pursuant to the Alliance.

“Project Trademarks” means any trademarks or names used primarily for the Alliance or any products or services developed under the Alliance; and

“Territory” means *[specify]*.

6.2 Under arrangements to be coordinated by the Management Committee, each party shall disclose to the other party such of its Background IPR as is necessary or desirable in order to enable the Project to be carried out effectively. Disclosure shall, if appropriate, include reasonable arrangements for the instruction of suitably qualified staff of the other party in the use and application of that Background IPR.

6.3 All Background IPR originating from a particular party shall remain the exclusive property of that party. The other party shall not use or disclose any such Background IPR except for the specific purposes of the Alliance or as expressly permitted by the Management Committee.

6.4 Each party warrants to the other party that, so far as it is aware, the use of its Background IPR in accordance with this contract will not infringe any Intellectual Property rights of any third party. A party gives no other warranty or representation of any kind to any other party in relation to its Background IPR (including, but not limited to, its suitability for any particular use or application).

6.5 All Project IPR shall, unless otherwise agreed between them, belong to the Parties equally as joint owners. Each party shall, if requested by the other party, enter into such assignment or other formal documentation as may be necessary or desirable to record that joint ownership.

6.6 During the period of this contract, the procedure for obtaining initial registered Intellectual Property rights in respect of any Project IPR shall be implemented by the Project Manager acting on his own initiative or at the direction of the Management Committee. The costs of applying for any such initial protection (including the costs of first filing) shall be met from the Joint Account. Any subsequent decision to proceed with registered protection shall be for the Management Committee.

6.7 In the event of any alleged infringement by a third party of any Project IPR or any Project IPR allegedly infringing any Intellectual Property rights of a third party, the Management Committee shall meet to decide the best course of action and the Parties shall thereafter be bound to take steps to implement that action.

6.8 Each party shall adopt such confidentiality procedures as may be reasonably necessary or prudent in accordance with good industry practice (including obtaining confidentiality undertakings from key employees) to

ensure the safe custody of any materials forming part of the Project IPR or of the other party's Background IPR.

6.9 Except as specifically agreed in writing between the Parties, neither party shall use any trademarks or trade names of the other party in the course of its business or in any form of publicity relating to the Alliance.

6.10 If a party wishes "to go to market" or otherwise exploit commercially any product, service or technology substantially derived from work under the Alliance, it shall notify the other party and discussions in good faith shall take place between the Parties regarding arrangements for use of any Project IPR or Project Trademarks. Unless otherwise agreed:

6.10.1 Each party shall be entitled to use in the course of its own business any general non-confidential know-how developed during the Alliance;

6.10.2 Any commercial marketing or exploitation of Project IPR (or the use of any Project Trademarks) shall require the prior consent of both Parties.

The provisions of this Article 6.10 shall survive any termination of this agreement.

## **7. Preferred supplier/distributor**

*[Comment: This Article may be appropriate if one of the Parties is likely to be appointed a preferred supplier or distributor of products developed under the Alliance.]*

7.1 It is anticipated that XYZ's business, if it develops in the field of *[specify]*, will create a need for *[specify e.g. products]*. Any decision to develop that business shall be solely for XYZ. If XYZ does develop this business, it is agreed that ABC shall become a "preferred supplier" to XYZ for *[specify products]* and have first opportunity to supply them to XYZ subject to price, specification, quality and delivery times being agreed and no less favourable than other potential comparable suppliers.

7.2 If XYZ decides to distribute *[specify products]* internationally, the Parties shall negotiate in good faith for the appointment of ABC as exclusive distributor in *[territories]* for an initial period of *[specify]* years (renewable by agreement) on commercial terms to be agreed in a separate distributorship contract.

## **8. Secondments and personnel**

*[Comment: This Article is only appropriate if there are likely to be secondments of staff between the Parties.]*

8.1 The Parties recognize that secondments of staff (and other sharing of personnel, will actively consider a programme for staff secondments. The terms of any such secondments shall be agreed between the Parties (if necessary through the Management Committee resources and know-how) may be an appropriate means to develop the Alliance.

8.2 Any employees of either ABC or XYZ who are seconded or sent to visit the premises of the other party during the Alliance shall remain employees of the Party sending them. the employer party shall (i) be responsible for ensuring that its employees comply with all security and site regulations

applicable at the other party's premises and (ii) indemnify the other party against any property damage or any personal injury caused by the negligent act or omission of any of its employees at the other party's premises.

## 9. Confidentiality and announcements

9.1 Each party shall use all reasonable efforts to keep confidential all commercial and technical information that it may acquire in relation to the customers, business or affairs of the other party. No party shall use or disclose any such information except with prior consent of the other party. This restriction shall not apply to any information:

- 9.1.1 Which is or becomes publicly available through no default of that party;
- 9.1.2 Is already in that party's possession without any obligation of confidentiality;
- 9.1.3 To the extent that it is required to be disclosed by law or by the rules of any recognized stock exchange or regulatory body.

9.2 *[Include Article 9.2 where the provision of technical assistance is part of the arrangements for establishing the Alliance. If it is not, then delete Article 9.2.]* Article 9.1 shall not restrict or prevent a party from using, in the course of its business, any know-how or technical information acquired pursuant to the arrangements contemplated by Article 33 and 44 of this contract provided that (i) such use shall not include sublicensing, (ii) appropriate measures to ensure confidentiality are maintained and (iii) no disclosure to third Parties takes place except as permitted by Article 9.1. This shall be subject to the provisions of any technical assistance contract or Project contract that (in the event of any conflict) shall over this Article 9 in respect of the use of information disclosed pursuant to those contracts.

9.3 Each party shall use all reasonable efforts to ensure that its employees, agents and any affiliates observe these confidentiality obligations.

9.4 No announcement in connection with the Alliance or this contract shall be made by either party without the prior approval of the other party (such approval not to be unreasonably withheld or delayed) except as may be required by law or by any stock exchange or by any governmental authority.

9.5 The provisions of this Article 9 shall survive any termination of this contract.

## 10. Restrictions on the Parties

*[Comment: The scope of any non-compete or other restrictions on the Parties should be carefully tailored to the particular Alliance. Restrictions will be difficult to enforce in many jurisdictions unless specific and reasonable in scope, Territory and length.]*

10.1 It is the intention of the Parties to work closely and collaboratively with each other in developing the Alliance. Therefore, during the period of the Alliance:

10.1.1 ABC shall not enter into a similar Alliance with any other party for operations in the field of *[specify]* or (directly or indirectly) carry on business in the field of *[specify]* in a manner competitive with XYZ in *[specify Territory]*;

10.1.2 XYZ shall not enter into a similar Alliance with any other party for operations in the field of *[specify]* or (directly or indirectly) carry on business in the field of *[specify]* in a manner competitive with ABC in *[specify Territory]*.

10.2 Neither party shall, outside of the Alliance, carry on (whether on its own or with any third party) any research Project that is directly competitive with any research Project being carried out by the Alliance.

10.3 During the period of the Alliance *[Option, add if appropriate: “And for one (1) year after its termination,”]* neither party shall attempt to employ or entice away any employee of the other party engaged in any managerial or technical capacity in relation to the operations of the Alliance.

## 11. Liability

11.1 It is contemplated that during the Alliance each party (and its employees and representatives) may provide recommendations and advice to the other as part of the relationship between the Parties. Both Parties acknowledge that any such recommendations and advice are given freely and without any warranties or liability. Neither party shall have any claim, liability or cause of action against the other party in respect of any such recommendation or advice given during the Alliance.

11.2 Neither party shall have any responsibility for any liabilities arising in the course of the other parts business.

11.3 Articles 11.1 and 11.2 are subject to any specific terms agreed in any technical assistance contract, Project contract or other contract between the Parties regarding liability for the supply of information or other technical assistance.

## 12. Duration and termination

*[Comment: This Article contemplates that the Alliance will continue until terminated by notice or joint agreement. In some cases, it may be preferred to establish the Alliance for a defined period (e.g. two years) and for any renewal or extension of that period to require joint agreement of the Parties.]*

12.1 The Alliance shall commence on the date of this contract. It shall continue indefinitely subject to termination in accordance with this Article 12. Each party nevertheless recognizes that it is vital for the success of the Alliance to maintain flexibility and to respond to changing circumstances and practical experience. Each party will consider in good faith any proposals put forward by the other party for the development of the Alliance.

12.2 The Alliance may be terminated by agreement between the Parties at any time.

12.3 Either party may give not less than *[3 months’]* *[vary period as appropriate]* written notice at any time to terminate the Alliance, provided



that no such notice shall be given prior to [specify date e.g. two years after commencement].

12.4 Either party shall have a right to terminate the Alliance if any of the following events shall occur in relation to the other party (the “Defaulting Party”):

12.4.1 If the Defaulting Party commits a material breach of this contract (or any other contract between the Parties entered into pursuant to this contract) and fails to remedy the breach within 45 days after being given notice by the other party to do so (and such notice specifies that the notifying party intends to exercise its rights of termination under this Article); or

12.4.2 If a filing is presented or an order is made for the appointment of an administrator, receiver, manager or similar officer in bankruptcy over any substantial part of the Defaulting Party’s assets or business (and such filing or order is not discharged within 30 days).

12.5 [Option: Add this Article 12.5 if a change in ownership of the other party could be critical: “12.5 A party shall have the right to terminate the Alliance by giving [45 days] notice if a third party acquires a controlling interest in the other party (and, for this purpose, a “controlling interest” means (i) the ownership or control (directly or indirectly) of more than 50% of the voting capital of that other party or (ii) the right to appoint or remove a majority of the directors of that party).” If it is not appropriate then delete this Article 12.5.]

12.6 In the event of termination:

12.6.1 The Parties shall consult and use all reasonable efforts to agree an orderly programme for winding up the activities of the Alliance;

12.6.2 The terms of this contract and (unless the Parties otherwise agree) the terms of any technical assistance contract and/or Project contract shall automatically terminate except that:

- (a) The provisions of Article 9 (Confidentiality and announcements), 11 (Liability) and 21 (Dispute resolution procedure) shall continue together with any other provisions specified in this contract or any Project contract or technical assistance contract as surviving termination;
- (b) Each party shall remain liable for any breach of its obligations prior to termination.

## 13. **Force majeure**

13.1 “*Force majeure*” means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and which it could not reasonably be expected to have taken into account at the time of the conclusion of this contract, or to have avoided or overcome it or its consequences.

13.2 A party affected by *force majeure* shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent

that the delay or non-performance is due to any *force majeure* of which it has notified the party in accordance with Article 13.3. The time for performance of that obligation shall be extended accordingly, subject to Article 13.4.

13.3 If any *force majeure* occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall within a reasonable time notify the other party as to the nature of the circumstances in question and their effect on its ability to perform.

13.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by *force majeure* for a continuous period in excess of three [*specify any other figure*] months, the other party shall be entitled to terminate this contract by giving written notice to the Party affected by the *force majeure*.

*[Alternative: If preferred, replace Article 13.4 with the following alternative: “13.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of [six] months, the Parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects. But if they do not agree upon such amendments or arrangements within a further period of 30 days, the other party shall be entitled to terminate this contract by giving written notice to the Party affected by the force majeure.”]*

## 14. Change of circumstances (hardship)

*[Comment: The Parties should be free to consult each other in the event of a major change in circumstances – particularly one creating Hardship for a particular party. However, an SME should only include the option in Article 14.4 (right to refer to the courts/ arbitral tribunal to make a revision or to terminate the contract) if (i) the SME considers that it is not likely to be used against that party’s interests by a party in a stronger tactical position or (ii) the right to refer to a court/tribunal is already an existing right under the applicable governing law in the event of Hardship.]*

14.1 Where the performance of this contract becomes more onerous for one of the Parties, that party is nevertheless bound to perform its obligations subject to the following provisions on change of circumstances (Hardship).

14.2 If, however, after the time of conclusion of this contract, events occur which have not been contemplated by the Parties and which fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations (Hardship), that party shall be entitled to request revision of this contract provided that:

14.2.1 The events could not reasonably have been taken into account by the affected party at the time of conclusion of this contract;

14.2.2 The events are beyond the control of the affected party; and

14.2.3 The risk of the events is not one which, according to this contract, the Party affected should be required to bear.

14.3 Each party shall in good faith consider any proposed revision seriously put forward by the other party in the interests of the relationship between the Parties. No revision shall, however, be effective unless agreed by both Parties

in accordance with Article 18.2 *[Option, add when the option in Article 14.4 is included: “Or established pursuant to Article 14.4.”]*

*[Option: See comment at the beginning of Article 14. Add if wished; otherwise delete. “14.4 If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 21. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances or to terminate this contract at a date and on terms to be fixed.”]*

## **15. No partnership or agency**

*[Comment: See introductory note 7. It may be difficult to avoid joint liability in many jurisdictions if the Alliance involves income or profit-sharing.]*

Nothing in this contract shall (i) be deemed to constitute a partnership in law between the Parties, (ii) constitute either party the agent of the other for any purpose or (iii) entitle either party to commit or bind the other (or any member of its respective group) in any manner.

## **16. Assignment and subcontracting**

16.1 This contract is personal to the Parties and neither party shall without the prior written approval of the other:

16.1.1 Assign, mortgage, charge or otherwise transfer or deal in, or create any trust over, any of its rights; or

16.1.2 Subcontract or otherwise delegate the whole or any part of its rights or obligations under this contract to another person.

## **17. Notices**

17.1 Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party specified in Article 17.2 below, in a manner that ensures receipt of the notice can be proved.

17.2 For the purposes of Article 17.1, notification details are the following, unless other details have been duly notified in accordance with this Article:

17.2.1 ABC: *[specify detail]*;

17.2.2 XYZ: *[specify detail]*.

## **18. Entire Agreement**

18.1 This contract sets out the entire agreement between the Parties with respect to the Alliance. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. *[Option, add where relevant: “This contract supersedes any previous agreement or understanding relating to its subject matter”.]*

18.2 This contract may not be varied except by agreement of the Parties in writing (which may include e-mail). *[Option, when the option of Article 14.4 or equivalent (reference to court/tribunal) has been included, add to previous sentence: “Or in accordance with Article 14.4”.]*

## 19. Effect of invalid or unenforceable provisions

If any provision of this contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this contract shall continue to be valid as to its other provisions and the remainder of the affected provision, unless it can be concluded from the circumstances that (in the absence of the provision found to be null and void) the Parties would not have concluded this contract. The Parties shall use all reasonable efforts to replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

## 20. Authorizations

20.1 This contract is conditional upon the following authorizations first being obtained *[specify the authorization(s) or other conditions required e.g. of governmental or regulatory authorities]*.

20.2 The relevant party shall use all reasonable efforts on its part to obtain such authorizations and shall notify the other party promptly of any difficulty encountered.

## 21. Dispute resolution procedure

21.1 If a dispute arises out of this contract, the Parties shall seek to resolve it on an amicable basis. They shall consider the appointment of a mediator to assist in that resolution. No party shall commence legal or arbitration proceedings unless 30 days' notice in writing has been given to the other party.

21.2 Any dispute, controversy or claim arising out of or relating to this contract (including its conclusion, interpretation, performance, breach, termination or invalidity) shall be finally settled under the rules of *[specify the arbitration institution]* by *[specify the number of arbitrators, e.g. sole arbitrator, three arbitrators]* appointed in accordance with the said rules. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.

*[The following are alternatives to a specified arbitral institution under Article 21.2:*

*Alternative 1: Ad hoc arbitration*

*“21.2 Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of UNCITRAL [specify other rules] by [specify the number of arbitrators, e.g. sole arbitrator, three arbitrators] appointed by [specify name of appointing institution or person]. The place of arbitration shall be [specify]. The language of the arbitration shall be [specify].”*

*[Alternative 2: State courts*

*“21.2 Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled by the courts of (specify place and country) which will have exclusive jurisdiction.”]*

## **22. Applicable law**

*[Specify national law]* law shall apply to this contract.

### SIGNATURES OF THE PARTIES

Signed for and on behalf of ABC

Signatory: .....

Date: .....

Signed for and on behalf of XYZ

Signatory: .....

Date: .....



## Chapter 2

# International Corporate Joint Venture

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## Introduction

This Model Contract is a framework for a **joint venture between two Parties to establish a jointly-owned company** (“JVC”). Key features are:

1. It contemplates *50-50 equal ownership*. If there are more than two Parties, or one is to have a majority share, its provisions will need to be adapted.
2. *Each party makes an initial financial contribution* to the capital of the JVC. It is important to establish whether or not a party will have any continuing obligation to provide further finance to the JVC. Article 5 is prepared on the basis that any future finance requires mutual consent.
3. *Each corporate JVC must be formed in a particular jurisdiction*. Usually, this will determine the governing law. It will be necessary to prepare Articles of association/by-laws or other formal constitutional documents in that jurisdiction that are consistent with the joint venture contract. It is good practice to ensure that the joint venture contract addresses key items as a matter of contract between the Parties.
4. For clarity regarding development of the JVC’s Business, it is good practice to *have a Business Plan* agreed between the Parties at the outset. This could be attached to, or at least identified in, the joint venture contract.
5. Many joint ventures involve contribution by a party of assets, property, technology or services or associated distributorship or supply arrangements. These will often require “ancillary contracts” to be entered into in order to spell out the detailed terms (price, specification, liability etc.).
6. Overall direction and management of the JVC is usually in the hands of the JVC *Board of directors*. It is important at the outset to clarify the balance of decision-making power between (i) the Parties as shareholders, (ii) the Board and (iii) individual executives of the JVC. It is common to specify that certain “Reserved Matters” will require mutual consent of the Parties either as shareholders or at the Board.
7. *A sale by a party of its Shares* in the JVC can, under the Model Contract, only be made *with mutual consent*.

8. If a party wishes *to bring the joint venture to an end*, this usually requires mutual agreement. Article 14.3 contemplates, after a reasonably lengthy procedure, that a party can nevertheless call for a winding up of the JVC in certain circumstances of breakdown or deadlock.

If more complex arrangements are involved or a wider range of options is needed, consult the (long-form) ITC Model Incorporated Joint Venture Contract (the “Long Form JVC Contract”).



## ITC MODEL CONTRACT FOR AN INTERNATIONAL CORPORATE JOINT VENTURE

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***PARTIES:***

Name (name of company)  
.....  
Legal form (e.g. limited liability company)  
.....  
Country of incorporation and (if appropriate) trade register number  
.....  
Address (place of business, phone, fax, e-mail)  
.....  
.....  
Represented by (name, position, address)  
.....  
.....

***Referred to as “ABC”***

Name (name of company)  
.....  
Legal form (e.g. limited liability company)  
.....  
Country of incorporation and (if appropriate) trade register number  
.....  
Address (place of business, phone, fax, e-mail)  
.....  
.....  
Represented by (name, position, address)  
.....  
.....

***Referred to as “XYZ”***

ABC and XYZ are together referred to as “the Parties” and individually as a “Party”.

*[Add any further information required e.g. the Parties’ fiscal identities]*

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## Background

- A. ABC and XYZ (the “Parties”) have agreed to form a new jointly owned company (the “JVC”) which shall be established and carry on Business in the manner set out in this contract.
- B. The Parties have agreed that their relations as shareholders in the JVC shall be governed by the terms of this contract.

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## Operative provisions

### 1. Interpretation

1.1 In this contract the following terms shall have the following meanings:

“Board” means the Board of directors of the JVC;

“Business” means the Business to be carried on by the JVC as *[specify nature of Business]* in accordance with the Business Plan as updated by the Board from time to time;

“Closing” means completion of the establishment of the JVC in accordance with Article 3;

“Member of the ABC Group” means ABC and any subsidiary or parent company for the time being of ABC and any other subsidiary for the time being of that parent company;

“Member of the XYZ Group” means XYZ and any subsidiary or parent company for the time being of XYZ and any other subsidiary for the time being of that holding parent;

“Shares” means ordinary Shares in the capital of the JVC;

*[Option: If the JVC is to operate in a specific Territory, add: “Territory” means [specify].]*

1.2 Any reference to an “Agreed Form” is to the draft form of the relevant document agreed between the Parties and signed on their behalf for the purpose of identification before the signature of this contract (with such amendments, if any, as may subsequently be agreed in writing between the Parties).

1.3 Any reference in this contract to an amount in *[specify currency]* shall include its market rate equivalent at the relevant time in any other currency.

### 2. Business of JVC

2.1 The Parties wish to establish the JVC for the purpose of *[set out scope of Business]* (the “Business”) *[Option, if JVC is to operate solely in a particular Territory, add: “In the Territory”]*. The Business shall be conducted in the best interests of the JVC in accordance with the then current Business Plan. The initial Business Plan is annexed to this contract *[delete if not annexed]*.

2.2 Each party shall act in good faith towards the other in order to promote the JVC's success *[Option, add if applicable: "With the objective of meeting the milestone targets and other goals set out in the Business Plan"]*. The Parties confirm their intention to consult fully on all matters materially affecting the development of the Business.

### 3. Establishment of JVC: Conditions precedent

3.1 The Parties *[Option: If one party is to have particular responsibility for initial formation, replace "the Parties" with name of particular party to be responsible e.g. "ABC"]* shall take appropriate steps to arrange for the formation of the JVC in *[specify country]*. The JVC shall not trade or carry on Business in any manner prior to Closing. Closing shall be conditional upon each of the following conditions ("Conditions Precedent") having first been satisfied or waived: *[set out any specific conditions precedent e.g.]*

3.1.1 *[Approval by specified regulatory authority];*

3.1.2 .....

3.2 Each party shall use all reasonable efforts to ensure that the conditions precedent are fulfilled as soon as possible and shall notify the other promptly of any difficulties encountered. If the conditions precedent are not fulfilled (or waived) by *[specify date]*, this contract (other than the provisions of Article 12 (confidentiality) and Article 24 (disputes resolution procedure) shall, unless otherwise agreed, thereupon automatically cease and terminate and neither party shall have any claim of any nature whatsoever against the other party.

### 4. Establishment of JVC: Closing

4.1 Closing shall take place on *[specify date]* (or, if later, within 7 days after the fulfilment or waiver of all the conditions precedent) when the following events and matters set out in this Article 4 shall take place. If not previously formed under Article 3.1, the Parties shall cause the JVC to be incorporated with the following characteristics:

4.1.1 The JVC shall be formed in *[country]* as *[specify type of company e.g. a private company limited by Shares];*

4.1.2 The Articles of association/bylaws of the JVC shall be in the Agreed Form *[annexed to this contract: Delete if the Articles/bylaws are not annexed];*

4.1.3 The name of the JVC shall be "*[specify]*";

4.1.4 The *[registered]* office of the JVC shall be at *[specify];*

4.1.5 The directors of the JVC shall be:

ABC Directors:	<i>[specify]</i>	XYZ Directors:	<i>[specify]</i>
	[            ]		[            ]
	[            ]		[            ]

4.1.6 The first auditors of the JVC shall be *[specify]*.

4.2 ABC shall subscribe unconditionally for *[specify number]* Shares in cash at a price of *[specify]* per share, payment for which shall be made in cleared funds into such bank account as shall be agreed by the Parties (the “JVC Account”). XYZ shall subscribe unconditionally for *[specify number]* Shares in cash at a price of *[specify]* per share, payment for which shall be made in cleared funds into the JVC account. The Parties shall procure that the JVC issues credited as fully paid:

4.2.1 *[Specify number]* Shares to ABC *[to include the initial [specify number] if ABC alone has already set up the company] ordinary Shares in the JVC subscribed for by ABC upon incorporation);* and

4.2.2 *[Specify number]* Shares to XYZ;

and that the names of ABC and XYZ are entered in the register of members of the JVC as the respective holders of the Shares subscribed by them *[and that share certificates are issued to ABC and XYZ in respect of such Shares: Delete if share certificates not issued under local law]*.

4.3 *[Omit this Article if the Parties do not also provide loans to fund the JVC on Closing as well as share capital.]* The Parties shall, in addition, advance loans to the JVC on Closing in *[currency]* in the following amounts:

ABC .....

XYZ .....

The terms of these loans, including as to interest, shall be the same for each party or otherwise as agreed between them and the Board from time to time. Any such loans shall be repaid to the Parties at the same time and in the same proportions.

4.4 The Parties shall cause the following ancillary contracts to be entered into, namely:

*[Specify any additional contracts to be executed on Closing in order to establish the Business of the JVC – for example:*

4.4.1 *The asset transfer/sale and purchase contract (in the Agreed Form) between ..... and the JVC for the transfer of .....;*

4.4.2 *The distributorship contract (in the Agreed Form) between ..... and the JVC relating to the distribution of .....;*

4.4.3 *The technology assistance contract (in the Agreed Form) between ..... and the JVC for the provision of technical assistance and licensing of .....;*

4.4.4 *The supply contract (in the Agreed Form) between ..... and the JVC for the supply of .....;*

4.4.5 *The services contract (in the Agreed Form) between ..... and the JVC for the provision of services to the JVC as therein provided;*

4.4.6 *The trademark licence(s) (in the Agreed Form) between ..... and the JVC for licensing of the use of the ..... mark.]*

*[Comment: Outline examples of a number of these contracts appear as*

*schedules to the Long Form JVC Contract.]*

## **5. Capital and further finance**

*[Comment: This Model Contract contemplates that the Shares of the JVC will be held 50-50 between the two Parties. If there are more than two Parties or the Shares are not to be held equally, terms will have to be adapted to the circumstances. In some cases, it may be appropriate to have separate “classes” of Shares (e.g. ABC Shares to be held by ABC and XYZ Shares to be held by XYZ) with different rights attaching to each class.]*

5.1 The JVC shall, in accordance with and following completion of the events and transactions referred to in Article 4, have an issued share capital of *[specify amount]* consisting of *[specify number]* Shares owned by ABC and *[specify number]* Shares owned by XYZ.

5.2 The share capital of the JVC may from time to time be increased by such sum as shall be mutually agreed but so that in any event, unless otherwise agreed, the increased share capital of the JVC shall be held in the proportions of 50% by ABC (or member(s) of the ABC Group) and 50% by XYZ (or member(s) of the XYZ Group).

5.3 If the JVC shall in the opinion of the Board require further finance, the JVC shall first approach its own banking sources. If finance cannot be obtained from the JVC’s own banking sources, neither party shall be obliged to provide any finance to the JVC. Any finance that the Parties do agree to provide shall (unless otherwise agreed) be provided by the Parties in equal proportions (whether by way of subscription of share capital, loans or otherwise).

5.4 The Parties shall not be obliged to provide guarantees in respect of any borrowings of the JVC but, if they do so, they shall be given in equal proportions. If a claim is made against a party under any such guarantee, that party shall be entitled to a contribution from the other party of such amount as shall ensure that the aggregate liability is borne in equal proportions.

## **6. Directors and Management**

6.1 The Business and affairs of the JVC shall (subject to the Shareholder Matters referred to in Article 7.2) be managed by the Board of the JVC. The Board shall consist of four (4) persons *[vary number as appropriate]* of which:

6.1.1 ABC shall be entitled to appoint and maintain in office two (2) directors (“ABC Directors”) and to remove any director so appointed from office (and to appoint another in the place of any director so removed); and

6.1.2 XYZ shall be entitled to appoint and maintain in office two (2) directors (“XYZ Directors”) and to remove any director so appointed from office (and to appoint another in the place of any director so removed).

6.2 Each appointment and removal by ABC or XYZ of a director pursuant to its entitlement shall be notified in writing to the other party and the JVC. ABC and XYZ shall each use their respective votes in the JVC to ensure that the Board of the JVC is constituted by persons appointed in the manner set out in this contract.

6.3 At least 14 days written notice shall be given to each member of the Board of any meeting of the Board, provided always that a shorter period of notice may be given with the written approval of at least one (1) ABC director and at least one (1) XYZ director. Any such notice shall include an agenda identifying in reasonable detail the matters to be discussed at the meeting and shall be accompanied by copies of any relevant papers. The Board shall meet regularly (either telephonically, by video conference or in person) and, unless otherwise agreed, not less than quarterly.

6.4 The quorum for the transaction of Business at any meeting of the Board shall be at least one (1) ABC director and at least one (1) XYZ director present at the time when the relevant Business is transacted.

6.5 The chairman shall be appointed from among the [ABC] directors. *[alternatively: If preferred, delete the previous sentence and replace with “The appointment of the chairman shall rotate each [year/meeting] between an ABC director and an XYZ director”.]* The chairman shall not have a casting vote.

6.6 At any meeting of the Board, each director shall be entitled to one vote. Any decision of the Board in favour of a resolution, to be valid, shall require the positive vote of at least one (1) ABC director and at least one (1) XYZ director. If the Parties are not represented at any meeting of the Board by an equal number of ABC Directors and XYZ Directors, then one of the directors present nominated by the Party which is represented by the fewer directors shall be entitled at that meeting to such additional vote or votes as shall result in the directors present representing each party having in aggregate an equal number of votes.

## 7. Reserved Matters

*[Comment: The list of “Reserved Matters” should be reviewed in the light of the scope of authority proposed for the Board. This Article ensures that the JVC cannot in any event take these steps without the approval of both Parties. The list should be adapted to meet the circumstances. Reserved Matters will be particularly important if one party has a minority voting position.]*

7.1 The following matters (“Reserved Matters”) shall require the prior approval of ABC and XYZ:

- 7.1.1 Any issue of Shares (or securities convertible into Shares) of the JVC other than an issue of Shares to ABC and XYZ in equal proportions as specified in Article 5.2;
- 7.1.2 Any alteration to the Articles of association/bylaws of the JVC;
- 7.1.3 Any sale of the whole or any substantial part of the JVC;
- 7.1.4 Any borrowing by the JVC that would result in the aggregate borrowings of the JVC being in excess of *[specify amount]* or such other amount as the Parties shall from time to time determine;
- 7.1.5 Approval of the annual budget and operating plan of the JVC;
- 7.1.6 Any expansion of the marketing Territory of the JVC beyond *[specify Territory]* or any development of the product line of the JVC beyond *[specify]* (as improved or enhanced from time to time);

- 7.1.7 Any major reorganization affecting the JVC, including the formation of any subsidiary of the JVC;
  - 7.1.8 Any contract or commitment by the JVC having a value or likely to involve expenditure by the JVC in excess of *[specify amount]* (or such other limit as the Parties shall from time to time agree);
  - 7.1.9 The appointment (or removal) and the terms of reference of the chief executive and the appointment (or removal) of any employee whose remuneration is in excess of *[specify amount]* (or such other amount as the Parties shall from time to time agree);
  - 7.1.10 The appointment (or removal) of the auditors of the JVC or any significant change in the accounting policies of the JVC;
  - 7.1.11 Any change for a particular year in the dividend policy specified in Article 10;
  - 7.1.12 The commencement, settlement or abandonment of litigation or admission of liability by the JVC involving a dispute in excess of *[specify amount]* (other than a claim against a Member of the ABC Group or a Member of the XYZ Group);
  - 7.1.13 Any payment by the JVC to any Member of the ABC Group or the XYZ Group (whether by way of management or administrative charges, bonus, licence fees, repayment of loan, dividends or otherwise) unless within permitted limits first approved by the Board;
  - 7.1.14 Filing by the JVC for receivership, reorganization or liquidation under any insolvency laws or any similar action.
- 7.2 Approval for the purposes of Article 7.1 may be given:
- 7.2.1 In the case of items specified in Articles 7.1.1, 7.1.2 and 7.1.3 *[review list to decide matters requiring approval at shareholder level rather than the Board]* (“Shareholder Matters”), by ABC and XYZ either in writing or by unanimous resolution at a general meeting of the shareholders of the JVC or by written resolution;
  - 7.2.2 In the case of the remaining Reserved Matters, by unanimous agreement of all the directors either by written resolution or by unanimous resolution at a meeting of the Board.
- 7.3 The provisions of Article 7.1 shall apply equally to any matters undertaken by a subsidiary of the JVC as if references therein to “the JVC” included, where appropriate, any such subsidiary.

## 8. General meetings

- 8.1 General meetings of the Parties as shareholders in the JVC shall take place in accordance with the applicable provisions of the Articles of association/bylaws which shall include terms that:
- 8.1.1 The quorum for transaction of any Business shall require the presence of a duly authorized representative of each of the Parties;

8.1.2 The notice of meeting shall set out an agenda identifying in reasonable detail the matters to be discussed (unless the Parties agree otherwise);

8.1.3 The chairman of the meeting shall be nominated by *[specify ABC or XYZ as appropriate]* but shall not have a casting vote.

## 9. Additional contributions of the Parties

*[Comment: This Article may be appropriate as a framework to set out principal responsibilities of each party towards the JVC in addition, for example, to the specific terms for (i) financial contributions under Articles 4 or 5 or (ii) services, products or technical assistance to be provided under ancillary contracts contemplated by Article 4.4.]*

9.1 It is intended that each party will contribute particular knowledge, skills or services to assist the establishment and success of the JVC. The general responsibilities of each party are set out in this Article 9.

9.2 The general contributions of ABC towards the JVC shall be:

*[These are examples only. Tailor the description to the circumstances of each JVC.]*

9.2.1 *[To provide technical assistance (including through the provision of training) in the field of . . . . . on reasonable terms to be agreed with the JVC through the Board [such technical assistance to be given under the terms of the technical assistance contract];*

9.2.2 *[. . . . .].*

9.3 The general contributions of XYZ towards the JVC shall be:

9.3.1 *[To use its contacts, knowledge and distribution network in [country] to assist the promotion of the JVC's products];*

9.3.2 *[To assist in the recruitment of local staff, facilities and resources for the operations of the JVC];*

9.3.3 *[. . . . .].*

9.4 Each party will use all reasonable efforts to provide its contribution to promote the success of the JVC. Each party shall provide its contribution towards the JVC using all such diligence and skill as is reasonable in the circumstances.

*[Alternative: If this is intended as a general statement of goodwill without legal liability, then delete the above Article 9.4 and replace with the following:*

*“9.4 Each party will use all reasonable efforts to provide its contribution to promote the success of the JVC. The relationship between the Parties for the JVC will, however, be built on trust and neither party shall (unless otherwise specified in this contract or any other contract between that party and the JVC) have any legal liability to the JVC or the other party in respect of the standard, adequacy or performance of its contribution to the JVC.”]*



## 10. Dividend policy

The Parties agree that (unless otherwise agreed under Article 7 in relation to a particular financial year) the JVC shall distribute by way of dividend not less than . . . . . [e.g. fifty (50)] % of the audited after tax profit in relation to each financial year.

## 11. Transfer of Shares

11.1 Unless it is a transfer made with the prior written consent of the other party, neither ABC nor XYZ shall sell, transfer, pledge, charge, dispose of or otherwise deal with any right or interest in any of its Shares in the JVC (including the grant of any option over or in respect of any Shares).

11.2 Consent shall not unreasonably be withheld for a transfer by a party to a member of its own group. Each of ABC and XYZ, respectively, undertakes to procure that, if any member of its group which holds Shares in the JVC ceases at any time to be a wholly owned subsidiary of that party, that subsidiary shall first transfer beneficially all its Shares in the JVC back to the relevant party (or another member of its group).

11.3 No transfer of Shares of the JVC shall in any event be registered or become effective unless the transferee shall first have entered into a contract undertaking to be bound by this contract (including this Article 11) to the same extent as the transferor would have been bound had the transfer not been effected.

## 12. Confidentiality

12.1 Each of the Parties shall at all times use all reasonable efforts to keep confidential (and to ensure that its employees and agents keep confidential) all commercial and technical information which it may acquire (i) in relation to the JVC or (ii) in relation to the clients, Business or affairs of the other party (or any member of its respective group). Neither party shall use or disclose any such information except with the consent of the other party or, in the case of information relating to the JVC, in the ordinary course of advancing the JVC's Business. The restriction in this Article 12.1 shall not apply to any information that is:

- 12.1.1 Publicly available through no fault of that party;
- 12.1.2 Already in the possession of that party prior to its disclosure without any obligation of confidentiality; or
- 12.1.3 Required to be disclosed by that party pursuant to any law, stock exchange regulation or binding judgment, order or requirement of any court or other competent authority.

12.2 Each party shall use all its respective powers to ensure (so far as it is able) that the JVC and its officers, employees and agents observe a similar obligation of confidence in favour of the Parties to this contract.

12.3 The provisions of this Article 12 shall survive any termination of this contract.

### 13. Restrictions on the Parties

*[Comment: Restrictions on a party's ability to carry on competing activities may be difficult to enforce in many jurisdictions unless they are specific and reasonable in scope, Territory and duration.]*

13.1 Neither ABC nor XYZ nor any member of its respective group shall (directly or indirectly or solely or jointly with any other person, firm or company) carry on or be engaged in any Competing Business in the Territory during the period of this contract.

13.2 For this purpose: "Competing Business" means *[specify]*; and "Territory" means *[specify]*.

13.3 During the period of this contract *[Option, add if appropriate: "And for one (1) year after its termination"]*, neither party shall attempt to employ or entice away any employee of the other party engaged in any managerial or technical capacity in relation to the operations of the JVC.

### 14. Deadlock or termination

14.1 In the event of a deadlock, breakdown or other circumstances in which a party wishes to terminate or substantially change the structure of the JVC, the matter shall be referred to the respective chairmen/chief executives of the Parties who shall seek to resolve the matter on an amicable basis.

14.2 If the matter cannot be settled by agreement in initial discussions, then either party may give notice that it seeks formally to resolve the situation within 90 days. The Parties shall continue to negotiate in good faith with a view to resolving the matter including by one of the following methods:

14.2.1 The purchase by the JVC of the disaffected party's Shares on terms acceptable to the Parties (provided that the purchase by the JVC can lawfully be made and is financially practicable);

14.2.2 The purchase by the other party of the disaffected party's Shares in the JVC (or the sale of that party's Shares to one or more third Parties);

14.2.3 The sale of the whole of the issued share capital of the JVC to a third party; or

14.2.4 Winding up of the JVC.

14.3 If no such method of settling the dispute has been agreed within 90 days after the notice is given under Article 14.2, a disaffected party may serve notice requiring the JVC to be wound-up. No notice requiring the winding up of the JVC may, however, be served by either party within the initial two (2) year period *[vary period as appropriate]* after the establishment of the JVC.

14.4 Upon or as soon as practicable after notice under Article 14.3, the Parties shall use their respective powers and votes to cause the JVC to be placed in liquidation. The Parties shall cooperate to ensure that all existing contracts entered into by the JVC prior to such winding up shall be duly completed subject to such arrangements as the Parties may mutually agree. The Parties shall endeavour to agree an appropriate allocation of the assets of the JVC (including any intellectual property owned by the JVC) prior to any such winding up.

## 15. Supremacy of this contract

15.1 ABC and XYZ shall each use its respective powers (including its votes in the JVC) and all other means at its disposal to ensure that this contract is duly observed and performed.

15.2 The Parties shall endeavour to ensure that the Articles of association/bylaws are consistent with the terms of this contract. If there is any conflict between this contract and the Articles of association/bylaws, this contract shall prevail as between the Parties and they shall make such changes to the Articles of association/bylaws as shall be necessary to give effect to this contract.

## 16. Force majeure

16.1 “*Force majeure*” means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of this contract or to have avoided or overcome it or its consequences.

16.2 A party affected by *force majeure* shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent that the delay or non-performance is due to any *force majeure* of which it has notified the other party in accordance with Article 16.3. The time for performance of that obligation shall be extended accordingly, subject to Article 16.4.

16.3 If any *force majeure* occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall within a reasonable time notify the other party as to the nature of the circumstances in question and their effect on its ability to perform.

16.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by *force majeure* for a continuous period in excess of three [*specify any other figure*] months, the other party shall be entitled to terminate this contract by giving written notice to the Party affected by the *force majeure*.

*[Alternative: If preferred, replace Article 16.4 with the following alternative: “16.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of [six] months, the Parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 days, the other party shall be entitled to terminate this contract by giving written notice to the Party affected by the force majeure.”]*

## 17. Change of circumstances (hardship)

*[Comment: The Parties should be free to consult each other in the event of a major change in circumstances – particularly one creating hardship for a particular party. However,*

*an SME should only include the option in Article 17.4 (right to refer to the courts/arbitral tribunal to make a revision) if (i) the SME considers that it is not likely to be used against that party's interests by a party in a stronger tactical position or (ii) the right to refer to a court/tribunal is an established right under the applicable governing law in the event of hardship.]*

17.1 Where the performance of this contract becomes more onerous for one of the Parties, that party is nevertheless bound to perform its obligations subject to the following provisions on change of circumstances (hardship).

17.2 If, however, after the time of conclusion of this contract, events occur which have not been contemplated by the Parties, and which fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations (hardship), that party shall be entitled to request revision of this contract provided that:

17.2.1 The events could not reasonably have been taken into account by the affected party at the time of conclusion of this contract;

17.2.2 The events are beyond the control of the affected party; and

17.2.3 The risk of the events is not one which, according to this contract, the Party affected should be required to bear.

17.3 Each party shall in good faith consider any proposed revision seriously put forward by the other party in the interests of the relationship between the Parties. No revision shall, however, be effective unless agreed by both Parties in accordance with Article 22.2 *[Option, add when the option in Article 17.4 is included: "Or established pursuant to Article 17.4".]*

*[Option: See comment at beginning of Article 17. Add if wished; otherwise delete:*

*"17.4 If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 24. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances or to terminate this contract at a date and on terms to be fixed."]*

## **18. Costs**

The costs of, and incidental to, the incorporation of the JVC shall be borne and paid by the JVC. Each party shall (unless otherwise agreed) bear its own costs incurred in the preparation, execution and performance of this contract.

## **19. No partnership or agency**

Nothing in this contract shall (i) be deemed to constitute a partnership in law between the Parties, (ii) constitute either party the agent of the other for any purpose or (iii) entitle either party to commit or bind the other (or any member of its respective group) in any manner.

## 20. Assignment and subcontracting

20.1 This contract is personal to the Parties and neither party shall without the prior written approval of the other:

20.1.1 Assign, mortgage, charge or otherwise transfer or deal in, or create any trust over, any of its rights; or

20.1.2 Subcontract or otherwise delegate the whole or any part of its rights or obligations under this contract to another person.

## 21. Notices

21.1 Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified in Article 21.2 below, in a manner that ensures receipt of the notice can be proved.

21.2 For the purposes of Article 21.1, notification details are the following, unless other details have been duly notified in accordance with this Article:

21.1.1 ABC: *[specify details]*;

21.1.2 XYZ: *[specify details]*.

## 22. Entire agreement/variations

22.1 This contract *[add where appropriate: “And any other contracts entered into on Closing pursuant to Article 4”]* sets out the entire contract between the Parties with respect to the JVC. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. *[Option, add where appropriate: “This contract supersedes [the Confidentiality Undertaking/any Heads of Agreement or Memorandum of Understanding].”]*

22.2 This contract may not be varied except by agreement in writing between the Parties *[Option, where the option in Article 17.4 (reference to court/tribunal) has been included, add to previous sentence: “Or in accordance with Article 17.4”]*.

## 23. Effect of invalid or unenforceable provisions

If any provision of this contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this contract shall continue to be valid as to its other provisions and the remainder of the affected provision, unless it can be concluded from the circumstances that (in the absence of the provision found to be null and void) the Parties would not have concluded this contract. The Parties shall use all reasonable efforts to replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

## 24. Dispute resolution procedure

24.1 If a dispute arises out of this contract, the Parties shall seek to resolve it on an amicable basis. They shall consider the appointment of a mediator to assist in that resolution. No party shall commence legal or arbitration proceedings unless 30 days' notice has been given to the other party.

24.2 Any dispute, controversy or claim arising out of or relating to this contract (including its conclusion, interpretation, performance, breach, termination or invalidity) shall be finally settled under the rules of *[specify the arbitration institution]* by *[specify the number of arbitrators, e.g. sole arbitrator, three arbitrators]* appointed in accordance with the said rules. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.

*[The following are alternatives to a specified arbitral institution under Article 24.2:*

*Alternative 1: Ad hoc arbitration*

*“24.2 Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of UNCITRAL [specify other rules] by [specify the number of arbitrators, e.g. sole arbitrator, three arbitrators] appointed by [specify name of appointing institution or person]. The place of arbitration shall be [specify]. The language of the arbitration shall be [specify].”*

*[Alternative 2: State courts*

*“24.2 Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled by the courts of (specify place and country) which will have exclusive jurisdiction.”*

## 25. Applicable law

*[Specify national law]* law shall apply to this contract.

SIGNATURES OF THE PARTIES

Signed for and on behalf of ABC

Signatory: .....

Date: .....

Signed for and on behalf of XYZ

Signatory: .....

Date: .....

## Chapter 3

# International Commercial Sale of Goods

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## Introduction

This Model Contract contains the substantive rules for an international sales contract, i.e. the main rights and obligations of the Parties, the remedies for breach of contract by the Buyer; the remedies for breach of contract by the Seller; the general rules that apply equally to both parties. It also contains the boilerplate clauses broadly accepted in international commercial contracts.

The Model Contract is greatly influenced by the United Nations Convention on Contracts for the International Sale of Goods (CISG), widely accepted by lawyers of different traditions and backgrounds. It articulates practical requirements arising from commercial practice with the general rules of the CISG.

The Model Contract can be viewed as a general framework for the numerous types of sales contracts in international trade. In implementing it, the Parties should adapt it to the nature of each particular sales contract as well as to the specific requirements of the applicable law, where such requirements exist.

Attention is drawn on the following points:

1. The Model Contract for the International Sale of Goods is presented in *two versions* – the “standard” and the “short” one. The standard version contains definitions of relevant notions (i.e. on the concept of lack of conformity), special comments (i.e. on the notice of non-conformity), explanations and/or warnings to the Parties (i.e. on the limitation of the Seller’s liability, on the validity of the agreed interest clause). The short version is more practice-oriented, covering the main rights and obligations of the Parties with no special explanations. In addition, the short version contains only selected boilerplate clauses, whereas the standard version provides for all the boilerplate clauses inserted in other Model Contracts of this handbook.
2. The Model Contract can be divided into four parts. The first part lays down *rules on the Goods*: Delivery, price, payment conditions and documents to be provided. The second part governs the *remedies* of the Seller in case of non-payment at the agreed time; the remedies of the Buyer in case of non-delivery of goods at the agreed time, lack of conformity of goods, transfer of property and legal defects. The third part contains the *rules on avoidance of contract and damages*– grounds for avoidance of contract, avoidance procedure, effects of avoidance in general, as well as rules on restitution, damages and mitigation of harm. The fourth part contains the *standard provisions*.
3. The Model Contract adopts the CISG concept of *lack of conformity*. This concept is wider than the concept of material defects (traditionally adopted

in civil law countries) and includes differences in quality, as well as differences in quantity, delivery of goods of different kinds and defects in packing. Nevertheless, specific cases of non-conformity defined under the CISG largely correspond to how material defects are defined in civil law countries. Such cases include unsuitability of the Goods for ordinary purpose or for particular purpose, as well as non-conformity with a sample or model.

Liability of the Seller for non-conformity is dealt with almost identically under the CISG and most national rules dealing with liability of the Seller for material defects. Furthermore, in the system of the CISG, “non-delivery” and “lack of conformity” are strictly separate forms of breach of contract. The same system is adopted in this Model Contract, specifying: a) special rules on remedies of the Buyer in case of non-delivery at the agreed time; b) special rules on remedies of the Buyer in case of non-conformity of goods; c) general rules on contract avoidance due to non-performance of contractual obligations.

4. On *contract avoidance* (the term “avoidance” of contract, also taken from the CISG, means termination of contract), the Model Contract uses the CISG concept of fundamental breach of contract, but with significant modifications. The Model Contract first of all defines cases that constitute a breach of contract (where a party fails to perform any of its obligations under the contract, including defective, partial or late performance). On that basis, the Model Contract establishes the rules for two different situations.

First is the case where the breach of contract amounts to a fundamental breach. That would be the case where strict compliance of the obligation which has not been performed is of the essence under the contract; or where non-performance substantially deprives the aggrieved party of what it was reasonably entitled to expect. The Model Contract also leaves the possibility for the Parties to specify cases which are to be considered as a fundamental breach, i.e. late payment, late delivery, non-conformity, etc. In the case of a fundamental breach, the Model Contract allows the aggrieved party to declare the contract void, without fixing an additional period of time to perform what is specified in the contract.

In the second situation, the breach of contract does not amount to a fundamental breach. The aggrieved party is obliged to fix an additional period of time for performance. Only when the other party fails to perform the obligation within that period, may the aggrieved party declare the contract void. The Model Contract adopts the CISG rule: A declaration of avoidance is effective only if made by notice to the other party.

5. The clause on *applicable law* of the Model Contract is specific to the international sale of goods. It specifies that questions that are not regulated by the contract itself are governed by the CISG. Questions not covered by the CISG are governed by the UNIDROIT Principles; and to the extent that such questions are not covered by the UNIDROIT Principles, they are governed by reference to the national law chosen by the Parties. Concerning the application of the CISG, one should note that the Parties may exclude the CISG in whole or only in part. The Parties may also agree on rules that modify, replace, or supplement those of the CISG.
6. The main sources of uniform contract law used in drafting the present Model Contract are the following: United Nations Convention on Contracts for the International Sale of Goods (CISG); Uniform Law on the International Sale of Goods (ULIS); UNIDROIT Principles of International Commercial Contracts; Principles of European Contract Law (PECL); ITC Model Contract for the International Commercial Sale of Perishable Goods; ICC Model International Sale Contract – Manufactured Goods Intended for Resale.



## ITC MODEL CONTRACT FOR THE INTERNATIONAL COMMERCIAL SALE OF GOODS (SHORT VERSION)

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***PARTIES:***

***Seller***

Name (name of company)  
.....  
Legal form (e.g. limited liability company)  
.....  
Country of incorporation and (if appropriate) trade register number  
.....  
Address (address of place of business of the seller, phone, fax, e-mail)  
.....  
.....  
Represented by (surname and first name, address, position, legal title of  
representation) . . . . .  
.....  
.....

***Buyer***

Name (name of company)  
.....  
Legal form (e.g. limited liability company)  
.....  
Country of incorporation and (if appropriate) trade register number  
.....  
Address (address of place of business of the buyer, phone, fax, e-mail)  
.....  
.....  
Represented by (surname and first name, address, position, legal title of  
representation) . . . . .  
.....  
.....

Hereinafter: “the Parties”

## 1. Goods

1.1 Subject to the terms agreed in this contract, the Seller shall deliver the following good(s) (hereinafter: “the Goods”) to the Buyer.

1.2 Description of the Goods (details necessary to define/specify the Goods which are the object of the sale, including required quality, description, certificates, country of origin, other details).

1.3 Quantity of the Goods (including unit of measurement).

1.3.1 Total quantity . . . . .

1.3.2 Per delivery instalment . . . . . (if appropriate)

1.3.3 Tolerance percentage: Plus or minus . . . . . % (if appropriate)

1.4 Inspection of the Goods (where an inspection is required, specify, as appropriate, details of organization responsible for inspecting quality and/or quantity, place and date and/or period of inspection, responsibility for inspection costs).

1.5 Packaging . . . . .

1.6 Other specification . . . . .

## 2. Delivery

2.1 Applicable International Chamber of Commerce (hereinafter: ICC) Incoterms (by reference to most recent version of the Incoterms at date of conclusion of the contract).

2.2 Place of delivery . . . . .

2.3 Date or period of delivery . . . . .

2.4 Carrier (name and address, where applicable) . . . . .

2.5 Other delivery terms (if any) . . . . .

## 3. Price

3.1 Total price . . . . .

3.2 Price per unit of measurement (if appropriate) . . . . .

3.3 Amount in numbers . . . . .

3.4 Amount in letters . . . . .

3.5 Currency . . . . .

3.6 Method for determining the price (if appropriate) . . . . .

## 4. Payment conditions

4.1 Means of payment (e.g. cash, cheque, bank draft, transfer) . . . . .

4.2 Details of Seller’s bank account (if appropriate) . . . . .

4.3 Time for payment . . . . .

The Parties may choose a payment arrangement among the possibilities set out below, in which case they should specify the arrangement chosen and provide the corresponding details:

- Payment in advance *[specify details]* . . . . .
- Payment by documentary collection *[specify details]* . . . . .
- Payment by irrevocable documentary credit *[specify details]* . . . . .
- Payment backed by bank guarantee *[specify details]* . . . . .
- Other payment arrangements *[specify details]* . . . . .

## 5. Documents

5.1 The Seller shall make available to the Buyer (or shall present to the bank specified by the Buyer) the following documents (tick corresponding boxes and indicate, as appropriate, the number of copies to be provided):

- Commercial invoice . . . . .
- The following transport documents (specify any detailed requirements).
- Packing list . . . . .
- Insurance documents . . . . .
- Certificate of origin . . . . .
- Certificate of inspection . . . . .
- Customs documents . . . . .
- Other documents . . . . .

5.2 In addition, the Seller shall make available to the Buyer the documents indicated in the ICC Incoterms the Parties have selected under Article 2 of this contract.

## 6. Non-performance of the Buyer's obligation to pay the price at the agreed time

6.1 If the Buyer fails to pay the price at the agreed time, the Seller shall fix to the Buyer an additional period of time of (specify the length) for performance of payment. If the Buyer fails to pay the price at the expiration of the additional period, the Seller may declare this contract avoided in accordance with Article 10 of this contract.

6.2 If the Buyer fails to pay the price at the agreed time, the Seller shall in any event be entitled, without limiting any other rights it may have, to charge interest on the outstanding amount (both before and after any judgment) at the rate of *[specify]* % per annum. *[Alternatively: Specify other rate of interest agreed by the Parties.]*

*[Comment: The Parties should take into consideration that in some legal systems payment of interest is unlawful, or is subject to a legal maximum rate, or there is provision for statutory interest on late payments.]*

## 7. Non-performance of the Seller's obligation to deliver the Goods at the agreed time

7.1 If the Seller fails to deliver the Goods at the agreed time, the Buyer shall fix to the Seller an additional period of time of (specify the length) for performance of delivery. If the Seller fails to deliver the Goods at the expiration of the additional period, the Buyer may declare this contract avoided in accordance with Article 10 of this contract.

*[Option: "7.2 If the Seller is in delay in delivery of any goods as provided in this contract, the Buyer is entitled to claim liquidated damages equal to 0.5% (parties may agree some other percentage: . . . . . %) of the price of those goods for each complete day of delay as from the agreed date of delivery or the last day of the agreed delivery period, as specified in Article 2 of this contract, provided the Buyer notifies the Seller of the delay.*

*Where the Buyer so notifies the Seller within . . . . . days from the agreed date of delivery or the last day of the agreed delivery period, damages will run from the agreed date of delivery or from the last day of the agreed delivery period. Where the Buyer so notifies the Seller more than . . . . . days after the agreed date of delivery or the last day of the agreed delivery period, damages will run from the date of notice. Liquidated damages for delay shall not exceed . . . . . % of the price of the delayed goods. Liquidated damages for delay do not preclude avoidance of this contract in accordance with Article 10."*

## 8. Lack of conformity

8.1 The Buyer shall examine the Goods, or cause them to be examined within as short period as is practicable in the circumstances. The Buyer shall notify the Seller of any lack of conformity of the Goods, specifying the nature of the lack of conformity, within . . . . . days after the Buyer has discovered or ought to have discovered the lack of conformity. In any event, the Buyer loses the right to rely on a lack of conformity if he fails to notify the Seller thereof at the latest within a period of two years (other period of time) from the date on which the Goods were actually handed over to the Buyer.

8.2 Where the Buyer has given due notice of non-conformity to the Seller, the Buyer may at his option:

- 8.2.1 Require the Seller to deliver any missing quantity of the Goods, without any additional expense to the Buyer;
- 8.2.2 Require the Seller to replace the Goods with conforming goods, without any additional expense to the Buyer;
- 8.2.3 Require the Seller to repair the Goods, without any additional expense to the Buyer;
- 8.2.4 Reduce the price in the same proportion as the value that the Goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. The Buyer may not reduce the price if the Seller replaces the Goods with conforming goods or repairs the Goods in accordance with paragraph 8.2.2 and 8.2.3 of this Article or if the Buyer refuses to accept such performance by the Seller;
- 8.2.5 Declare this contract avoided in accordance with Article 10 of this contract.

The Buyer shall in any event be entitled to claim damages.

*[Option: “8.3 The Seller’s liability under this Article for lack of conformity of the Goods is limited to [specify the limitation(s)].”]*

## 9. Transfer of property

The Seller must deliver to the Buyer the Goods specified in Article 1 of this contract free from any right or claim of a third person.

*[Option: “Retention of title. The Seller must deliver to the Buyer the Goods specified in Article 1 of this contract free from any right or claim of a third person. The property in the Goods shall not pass to the Buyer until the Seller has received payment in full of the price of the Goods. Until property in the Goods passes to the Buyer, the Buyer shall keep the Goods separate from those of the Buyer and third parties and properly stored, protected and insured and identified as the Seller’s property.”]*

## 10. Avoidance\* of contract

10.1 There is a breach of contract where a party fails to perform any of its obligations under this contract, including defective, partial or late performance.

10.2 There is a fundamental breach of contract where:

10.2.1 Strict compliance with the obligation which has not been performed is of the essence under this contract; or

10.2.2 The non-performance substantially deprives the aggrieved party of what it was reasonably entitled to expect under this contract.

*[Option: “The Parties additionally agree that the following is to be considered as a fundamental breach of contract:*

*(Specify the cases that constitute a fundamental breach of contract e.g. late payment, late delivery, non-conformity, etc.)”]*

10.3 In a case of a breach of contract according to paragraph 10.1 of this Article, the aggrieved party shall, by notice to the other party, fix an additional period of time of (specify the length) for performance. During the additional period of time the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages, but may not declare this contract avoided. If the other party fails to perform its obligation within the additional period of time, the aggrieved party may declare this contract avoided.

10.4 In case of a fundamental breach of contract according to paragraph 10.2 of this Article, the aggrieved party may declare this contract avoided without fixing an additional period of time for performance to the other party.

10.5 A declaration of avoidance of this contract is effective only if made by notice to the other party.

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\* Note: For the purposes of this Model Contract, the term “Avoidance” is taken from the CISG and means termination of contract.

## 11. **Force majeure – excuse for non-performance**

11.1 “*Force majeure*” means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of this contract or to have avoided or overcome it or its consequences.

11.2 A party affected by *force majeure* shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent that the delay or non-performance is due to any *force majeure* of which it has notified the other party in accordance with Article 11.3. The time for performance of that obligation shall be extended accordingly, subject to Article 11.4.

11.3 If any *force majeure* occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.

11.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by *force majeure* for a continuous period in excess of three [*specify any other figure*] months, the other party shall be entitled to terminate this contract by giving written notice to the Party affected by the *force majeure*.

*[If preferred, replace 11.4 with the following alternative:*

*“11.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of three [*specify any other figure*] months, the Parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 [*specify any other figure*] days, the other party shall be entitled to terminate this contract by giving written notice to the Party affected by the force majeure.”]*

## 12. **Entire agreement**

12.1 This contract sets out the entire agreement between the Parties. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. [*Add where relevant: “This contract supersedes any previous agreement or understanding relating its subject matter”*].

12.2 This contract may not be varied except by an agreement of the Parties in writing (which may include e-mail).

## 13. **Notices**

13.1 Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified in Article 13.2 below, in a manner that ensures receipt of the notice can be proved.

13.2 For the purposes of Article 13.1, notification details are the following, unless other details have been duly notified in accordance with this Article:

– ..... ;  
 – .....

## 14. Dispute resolution procedure

Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of *[specify the arbitration institution]* by *[specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators]* appointed in accordance with the said rules. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.

*[The following are alternatives to a specified arbitral institution under Article 14.*

*Alternative 1: Ad hoc arbitration*

*“Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of UNCITRAL [specify other rules] by [specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators] appointed by [specify name of appointing institution or person]. The place of arbitration shall be [specify]. The language of the arbitration shall be [specify].”*

*[Alternative 2: State courts*

*“Any dispute, controversy or claim arising out of or relating to this contract, in particular its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled by the courts of (specify place and country) which will have exclusive jurisdiction.”*

## 15. Applicable law and guiding principles

15.1 Questions relating to this contract that are not settled by the provisions contained in the contract itself shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention of 1980, hereafter referred to as CISG).

Questions not covered by the CISG shall be governed by the UNIDROIT Principles of International Commercial Contracts (hereafter referred to as UNIDROIT Principles), and to the extent that such questions are not covered by the UNIDROIT Principles, by reference to *[specify the relevant national law by choosing one of the following options:*

*The applicable national law of the country where the Seller has his place of business,*  
*or*

*The applicable national law of the country where the Buyer has his place of business, or*

*The applicable national law of a third country (specify the country).]*

15.2 This contract shall be performed in a spirit of good faith and fair dealing.

DATE AND SIGNATURE OF THE PARTIES

Seller

Buyer

Date . . . . .

Name . . . . .

Signature

Signature



## ITC MODEL CONTRACT FOR THE INTERNATIONAL COMMERCIAL SALE OF GOODS (STANDARD VERSION)

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***PARTIES:***

***Seller***

Name (name of company)

.....

Legal form (e.g. limited liability company)

.....

Country of incorporation and (if appropriate) trade register number

.....

Address (address of place of business of the Seller, phone, fax, e-mail)

.....

.....

Represented by (surname and first name, address, position, legal title of representation) . . . . .

.....

.....

***Buyer***

Name (name of company)

.....

Legal form (e.g. limited liability company)

.....

Country of incorporation and (if appropriate) trade register number

.....

Address (address of place of business of the Buyer, phone, fax, e-mail)

.....

.....

Represented by (surname and first name, address, position, legal title of representation) . . . . .

.....

.....

Hereinafter: “the Parties”

## 1. Goods

1.1 Subject to the terms agreed in this contract, the Seller shall deliver the following good(s) (hereinafter: “the Goods”) to the Buyer.

1.2 Description of the Goods (details necessary to define/specify the Goods which are the object of the sale, including required quality, description, certificates, country of origin, other details).

1.3 Quantity of the Goods (including unit of measurement).

1.3.1 Total quantity . . . . .

1.3.2 Per delivery instalment (in the case of a contract for delivery of the Goods by instalments) . . . . .

1.3.3 Tolerance percentage: Plus or minus . . . . . % (if appropriate).

1.4 Inspection of the Goods (where an inspection is required, specify, as appropriate, details of organization responsible for inspecting quality and/or quantity, place and date and/or period of inspection, responsibility for inspection costs).

1.5 Packaging . . . . . ;

1.6 Other specification . . . . . (e.g. the intended use of the Goods could be specified).

## 2. Delivery

2.1 Applicable International Chamber of Commerce (hereinafter: ICC) Incoterms (by reference to most recent version of the Incoterms at date of conclusion of the contract) . . . . .

2.2 Place of delivery . . . . .

2.3 Date or period of delivery . . . . .

*[Comment: Where there is a delivery by instalments the Parties should indicate every date of delivery for each instalment.]*

2.4 Carrier (where applicable) (name and address of carrier, contact person) . . . . .

2.5 Other delivery terms (if any) . . . . .

## 3. Price

3.1 Total price . . . . .

3.2 Price per unit of measurement (if appropriate) . . . . .

3.3 Amount in numbers . . . . .

3.4 Amount in letters . . . . .

3.5 Currency . . . . .

3.6 Method for determining the price (if appropriate) . . . . .

## 4. Payment conditions

- 4.1 Means of payment (e.g. cash, cheque, bank draft, transfer) . . . . .
- 4.2 Details of Seller's bank account [*if appropriate*]. . . . .
- 4.3 Time for payment [*specify the time*] . . . . .

The Parties may choose a payment arrangement among the possibilities set out below, in which case they should specify the arrangement chosen and provide the corresponding details:

Payment in advance

Amount to be paid (total price or part of the price and/or percentage of the total price) . . . . .

Latest date for payment to be received by the Seller's bank. . . . .

Special conditions applying to this payment [*if any*] . . . . .

Payment by documentary collection

Amount to be paid [*total price or price per delivery instalment*] . . . . .

Latest date for payment . . . . .

Means of payment: (i.e. documents against payment – D/P, documents against acceptance – D/A) hereafter: . . . . .

The documents to be presented are specified at Article 5 of this contract.

Payment by documentary collection shall be the subject to the Uniform Rules for Collections published by the International Chamber of Commerce (ICC).

Payment by irrevocable documentary credit

The Buyer must arrange for an irrevocable documentary credit in favour of the Seller to be issued by a reputable bank, subject to the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce (ICC). The issue must be notified at least 14 days before the agreed date for delivery, or before the beginning of the agreed delivery period specified at Article 2 of this contract, as appropriate, unless the Parties agree otherwise as specified hereafter:

[*Date on which the documentary credit must be notified to the Seller, other*] . . . . .

The credit shall expire 14 days after the end of the period or date of delivery specified in Article 2 of this contract, unless otherwise agreed hereafter: . . . . .

The documentary credit does not have to be confirmed, unless the Parties agree otherwise, as specified hereafter: . . . . .

All costs incurred in relation to confirmation shall be borne by the Seller, unless the Parties agree otherwise, as specified hereafter: . . . . .

The documentary credit shall be payable at sight and allow partial shipments and trans-shipments, unless the Parties agree otherwise, as specified hereafter: . . . . .

- Payment backed by bank guarantee

The Buyer shall provide, at least 30 days before the agreed date of delivery or the beginning of the agreed delivery period specified at Article 2 of this contract, unless the Parties specify hereafter some other date: . . . . ., either a first demand bank guarantee subject to the Uniform Rules for Demand Guarantees published by the ICC, or a standby letter of credit subject either to such rules or to the Uniform Customs and Practice for Documentary Credits published by the ICC, in either case issued by a reputable bank.

- Other payment arrangements
- . . . . .

## 5. Documents

5.1 The Seller shall make available to the Buyer (or shall present to the bank specified by the Buyer) the following documents (tick corresponding boxes and indicate, as appropriate, the number of copies to be provided):

- Commercial invoice . . . . .
- The following transport documents (specify any detailed requirements).
- Packing list . . . . .
- Insurance documents . . . . .
- Certificate of origin . . . . .
- Certificate of inspection . . . . .
- Customs documents . . . . .
- Other documents . . . . .

5.2 In addition, the Seller shall make available to the Buyer the documents indicated in the ICC Incoterms the Parties have selected under Article 2 of this contract.

## 6. Non-performance of the Buyer's obligation to pay the price at the agreed time

6.1 If the Buyer fails to pay the price at the agreed time, the Seller shall fix to the Buyer an additional period of time of (specify the length, e.g. 7 days, 14 days, 30 days, etc. or opt for a "period of time of reasonable length") for performance of payment. If the Buyer fails to pay the price at the expiration of the additional period, the Seller may declare this contract avoided in accordance with Article 11 of this contract.

6.2 If the Buyer fails to pay the price at the agreed time, the Seller shall in any event be entitled, without limiting any other rights it may have, to charge interest on the outstanding amount (both before and after any judgment) at the rate of *[specify]* % per annum. *[alternatively: Specify other rate of interest agreed by the Parties.]*

*[Comment: The Parties should take into consideration that in some legal systems payment of interest is unlawful, or is subject to a legal maximum rate, or there is provision for statutory interest on late payments.]*

## 7. Non-performance of the Seller's obligation to deliver the Goods at the agreed time

7.1 If the Seller fails to deliver the Goods at the agreed time, the Buyer shall fix to the Seller an additional period of time (specify the length, e.g. 7 days, 14 days, 30 days, etc. or opt for a "period of time of reasonable length") for performance of delivery. If the Seller fails to deliver the Goods at the expiration of the additional period, the Buyer may declare this contract avoided in accordance with Article 11 of this contract.

*[Option: The Parties may provide liquidated damages for late delivery. If they decide so, they could use the following model clause on liquidated damages unless otherwise agreed.*

*"7.2 If the Seller is in delay in delivery of any goods as provided in this contract, the Buyer is entitled to claim liquidated damages equal to 0.5% (parties may agree some other percentage: . . . . . %) of the price of those goods for each complete day of delay as from the agreed date of delivery or the last day of the agreed delivery period, as specified in Article 2 of this contract, provided the Buyer notifies the Seller of the delay.*

*Where the Buyer so notifies the Seller within . . . . . days from the agreed date of delivery or the last day of the agreed delivery period, damages will run from the agreed date of delivery or from the last day of the agreed delivery period. Where the Buyer so notifies the Seller more than . . . . . days after the agreed date of delivery or the last day of the agreed delivery period, damages will run from the date of notice. Liquidated damages for delay shall not exceed . . . . . % of the price of the delayed goods. Liquidated damages for delay do not preclude avoidance of contract in accordance with Article 11."*

## 8. Lack of conformity

8.1 There is a lack of conformity where the Seller has delivered:

- 8.1.1. Part only or a larger or a smaller quantity of the Goods than specified in Article 1 of this contract;
- 8.1.2. The Goods which are not those to which this contract relates or goods of a different kind;
- 8.1.3. The Goods which lack the qualities and/or characteristics specified in Article 1 of this contract and/or which lack the qualities of a sample or model which the Seller has held out to the Buyer;
- 8.1.4. The Goods which do not possess the qualities and/or characteristics necessary for their ordinary or commercial use;
- 8.1.5. The Goods which do not possess the qualities and/or characteristics for any particular purpose expressly or impliedly made known to the Seller at the time of the conclusion of this contract;
- 8.1.6. The Goods which are not contained or packaged in the manner specified in Article 1 of this contract. *[Comment: In the absence of such a contract clause, it shall be the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the Goods.]*

8.2 The Seller shall be liable under paragraph 8.1 of this Article for any lack of conformity that exists at the time when the risk passes to the Buyer, even though the lack of conformity becomes apparent only after that time.

*[Comment: The Parties may limit the Seller's liability for lack of conformity of the Goods. However, such a contract clause shall be null and void if a lack of conformity was known to the Seller and he failed to notify the Buyer thereof. If the Parties decide to limit the Seller's liability for lack of conformity, they could use the following clause:*

*The Seller's liability under paragraph 8.1 of this Article for lack of conformity of the Goods is limited to [specify the limitation(s)].*

8.3 The Seller shall not be liable under paragraph 8.1 of this Article for any lack of conformity if, at time of the conclusion of this contract, the Buyer knew or could not have been unaware of such lack of conformity.

8.4 The Buyer shall examine the Goods, or cause them to be examined, within as short period as is practicable in the circumstances. The Buyer shall notify the Seller of any lack of conformity of the Goods, specifying the nature of the lack of conformity, within . . . . . days after the Buyer has discovered or ought to have discovered the lack of conformity. In any event, the Buyer loses the right to rely on a lack of conformity if he fails to notify the Seller thereof at the latest within a period of two years (other period of time) from the date on which the Goods were actually handed over to the Buyer.

*Comment: The Parties may specify that the notice of non-conformity shall be in writing. The Parties may also specify that, where the notice of non-conformity has been sent by letter or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the Buyer of the right to rely thereon.]*

8.5 Where the Buyer has given due notice of non-conformity to the Seller, the Buyer may at his option:

- 8.5.1 Require the Seller to deliver any missing quantity of the Goods, without any additional expense to the Buyer;
- 8.5.2 Require the Seller to replace the Goods with conforming goods, without any additional expense to the Buyer;
- 8.5.3 Require the Seller to repair the Goods, without any additional expense to the Buyer;
- 8.5.4 Reduce the price in the same proportion as the value that the Goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. The Buyer may not reduce the price if the Seller replaces the Goods with conforming goods or repairs the Goods in accordance with paragraph 8.5.3 and 8.5.3 of this Article or if the Buyer refuses to accept such performance by the Seller;
- 8.5.5 Declare this contract avoided in accordance with Article 11 of this contract.

The Buyer may also claim damages as provided for in Article 14 of this contract.

## **[9. Expertise procedure [Optional]**

9.1 *In the event that the Buyer is not satisfied with the quality of the Goods delivered or to be delivered, it must inform the Seller of such dissatisfaction as soon as possible, and in any event within . . . . . days of delivery of the Goods.*

9.2 *The Buyer shall immediately apply to the following institution . . . . . for an expert to be appointed. If no institution has been specified by the Parties, then the Buyer shall immediately proceed to appoint an expert. Any expert appointed shall be independent of the Parties.*

9.3 *The expert shall consider and report to the Parties on the alleged non-conformity of the Goods.*

9.4 *For this purpose, the expert shall be entitled to inspect the entire goods, or samples taken under his supervision, and may carry out any test which he considers to be appropriate.*

9.5 *The expert shall submit his report to both parties by (specify the means, e.g. registered post). The report shall be final and binding upon the Parties unless, within . . . . . days after it has been received, it is challenged by one of the Parties by the commencement of proceedings in accordance with the dispute resolution procedure provided under this contract.*

9.6 *The expert's fees and expenses shall be borne by the Buyer pending completion of the expertise procedure, but shall be reimbursed to the Buyer by the Seller if the non-conformity of the Goods is established.]*

## **10. Transfer of property**

10.1 The Seller must deliver to the Buyer the Goods specified in Article 1 of this contract free from any right or claim of a third person.

*[Option: The Parties may provide for the retention of title clause if such a clause is valid under the law applicable to the contract. According to that clause, the Goods shall remain the property of the Seller until the full payment of the price. If the Parties decide so, they can use the following clause:*

*“10.1 Retention of title. The property in the Goods specified in Article 1 of this contract shall not pass to the Buyer until the Seller has received payment in full of the price of the Goods. Until property in the Goods passes to the Buyer, the Buyer shall keep the Goods separate from those of the Buyer and third parties and properly stored, protected and insured and identified as the Seller's property.”]*

10.2 If the Goods specified in Article 1 of this contract are subject to a right or claim of a third person, the Buyer shall notify the Seller of such right or claim and request that the other goods free from all rights and claims of third persons be delivered to it by the Seller without any additional expense to the Buyer. *[alternatively, the Buyer may request the Seller to free the Goods from all rights and claims of third persons within (specify the period of time e.g. reasonable time, immediately, 30 days, etc.) without any additional expense to the Buyer.]*

10.3 If the Seller complies with a request made under paragraph 10.2 of this Article, and the Buyer nevertheless suffers a loss, the Buyer may claim damages in accordance with Article 14 of this contract.

10.4 If the Seller fails to comply with a request made under paragraph 10.2 of this Article, the Buyer may declare this contract avoided in accordance with Article 11 of this contract and claim damages in accordance with Article 14.3 of this contract. If the Buyer does not declare this contract avoided he shall have the right to claim damages in accordance with Article 14.3 of this contract.

10.5 The Buyer shall lose his right to declare this contract avoided if he fails to notify the Seller as provided in paragraph 10.2 of this Article within . . . . . days [*Alternative: Reasonable time, immediately, etc. from the moment when he became aware or ought to have become aware of the right or claim of the third person in respect of the Goods.*]

10.6 The Seller shall not be liable under this Article if the existence of right or claim of a third person on the Goods was notified to the Buyer at the time of the conclusion of this contract and the Buyer agreed to take the Goods subject to such right or claim.

[10.7 *Optional: “No action for legal defects can be taken by the Buyer after one year (specify other period of time) from the date when the Buyer became aware of the existence of right or claim of a third person on the Goods.”*]

## 11. Avoidance\* of contract

11.1 There is a breach of contract where a party fails to perform any of its obligations under this contract, including defective, partial or late performance.

11.2 There is a fundamental breach of contract where:

11.2.1 Strict compliance with the obligation which has not been performed is of the essence under this contract; or

11.2.2 The non-performance substantially deprives the aggrieved party of what it was reasonably entitled to expect under this contract.

[*Option: The Parties additionally agree that the following is to be considered as a fundamental breach of contract:*

[*Specify the cases that constitute a fundamental breach of contract e.g. late payment, late delivery, non-conformity, etc.”*].]

11.3 In a case of a breach of contract according to paragraph 11.1 of this Article, the aggrieved party shall, by notice to the other party, fix an additional period of time of reasonable length [*alternatively, the Parties may specify the length, e.g. 15 days, 30 days*] for performance. During the additional period of time the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not declare this contract avoided. If the other party fails to perform its obligation within the additional period of time, the aggrieved party may declare this contract avoided.

11.4 In case of a fundamental breach of contract according to paragraph 11.2 of this Article, the aggrieved party may declare this contract avoided without fixing an additional period of time for performance to the other party.

11.5 A declaration of avoidance of this contract is effective only if made by notice to the other party.

\* *Note: For the purposes of this Model Contract, the term “Avoidance” is taken from the CISG and means termination of contract.*



## 12. Effects of avoidance in general

12.1 Avoidance of this contract releases both parties from their obligation to effect and to receive future performance, subject to any damages that may be due.

12.2 Avoidance of this contract does not preclude a claim for damages for non-performance.

12.3 Avoidance of this contract does not affect any provision in this contract for the settlement of disputes or any other term of this contract that is to operate even after avoidance.

## 13. Restitution

13.1 On avoidance of this contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received.

13.2 If both parties are required to make restitution, they shall do so concurrently.

13.3 Where the Seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by Article 6.2 of this contract, as of the date of payment.

13.4 The Buyer shall be liable to account to the Seller for all the benefits which he has derived from the Goods or part of them, as the case may be:

13.4.1 Where he is under an obligation to return the Goods or part of them; or

13.4.2 Where it is impossible for him to return the Goods or part of them, but the contract is nevertheless avoided.

## 14. Damages

14.1 Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under *force majeure* as provided for in Article 17 of this contract.

14.2 Where this contract is not avoided, damages for a breach of this contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the Party in breach ought to have foreseen at the time of the conclusion of this contract, in the light of the facts and matters which then were known or ought to have been known to it, as a possible consequence of the breach of this contract.

14.3 *[To be adapted to a particular contract]* In case of avoidance of this contract, where there is a current price for the Goods, damages shall be equal to the difference between the price fixed by the contract and the current price on the date on which the contract is avoided. In calculating the amount of damages, the current price to be taken into account shall be that prevailing at

the place where delivery of the Goods should have been made. If there is no such current price or if its application is inappropriate, it shall be the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the Goods. If there is no current price for the Goods, damages shall be calculated on the same basis as that provided in paragraph 14.2 of this Article.

14.4 If this contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance [*the Parties may specify the concrete terms*], the Buyer has bought goods in replacement or the Seller has resold goods, the Party claiming damages shall recover the difference between the contract price and the price paid for the Goods bought in replacement or that obtained by the resale.

14.5 The damages referred to in paragraphs 14.5 and 14.6 of this Article may be increased by the amount of any reasonable expenses incurred as a result of the breach or up to the amount of any loss, including loss of profit, which should have been foreseen by the Party in breach, at the time of the conclusion of this contract, in the light of the facts and matters which were known or ought to have been known to it, as a possible consequence of the breach of this contract.

14.6 Damages are to be paid in a lump sum [*the Parties may specify the other solution. Comment: Damages may be payable in instalments where the nature of the harm makes this appropriate. Damages to be paid in instalments may be indexed*].

14.7 Damages are to be assessed in the currency in which the monetary obligation was expressed [*the Parties may specify the other solution, e.g. in the currency in which the harm was suffered*].

## 15. Mitigation of harm

A party who relies on a breach of this contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If it fails to take such measures, the Party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

## 16. Change of circumstances(hardship)

[*Comment: The Parties should be free to consult each other in the event of a major change in circumstances – particularly one creating hardship for a particular party. However, an SME should only include the option at the end of Article 16.3 (right to refer to the courts/arbitral tribunal to make a revision or to terminate the contract) if (i) the SME considers that it is not likely to be used against that party's interests by a party in a stronger tactical position or (ii) the right to refer to a court/tribunal is already an existing right under the applicable governing law in the event of hardship.*]

16.1 Where the performance of this contract becomes more onerous for one of the Parties, that party is nevertheless bound to perform its obligations subject to the following provisions on change of circumstances (hardship).

16.2 If, however, after the time of conclusion of this contract, events occur which have not been contemplated by the Parties and which fundamentally

alter the equilibrium of the present contract, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations (hardship), that party shall be entitled to request revision of this contract provided that:

- 16.2.1 The events could not reasonably have been taken into account by the affected party at the time of conclusion of this contract;
- 16.2.2 The events are beyond the control of the affected party;
- 16.2.3 The risk of the events is not one which, according to this contract, the Party affected should be required to bear;
- 16.2.4 Each party shall in good faith consider any proposed revision seriously put forward by the other party in the interests of the relationship between the Parties.

*[Option [add if wished: Otherwise delete if not applicable or not enforceable under the law governing the contract.]*

*“16.3 If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 22. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances, or to terminate this contract at a date and on terms to be fixed.”]*

## **17. Force majeure – excuse for non-performance**

17.1 “*Force majeure*” means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of this contract or to have avoided or overcome it or its consequences.

17.2 A party affected by *force majeure* shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent that the delay or non-performance is due to any *force majeure* of which it has notified the other party in accordance with Article 17.3. The time for performance of that obligation shall be extended accordingly, subject to Article 17.4.

17.3 If any *force majeure* occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.

17.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by *force majeure* for a continuous period in excess of three *[specify any other figure]* months, the other party shall be entitled to terminate this contract by giving written notice to the Party affected by the *force majeure*.

*[Alternative: If preferred, replace 17.4 with the following alternative:*

*“17.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of three [specify*

*any other figure] months, the Parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 [specify any other figure] days, the other party shall be entitled to terminate this contract by giving written notice to the Party affected by the force majeure.”.]*

**18. Entire agreement**

18.1 This contract sets out the entire agreement between the Parties. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. *[Add where relevant: “This contract supersedes any previous agreement or understanding relating its subject matter”].*

18.2 This contract may not be varied except by an agreement of the Parties in writing, (which may include e-mail). *[Add where Article 16.3 or equivalent is included: “Or in accordance with Article 16.3”].*

**19. Notices**

19.1 Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified in Article 19.2 below, in a manner that ensures receipt of the notice can be proved.

19.2 For the purposes of Article 19.1, notification details are the following, unless other details have been duly notified in accordance with this Article:

- .....
- .....

**20. Effect of invalid or unenforceable provisions**

If any provision of this contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this contract shall continue to be valid as to its other provisions and the remainder of the affected provision, unless it can be concluded from the circumstances that, in the absence of the provision found to be null and void, the Parties would not have concluded this contract. The Parties shall use all reasonable efforts to replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

**21. Authorizations [add where relevant]**

21.1 This contract is conditional upon the following authorizations first being obtained *[specify the authorization(s) or other conditions required e.g. of governmental or regulatory authority].*

21.2 The relevant party shall use all reasonable efforts on its part to obtain such authorizations and shall notify the other party promptly of any difficulty encountered.

## 22. Dispute resolution procedure

Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of *[specify the arbitration institution]* by *[specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators]* appointed in accordance with the said rules. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.

*[The following are alternatives to a specified arbitral institution under Article 22.*

### *Alternative 1: Ad hoc arbitration*

*“Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of UNCITRAL [specify other rules] by [specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators] appointed by [specify name of appointing institution or person]. The place of arbitration shall be [specify]. The language of the arbitration shall be [specify].”*

### *[Alternative 2: State courts*

*“Any dispute, controversy or claim arising out of or relating to this contract, in particular its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled by the courts of (specify place and country) which will have exclusive jurisdiction.”*]

## 23. Applicable law and guiding principles

23.1 Questions relating to this contract that are not settled by the provisions contained in the contract itself shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention of 1980, hereafter referred to as CISG).

Questions not covered by the CISG shall be governed by the UNIDROIT Principles of International Commercial Contracts (hereafter referred to as UNIDROIT Principles), and to the extent that such questions are not covered by the UNIDROIT Principles, by reference to *[specify the relevant national law by choosing one of the following options:*

*The applicable national law of the country where the Seller has his place of business, or*

*The applicable national law of the country where the Buyer has his place of business, or*

*The applicable national law of a third country (specify the country)].*

23.2 This contract shall be performed in a spirit of good faith and fair dealing.

DATE AND SIGNATURE OF THE PARTIES

Seller

Buyer

Date . . . . .

Name. . . . .

Signature

Signature

## Chapter 4

# International Long-Term Supply of Goods

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## Introduction

This Model Contract is for the **long-term supply of manufactured Goods**, between a Supplier and a Customer.

1. The contract is intended for use in connection with *manufactured Goods, rather than commodities*, which have their own special features, and are often sold on the standard forms of producers' or dealers' associations.
2. The Supplier may or may not be the manufacturer of the Goods.
3. The contract is not intended for use where the Goods are supplied for resale by a distributor (see the Model Contract for the International Distribution of Goods).
4. The contract can also be compared to the Model Contract for the International Commercial Sale of Goods, intended for a single sales transaction, or where there is no ongoing commitment between the Parties.
5. One main contract aim is to establish the *level of each party's obligation* to the other – whether this involves Goods ordered from time to time, or fixed or minimum quantities. Options are included for these possibilities (Article 1). In addition, there may be a provision for minimum or maximum order quantities.
6. Another aim is to establish the *procedure for ordering and delivering the Goods*, so as to maximize the level of certainty for each party (Article 2).
7. A third aim is to provide a *mechanism to establish prices* at which the Goods are to be supplied over the period of the contract. Again, various options are included for pricing, as well as payment (Articles 3 and 4).
8. A contract of this type may also deal with issues of *liability*, subject to (or possibly overriding) the default position under applicable law (Articles 5 and 7).
9. This contract also examines *duration*. In view of the different considerations one can take into account, it is not possible to provide for all possibilities. Commonly such a contract will be for several years, sometimes with the right of one party or both parties to terminate early for convenience, for breach of contract or for insolvency of the other party. A maximum period may be imposed by applicable law, depending on the circumstances (Article 8).

10. *Standard provisions* have been included, including change of circumstances (hardship) (Article 9), and *force majeure* (Article 10).
11. In some cases, long-term supply agreement is used in connection with the standard Terms of sale of the Supplier or even the standard Terms of purchase of the Customer. For cases where these do not exist or are not intended to apply, a set of simple additional *Terms of supply* has been included (schedule 4).



## ITC MODEL CONTRACT FOR THE INTERNATIONAL LONG-TERM SUPPLY OF GOODS

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***PARTIES:***

***Supplier***

Name (name of company)  
.....  
Legal form (e.g. limited liability company)  
.....  
Country of incorporation and (if appropriate) trade register number  
.....  
Address (address of place of business of the Supplier, phone, fax, e-mail)  
.....  
.....  
Represented by (surname and first name, address, position, legal title of  
representation) . . . . .  
.....  
.....

***Customer***

Name (name of company)  
.....  
Legal form (e.g. limited liability company)  
.....  
Country of incorporation and (if appropriate) trade register number  
.....  
Address (address of place of business of the Customer, phone, fax, e-mail)  
.....  
.....  
Represented by (surname and first name, address, position, legal title of  
representation) . . . . .  
.....  
.....

Collectively “the parties”

*[Add any further information required e.g. the Parties’ fiscal identities.]*

---

## Background

- A. The Supplier carries on business in the *[manufacture and – delete if not appropriate]* supply of *[specify Goods]*.
- B. The Customer wishes to purchase certain of the Goods *[manufactured and – delete if not applicable]* supplied by the Supplier, details of which are set out in schedule 1 (the “Goods”) and the Supplier is willing to sell such Goods to the Customer, on the Terms of this contract.

---

## Operative provisions

### 1. Supply of the Goods

1.1 During the period of this contract (the “Term”) the Supplier shall sell and the Customer shall purchase the Goods ordered by the Customer, subject to the following provisions.

1.2 The specification of the Goods shall be as set out in schedule 1, but the Supplier reserves the right to make any change in the specification of the Goods that is necessary in order for them to conform with any applicable laws, provided the Supplier promptly informs the Customer in writing of any such change that it proposes to make.

1.3 The Customer shall promptly inform the Supplier of any proposed change in the specification of the Goods which is necessary in order for them to conform with any applicable laws in the territory of the Customer, in which event the Supplier shall promptly notify the Customer in writing whether it is willing to change the specification and (if so) any resulting change in the price of the Goods. If the Supplier does not notify the Customer in writing within a reasonable time (not exceeding *[thirty (30) days – specify any other period]*) that it agrees to the change in the specification, or if it does do so but the Customer does not notify the Supplier in writing within a reasonable time (not exceeding *[thirty (30) days – specify any other period]*) that it agrees any change in the price of the Goods proposed by the Supplier, the Goods in question shall cease to be subject to this contract, and where the Goods in question form all or a substantial proportion of the Goods covered by this contract, either party may terminate this contract by giving written notice to the other party.

*[Select either Alternative 1 or 2: Minimum quantity purchase obligation:*

*“In each [year – specify any other period] of the Term the Customer, unless prevented by force majeure, shall order from the Supplier not less than the minimum quantity of the Goods specified in schedule 2. If the Supplier fails by reason of force majeure or otherwise to supply the Customer with the quantity of the Goods so ordered by the Customer, the minimum quantity of the Goods for the [year – specify any other period] in question shall be reduced by the quantity of the Goods that the Supplier fails to supply.”]*

*[Alternative 2: Minimum percentage purchase obligation:*

*“In each [year – specify any other period] during the Term the Customer shall order from the Supplier not less than [specify] % of the Customer’s requirements of the Goods (or other Goods of the same description) calculated by reference to the total quantities of*

*the Goods (and any other Goods of the same description) of which the Customer takes delivery from any person in that [year – specify any other period]. If the Supplier fails by reason of force majeure or otherwise to supply the Customer with any quantity of the Goods so ordered, the minimum quantity for the [year – specify any other period] in question that the Customer would otherwise be required to purchase shall be reduced by the quantity that the Supplier fails to supply.”]*

1.4 The Supplier shall provide the Customer with any instructions concerning the use of the Goods which are reasonably required or which the Supplier may reasonably specify, in which case the Customer undertakes to comply with those instructions.

*[1.5 Option 1: Additional Terms of Supply*

*“Subject to the provisions of this contract, the supply of the Goods shall be made on the basis of the Terms of sale set out in schedule 4. In the event of any conflict between those Terms and the Terms of this contract, the Terms of this contract shall prevail.”]*

*[Option 2: Supplier's Standard Terms of Sale (or Customer's Standard Terms of Purchase)*

*“Subject to the provisions of this contract, the supply of the Goods shall be made on the basis of the Supplier's standard Terms of sale (or the Customer's standard Terms of purchase), a copy of which is annexed to this contract.”]*

## **2. Procedure for ordering and delivering the Goods**

2.1 The Customer shall, not less than *[fifteen (15) – specify any other period]* days before the beginning of each *[month – specify any other period]*, give the Supplier its written order for the Goods to be delivered to the Customer during that *[month – specify any other period]*.

2.2 Each order for the Goods must be given in writing and shall be subject to confirmation in writing by the Supplier. The Supplier shall confirm the order in writing to the Customer within *[fifteen (15) days – specify any other period]* after it is given unless the Supplier has a valid reason not to do so. Upon confirmation by the Supplier each order shall be final, but the Supplier may at its discretion accept an amendment to an order within *[fifteen (15) days – specify any other period]* after it is given.

2.3 *[Each order for the Goods shall upon confirmation by the Supplier be deemed to constitute a separate contract, and accordingly any breach by the Supplier in relation to any one order shall not entitle the Customer to terminate this contract as a whole. – delete if not appropriate.]*

2.4 The Customer shall notify the Supplier in writing of:

2.4.1 Its estimated orders for the Goods for each year *[specify any other period]* during the Term, within *[specify period]* months prior to that *[year – specify any other period]*; and

2.4.2 Any revisions to those estimates, as soon as practicable after they are made.

2.5 The Customer shall be responsible to the Supplier for:

2.5.1 Ensuring the accuracy of each order for the Goods given by the Customer;

2.5.2 Promptly giving the Supplier all necessary information relating to the Goods which is reasonably requested by the Supplier to enable the Supplier to fulfil each order in accordance with its Terms; and

2.5.3 Obtaining any necessary import licences or other requisite documents (except those agreed to be provided by the Supplier in accordance with schedule 4), and otherwise complying with any applicable laws or regulations concerning the importation of the Goods, and for paying all applicable customs duties, taxes and charges in respect of the importation of the Goods and their resale (unless they are exempt).

2.6 Upon confirmation of each order the Supplier shall as soon as is practicable *[and in any event within [specify] days – delete if not appropriate]* inform the Customer of the Supplier's estimated delivery date for the Goods.

2.7 The Supplier shall *[use its reasonable commercial endeavours to – delete if not appropriate]* deliver the Goods on *[or within [specify] days of – delete if not appropriate]* the estimated delivery date for each order.

2.8 *[Option 1: "Liquidated damages for delay:*

*If there is any delay in the delivery of the Goods [of more than specify] days after the estimated delivery date] then, unless the delay is due to force majeure, the price of the Goods shall be reduced by [specify monetary amount] for every day of the delay until delivery of the Goods, subject to a maximum of [specify] % of the price."*

*Option 2: "No liability for delay due to Customer:*

*The Supplier shall have no liability for any delay in delivery of the Goods that is due to any failure by the Customer to provide any required information in good time."*

2.9 The Supplier shall use its reasonable commercial endeavours to manufacture and maintain sufficient stocks of the Goods to fulfil its obligations under this contract, but may *[after consultation with the Customer – delete if not appropriate]* discontinue the manufacture of all or any of the Goods, in which case the Supplier will give the Customer *[thirty (30) days' – specify any other period]* notice in writing of the discontinuation, and the Supplier shall fulfil all outstanding orders for the Goods in question which are placed by the Customer before the date of the notice.

2.10 If the Customer's orders for the Goods exceed (or if it appears from any estimate or revised estimate given by the Customer that they will exceed) the output capacity or available stocks of the Supplier:

2.10.1 The Supplier shall as soon as practicable notify the Customer;

2.10.2 The Customer shall be entitled to obtain from any other person such quantity of the Goods as the Supplier is unable to supply in accordance with the Customer's orders until such time as the Supplier has given the Customer written notice (together with such supporting evidence as the Customer may reasonably require) that it is able and willing to resume the supply of the Goods in accordance with the Customer's orders and the Customer has had a reasonable time to terminate any alternative supply arrangements which it may have made with any other person; and

2.10.3 *[That quantity shall be deemed for the purposes of Article 1.4 to have been ordered from the Supplier – delete if there is no minimum purchase obligation.]*

2.11 *[Option (where there is a minimum purchase obligation):*

*“Within [sixty (60) days – specify any other period] after the end of each [year – specify any other period] during the Term the Customer shall submit to the Supplier a written report showing:*

2.11.1 *The total quantity of the Goods (or any other Goods of the same description) of which the Customer has taken delivery from any person (including the Supplier) in that year, and*

2.11.2 *The percentage of that total quantity which in that year was ordered by the Customer from the Supplier.” [Delete if there is not a minimum percentage purchase obligation under Article 1.4].]*

### **3. Price of the Goods**

3.1 Except as otherwise agreed in writing between the Supplier and the Customer, the prices for all Goods to be supplied under this contract shall be the Supplier’s *[Ex works/FOB – specify any other basis]* list prices from time to time.

3.2 The Supplier shall:

3.2.1 Supply the Customer with copies of the Supplier’s *[Ex works/FOB – specify any other basis]* price lists for the Goods in force from time to time; and

3.2.2 Give the Customer not less than *[specify period]* months’ notice in writing of any alteration in those prices, and the prices as so altered shall apply to all Goods delivered on and after the applicable date of the increase, including outstanding orders.

Alternative to Article 3.2.2: Give the Customer not less than *[specify period]* months’ notice in writing of any alteration in those prices, and the prices as so altered shall apply to all Goods ordered after the applicable date of the increase.

*[Option: Cost related price increase*

*“3.3 The Supplier reserves the right to increase the price of the Goods to reflect any material increase in the cost to the Supplier of [manufacturing – delete if not appropriate] or supplying the Goods by giving not less than [specify period] notice to the Customer, [provided that the Supplier shall not increase the price of any of the Goods by more than [specify] % in any year [specify any other period] of the Term – delete if not appropriate], and the prices as so altered shall apply to all Goods ordered after the applicable date of the increase.”]*

*[Option: Customer’s right of termination for price increase*

*“3.4 If pursuant to Article 3.2 or 3.3 the Supplier increases or proposes to increase the price of the Goods [by more than [specify] % in any year [specify any other period], the Customer may terminate this contract by giving not less than [specify period] written notice to the Supplier.”]*

*[Option: Price comparison*

*“3.5 If at any time the Customer can establish that the price charged by the Supplier for any of the Goods exceeds the price at which a bona fide third party is supplying Goods*

*of a similar specification in commercially significant quantities and on a regular basis in the territory of the Customer, the price of the Goods shall, at the request of the Customer in writing, be reduced so as to match that other price. If the Supplier does not agree in writing to such a request within a reasonable time (not exceeding thirty (30) days – specify any other period)), the Goods in question shall cease to be subject to this contract, and where the Goods in question form all or a substantial proportion of the Goods covered by this contract, either party may terminate this contract by giving written notice to the other party.”.]*

3.6 The prices of the Goods are [*inclusive/exclusive – delete as appropriate*] of any value added tax or similar sales tax, for which the Customer shall be liable in addition to the price.

3.7 If the Supplier agrees to deliver the Goods otherwise than on an [*Ex works/FOB – specify as appropriate*] basis, the price is exclusive of the Supplier’s charges for transport, packaging and insurance up to the point of delivery, for which the Customer shall be liable in addition to the price.

## 4. Payment

4.1 The price of the Goods shall be payable within [*thirty (30) days – specify any other period*] of the Supplier’s invoice (which may be submitted at any time after the Goods are dispatched) or as otherwise agreed in writing between the Parties.

4.2 All payments shall be made by transfer to a bank account specified by the Supplier in writing, without any set-off, deduction or withholding except for any tax which the Customer is required by law to deduct or withhold.

4.3 [*Option 1: Payment in advance*

*“The Supplier may invoice the Customer for the price of the Goods at any time before delivery, and the Customer shall pay the sum due in cleared funds to the bank nominated by the Supplier on or before delivery.”.]*

[*Option 2: Other methods of payment*

*“The Supplier may require the Customer to pay the price of any Goods by [*specify payment method, e.g. payment by documentary collection / payment by irrevocable documentary credit.*”.]*

4.4 Time for payment of the price of the Goods shall be of the essence of this contract – [*delete if not appropriate.*]

4.5 If the Customer fails to pay the price for any Goods in accordance with this contract the Supplier may (without limiting any other right or remedy):

4.5.1 Cancel or suspend any further delivery to the Customer under any order;

4.5.2 Sell or otherwise dispose of any Goods which are the subject of any order by the Customer, whether or not appropriated to the order, and apply the proceeds of sale to the overdue payment; and

4.5.3 Charge the Customer interest on the outstanding amount (both before and after any judgment) at the rate of [*specify*] % from the due date until the outstanding amount is paid in full.

*[Comment: The Parties should take into consideration that in some legal systems payment of interest is unlawful, or is subject to a legal maximum rate, or there is provision for statutory interest on late payments.]*

## 5. Warranties relating to the Goods

5.1 Subject to the following provisions, the Supplier warrants to the Customer that:

5.1.1 The Supplier will have good title to the Goods supplied under this contract;

5.1.2 *[The use or resale of the Goods supplied under this contract will not infringe the patent, design, copyright, trademark or other intellectual property rights of any third party – delete if not appropriate];* and

5.1.3 Subject to Article 5.2, the Goods supplied under this contract will comply with any specification agreed for them and be free from defects in material and workmanship for a period of *[ninety (90) days – specify any other period]* from delivery to the Customer.

5.2 The Supplier shall be under no liability in respect of any defect in the Goods arising from fair wear and tear, or any wilful damage, negligence, subjection to abnormal working conditions, failure to follow the Supplier's written instructions, misuse or alteration or repair of the Goods without the Supplier's approval, or any other act or omission on the part of the Customer, its employees or agents or any third party.

5.3 *[In the event of any breach of the Supplier's warranty under Article 5.1.3 the Supplier's liability shall be limited to]:*

5.3.1 Repair or (if that is not practical) replacement of the Goods in question; or

5.3.2 Repayment of any part of the price for the Goods in question which has been paid *[delete if not appropriate]*.

5.4 *[Option: "Where the Supplier is not the manufacturer of the Goods, the Supplier shall, without limiting its other obligations, extend to the Customer the benefit of any warranty or other Term given by the manufacturer." [delete if not appropriate].]*

*[Option (in common law systems):*

*"5.5 All other warranties or other Terms, express or implied by statute or otherwise, are excluded to the fullest extent permitted by law."]*

## 6. Confidentiality

6.1 Both parties understand and acknowledge that, by virtue of this contract, they may both receive or become aware of information belonging or relating to the other party, its business, business plans, affairs or activities, which information is confidential and proprietary to the other party and/or its Suppliers and/or Customers and in respect of which they are bound by a strict duty of confidence ("Confidential Information").

6.2 In consideration of such Confidential Information being disclosed or otherwise made available to either party for the purposes of the performance

of this contract, both parties hereby undertake that they will not at any time, either before or after the termination of this contract, and either directly or indirectly, disclose, divulge or make unauthorized use of any Confidential Information, except to the extent to which such Confidential Information:

- 6.2.1 Is publicly known at the time of its disclosure or being made available to them;
- 6.2.2 After such disclosure or being made available to them, becomes publicly known otherwise than through a breach of this provision;
- 6.2.3 Is required by law, regulation or order of a competent authority (including any regulatory or governmental body or securities exchange) to be disclosed by one of the Parties, provided that, where practicable, the other party is given reasonable advance notice of the intended disclosure.

6.3 Upon the earlier of a request from the other party or the termination of this contract, each party shall return to the other or destroy all documents or records in any medium or format containing any Confidential Information that are in its possession or control and will not retain any copies of them.

6.4 The provisions of this Article 6 will continue without limit of time, notwithstanding the termination of this contract for any reason.

## 7. Liability

*[Option: Limitation of Supplier's liability]*

*“Except in respect of death or personal injury caused by the Supplier's negligence, the Supplier shall not be liable to the Customer by reason of any representation (unless fraudulent), or any implied warranty, condition or other Term, for any loss of profit or any indirect, special or consequential loss or damage (whether caused by the negligence of the Supplier, its servants or agents or otherwise) in relation to the supply of the Goods (or any failure to supply them) or their resale by the Customer, or otherwise arising out of or in connection with this contract.”*

*Comment: The Parties should take into consideration that in some legal systems limitations or exclusions of liability may not be effective, or may be subject to restrictions, and that the wording of such a provision should otherwise reflect the applicable law of the contract.]*

## 8. Duration, termination and consequences of termination

8.1 This contract will take effect on the date of its signature by both parties or, if signatures do not occur simultaneously, when the latest signature is given. Unless sooner terminated pursuant to Articles 8.2, 8.3 or 8.4, this contract shall continue for a period of *[specify period]*.

*[Comment: The duration of the contract may be limited for reasons of applicable law (for example, it may need to be limited to 5 years where the EU vertical agreements block exemption is relevant).]*

*[Option: Termination for convenience]*

*“8.2 Either party shall be entitled to terminate this contract at any time by giving not less than *[specify period]* written notice to the other.”*



8.3 The Supplier may (without limiting its rights under Article 4.5) terminate this contract with immediate effect by giving written notice to the Customer, if the latter fails to pay any sum payable by it under this contract within *[specify period]* days of the due date for payment.

8.4 Either party may (without limiting any other remedy) at any time terminate this contract by giving written notice to the other if:

8.4.1 The other party commits any breach of this contract and (if capable of remedy) fails to remedy the breach within *[thirty (30) specify any other figure]* days after being required by written notice to do so; or

8.4.2 The other party goes into liquidation, becomes bankrupt, makes a voluntary arrangement with its creditors or has a receiver or administrator appointed.

*[Comment: References to events of insolvency will need to be adapted for the legal system in question.]*

8.5 For the purposes of Article 8.4.1, a breach of any provision of this contract shall be considered capable of remedy if the Party in breach can comply with the provision in question in all respects other than as to the time of performance.

*[Comment: In some legal systems it may be desirable not to include a provision for termination on breach, or to include more detailed provisions concerning the rights and remedies of the Parties in this respect.]*

8.6 The termination of this contract for any reason shall not affect:

8.6.1 Either party's accrued rights, remedies or liabilities including payments due at the effective date of termination; or

8.6.2 The coming into force or the continuance in force of any provision of this contract that is expressly or by implication intended to come into or continue in force on or after termination.

## **9. Change of circumstances (hardship)**

*[Comment: The Parties should be free to consult each other in the event of a major change in circumstances – particularly one creating hardship for a particular party. However, an SME should only include the option at the end of Article 9.4 (right to refer to the courts/arbitral tribunal to make a revision or to terminate the contract) if (i) the SME considers that it is not likely to be used against that party's interests by a party in a stronger tactical position or (ii) the right to refer to a court/tribunal is already an existing right under the applicable governing law in the event of hardship.]*

9.1 Where the performance of this contract becomes more onerous for one of the Parties, that party is nevertheless bound to perform its obligations subject to the following provisions on change of circumstances (hardship).

9.2 If, however, after the time of conclusion of this contract, events occur which have not been contemplated by the Parties and which fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations (hardship), that party shall be entitled to request revision of this contract provided that:

- 9.2.1 The events could not reasonably have been taken into account by the affected party at the time of conclusion of this contract;
- 9.2.2 The events are beyond the control of the affected party; and
- 9.2.3 The risk of the events is not one that, according to this contract, the Party affected should be required to bear.

9.3 Each party shall in good faith consider any proposed revision seriously put forward by the other party in the interests of the relationship between the Parties.

*[Option (delete if not applicable or not enforceable under the law governing the contract – see comment at beginning of Article 9):*

*“9.4 If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 18. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances, or to terminate this contract at a date and on Terms to be fixed.”]*

## 10. **Force majeure**

10.1 “*Force majeure*” means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of this contract, or to have avoided or overcome it or its consequences.

10.2 A party affected by *force majeure* shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent that the delay or non-performance is due to any *force majeure* of which it has notified the other party in accordance with Article 10.3. The time for performance of that obligation shall be extended accordingly, subject to Article 10.4.

10.3 If any *force majeure* occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.

10.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by *force majeure* for a continuous period in excess of three *[specify any other figure]* months, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the *force majeure*.

*[Alternative: If preferred, replace 10.4 with the following alternative:*

*“10.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of three [specify any other figure] months, the Parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 [specify any other figure] days, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the force majeure.”]*

## 11. General warranties

11.1 Each party warrants to the other that:

11.1.1 It has the authority to enter into this contract;

11.1.2 The signatory to this contract for and on behalf of that party is authorized and fully empowered to execute this contract on that party's behalf;

11.1.3 The entry into and performance of this contract by that party will not breach any contractual or other obligation owed by that party to any other person, any rights of any other person or any other legal provision;

11.1.4 The entry into and performance of this contract by that party require no governmental or other approvals or, if any such approval is required, it has been obtained; and

11.1.5 It will at all times during the Term of this contract comply with the Terms of and maintain in force any necessary governmental or other approvals, consents, notifications, registrations or other legal requirements for the performance by that party of its obligations under this contract.

## 12. Entire agreement

12.1 This contract sets out the entire agreement between the Parties. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. *[Option, add where relevant: "This contract supersedes any previous agreement or understanding relating its subject matter".]*

12.2 This contract may not be varied except by an agreement of the Parties in writing (which may include e-mail) *[add where Article 9.4 is included: "Or in accordance with Article 9.4".]*

## 13. Notices and writing

13.1 Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified in Article 13.2 below, in a manner that ensures receipt of the notice can be proved.

13.2 For the purposes of Article 13.1, notification details are the following, unless other details have been duly notified in accordance with this Article:

13.2.1 For the Supplier: *[insert details]*

13.2.2 For the Customer: *[insert details]*

## 14. No partnership or agency

Nothing in this contract shall (i) be deemed to constitute a partnership in law between the Parties, (ii) constitute either party the agent of the other for any purpose or (iii) entitle either party to commit or bind the other (or any member of its respective group) in any manner.

## 15. Assignment and subcontracting

15.1 This contract is personal to the Parties and, except to the extent necessary for the collection of outstanding bills through a factoring agent, neither party shall without the prior written approval of the other:

15.1.1 Assign, mortgage, charge or otherwise transfer or deal in, or create any trust over, any of its rights; or

15.1.2 Subcontract or otherwise delegate the whole or any part of its rights or obligations under this contract to another person.

## 16. Effect of invalid or unenforceable Articles

16.1 If any provision of this contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this contract shall continue to be valid as to its other provisions and the remainder of the affected provision, unless it can be concluded from the circumstances that, in the absence of the provision found to be null and void, the Parties would not have concluded this contract.

16.2 The Parties shall use all reasonable efforts to replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

## 17. Authorizations

17.1 This contract is conditional upon the following authorizations first being obtained *[specify the authorization(s) or other conditions required e.g. of governmental or regulatory authority]*.

17.2 The relevant party shall use all reasonable efforts on its part to obtain such authorizations and shall notify the other party promptly of any difficulty encountered.

## 18. Dispute resolution procedure

Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of *[specify the arbitration institution]* by *[specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators]* appointed in accordance with the said rules. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.

*[The following are alternatives to a specified arbitral institution under Article 18:*

*“Alternative 1: Ad hoc arbitration*

*Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of UNCITRAL [specify other rules] by [specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators] appointed by [specify name of appointing institution or person]. The place of arbitration shall be [specify]. The language of the arbitration shall be [specify].”*

*[Alternative 2: State courts*

*“Any dispute, controversy or claim arising out of or relating to this contract, in particular its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled by the courts of [specify place and country] which will have exclusive jurisdiction”.]*

## **19. Language of contract**

This contract has been negotiated and concluded in *[English]*. It may be translated into any other language for practical purposes, but the *[English]* version shall prevail in the event of any doubt.

## **20. Applicable law**

*[Select either Alternative 1 or 2]*

*[Alternative 1: “Questions relating to this contract which are not settled by the provisions contained in this contract itself shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention of 1980, hereafter referred to as CISG) as well as the UNIDROIT Principles of International Commercial Contracts, and to the extent that such questions are not covered by CISG or the UNIDROIT principles, by reference to [specify the relevant national law].”*

*[Alternative 2: “[specify national law] law shall apply to this contract.”]*

## **Schedule 1: The Goods**

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## **Schedule 2: Minimum purchase quantities**

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## **Schedule 3: Minimum/maximum order quantities**

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## **Schedule 4: Terms of supply**

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### **1. Quantity**

1.1 *[Subject to Article 1.4 of this contract – delete if not appropriate], the quantity of the Goods to be supplied by the Supplier shall be as set out in each order submitted by the Customer (if confirmed by the Supplier).*

1.2 *[Each order shall be subject to the minimum/maximum quantities specified in schedule 3 – delete if not appropriate].*

1.3 *[The seller reserves the right to deliver up to [specify] % more or [specify] % less than the quantity ordered without any adjustment in the price, and the quantity so delivered shall be deemed to be the quantity ordered – delete if not appropriate.]*

### **2. Delivery of the Goods**

2.1 The Goods shall be delivered to the Supplier on the following basis (references being to the latest Incoterms of the International Chamber of Commerce at the date of conclusion of the contract): Ex works/FOB *[specify sea or air port]* / other *[specify it]*.

*[Comment: Delete or fill in as appropriate.]*

### 3. Inspection of the Goods

*[Option: Inspection before delivery]*

“3.1 The Supplier shall *[at its own cost – delete if not appropriate]* arrange for testing and inspection of the Goods at the Supplier’s premises before shipment *[by – specify body]*. The Supplier shall have no liability for any claim in respect of any defect in the Goods that would be apparent on inspection and which is made after shipment” – *[delete if not appropriate].]*

*[Option: Inspection after delivery]*

“3.2 The Customer shall, within *[seven (7) – specify any other period]* days of the arrival of each delivery of the Goods at the Customer’s premises, inspect the Goods at its own cost and notify the Supplier in writing of any defect in Goods or any other matter by reason of which the Customer alleges that the Goods delivered do not comply with this contract, and which should be apparent on inspection” *[delete if not appropriate].]*

### 4. Documents

The Supplier shall make available to the Customer (or shall present to the bank specified by the Customer) the following documents:

*[specify documents e.g. packing list / insurance documents / certificate of origin / certificate of inspection / customs documents / other documents].*

### 5. Transfer of risk

5.1 Risk of damage to or loss of the Goods *[and the property in the Goods – delete if not appropriate]* shall pass to the Customer in accordance with the relevant Incoterms or otherwise at the time of delivery of the Goods.

***[Option: “6. Option: Retention of title***

6.1 Notwithstanding the delivery of and the passing of risk in the Goods, or any other provision of this contract, the property in the Goods shall not pass to the Customer until the Supplier has received payment in full of the price of the Goods.

6.2 Until property in the Goods passes to the Customer:

6.2.1 The Customer shall hold the Goods on behalf of the Supplier, and shall keep the Goods separate from those of the Customer and third parties and properly stored, protected and insured and identified as the Supplier’s property;

6.2.2 Provided none of the events referred to in Article 7.4.2 of this contract has taken place in relation to the Customer, the Customer may resell or use up the Goods in the ordinary course of its business (in which case property in the Goods will be deemed to pass to the Customer);

6.2.3 Provided the Goods have not been sold or used up, the Supplier may at any time require the Customer to deliver up to the Supplier the Goods for which the Supplier has not received payment in full of the price and, if the Customer fails to do so forthwith, the Supplier may enter upon any premises of the Customer or any third party where the Goods are stored and repossess the Goods; and

6.2.4 *The Customer shall not pledge or in any way charge by way of security for any indebtedness any of the Goods which remain the property of the Supplier, but if the Customer does so all money owing by the Customer to the Supplier shall become due and payable.”.]*

*[Comment: The Parties should take into consideration that in some legal systems a retention of title provision is not possible, or may be ineffective in the case of insolvency of the Customer, or it may not be possible to enter the Customer’s premises or obtain repossession of the Goods without a court order. A retention of title provision will not be appropriate if the contract requires payment to be made on or before delivery.]*

DATE AND SIGNATURE OF THE PARTIES

Supplier

Customer

Date . . . . .

Name. . . . .

Signature

Signature



## Chapter 5

# International Contract Manufacture Agreement

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## Introduction

This Model Contract is a framework for a so-called **contract manufacture agreement**, i.e. when the Client wishes the Manufacturer to design, manufacture and deliver goods which the Client intends to integrate into its own final products or services, and therefore must meet certain specific requirements of the Client.

1. As most of the Model Contracts of this handbook, this Model Contract provides a series or “*menu*” of *possibilities* depending on the background and the nature of the production. Many provisions may not be relevant to the particular contract and should, if not relevant, be deleted.
2. The Model Contract provides for a *basic scheme*, and two main options. The basic scheme is based on the assumption that the *Manufacturer is fully equipped* and has the technology to produce conforming goods, in its position as most specialized party.

The *options*, which do not exclude the basic scheme but may be combined with it and with each other, are tailored to cases in which (i) the *Client has to supply the Manufacturer* with certain specific equipment or tooling (Article 1.5) and (ii) *the Client has to transfer parts* of its own technology to the Manufacturer to enable him to finalize the products (Article 1.4).

3. The model agreement also covers the situation/*option* where the Parties have agreed that the *Manufacturer shall submit samples* before production is launched (Article 1.6).
4. These initial options may of course be adapted to the specific needs of the Parties, or deleted. They are not exclusive of each other and may be combined.
5. Articles 1.4, 5 and 6 deal with issues of *intellectual property*. It is assumed that the intellectual property rights are properly protected by appropriate registration. Moreover, Article 9 imposes a duty of confidentiality upon both parties, which should provide additional protection in particular if know-how is communicated by one party to the other. It is suggested to verify that the regime set out in Article 6 for improvements is acceptable in the light of any applicable anti-trust/competition law.

6. The cooperation of the Parties might be a contract of *duration*. It is therefore important to establish the duration of the alliance (see Article 7.1). An option (not addressed in the model) could be that the contract has a specific term with subsequent renewal requiring mutual agreement.
7. As far as the law applicable to the contract is concerned (Article 19), it is suggested to remind expressly that the UN Convention on the International Commercial Sale of Goods (*CISG*) *does not apply* to that type of agreement, “in which the preponderant part of the obligations of the party which furnishes the Goods consists in the supply of labour or other services” (Article 3 (2) CISG).

This Model Contract is a general framework only and must be tailored to specific circumstances.

# ITC MODEL INTERNATIONAL CONTRACT MANUFACTURE AGREEMENT

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***PARTIES:***

***Manufacturer***

Name (name of company)

.....

Legal form (e.g. limited liability company)

.....

Country of incorporation and (if appropriate) trade register number

.....

Address (address of place of business of the Manufacturer, phone, fax, e-mail)

.....

.....

Represented by (surname and first name, address, position, legal title of representation) . . . . .

.....

.....

***Client***

Name (name of company)

.....

Legal form (e.g. limited liability company)

.....

Country of incorporation and (if appropriate) trade register number

.....

Address (address of place of business of the Client, phone, fax, e-mail)

.....

.....

Represented by (address of place of business of the Client, phone, fax, e-mail) . . . . .

.....

.....

Collectively “the Parties”

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## Background

- A. The Client carries on business in the *[field/provision/supply of – specify]*.
- B. The Manufacturer undertakes as part of its business the production/ manufacture and the supply of *[- specify the Goods/products]*.
- C. The Manufacturer has experience and expertise in the design, engineering and manufacture of goods and the Client, relying on such representation, wishes to engage the Manufacturer to manufacture and supply such goods in relation to the Client’s business, and the Manufacturer is willing to manufacture and supply such goods for the Client, on the terms of this contract.
- D. To the extent required by the performance of this contract, the Parties shall exchange information on their respective technology and equipment *[if not necessary, delete this sub-section D]*.
- E. *[If necessary, give an additional short explanation of the reason for the contract. If not necessary, delete this sub-section E]*.

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## Operative provisions

### 1. Manufacture and supply of the Goods

1.1 Subject to the terms agreed in this contract and the more detailed specifications contained in schedule 1, the Manufacturer shall manufacture and supply the following good(s) to the Client (hereinafter: “the Good” or “the Goods”): *[provide short description of The Good(s) – detailed technical specification is to be found in schedule 1]*:

- .....
- .....
- .....

1.2 The Good(s) to be manufactured and supplied to the Client by the Manufacturer under this contract shall be delivered at/in *[specify place(s) of delivery – delete sub-Article 1.2 if not relevant]*:

- .....
- .....

1.3 The Good(s) to be manufactured and supplied to the Client by the Manufacturer under this contract shall be delivered on *[specify date/time of performance]*.

*[Alternative 1: If the Good(s) are to be supplied during a certain (limited) period of time:*

*“1.3.1 The Good(s) to be manufactured and supplied to the Client by the Manufacturer under this contract shall be delivered between . . . . . and . . . . . [specify timeframe/duration of performance], with the following intervals . . . . . [specify if necessary – delete if not relevant].”]*

*[Alternative 2: If the Good(s) are to be supplied at regular intervals, with no limitation in time:*

*“1.3.1 The Good(s) to be manufactured and supplied to the Client by the Manufacturer under this contract shall be delivered as from . . . . . [specify date of first delivery], with the following intervals . . . . . [specify schedule or intervals].”]*

*[Alternative 3: If the Good(s) are to be manufactured and supplied upon orders of the Client:*

*“1.3.1 The Good(s) to be manufactured and supplied to the Client by the Manufacturer under this contract shall be delivered within . . . . . days/weeks [specify number of days/weeks] following each of the Client’s orders. The Client’s orders shall be placed with the Manufacturer not less than . . . . . weeks [specify number of weeks] before the beginning of each quarter/month [select what is relevant], and shall cover all goods to be manufactured and supplied to the Client during that quarter/month [select what is relevant]. Each of the Client’s orders shall be final, except that the Manufacturer shall give reasonable consideration to any amendment to an order requested by the Client before the beginning of the quarter/month for which the order was placed. The orders shall be given in writing or, if given orally, shall be confirmed by the Client in writing within a reasonable period.”]*

*1.4 [Only for contracts/situations where the Client has to disclose to the Manufacturer such of its technology as is necessary to enable the Manufacturer to manufacture the Goods in accordance with the specification listed in schedule 1. If this Article 1.4 applies, check whether Article 5 should also apply – this sub-Article 1.4, or parts of it, shall be deleted if not relevant/not applicable.]*

As soon as practicable after the execution of this contract the Client shall at its own cost disclose to the Manufacturer such of its technology as is necessary to enable the Manufacturer to manufacture the Goods in accordance with the specification in schedule 1.

1.4.1 Any such disclosure of technology shall be subject to the confidentiality provisions of Article 9, but nothing in this contract shall require the Client specially to prepare any technology or to engage in any research or development on the Manufacturer’s behalf.

1.4.2 The Client shall permit the Manufacturer to send, at the Manufacturer’s expense, appropriately qualified employees of the Manufacturer to visit the Client’s premises for training with the Client’s technology. The numbers of the Manufacturer’s employees who are to visit any premises of the Client and the timing of any visits, as well as any other relevant issue such as security, safety, indemnification in case of negligence, etc. shall be as agreed in advance between the Client and the Manufacturer.

1.4.3 The Manufacturer shall not supply the Goods produced through the use of the Client’s technology to any person other than the Client.

*1.5 [Only for contracts/situations where the Client has to supply the Manufacturer with certain specific equipment – the sub-Article, or parts of it shall be deleted if not relevant/not applicable.]*

As soon as practicable after the execution of this contract the Client shall at its own cost supply the Manufacturer with any equipment which is necessary for the proper manufacture of the Goods under this contract, and install it at the Manufacturer's premises.

- 1.5.1 The Client warrants that, at the time of installation at the Manufacturer's premises, the equipment will be in good working order and fit for its purpose for a period of . . . . . production hours [*specify number of hours*], subject to fair wear and tear and except in the case of improper maintenance or use or any other default on the part of the Manufacturer.
- 1.5.2 The equipment shall remain the absolute property of the Client but shall, for so long as it is in the possession or control of the Manufacturer, be at the sole risk of the Manufacturer. The Manufacturer shall accordingly ensure that it is properly and securely stored and identified as the property of the Client, and shall not part with possession of it, or make it available, to any third party.
- 1.5.3 The Manufacturer shall maintain with a reputable insurance company insurance cover for the replacement cost or the repair of the equipment and damages, and shall have the Client's interest noted on the policy.
- 1.5.4 The Client shall, from time to time during the period of this contract and at the Manufacturer's reasonable and duly documented request, reimburse the Manufacturer in respect of the reasonable costs of any tooling required for the maintenance and the repair or replacement of the equipment, except in the case of any default on the part of the Manufacturer.
- 1.5.5 The Manufacturer shall not use the Client's equipment except for the purposes of supplying the Goods to the Client under this contract, and he shall not supply the Goods produced through the use of the Client's equipment to any person other than the Client.

1.6 [*Only for contracts/situations where the Client has requested the Manufacturer submit samples before production is launched. – the entire sub-Article shall be deleted if not relevant/not applicable*]. The Manufacturer shall, within . . . . . days/weeks [*specify number of days/weeks*] after the execution of this contract [*Alternative: As soon as practicable after the disclosure of the Client's technology and the supply and installation of the equipment under Article 1.4*] submit to the Client for approval pre-production samples of the Good(s). The Manufacturer shall not commence the manufacture of the Goods until the Client has communicated its approval of the samples to the Manufacturer in writing. Approval shall not be unreasonably withheld or delayed by the Client and, once given, shall constitute irrevocable confirmation that the Goods manufactured in conformity with the samples (or differing only within normal industrial limits) will comply with the specification in schedule 1 and will meet the requirements of quality specified in Article 4, except in respect of defects which are not capable of being revealed on reasonable inspection by the Client.

1.7 Either party may at any time request that the Goods be adapted/amended in order to comply with any applicable safety or other statutory requirements.

If the changes induced by such adaptation/amendment materially affect the nature or quality of the Goods, the Parties shall renegotiate in good faith the relevant parameters of this contract and any relevant schedule.

## 2. Payment of price

2.1 All sales of the Goods under this contract shall be:

2.1.1 At the prices calculated in accordance with schedule 2; and

2.1.2 Subject to the terms of sale set out in schedule 4, to the exclusion of any other terms, except as provided in this contract or agreed in writing between the Parties.

2.2 The Manufacturer shall invoice the Client for the price in respect of all goods supplied under this contract on or at any time after each delivery to the Client.

2.3 Subject to its rights under Article 4, the Client shall pay the price stated in each invoice submitted by the Manufacturer under Article 2.2 within 30 days of the date of the invoice.

## 3. Late payment and interest

If payment is not made on the due date, the supplier shall be entitled, without limiting any other rights it may have, to charge interest on the outstanding amount (both before and after any judgment) at the rate of *[specify]* % per annum.

*[Comment: The Parties should take into consideration that in some legal systems payment of interest is unlawful, or is subject to a legal maximum rate, or there is provision for statutory interest on late payments.]*

## 4. Quality of the products

4.1 In entering into this contract, the Client relies on the Manufacturer's expertise to manufacture the Goods, and the Manufacturer accordingly warrants to the Client that all goods under this contract shall:

4.1.1 Conform in all respects to the specifications in schedule 1;

4.1.2 For a period of *[specify duration]* from delivery, be of the quality required by the contract and free from defects in design, workmanship or materials; in case of delivery of defective or non-conforming goods, the Manufacturer shall remedy the defect or the non-conformity within 30 days after receipt of a written notice giving full particulars of the defect or the non-conformity and requiring it to be remedied. If the defect or the non-conformity amounts to a material breach of any of the provisions of this contract and the Manufacturer fails to remedy the breach within 30 days after receipt of the aforesaid written notice, the Client shall be entitled to terminate this contract in conformity with Article 7.2.1.

4.1.3 Comply with all . . . . . standards and applicable statutes and regulations relating to the Goods [*specify type of standards/statutes/regulations – delete sub-Article if not applicable*].

4.2 [*Only if samples are to be submitted to the Client*] Subject to Article 1.6, the Client may reject any of the Goods that do not comply with Article 4.1.

4.3 For the purposes of assuring to the Client the quality of the Goods required under this contract the Manufacturer shall permit the duly authorized representative of the Client, at any time during normal working hours and on reasonable notice, to inspect any premises of the Manufacturer or any third party where any of the Goods, or any labelling or packaging for them, are manufactured or stored by or for the Manufacturer.

4.4 If any claim is made against the Client arising out of or in connection with the manufacture of or any defect in the Goods, the Manufacturer shall, except to the extent that the claim is due to any defect in the specification made by the Client or the technology or the equipment provided by the Client, indemnify the Client against all damages or other compensation awarded against the Client in connection with the claim or paid or agreed to be paid by the Client in settlement of the claim and all legal or other expenses incurred by the Client in or about the defence or settlement of the claim. The Client shall notify the Manufacturer as soon as practicable after becoming aware of the claim, and take all action reasonably requested by the Manufacturer to avoid, compromise or defend the claim and any proceedings in respect of the claim, subject to the Client being indemnified and secured to its reasonable satisfaction against all costs and expenses which may be incurred in doing so.

4.5 Notwithstanding anything to the contrary in this contract, the Manufacturer shall not, except in respect of death or personal injury caused by the negligence of the Manufacturer, be liable to the Client for any loss of profit or any indirect, special or consequential loss or damage, costs, expenses or other claims (whether occasioned by the negligence of the Manufacturer or its employees or agents or otherwise) arising out of or in connection with the manufacture or supply of the Goods (including any delay in supplying or any failure to supply the Goods in accordance with this contract or at all), their use or resale by the Client or their use by any customer of the Client, and the total liability of the Manufacturer for any other loss, damage, costs, expenses or other claims which so arise shall not exceed the price of the Goods in question.

## 5. Intellectual property and trademarks

*[Only for contracts/situations where the Client has disclosed technology to the Manufacturer (see sub-Article 1.4 above), which is protected by intellectual property rights – the Article, or parts of it shall be deleted if not relevant/not applicable.]*

5.1 The Client authorizes the Manufacturer, for the purposes of exercising its rights and performing its obligations under this contract:

5.1.1 To use the technology disclosed under Article 1.4 and any intellectual property of the Client in respect of the technology; and

5.1.2 To apply the Client's trademarks to the Goods.

5.2 Subject to Article 5.1, the Manufacturer shall have no rights in respect of any of the technology disclosed under Article 1.4, any intellectual property of



the Client in respect of it or any of the trademarks, and the Manufacturer shall not use any of that technology or intellectual property except for the purposes specified in Article 5.1 and otherwise in accordance with this contract.

5.3 The Manufacturer shall use the trademarks on or in relation to the Goods in the form and manner specified by the Client from time to time, and not otherwise.

5.4 All artwork supplied by the Client from time to time for use in relation to the Goods or their labelling and packaging, and all intellectual property in respect of it, shall belong exclusively to the Client.

5.5 The Manufacturer shall at the request and expense of the Client take all such steps as the Client may reasonably require to assist the Client in maintaining the validity and enforceability of any intellectual property referred to in Article 5.1 or 5.4 and the trademarks, and shall enter into such formal licences as the Client may reasonably request for this purpose. The Manufacturer shall not represent that it has any title in or right of ownership to any of the trademarks or do or suffer to be done any act or thing which may in any way impair the rights of the Client in any of the trademarks or bring into question the validity of its registration.

5.6 The Manufacturer shall promptly and fully notify the Client of any actual or threatened infringement of any of the intellectual property referred to in Article 5.1 or 5.4 or of the trademarks which comes to the Manufacturer's notice, or which the Manufacturer suspects has taken or may take place.

5.7 If any claim is made against the Manufacturer that the manufacture or sale of the Goods infringes the intellectual property or other rights of any third party, the Client shall, except to the extent that the claim is due to the default of the Manufacturer, indemnify the Manufacturer against all damages or other compensation awarded against the Manufacturer in connection with the claim or paid or agreed to be paid by the Manufacturer in settlement of the claim and all legal or other expenses incurred by the Manufacturer in or about the defence or settlement of the claim. The Manufacturer shall notify the Client forthwith after becoming aware of the claim, and take all action reasonably requested by the Client to avoid, compromise or defend the claim and any proceedings in respect of the claim, subject to the Manufacturer being indemnified and secured to its reasonable satisfaction against all costs and expenses which may be incurred in so doing.

## **6. Cooperation of the Parties for improvements and modifications**

6.1 The Client and the Manufacturer shall meet once in each quarter to review any matters likely to be relevant in relation to the manufacture, sale, use or development of the Goods.

6.2 Without limiting the general scope of Article 6.1:

6.2.1 The Client shall provide the Manufacturer with details of any improvement belonging to the Client which it wishes to be incorporated into the Goods or any other modification which it wishes to be made to the Goods from time to time; and

6.2.2 The Manufacturer shall provide the Client with details of any improvement which is made, developed or acquired by the Manufacturer from time to time.

6.3 An improvement as referred to in this section means any development, enhancement or derivative of the Good, or its design or manufacturing process, which would make The Good cheaper, more effective, more useful or more valuable, or would in any other way render the Good preferable in commerce.

6.4 The title to and all intellectual property rights in respect of any improvement made, developed or acquired by either party shall belong to that party, but the Client may use any improvement which is made, developed or acquired by the Manufacturer, and any applicable intellectual property of the Manufacturer, for its own purposes by way of a non-exclusive, royalty-free licence without limit of time.

6.5 The Manufacturer shall not unreasonably withhold its consent to the incorporation into the Goods of any improvement belonging to the Client or any other modification to the Goods referred to in Article 6.2.1, or of any improvement belonging to the Manufacturer referred to in Articles 6.2.2 and 6.4.

6.6 To the extent necessary, the incorporation of any improvement or any other modification to the Goods, which is agreed between the Client and the Manufacturer, shall be recorded in writing in Schedule I as an amendment to the contractually agreed specification of the Goods.

## **7. Duration and termination**

7.1 This contract shall take effect on the date of its signature by both parties or, if signatures do not occur simultaneously, when the latest signature is given. Unless sooner terminated pursuant to Articles 7.2 or 7.3, this contract shall continue for a period of *[specify – check that provision is in line with Article 1.3]*.

7.2 Either party shall be entitled forthwith to terminate this contract by giving written notice to the other if:

7.2.1 The other party commits any continuing or material breach of any of the provisions of this contract and fails to remedy the breach within 30 days after receipt of a written notice giving full particulars of the breach and requiring it to be remedied.

7.2.2 An encumbrancer takes possession or a receiver is appointed over any of the property or assets of the other party;

7.2.3 The other party makes any voluntary arrangement with its creditors or becomes subject to an administration order;

7.2.4 The other party goes into liquidation (except for the purposes of an amalgamation, reconstruction or other reorganization and in such manner that the company resulting from the reorganization effectively agrees to be bound by or to assume the obligations imposed on that other party under this contract); or

7.2.5 The other party ceases, or threatens to cease, to carry on business.

7.3 [Only if samples have to be submitted to the Client pursuant to Article 1.6] – if not, delete this Article 7.3.]

The Client may at its option terminate this contract forthwith by giving written notice to the Manufacturer, if the latter fails to produce samples of the Good(s) under Article 1.6 in accordance with the specification and to the reasonable satisfaction of the contractor on or before . . . . . [specify date].

7.4 Any waiver by either party of a breach of any provision of this contract shall not be considered as a waiver of any subsequent breach of the same or any other provision.

7.5 The rights to terminate this contract given by this Article shall not prejudice any other right or remedy of either party in respect of the breach concerned (if any) or any other breach.

## **8. Consequences of termination**

8.1 On the termination of this contract for any reason, the Manufacturer shall offer to sell to the Client all goods which have been manufactured by the Manufacturer but not delivered to the Client at the date of termination, and all usable but unused stocks of labelling and packaging for the Goods bearing any of the trademarks, at a price equal to their cost to the Manufacturer.

8.2 Subject to Article 8.1, on the termination of this contract for any reason the Manufacturer shall:

8.2.1 Subject to Article 1.4, cease to manufacture and sell the Goods or to use, either directly or indirectly, any of the technology referred to in Article 1.4 or intellectual property referred to in Article 5 and forthwith return to the Client any documents in its possession or control which contain or record any part of any of that technology or intellectual property;

8.2.2 Cease to use any of the trademarks;

8.2.3 Consent to the cancellation of any formal licence granted to it, or of any record of it in any register, in respect of any intellectual property of the Client or any of the trademarks; and

8.2.4 At its own cost forthwith return the equipment to the Client;

8.3 Subject as provided in this Article and except in respect of any accrued rights, neither party shall have any further obligation to the other.

8.4 The provisions of Articles 9, 18 and 19 shall continue in force in accordance with their terms, notwithstanding termination of this contract for any reason.

8.5 The termination of this contract for any reason shall not affect the coming into force or the continuance in force of any provision of this contract that is expressly or by implication intended to come into or continue in force on or after termination.

## **9. Confidentiality**

9.1 Both parties understand and acknowledge that, by virtue of the present contract, they may both receive or become aware of technology as well as

information belonging or relating to the other party, its business, business plans, affairs or activities, which information is confidential and proprietary to the other party and/or its Manufacturers and/or customers and in respect of which they are bound by a strict duty of confidence (“Confidential Information”).

9.2 As a consequence thereof, neither party shall, either during the period of this contract or at any subsequent time, disclose to any other person any technology or other Confidential Information disclosed to it by the other party under this contract, and shall use its best endeavours to keep such technology or other information confidential (whether marked as such or not), except as provided by Article 9.3 or 9.4.

9.3 Any of the technology or other Confidential Information referred to in Article 9.1 may be disclosed to:

9.3.1 Any contractor or supplier to the party in question of any equipment or products;

9.3.2 Any governmental or other authority or regulatory body; or

9.3.3 Any directors or employees of the party in question; to such extent only as is necessary for the purposes of this contract or as required by law, and subject in each case (other than under Article 9.3.2) to the party in question first obtaining (and submitting to the other a copy of) a written undertaking from the person to whom the disclosure is made, as nearly as practicable in the terms of this Article, to keep it confidential and to use it only for the purposes for which the disclosure is made.

9.4 Any of the technology or other Confidential Information referred to in Article 9.1 may be used by the party in question for any purpose, or disclosed by that party to any other person, to the extent only that any part of it is at the date of this contract or subsequently becomes public knowledge through no fault of the party in question, provided that in so doing that party does not disclose any part of that technology or other Confidential Information which is not public knowledge.

9.5 This undertaking, and the obligations contained herein, will continue without limit of period.

## **10. *Force majeure* – excuse for non-performance**

10.1 “*Force majeure*” means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of this contract or to have avoided or overcome it or its consequences.

10.2 A party affected by *force majeure* shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent that the delay or non-performance is due to any *force majeure* of which it has notified the other party in accordance with Article 10.3. The time for performance of that obligation shall be extended accordingly, subject to Article 10.4.

10.3 If any *force majeure* occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.

10.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by *force majeure* for a continuous period in excess of three [*specify any other figure*] months, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the *force majeure*.

*[Alternative: If preferred, replace 10.4 with the following alternative:*

*“10.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of three [*specify any other figure*] months, the Parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 [*specify any other figure*] days, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the force majeure.”]*

## 11. Change of circumstances (hardship)

*[Comment: The Parties should be free to consult each other in the event of a major change in circumstances – particularly one creating hardship for a particular party. However, an SME should only include the option at the end of Article 11.4 (right to refer to the courts/arbitral tribunal to make a revision or to terminate the contract) if (i) the SME considers that it is not likely to be used against that party’s interests by a party in a stronger tactical position or (ii) the right to refer to a court/tribunal is already an existing right under the applicable governing law in the event of hardship.]*

11.1 Where the performance of this contract becomes more onerous for one of the Parties, that party is nevertheless bound to perform its obligations subject to the following provisions on change of circumstances (hardship).

11.2 If, however, after the time of conclusion of this contract, events occur which have not been contemplated by the Parties and which fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations (hardship), that party shall be entitled to request revision of this contract provided that:

- 11.2.1 The events could not reasonably have been taken into account by the affected party at the time of conclusion of this contract;
- 11.2.2 The events are beyond the control of the affected party; and
- 11.2.3 The risk of the events is not one which, according to this contract, the Party affected should be required to bear.

11.3 Each party shall in good faith consider any proposed revision seriously put forward by the other party in the interests of the relationship between the Parties.

*[Option: Add if wished, otherwise delete if not applicable or not enforceable under the law governing the contract – see comment at beginning of Article 11.*

*“11.4 If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 18. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances, or to terminate this contract at a date and on terms to be fixed.”]*

**12. No partnership or agency**

Nothing in this contract shall (i) be deemed to constitute a partnership in law between the Parties, (ii) constitute either party the agent of the other for any purpose or (iii) entitle either party to commit or bind the other (or any member of its respective group) in any manner.

**13. Assignment and subcontracting**

13.1 This contract is personal to the Parties and *[include only where relevant, except to the extent necessary for the collection of outstanding bills through a factoring agent,]* neither party shall without the prior written approval of the other:

13.1.1 Assign, mortgage, charge or otherwise transfer or deal in, or create any trust over, any of its rights; or

13.1.2 Subcontract or otherwise delegate the whole or any part of its rights or obligations under this contract to another person.

**14. Notices**

14.1 Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified in Article 14.2 below, in a manner that ensures receipt of the notice can be proved.

14.2 For the purposes of Article 14.1, notification details are the following, unless other details have been duly notified in accordance with this Article:

- .....
- .....

**15. Entire agreement**

15.1 This contract sets out the entire agreement between the Parties. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. *[Option, add where relevant: “This contract supersedes any previous agreement or understanding relating to its subject matter”.]*

15.2 This contract may not be varied except by an agreement of the Parties in writing (which may include e-mail) *[add where Article 11.4 or equivalent is included: “Or in accordance with Article 11.4”].*

## 16. Effect of invalid or unenforceable provisions

If any provision of this contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this contract shall continue to be valid as to its other provisions and the remainder of the affected provision, unless it can be concluded from the circumstances that, in the absence of the provision found to be null and void, the Parties would not have concluded this contract. The Parties shall use all reasonable efforts to replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

## 17. Authorizations

17.1 This contract is conditional upon the following authorizations first being obtained *[specify the authorization(s) or other conditions required e.g. of governmental or regulatory authority]*:

- ..... ;
- ..... ;
- ..... ;

17.2 The relevant party shall use all reasonable efforts on its part to obtain such authorizations and shall notify the other party promptly of any difficulty encountered.

## 18. Dispute resolution procedure

Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of *[specify the arbitration institution]* by *[specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators]* appointed in accordance with the said rules. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.

*[The following are alternatives to a specified arbitral institution under Article 18:*

*Alternative 1: Ad hoc arbitration*

*“Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of UNCITRAL [specify other rules] by [specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators] appointed by [specify name of appointing institution or person]. The place of arbitration shall be [specify]. The language of the arbitration shall be [specify].”]*

*[Alternative 2: State courts*

*“Any dispute, controversy or claim arising out of or relating to this contract, in particular its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled by the courts of (specify place and country) which will have exclusive jurisdiction.”]*

## **19. Applicable law**

[Specify national law] law shall apply to the contract. The application of the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention of 1980 – CISG) is excluded.



### Schedule 1: Specifications of the Goods to be manufactured

This schedule shall describe the Goods to be manufactured and supplied by the Manufacturer to the Client, along with all necessary technical data, tolerances, etc.

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### Schedule 2: Price

- (1) The price for the Goods shall be a delivered price calculated as follows . . . . . (specify currency)
- (2) Specify method of invoicing (periodicity, etc.)
- (3) *[If applicable]* The price for the Goods is exclusive of any applicable value added tax.

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### Schedule 3: Equipment

*[If applicable (see Article 1.5), specify the Client’s equipment that is placed at Manufacturer’s disposal]*

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### Schedule 4: Terms of sale

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DATE AND SIGNATURE OF THE PARTIES

Manufacturer	Client
Date . . . . .	. . . . .
Name . . . . .	. . . . .
Signature	Signature



## Chapter 6

# International Distribution of Goods

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## Introduction

This Model Contract is for the **distribution of manufactured goods**, between a Supplier and a Distributor.

1. The contract, like the Model Contract for International Long-Term Supply of Goods, is intended for use in connection with the supply of manufactured goods, whether or not The Supplier is the manufacturer of the goods. Frequently (but not always) the goods in question will be intended for retail sale.
2. A main reason to appoint a Distributor is that the *Supplier is unable to carry out the distribution in a particular Territory alone, or is unwilling to invest in the distribution infrastructure that is required in order to do so*. The Supplier will wish to be assured that the distribution of the goods will be undertaken in an efficient and vigorous manner. The *Distributor will usually seek assurances that its efforts will be protected in some way*, possibly by being appointed as the sole Distributor, or as the exclusive Distributor, in a given Territory. *Conversely, a Supplier may wish to ensure that the Distributor's efforts are concentrated on the Territory in question*. These points are dealt with in Article 1.
3. *Territorial restrictions on either party* may have consequences under applicable law, and these aspects need to be carefully considered.
4. The increasing importance of *electronic commerce* is a further aspect of distribution that needs to be dealt with in the contract.
5. The provisions of the contract dealing with the *supply* of the goods (Article 2), the procedure for *ordering* the goods (Article 3), the *price* of the goods (Article 4), *payment* of the price (Article 5), *warranties* relating to the goods (Article 6) and other terms of supply (schedule 4) are essentially the *same as for the Model Contract for International Long-Term Supply of Goods*.
6. Article 7 deals with the central issue of *how the goods are to be distributed*, and what level of effort will be required. In its turn Article 8 deals with the *support and training* to be given by the Supplier.
7. Frequently the goods to be distributed will be protected by various forms of *Intellectual Property*, in particular Trademarks, which the Distributor will need to use in the course of its marketing and distribution activities, and these are dealt with in Article 9.

8. The remaining provisions of the contract are similar to those of the Model Contract for International Long-Term Supply of Goods, except for Article 13, which deals with the *consequences of termination*, in terms of the repurchase of stock and related matters.

## ITC MODEL CONTRACT FOR THE INTERNATIONAL DISTRIBUTION OF GOODS

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***PARTIES:***

***Supplier***

Name (name of company)  
.....  
Legal form (e.g. limited liability company)  
.....  
Country of incorporation and (if appropriate) trade register number  
.....  
Address (address of place of business of the Supplier, phone, fax, e-mail) . . .  
.....  
.....  
Represented by (surname and first name, address, position, legal title of  
representation) . . . . .  
.....  
.....

***Distributor***

Name (name of company)  
.....  
Legal form (e.g. limited liability company)  
.....  
Country of incorporation and (if appropriate) trade register number  
.....  
Address (address of place of business of the Distributor, phone, fax, e-mail)  
.....  
.....  
Represented by (surname and first name, address, position, legal title of  
representation) . . . . .  
.....  
.....

collectively “the Parties”

*[Add any further information required e.g. the Parties’ fiscal identities]*

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## Background

- A. The Supplier carries on business in the *[manufacture and – delete if not applicable]* supply of *[specify Goods]*.
- B. The Supplier wishes to appoint the Distributor as the Supplier's Distributor in the Territory of *[specify Territory]* (the "Territory") for the resale of certain of the Goods *[manufactured and – delete if not applicable]* supplied by the Supplier, details of which are set out in schedule 1 (the "Goods"), and the Distributor is willing to accept such an appointment, on the terms of this contract.

---

## Operative provisions

### 1. Appointment of the Distributor

1.1 The Supplier appoints the Distributor as the Supplier's Distributor for the resale of the Goods in the Territory during the period of this contract (the "Term"), subject to the following provisions.

1.2 The appointment of the Distributor is exclusive/non-exclusive *[delete as appropriate]*.

*[Comment: The Parties should take into consideration that in some legal systems exclusivity may have competition law implications.]*

1.3 For so long as the appointment of the Distributor remains exclusive the Supplier shall not:

1.3.1 Appoint any other person as its Distributor for the sale of the Goods in the Territory; or

1.3.2 Supply (either by itself or through an agent) any of the Goods to any other person in the Territory; or

1.3.3 Supply any of the Goods to any other person outside the Territory if the Supplier knows, or ought reasonably to know, that they are intended for resale in the Territory *[- delete if the appointment is not exclusive.]*

1.4 The Supplier reserves the right to advertise and sell its products (including the Goods through its website (currently at *www [specify domain name]*) to customers in the Territory *[but the Supplier shall pay the Distributor a commission of [ten (10) % – specify any other figure]* of the net sales value received by the Supplier for any Goods sold through its website to customers in the Territory *[- to be deleted if not appropriate.]*

1.5 The Distributor shall not:

1.5.1 Obtain any of the Goods (or any Goods which compete with the Goods) for resale from any person other than the Supplier;

1.5.2 Be concerned or interested, either directly or indirectly, in the manufacture or distribution in the Territory of any Goods which compete with any of the Goods;

1.5.3 Seek customers, establish a warehouse or distribution outlet for any of the Goods or otherwise actively market any of the Goods outside the Territory; or

1.5.4 Sell any of the Goods to any person outside the Territory, or inside the Territory if the Distributor knows, or ought reasonably to know, that the person intends to resell the Goods outside the Territory. *[Delete if not appropriate.]*

*[Comment: The Parties should take into consideration that in some legal systems restrictions on sale by a Distributor may not be lawful.]*

*[Option: “1.6 [The Distributor shall not sell the Goods through any mail order or similar system, or via the Internet or any other electronic means, to customers either in or outside the Territory.” [delete if not appropriate].]*

*[Comment: The Parties should take into consideration that in some legal systems a restriction on sales through the Internet or otherwise may not be lawful.]*

*[Alternative 1:*

*“1.6 The Distributor shall be entitled to resell the Goods via the Internet, e-mail or any other electronic means, provided that any website, e-mail or other electronic means used for this purpose is not specifically targeted at customers outside the Territory.”]*

*[Alternative 2:*

*“1.6 The Distributor shall not sell any of the Goods through a sales’ agent or to a sub-Distributor in the Territory without the prior written consent of the Supplier, but the Supplier shall not unreasonably withhold or delay giving such consent.” [delete if not appropriate].]*

## **2. Supply of the Goods**

2.1 During The Term the Supplier shall sell and the Distributor shall purchase the Goods ordered by the Distributor for resale, subject to the Terms of this contract.

2.2 The specification of the Goods shall be as set out in schedule 1, but the Supplier reserves the right to make any change in the specification of the Goods that is necessary in order for them to conform with any applicable laws, provided the Supplier promptly informs the Distributor in writing of any such change that it proposes to make.

2.3 The Distributor shall promptly inform the Supplier of any proposed change in the specification of the Goods which is necessary in order for them to conform with any applicable laws in the Territory, in which event the Supplier shall promptly notify the Distributor in writing whether it is willing to change the specification and (if so) any resulting change in the price of the Goods. If the Supplier does not notify the Distributor in writing within a reasonable time (not exceeding *[thirty (30) days – specify any other period]*) that it agrees to the change in the specification, or if it does do so but the Distributor does not notify the Supplier in writing within a reasonable time (not exceeding *[thirty (30) days – specify any other period]*) that it agrees any change in the price of the Goods proposed by the Supplier, the Goods in question shall cease to be subject to this contract, and where the Goods in question form all or a substantial proportion of the Goods covered by this contract, either party may terminate this contract by giving written notice to the other party.

*[Option: Minimum purchase obligation*

*“2.4 In each [year – specify any other period] of the Term the Distributor, unless prevented by force majeure, shall order from the Supplier not less than the minimum quantity of the Goods specified in schedule 2. If the Supplier fails by reason of force majeure or otherwise to supply the Distributor with that quantity of the Goods, the minimum quantity of the Goods for the [year – specify any other period] in question shall be reduced by the quantity of the Goods that the Supplier fails to supply.”]*

2.5 Subject to the provisions of this contract, the supply of the Goods shall be made on the basis of the terms of sale set out in schedule 4. In the event of any conflict between those terms and the terms of this contract, the terms of this contract shall prevail.

### **3. Procedure for ordering the Goods**

3.1 The Distributor shall, not less than *[fifteen (15) – specify any other period]* days before the beginning of each *[month – specify any other period]*, give the Supplier its written order for the Goods to be delivered to the Distributor during that *[month – specify any other period]*.

3.2 Each order for the Goods must be given in writing and shall be subject to confirmation in writing by the Supplier. The Supplier shall confirm the order in writing to the Distributor within *[fifteen (15) days – specify any other period]* after it is given, unless the Supplier has a valid reason not to do so. Upon confirmation by the Supplier each order shall be final, but the Supplier may at its discretion accept an amendment to an order within *[fifteen (15) days – specify any other period]* after it is given.

*[Option: “3.3 [Each order for the Goods shall upon confirmation by the Supplier be deemed to constitute a separate contract, and accordingly any breach by the Supplier in relation to any one order shall not entitle the Distributor to terminate this contract as a whole” [– delete if not appropriate].]*

3.4 The Distributor shall notify the Supplier in writing of:

3.4.1 Its estimated orders for the Goods for each *[year – specify any other period]* during the Term, within *[specify period]* months prior to that *[year – specify any other period]*; and

3.4.2 Any revisions to those estimates, as soon as practicable after they are made.

3.5 The Distributor shall be responsible to the Supplier for:

3.5.1 Ensuring the accuracy of each order for the Goods given by the Distributor;

3.5.2 Promptly giving the Supplier all necessary information relating to the Goods which is reasonably requested by the Supplier to enable the Supplier to fulfil each order in accordance with its terms; and

3.5.3 Obtaining any necessary import licences or other requisite documents (except those to be provided by the Supplier in accordance with schedule 4), and otherwise complying with any applicable laws or regulations concerning the importation of the



Goods into the Territory, and for paying all applicable customs duties, taxes and charges in respect of the importation of the goods into the Territory and their resale in the Territory (unless they are exempt).

3.6 Upon confirmation of each order the Supplier shall as soon as is practicable *[and in any event within [specify] days – delete if not appropriate]* inform the Distributor of the Supplier's estimated delivery date for the Goods.

3.7 The Supplier shall *[use its reasonable commercial endeavours to – delete if not appropriate]* deliver the Goods on *[or within [specify] days of – delete if not appropriate]* the estimated delivery date for each order.

3.8 *[Option 1: Liquidated damages for delay*

*“If there is any delay in the delivery of the Goods [of more than [specify] days after the estimated delivery date] then, unless the delay is due to force majeure, the price of the Goods shall be reduced by [specify monetary amount] for every day of the day until delivery of the Goods, subject to a maximum of [specify] % of the price.”]*

*[Option 2: No liability for delay due to Distributor*

*“The Supplier shall have no liability for any delay in delivery of the Goods that is due to any failure by the Distributor to provide any required information in good time.”]*

3.9 The Supplier shall use its reasonable commercial endeavours to manufacture and maintain sufficient stocks of the Goods to fulfil its obligations under this contract, but may *[after consultation with the Distributor – delete if not appropriate]* discontinue the manufacture of all or any of the Goods, in which case the Supplier will give the Distributor *[thirty (30) days' – specify any other period]* notice in writing of the discontinuation, and the Supplier shall fulfil all outstanding orders for the Goods in question which are placed by the Distributor before the date of the notice.

3.10 If the Distributor's orders for the Goods exceed (or it appears from any estimate or revised estimate given by the Distributor that they will exceed) the output capacity or available stocks of the Supplier:

3.10.1 The Supplier shall as soon as practicable notify the Distributor;

3.10.2 The Distributor shall be entitled to obtain from any other person such quantity of the Goods as the Supplier is unable to supply in accordance with the Distributor's orders until such time as the Supplier has given the Distributor written notice (together with such supporting evidence as the Distributor may reasonably require) that it is able and willing to resume the supply of the Goods in accordance with the Distributor's orders and the Distributor has had a reasonable time to terminate any alternative supply arrangements which it may have made with any other person; and

3.10.3 *[That quantity shall be deemed for the purposes of Article 2.4 to have been ordered from the Supplier – delete if there is no minimum purchase obligation under Article 2.4.]*

3.11 *[Option (where there is a minimum purchase obligation):*

*“Within [sixty (60) days – specify any other period] after the end of each [year – specify any other period] during the Term the Distributor shall submit to the Supplier a*

*written report showing the total quantity of the Goods (or any other Goods of the same description) of which the Distributor has taken delivery from any person (including the Supplier) in that year.”]*

## **4. Price of the Goods**

4.1 Except as otherwise agreed in writing between the Supplier and the Distributor, the prices for all Goods to be supplied under this contract shall be the Supplier’s *[Ex works/FOB – specify any other basis]* list prices from time to time.

4.2 The Supplier shall:

4.2.1 Supply the Distributor with copies of the Supplier’s *[Ex works/FOB – specify any other basis]* price lists for the Goods in force from time to time; and

4.2.2 Give the Distributor not less than *[specify period]* months’ notice in writing of any alteration in those prices, and the prices as so altered shall apply to all Goods delivered on and after the applicable date of the increase, including outstanding orders.

*[Alternative to Article 4.2.2: Give the Distributor not less than [specify period] months’ notice in writing of any alteration in those prices, and the prices as so altered shall apply to all Goods ordered after the applicable date of the increase.]*

*[Option: Cost related price increase*

*“4.3 The Supplier reserves the right to increase the price of the Goods to reflect any material increase in the cost to the Supplier of [manufacturing or – delete if not appropriate] supplying the Goods subject to giving not less than [specify period] notice to the Distributor [provided that the Supplier shall not increase the price of any of the Goods by more than [specify] % in any [year – specify any other period] of the Term – delete if not appropriate], and the prices as so altered shall apply to all Goods ordered after the applicable date of the increase.”]*

*[Option: Distributor’s right of termination for price increase*

*“4.4 If pursuant to Article 4.2 [or 4.3] the Supplier increases or proposes to increase the price of the Goods [by more than [specify] % in any year [specify any other period]], the Distributor may terminate this contract by giving not less than [specify period] written notice to the Supplier.”]*

*[Option: Price comparison*

*“4.5 If at any time the Distributor can establish that the price of any of the Goods exceeds the price at which a bona fide third party is supplying Goods of a similar specification in commercially significant quantities and on a regular basis in the Territory of the Distributor, the price of the Goods shall, at the request of the Distributor in writing, be reduced accordingly. If the Supplier does not agree in writing to such a request within a reasonable time (not exceeding [thirty (30) days – specify any other period]), the Goods in question shall cease to be subject to this contract, and where the Goods in question form all or a substantial proportion of the Goods covered by this contract, either party may terminate this contract by giving written notice to the other party.”]*

4.6 The prices of the Goods are *[exclusive/inclusive – delete as appropriate]* of any applicable value added tax or similar tax, for which the Distributor shall be liable in addition to the price.

4.7 If the Supplier agrees to deliver the Goods otherwise than on an *[Ex works/FOB – specify as appropriate]* basis, the price is exclusive of the Supplier's charges for transport, packaging and insurance up to the point of delivery, for which the Distributor shall be liable in addition to the price.

## 5. Payment

5.1 The price of the Goods shall be payable within *[thirty (30) days – specify any other period]* of the Supplier's invoice (which may be submitted at any time after the Goods are despatched) or as otherwise agreed in writing between the Parties.

5.2 All payments shall be made by transfer to a bank account specified by the Supplier in writing, without any set-off, deduction or withholding except for any tax that the Distributor is required by law to deduct or withhold.

5.3 *[Option 1: Payment in advance*

*“The Supplier may invoice the Distributor for the price of the Goods at any time before delivery, and the Distributor shall pay the sum due in cleared funds to the bank nominated by the Supplier on or before delivery.”]*

*[Option 2: Other methods of payment*

*“The Supplier may require the Distributor to pay the price of any Goods by [specify payment method, e.g. payment by documentary collection / payment by irrevocable documentary credit].”]*

5.4 Time for payment of the Goods shall be of the essence of this contract. *[delete if not applicable.]*

5.5 If the Distributor fails to pay the price for any Goods in accordance with this contract, the Supplier may (without limiting any other right or remedy):

5.5.1 Cancel or suspend any further delivery to the Distributor under any order;

5.5.2 Sell or otherwise dispose of any Goods which are the subject of any order by the Distributor, whether or not appropriated to the order, and apply the proceeds of sale to the overdue payment; and

5.5.3 Charge the Distributor interest on the outstanding amount (both before and after any judgment) at the rate of *[specify]* % from the due date until the outstanding amount is paid in full.

*[Comment: The Parties should take into consideration that in some legal systems payment of interest is unlawful, or is subject to a legal maximum rate, or there is provision for statutory interest on late payments.]*

## 6. Warranties relating to the Goods

6.1 Subject to the following provisions, the Supplier warrants to the Distributor that:

- 6.1.1 The Supplier has *[or at the time of delivery will have – delete if not appropriate]* good title to the Goods supplied under this contract;
- 6.1.2 *[The importation of the Goods and the resale of the Goods by the Distributor [and their use by any customer of the Distributor – delete if not appropriate] will not infringe the patent, design, copyright, Trademark or other Intellectual Property rights of any other person – delete if not appropriate];* and
- 6.1.3 Subject to Article 6.2, the Goods supplied under this contract *[and their use by any customer of the Distributor will comply with any specification agreed for them and be free from defects in material and workmanship for a period of [ninety (90) days – specify any other period]* from delivery to the Distributor and comply with all health and safety and other applicable legal requirements.

6.2 The Supplier shall be under no liability in respect of any defect in the Goods arising from fair wear and tear, or any wilful damage, negligence, subjection to abnormal working conditions, failure to follow the Supplier's written instructions, misuse or alteration or repair of the Goods without the Supplier's approval, or any other act or omission on the part of the Distributor, its employees or agents or any third party.

*[Option: "6.3 In the event of any breach of the Supplier's warranty under Article 6.1.3 the Supplier's liability shall be limited to:*

- 6.3.1 *Repair or (if that is not practical) replacement of the product in question; or*
- 6.3.2 *Repayment of any part of the price for the product in question which has been paid" [– delete if not appropriate.]*

*[Option: "6.4 [Where the Supplier is not the manufacturer of the Goods, the Supplier shall, without limiting its other obligations, extend to the Distributor the benefit of any warranty given by the manufacturer" [– delete if not appropriate.]*

*[Option (in common law systems) "6.5 All other warranties or other terms, express or implied by statute or otherwise, are excluded to the fullest extent permitted by law."]*

## **7. Distribution of the Goods**

7.1 The Distributor shall use its reasonable commercial endeavours to promote, market and distribute the sale of the Goods throughout the Territory.

7.2 The Distributor shall use its reasonable commercial endeavours to distribute the sale of the Goods in accordance with a Business Plan for the marketing and sale of the Goods (the "Business Plan"), the first Business Plan being in the form annexed to this contract. The Distributor shall update the Business Plan on an annual basis, and pending any such updating the previous year's Business Plan shall continue to apply.

7.3 In connection with the promotion, marketing and sale of the Goods the Distributor shall:

- 7.3.1 Make it clear in all dealings with customers and prospective customers that it is acting as Distributor of the Goods and not as the agent of the Supplier;

- 7.3.2 Comply with all applicable legal requirements;
  - 7.3.3 (Subject to Article 3.10) maintain a level of stocks of the Goods necessary to meet its customers' requirements;
  - 7.3.4 Keep all stocks of the Goods which it holds in conditions that are appropriate for their storage and provide appropriate security for the Goods;
  - 7.3.5 Insure at its own cost with a reputable insurance company all stocks of the Goods held by it against all risks which would normally be insured against by a prudent businessman to at least their full replacement value, and produce to the Supplier on demand full particulars of that insurance and the receipt for the then current premium;
  - 7.3.6 *[Provide the Supplier with copies of its up to date price lists – delete if not appropriate.]*  
*[Comment: The Parties should take into consideration that in some legal systems such a provision may have competition law implications.]*
  - 7.3.7 Provide the Supplier on request with copies of brochures, catalogues, manuals and other marketing materials used by the Distributor in relation to the Goods;
  - 7.3.8 Use in relation to the Goods only advertising, promotional and marketing materials which are approved in writing by the Supplier;
  - 7.3.9 Observe all directions and instructions reasonably given to it by the Supplier in relation to the promotion and advertisement of the Goods, and not make any written or oral statements as to the quality or fitness of the Goods without the prior written approval of the Supplier;
  - 7.3.10 Employ a sufficient number of suitably qualified personnel to fulfil its obligations under this contract; and
  - 7.3.11 Provide an after-sales and maintenance service for customers in relation to the Goods to the Supplier's reasonable satisfaction during the Term and for a period of *[six (6) months – specify any other period]* after the termination of this contract.
- 7.4 The Distributor shall:
- 7.4.1 Keep full and proper books of account and records showing clearly all enquiries, quotations, transactions and proceedings relating to the Goods, and allow the Supplier, on reasonable notice, access to its accounts and records relating to the Goods for the purpose of inspection;
  - 7.4.2 Provide the Supplier on a monthly basis with a report, in such form as the Supplier may reasonably require, of all sales of the Goods that it has made in the preceding month and containing such other information as the Supplier may reasonably require;
  - 7.4.3 Inform the Supplier immediately of any changes in the ownership or control of the Distributor and of any change in its organization or method of doing business which might affect the performance of the Distributor's duties under this contract; and

7.4.4 Consult with the Supplier's representatives from time to time in order to assess the state of the market in the Territory, and permit them to inspect any premises used by the Distributor in connection with the sale of the Goods.

7.5 The Distributor shall carry out its obligations in relation to the marketing, promotion and sale of the Goods and the provision of after-sales and maintenance services at its own expense and with all due skill, care and diligence, and shall at all times act towards the Supplier dutifully and in good faith in all matters relating to this contract.

7.6 *[Option 1: Supplier's contribution to advertising*

*"The Supplier shall in each [year – specify any other period] of The Term spend not less than [specify amount] on advertising and promoting the Goods in the Territory.".]*

*[Option 2: Distributor's contribution to advertising*

*"During each [year – specify any other period] of the Term the Distributor shall spend not less than the amount specified in the Business Plan for that [year – specify any other period] on advertising and promoting the Goods in the Territory.".]*

## 8. Support and training

8.1 The Supplier shall from time to time provide the Distributor *[free of charge – delete if not appropriate]* with reasonable samples of the Goods, and such brochures, catalogues, manuals and up to date promotional and advertising information concerning the Goods as the Supplier may consider appropriate or as the Distributor may reasonably request, in order to assist the Distributor with the sale of the Goods in the Territory.

8.2 The Supplier shall endeavour to answer as soon as practicable any technical enquiries concerning the Goods which are made by the Distributor or its customers, and provide the Distributor with support in dealing with any defective Goods.

*[Option: "8.3 During the first year of the Term:*

*8.3.1 The Supplier shall make available to the Distributor (at times to be agreed and for up to [specify number] working days) the services of a suitably qualified employee of the Supplier to assist the Distributor in the marketing of the Goods; and*

*8.3.2 The Distributor may send to the Supplier's premises (at times to be agreed and for up to [specify number] working days) up to [specify number] suitably qualified employees of the Distributor for training by the Supplier in relation to the Goods and their marketing – delete if not appropriate.".]*

8.4 The Distributor shall:

8.4.1 Reimburse the Supplier for all travelling, accommodation and other expenses reasonably incurred by any employees of the Supplier in providing those services; and

8.4.2 Remain liable for all salaries and other employment costs of, and all travelling, accommodation and other expenses incurred by, employees of the Distributor who are sent to the Supplier's premises." *[Delete if not appropriate.]*

## 9. Intellectual Property

9.1 The Supplier grants to the Distributor the exclusive/non-exclusive [*delete as appropriate*] right to use in the Territory in relation to the promotion, marketing and sale of the Goods the Supplier's Trademarks details of which are given in schedule 5 and any other Trademarks used by the Supplier in relation to the Goods at any time during the Term which are notified in writing to the Distributor (the "Trademarks") and any patent, copyright, design right or other Intellectual Property rights ("Intellectual Property") of the Supplier, to the extent necessary for the purposes of exercising its rights and performing its obligations under this contract.

9.2 The Distributor shall ensure that each reference to and use of any of the "Trademarks" by the Distributor in relation to the Goods in any advertising or marketing material or otherwise is in a manner from time to time approved by the Supplier and accompanied by an acknowledgement, in a form approved by the Supplier, that it is a Trademark (or registered Trademark) of the Supplier.

9.3 The Distributor shall not:

9.3.1 Modify the Goods or their packaging, except to the extent that this is required in accordance with applicable law;

9.3.2 Alter or remove from the Goods any of the Trademarks, or the numbers or other means of identification used on or in relation to the Goods;

9.3.3 Use any of the Trademarks in any way which might prejudice their distinctiveness or validity or the goodwill of the Supplier;

9.3.4 Use in relation to the Goods any Trademarks other than the Trademarks without obtaining the prior written consent of the Supplier;

9.3.5 Use in the Territory any Trademarks or trade names which so resemble any of the Trademarks as to be likely to cause confusion or deception;

9.3.6 Use any of the Trademarks as part of the Distributor's corporate or business name; or

9.3.7 Apply for or register as a Trademark or as a domain name in the Territory or elsewhere any name or mark which is the same as or similar to any of the Trademarks or any domain name of the Supplier, but if the Distributor applies for or registers any Trademark or domain name in breach of this Article, it shall [*hold the benefit of the application or the registration on trust for the Supplier and – delete if not appropriate*] transfer it to the Supplier on demand.

9.4 Except as provided in this contract, the Distributor shall have no rights in respect of any trade names or Trademarks used by the Supplier in relation to the Goods or of the goodwill associated with them, or any other Intellectual Property of the Supplier in respect of the Goods.

9.5 The Distributor shall, at the request and expense of the Supplier, execute a "formal licence in respect of the use by the Distributor in the Territory of the Trademarks or any other Intellectual Property of the Supplier in respect of the Goods, in a form which the Supplier may reasonably require, provided that

the provisions of the licence are not more onerous or restrictive than those of this contract, and shall where appropriate assist the Supplier in effecting the registration of any such licence in the Territory.

9.6 The Distributor shall, at the request and expense of the Supplier, take all steps that the Supplier may reasonably require to assist the Supplier in maintaining the validity and enforceability of the Trademarks or any other Intellectual Property of the Supplier in respect of the Goods.

9.7 The Distributor shall not do or authorize any third party to do any act which would or might invalidate or be inconsistent with any of the Trademarks or any other Intellectual Property of the Supplier or its licensor in respect of the Goods, and shall not authorize any third party to do so.

9.8 The Distributor shall promptly and fully notify the Supplier of any actual, threatened or suspected infringement in the Territory of any of the Trademarks or any other Intellectual Property of the Supplier in respect of the Goods which comes to the Distributor's notice, and of any claim or threatened claim by any third party that the importation of the Goods into the Territory, or their sale in the Territory, infringes the Trademark or other Intellectual Property rights of any other person.

9.9 In the event of any such infringement or claim:

9.9.1 The Distributor shall at the request and expense of the Supplier take all steps reasonably necessary to assist the Supplier in taking or resisting any proceedings in relation to the infringement or claim; *[and*

9.9.2 *The Supplier shall have sole control over any proceedings or negotiations in connection with the infringement or claim – delete if not appropriate.]*

*[Option: Indemnity for Intellectual Property infringement*

*“9.10 The Supplier shall indemnify the Distributor against any loss, damages, costs or expenses which are awarded against or incurred by the Distributor as a result of any claim or threatened claim by any third party that the importation of the Goods into the Territory, or their sale in the Territory, or the exercise by the Distributor of any other rights granted by the Supplier under this contract, infringes the Trademark or other Intellectual Property rights of any other person, provided that:*

*9.10.1 Except pursuant to a final award, the Distributor shall not pay or accept any such claim, or compromise any such proceedings, without the consent of the Supplier;*

*9.10.2 The Distributor shall not do anything which could invalidate any insurance policy or cover which the Distributor may have in relation to any such claim or threat, [and this indemnity shall not apply to the extent that the Distributor recovers any sums under any such policy or cover (which the Distributor shall use its reasonable endeavours to do) – delete if not appropriate];*

*9.10.3 The Distributor shall account to the Supplier for any damages and costs which are awarded against, or which are agreed to be paid by, any other person in respect of any such claim or threat; [and]*

*9.10.4 The Distributor shall take any steps which the Supplier may reasonably require to mitigate or reduce any loss of the Distributor – delete if not appropriate.”.]*



## 10. Confidentiality

10.1 Both parties understand and acknowledge that, by virtue of this contract, they may both receive or become aware of information belonging or relating to the other party, its business, Business Plans, affairs or activities, which information is confidential and proprietary to the other party and/or its Suppliers and/or customers and in respect of which they are bound by a strict duty of confidence (“Confidential Information”).

10.2 In consideration of such Confidential Information being disclosed or otherwise made available to either party for the purposes of the performance of this contract, each party undertakes that it will not at any time, either before or after the termination of the present contract, and either directly or indirectly, disclose, divulge or make unauthorized use of any Confidential Information, except to the extent to which such confidential information:

10.2.1 Is publicly known at the time of its disclosure or being made available to it;

10.2.2 After such disclosure or being made available to them, becomes publicly known otherwise than through a breach of this provision;

10.2.3 Is required by law, regulation or order of a competent authority (including any regulatory or governmental body or securities exchange) to be disclosed by the party in question, provided that, where practicable, the other party is given reasonable advance notice of the intended disclosure.

10.3 Upon the earlier of a request from the other party or the termination of this contract, each party shall return to the other or destroy all documents or records in any medium or format containing any Confidential Information which are in its possession or control and shall not retain any copies of them.

10.4 The provisions of this Article 10 shall continue without limit of time, notwithstanding the termination of this contract for any reason.

## 11. Liability

11.1 In any case where employees of one party visit the premises of the other party for the purposes of this contract, the party sending them shall:

11.1.1 Procure that such employees comply with all security, safety and other regulations which are in force at the other party’s premises; and

11.1.2 Indemnify the other party against all liabilities, costs, damages and expenses to the extent that the same are caused by any negligent act or omission by any such employee at the other party’s premises.

*[Option: Limitation of Supplier’s liability*

*“11.2 Except in respect of death or personal injury caused by the Supplier’s negligence, the Supplier shall not be liable to the Distributor by reason of any representation (unless fraudulent), or any implied warranty, condition or other term, for any loss of profit or any indirect, special or consequential loss or damage (whether caused by the negligence of the Supplier, its servants or agents or otherwise) in relation to the supply of the Goods (or*

*any failure to supply them) or their resale by the Distributor, or otherwise arising out of or in connection with this contract.”]*

*[Comment: The Parties should take into consideration that in some legal systems limitations or exclusions of liability may not be effective, or may be subject to restrictions, and that the wording of such a provision should otherwise reflect the applicable law of the contract.]*

## 12. Duration and termination

12.1 This contract will take effect on the date of its signature by both parties or, if signatures do not occur simultaneously, when the latest signature is given. Unless sooner terminated pursuant to Articles 12.2, 12.3 or 12.4, this contract shall continue for a period of *[specify period]*.

*[Comment: The duration of the contract may be limited for reasons of applicable law (for example, it may need to be limited to 5 years where the EU vertical agreements block exemption is relevant).]*

*[Option: Termination for convenience*

*“12.2 Either party shall be entitled to terminate this contract at any time by giving not less than *[specify period]* written notice to the other.”]*

12.3 The Supplier may (without limiting its rights under Article 5.5) terminate this contract with immediate effect by giving written notice to the Distributor, if the latter fails to pay any sum payable by it under this contract within *[specify figure]* days of the due date for payment.

12.4 Either party may (without limiting any other remedy) at any time terminate this contract by giving written notice to the other if:

12.4.1 The other party commits any breach of this contract and (if capable of remedy) fails to remedy the breach within *[thirty (30) – specify any other figure]* days after being required by written notice to do so; or

12.4.2 The other party goes into liquidation, becomes bankrupt, makes a voluntary arrangement with its creditors or has a receiver or administrator appointed.

Comment: References to events of insolvency will need to be adapted for the legal system in question.

12.5 For the purposes of the Article 12.4.1, a breach of any provision of this contract shall be considered capable of remedy if the party in breach can comply with the provision in question in all respects other than as to the time of performance.

*[Comment: In some legal systems it may be desirable not to include a provision for termination on breach, or to include more detailed provisions concerning the rights and remedies of the Parties in this respect.]*

12.6 The termination of this contract for any reason shall not affect:

12.6.1 Either party’s accrued rights, remedies or liabilities including payments due at the effective date of termination; or

12.6.2 The coming into force or the continuance in force of any provision

of this contract which is expressly or by implication intended to come into or continue in force on or after termination.

### 13. Consequences of termination

13.1 The following provisions shall take effect upon the termination of this agreement for any reason.

13.2 The Supplier shall be entitled to repurchase from the Distributor all or part of any stocks of the Goods then held by the Distributor at their invoice value or the value at which they stand in the books of the Distributor, whichever is lower, subject to the following provisions:

13.2.1 The Supplier shall be responsible for arranging and for the cost of transport and insurance;

13.2.2 The Distributor may sell stocks for which it has accepted orders from customers prior to the date of termination, or in respect of which the Supplier does not, by giving written notice to the Distributor within *[specify period]* after the date of termination, exercise its right to repurchase; and

13.2.3 For those purposes and to the necessary extent, the provisions of this contract shall continue in full force and effect.

13.3 The Distributor shall at its own expense within *[specify period]* send to the Supplier or otherwise dispose of in accordance with the directions of the Supplier all samples of the Goods and any advertising, promotional or sales material relating to the Goods then in the possession of the Distributor.

13.4 Outstanding unpaid invoices rendered by the Supplier in respect of the Goods shall become immediately payable by the Distributor and invoices in respect of goods ordered prior to termination but for which an invoice has not been submitted shall be payable immediately upon submission of the invoice.

13.5 The Distributor shall cease to promote, market or advertise the Goods or to make any use of the Trademarks or any other Intellectual Property of the Supplier except for the purpose of selling any goods in respect of which the Supplier does not exercise its right or repurchase.

13.6 The Distributor shall at its own expense join with the Supplier in procuring the cancellation of any registration effected pursuant to Article 9.5.

*[Option: Post-term non-compete provision]*

*“13.7 The Distributor shall not for a period of [one year – specify any shorter provision] after termination of this contract be concerned or interested, either directly or indirectly, in the manufacture or distribution in the Territory of any goods which compete with any of the Goods.”*

*Comment: The competition law implications of such a provision under any applicable law will need to be considered. This wording is intended to comply with the EU vertical agreements block exemption.]*

## 14. Change of circumstances (hardship)

*[Comment: The Parties should be free to consult each other in the event of a major change in circumstances – particularly one creating hardship for a particular party. However, an SME should only include the option at the end of Article 14.4 (right to refer to the courts/arbitral tribunal to make a revision or to terminate the contract) if (i) the SME considers that it is not likely to be used against that party's interests by a party in a stronger tactical position or (ii) the right to refer to a court/tribunal is already an existing right under the applicable governing law in the event of hardship.]*

14.1 Where the performance of this contract becomes more onerous for one of the Parties, that party is nevertheless bound to perform its obligations subject to the following provisions on change of circumstances (hardship).

14.2 If, however, after the time of conclusion of this contract, events occur which have not been contemplated by the Parties and which fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations (hardship), that party shall be entitled to request revision of this contract provided that:

14.2.1 The events could not reasonably have been taken into account by the affected party at the time of conclusion of this contract;

14.2.3 The events are beyond the control of the affected party; and

14.2.4 The risk of the events is not one which, according to this contract, the party affected should be required to bear.

14.3 Each party shall in good faith consider any proposed revision seriously put forward by the other party in the interests of the relationship between the Parties.

*[Option (add if wished; otherwise delete if not applicable or not enforceable under the law governing the contract – see comment at beginning of Article 14):*

*“14.4 If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 23. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances, or to terminate this contract at a date and on terms to be fixed.”]*

## 15. Force majeure

15.1 “Force majeure” means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of this contract or to have avoided or overcome it or its consequences.

15.2 A party affected by *force majeure* shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent that the delay or non-performance is due to any *force majeure* of which it has notified the other party in accordance with Article 15.3. The time for performance of that obligation shall be extended accordingly, subject to Article 15.4.

15.3 If any *force majeure* occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.

15.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by *force majeure* for a continuous period in excess of three *[specify any other figure]* months, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the *force majeure*.

*[Alternative: If preferred, replace 15.4 with the following alternative:*

*“15.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of three [specify any other figure] months, the Parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 [specify any other figure] days, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the force majeure.”]*

## 16. General warranties

16.1 Each party warrants to the other that:

16.1.1 It has the authority to enter into this contract;

16.1.2 The signatory to this contract for and on behalf of that party is authorized and fully empowered to execute this contract on that party's behalf;

16.1.3 The entry into and performance of this contract by that party will not breach any contractual or other obligation owed by that party to any other person, any rights of any other person or any other legal provision;

16.1.4 The entry into and performance of this contract by that party require no governmental or other approvals or, if any such approval is required, it has been obtained; and

16.1.5 It will at all times during the Term of this contract comply with the terms of and maintain in force any necessary governmental or other approvals, consents, notifications, registrations or other legal requirements for the performance by that party of its obligations under this contract.

## 17. Entire agreement

17.1 This contract sets out the entire agreement between the Parties. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. *[Add where relevant: This contract supersedes any previous agreement or understanding relating its subject matter.]*

17.2 This contract may not be varied except by an agreement of the Parties in writing (which may include e-mail) [*Add where Article 14.4 is included: “Or in accordance with Article 14.4”*].

## **18. Notices and writing**

18.1 Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified in Article 18.2 below, in a manner that ensures receipt of the notice can be proved.

18.2 For the purposes of Article 18.1, notification details are the following, unless other details have been duly notified in accordance with this Article:

- (a) For the Supplier;
- (b) For the Distributor.

## **19. No partnership or agency**

Nothing in this contract shall (i) be deemed to constitute a partnership in law between the Parties, (ii) constitute either party the agent of the other for any purpose or (iii) entitle either party to commit or bind the other (or any member of its respective Group) in any manner.

## **20. Assignment and subcontracting**

20.1 This contract is personal to the Parties and, except to the extent necessary for the collection of outstanding bills through a factoring agent, neither party shall without the prior written approval of the other:

20.1.1 Assign, mortgage, charge or otherwise transfer or deal in, or create any trust over, any of its rights; or

20.1.2 Subcontract or otherwise delegate the whole or any part of its rights or obligations under this contract to another person.

## **21. Effect of invalid or unenforceable Articles**

21.1 If any provision of this contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this contract shall continue to be valid as to its other provisions and the remainder of the affected provision, unless it can be concluded from the circumstances that, in the absence of the provision found to be null and void, the Parties would not have concluded this contract.

21.2 The Parties shall use all reasonable efforts to replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

**[Add where relevant:] 22. Authorizations**

22.1 This contract is conditional upon the following authorizations first being obtained *[specify the authorization(s) or other conditions required e.g. of a governmental or regulatory authority]*.

22.2 The relevant party shall use all reasonable efforts on its part to obtain such authorizations and shall notify the other party promptly of any difficulty encountered.

**23. Dispute resolution procedure**

Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of *[specify the arbitration institution]* by *[specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators]* appointed in accordance with the said rules. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.

*[The following are alternatives to a specified arbitral institution under Article 23:*

*Alternative 1: Ad hoc arbitration*

*Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of UNCITRAL [specify other rules] by [specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators] appointed by [specify name of appointing institution or person]. The place of arbitration shall be [specify]. The language of the arbitration shall be [specify].]*

*[Alternative 2: State courts*

*Any dispute, controversy or claim arising out of or relating to this contract, in particular its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled by the courts of [specify place and country] which will have exclusive jurisdiction.]*

**24. Language of contract**

This contract has been negotiated and concluded in *[English]*. It may be translated into any other language for practical purposes, but the *[English]* version shall prevail in the event of any doubt.

**25. Applicable law**

*[Alternative 1: “Questions relating to this contract which are not settled by the provisions contained in this contract itself shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention of 1980, hereafter referred to as CISG) as well as the UNIDROIT Principles of International Commercial Contracts, and to the extent that such questions are not covered by CISG or the UNIDROIT Principles, by reference to [specify the relevant national law].”]*

*[Alternative 2: “[Specify national law] shall apply to this contract.”]*

## Schedule 1: The Goods

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## Schedule 2: Minimum purchase quantities

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## Schedule 3: Minimum/maximum order quantities

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## Schedule 4: Terms of supply

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### 1. Quantity of the Goods

1.1 *[Subject to Article 2.4 of this contract – delete if not applicable], the quantity of the Goods to be supplied by the Supplier shall be as set out in each order submitted by the Distributor (if confirmed by the Supplier).*

1.2 *[Each order shall be subject to the minimum/maximum quantities specified in schedule 3 – delete if not applicable.]*

1.3 *[The Supplier reserves the right to deliver up to [specify] % more or [specify] % less than the quantity ordered without any adjustment in the price, and the quantity so delivered shall be deemed to be the quantity ordered – delete if not applicable.]*

### 2. Delivery of the Goods

The Goods shall be delivered to the Supplier on the following basis (references being to the latest Incoterms of the International Chamber of Commerce at the date of conclusion of this contract): Ex works/FOB *[specify sea or air port]* / Other (specify).

*[Comment: Delete or fill in as applicable.]*



### 3. Inspection of the Goods

*[Option 1: Inspection before delivery]*

“The Supplier shall *[at its own cost – delete if not applicable]* arrange for testing and inspection of the Goods at the Supplier’s premises before shipment *[by – specify body]*. *[The Supplier shall have no liability for any claim in respect of any defect in the Goods which would be apparent on inspection and which made after shipment – delete if not applicable.]*”

*[Option 2: Inspection after delivery]*

“The Distributor shall, within *[seven (7) – specify any other period]* days of the arrival of each delivery of the Goods at the Distributor’s premises, inspect the Goods at its own cost and notify the Supplier in writing of any defect in goods or any other matter by reason of which the Distributor alleges that the Goods delivered do not comply with this contract, and which should be apparent on inspection – delete if not applicable.”

### 4. Documents

The Supplier shall make available to the Distributor (or shall present to the bank specified by the Distributor) the following documents:

*[specify documents e.g. packing list / insurance documents / certificate of origin / certificate of inspection / customs documents / other documents.]*

### 5. Transfer of risk

Risk of damage to or loss of the Goods *[and the property in the Goods – delete if not applicable]* shall pass to the Distributor in accordance with the relevant Incoterms or otherwise at the time of delivery of the Goods.

*[Option: “6. Retention of title*

*6.1 Notwithstanding the delivery of and the passing of risk in the Goods, or any other provision of this contract, the property in the Goods shall not pass to the Distributor until the Supplier has received payment in full of the price of the Goods.*

*6.2 Until property in the Goods passes to the Distributor:*

*6.2.1 The Distributor shall hold the Goods on behalf of the Supplier, and shall keep the Goods separate from those of the Distributor and third parties and properly stored, protected and insured and identified as the Supplier’s property;*

*6.2.2 Provided none of the events referred to in Article 12.4.2 of this contract has taken place in relation to the Distributor, the Distributor may resell or use up the Goods in the ordinary course of its business (in which case property in the Goods will be deemed to pass to the Distributor);*

*6.2.3 Provided the Goods have not been sold or used up, the Supplier may at any time require the Distributor to deliver up to the Supplier the Goods for which the Supplier has not received payment in full of the price and, if the Distributor fails to do so forthwith, the Supplier may enter upon any premises of the Distributor or any third party where the Goods are stored and repossess the Goods; and*

*6.2.4 The Distributor shall not pledge or in any way charge by way of security for any indebtedness any of the Goods which remain the property of the*

*Supplier, but if the Distributor does so all money owing by the Distributor to the Supplier shall become due and payable.”.]*

*[Comment: The Parties should take into consideration that in some legal systems a retention of title provision is not possible, or may be ineffective in the case of insolvency of the Distributor, or it may not be possible to enter the Distributor’s premises or obtain repossession of the Goods without a court order. A retention of title provision will not be appropriate if the contract requires payment to be made on or before delivery.]*

## **Schedule 5: Supplier’s trademarks**

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### DATE AND SIGNATURE OF THE PARTIES

Supplier	Distributor
Date . . . . .	. . . . .
Name . . . . .	. . . . .
Signature	Signature

## Chapter 7

# International Commercial Agency

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### Introduction

This Model Contract encompasses the most commonly accepted provisions governing the **relationship between a Principal and a commercial Agent**.

1. The contract is intended for use in connection with the introduction, promotion, negotiation and conclusion of sales of products or services by an independent Agent on behalf of a Principal, within a defined territory.
2. A main reason to appoint an Agent is that the Principal is unable to carry out the introduction, promotion, negotiation and conclusion of sales of products or services in a particular territory by itself, or is unwilling to make the necessary investments that are required.
3. The Agent may be a physical person or a company. *When the Agent is a physical person, under no circumstances can it be considered as an employee of the Principal.*
4. *The Agent's strength lies in its contacts with customers and its weakness derives from the fact that such customers belong to the Principal.* This explains why, in many countries, such as EU countries, public policy laws aim to protect the Agent's rights, especially upon the termination of the contract.
5. *The Parties are subject to mandatory legal provisions of public policy* that may apply regardless of the law of the contract chosen by the Parties. Such provisions are binding, which means that the Parties cannot ignore or decide not to apply them. These provisions may restrict the validity of certain provisions of the contract, and may allow a court to reduce or extend the obligations of the Parties.
6. Before any discussion takes place between the Parties, it is therefore strongly recommended to check whether the agency contract contemplated may be impacted by such laws.
7. When the agency contract applies to products, the Principal may or may not be the manufacturer of these products. The Principal may be, for instance, a distributor.
8. The *main purpose* of the contract is to establish the level of each party's obligations towards the other, such as the authority of the Agent to commit the Principal (Article 2.2), to receive payments on his behalf (Article 2.3), the obligation for the Principal to accept the orders transmitted by the Agent (Articles 3.4 and 3.5), the information which the Principal should

pass on to the Agent, such as the minimum overall orders, any change in the range of products or services, price, etc. (Articles 3.3, 3.7), minimum orders (Article 4), advertising, fairs and exhibitions (Article 5), Internet sales (Article 6), non-competition (Article 7), trademarks and property rights (Article 9), exclusivity (Article 10) commissions (Articles 11 and 12), consequences on termination (Article 14 and 15) and assignment and appointment of sub-Agents (Article 19).

9. Parties should *review alternatives and options* proposed in order to strike those that are irrelevant to the Parties' common intentions.
10. *Standard provisions* have been incorporated, including financial responsibility of the Agent (optional clause 13), *force majeure* – excuse for non-performance (Article 16) and change of circumstances (hardship) (Article 17).

## ITC MODEL CONTRACT FOR AN INTERNATIONAL COMMERCIAL AGENCY

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***PARTIES:***

***Principal***

Name (name of company)

.....

Legal form (e.g. limited liability company)

.....

Country of incorporation and (if appropriate) trade register number

.....

Address (address of place of business, phone, fax, e-mail)

.....

.....

Represented by (name, position, legal title of representation, address)

.....

.....

***Referred to as the “Principal”***

***Agent***

Name (name of company)

.....

Legal form (e.g. limited liability company)

.....

Country of incorporation, trade register number and licence number (if appropriate)

.....

Address (address of place of business, phone, fax, e-mail)

.....

.....

Represented by (name, position, legal title of representation, address)

.....

.....

*[Add any further information required e.g. The Parties’ fiscal identities]*

Referred to as the “Agent”

Collectively “the Parties”

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## Background

- A. The Principal carries on business in the (field/provision/supply) of *[specify]*.
- B. The Agent undertakes as part of its business the (introduction and) *[delete if not relevant]* the promotion of the sale of products (or services) in relation to *[specify]*.
- C. The Principal wishes to appoint the Agent to (introduce and) *[delete if not relevant]* promote the sale of such products (or services) in relation to the Principal's business, and the Agent is willing to promote the sale of such products (or services) accordingly, on the terms of the present contract.

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## Operative provisions

### 1. Scope of appointment

1.1 The Principal appoints the Agent as its commercial Agent, to promote the sale of the product(s) (or services) within the territory (and in the promotion channels) hereafter defined.

1.2 **Product(s)** (or service(s)). The following product(s) (or service(s)) shall be promoted by the Agent under this contract: *[describe the product(s)/service(s)]*

– ..... ;

– ..... ;

1.3 **Territory.** The product(s) (or service(s)) shall be promoted by the Agent under this contract within the following territory: *[describe the territory]*

– ..... ;

– ..... ;

1.4 **Promotion channel(s).** *[Delete if no relevant]* The product(s) (or service(s)) shall be promoted by the Agent throughout the following promotion channel(s): *[describe the promotion channel(s)]*

– ..... ;

– ..... ;

*Comment: The Parties may wish to limit the scope of the agency contract to certain categories of customers. As regards the identification of the promotion channels, the Parties can either list the categories that fall under this contract (retailers, industrial users, mass distributors) or list the categories to which the contract will not apply.*

### 2. Obligations of the Agent

2.1 In performing its activities, the Agent shall look after the Principal's interests and act dutifully and in good faith.

2.2 The Agent shall (introduce) *[delete if not relevant]* the product(s) (or service(s)) and promote the sale of such product(s) (or services) in the territory (and in the promotion channels) *[delete if not relevant]* in accordance with the terms agreed in this contract. The Agent has no authority to make contracts on behalf of, or in any way to bind the Principal, but it shall pass any offer received to the Principal.

*[Alternative (where the Agent has the authority to bind the Principal): “2.2 The Agent shall (introduce) the product(s) (or service(s)) [delete if not relevant], promote, negotiate and conclude the sale of the product(s) (or service(s)) in the territory (and in the promotion channels) [delete if not relevant] in accordance with the terms agreed in this contract. The Agent shall pass any order received to the Principal.”]*

2.3 The Agent is not entitled to receive payments in the name and on behalf of the Principal without its prior written authorization to that effect. If the Agent has been authorized, it must transmit the payments as soon as possible to the Principal and until then hold them separately on deposit on the Principal's behalf.

2.4 The Agent shall strictly observe the contractual provisions communicated by the Principal and shall bring to the attention of the customers the terms and conditions of sale (particularly the delivery period, price and payment) communicated by the Principal.

2.5 The Agent shall with due diligence keep the Principal informed about its activity, the market conditions and the state of competition. The Agent shall provide all the necessary information in *[specify language]* to the Principal available to it concerning the laws and regulations within the territory that shall apply to the product(s) (or service(s)) as well as its activity. The Agent shall further send every (three months) *[specify any other figure]* a report on its activities.

2.6 The Agent shall perform its activity independently and shall, in no case, be considered as an employee of the Principal.

### **3. Obligations of the Principal**

3.1 In its relation with the Agent, the Principal must act dutifully and in good faith.

3.2 The Principal shall in particular remunerate the Agent according to the commission and terms of payment provided for in this contract.

3.3 The Principal shall inform the Agent before it starts to perform the obligations mentioned in paragraph 2.2 of the minimum overall orders that should be collected in order for the Principal to be able to supply the product(s) (or service(s)).

3.4 The Principal shall in addition inform the Agent without delay of its acceptance, refusal or non-execution of any offers/orders transmitted by the Agent.

3.5 The Principal shall not reject the offers/orders transmitted by the Agent unless:

3.5.1 There are serious doubts, supported by any written evidence, on the solvency of the customer.

3.5.2 The offer does not meet the Principal's expectations in terms of image and standards.

3.5.3 The overall orders collected by the Agent are below the minimum overall orders referred to in paragraph 3.3.

3.6 The Principal's unjustified refusals of offers/orders shall be considered as a breach of the contract by the Principal.

3.7 The Principal shall immediately inform the Agent of any change in its range of product(s) (or service(s)) its prices, conditions of sale or terms of payment as well as of any change of the technical specifications or capacity of supply of the product(s) (or service(s)). Should the Principal expect that its capacity of supply will be significantly lower than the Agent's normal expectancy, it shall inform the Agent without delay.

3.8 The Principal shall provide the Agent, free of charge, with all information and documentation needed for the performance of the present contract, including, but not limited to, the terms and conditions of sale, price lists, technical documents.

3.9 The Principal shall furthermore keep the Agent informed of any relevant communication with or for the attention of the customers in the territory.

#### **4. Minimum orders**

4.1 The Agent will have to meet the annual minimum orders objectives set out in schedule I.

4.2 These objectives will be revised annually [*specify any other period*].

4.3 If, at the end of the year [*specify any other period*], the minimum number/volume of orders applicable to such year is not met by the Agent, the Principal shall be entitled, subject to giving a one month's notice and not later than two months [*specify any other period*] after the end of that year at his choice:

4.3.1 To terminate the present contract, under Article 14;

4.3.2 To cancel the Agent's exclusivity (whenever applicable); or

4.3.3 To reduce the extension of the territory, by excluding the territories where the Agent has made less promotion.

#### **5. Advertising, fairs and exhibitions**

5.1 The Parties shall agree on the advertising campaign to be made within the territory.

5.2 The cost of all agreed advertising campaigns shall be at the Principal's expense.

[*Alternative: "5.2 The cost of agreed advertising campaigns shall be apportioned between the Parties as follows:*

*Principal: . . . . . %*

*Agent: . . . . . %]*



5.3 The Principal shall supply the Agent, free of charge, with any advertisement content and materials in relation with the product(s) (or service(s)) needed for the performance of this contract.

*[Option: “5.4 The Principal shall also authorize the Agent to issue advertising content and materials for use in relation with the product(s) or service(s) and not otherwise. All advertisement content and materials issued by the Agent in relation with the product(s) (or service(s)) shall strictly conform to the Principal’s guidelines and marketing policies.”]*

5.5 In any event, the Agent shall ensure that the advertising campaign as well as the advertisement content and materials strictly comply with local rules and regulations.

5.6 The Parties shall participate in the fairs or exhibitions within the territory listed in schedule 2.

5.7 The Principal will bear the expenses incurred for the participation in a fair or exhibition.

*[Alternative: “5.7 The cost of the agreed Agent’s participation shall be apportioned between the Parties as follows:*

*Principal: . . . . . %*

*Agent: . . . . . %”]*

## **6. Internet**

The Agent is not authorized to advertise or promote the sale of the products or its activity as Agent of the Principal on Internet without the Principal’s prior written approval.

## **7. Non-competition**

*[Comment: The Parties may wish to extend the terms of the non-competition clause after the termination of the contract. In which case, the Parties should take into consideration the mandatory provisions of the EC Directive of 18 December 1986 and other legal systems that may restrict the validity of such a clause and allow the court to reduce the obligations of the Parties.]*

7.1 The Agent undertakes not to compete with the Principal or to enter into any business relationship with competitors of the Principal for the entire duration of the present contract.

7.2 In particular, the Agent undertakes not to represent, manufacture, provide or sell, directly or indirectly, in the territory (and in the promotion channels) any product(s) (or service(s)) identical with the product(s) (or service(s)) which compete with the product(s) (or service(s)) without prior written authorization of the Principal.

*[Option: “7.3 However, the Agent may represent, manufacture, provide or sell product(s) (or service(s)) which are not competing with the product(s) (or service(s)), provided it informs the Principal in advance of such activity.”]*

*[Option: “7.4 The Agent shall inform the Principal of any existing agreement, binding the Agent, towards any other product(s) (or service(s)), whether as manufacturer,*

*representative, Agent or retailer, and shall thereafter keep the Principal informed of any such activity. With regards to this undertaking, the Agent declares that, on the date on which the present contract is signed, it represents (and/or manufactures, distributes, sells directly or indirectly), the products (or service(s)) listed in schedule 3. The exercise of such activity by the Agent shall in no case prejudice the fulfilment of its obligations towards the Principal under the present contract.”]*

*[Option: “7.5 This undertaking shall remain valid during a period of two [specify any other figure] years after the termination of the present contract.”]*

## **8. Restriction of territory**

8.1 The Agent shall not solicit orders (or negotiate and conclude contracts) *[delete if not applicable]* outside the territory, unless expressly agreed by the Principal.

8.2 The Agent shall notify the Principal of any inquiry received from outside the territory. Such notification shall not entitle the Agent to any commission.

## **9. Trademarks and property rights**

9.1 The Principal hereby grants to the Agent the right to use the trademarks, trade names or intellectual property in relation to the product(s) (or service(s)) for the purpose of exercising its rights and performing its obligations under this contract.

9.2 The Agent shall use the Principal’s trademarks, trade names or intellectual property in relation to the product(s) (or service(s)) in the form and manner specified by the Principal and in the Principal’s sole interest, and not otherwise.

9.3 Any use of the Principal’s trademarks, trade names or intellectual property on the Agent’s letter paper, on advertisement materials or on any other materials addressed to third parties or on Internet shall require the prior consent of the Principal.

9.4 The Agent agrees neither to register, nor to allow or favour the registration by third parties of any of the trademarks in the territory. The Agent further agrees not to include the trademarks in its own trade or company name.

9.5 The Agent shall notify the Principal of any infringement of the Principal’s trademarks, trade names and symbols or any other property rights it may become aware of.

9.6 The Principal warrants to the Agent that the products as well as the Principal’s trademarks, trade names or any other symbols do not infringe intellectual any property rights of any third parties in the territory.

9.7 In this respect, the Principal undertakes to hold harmless the Agent from any and all costs, losses, damages and liabilities which may occur due to trademarks infringement by the use of the Principal’s trademarks, trade names or any other symbols by the Agent.

## 10. Exclusivity

*[Strike out option and alternative if not relevant]*

The Principal grants exclusivity to the Agent, which means that it undertakes not to appoint other Agents within the territory (and in the promotion channels) for the duration of the present contract.

*[Option (Direct sales by the Principal): “However, the Principal retains the right to directly market or sell the product(s) (or service(s)) in the territory (and in the promotion channels), including via Internet.”]*

*[Alternative (No exclusivity): “The Principal does not grant exclusivity to the Agent, which means that it reserves the right to appoint other Agents within the territory (and in the promotion channels) for the duration of the present contract.”]*

## 11. Agent’s commission – right to commission

11.1 Unless when the right to commission has been expressly excluded by the Parties, the Agent is entitled to the commission provided for in schedule 4 on all sales of the product(s) (or service(s)) made within the territory throughout the duration of this contract, whether such sale was generated by the Agent or not, in accordance with Article 10.

*[Option (No commission on direct sales): “However, the Agent shall not be entitled to commission on any direct sales of the product(s) (or service(s)) made by the Principal within the territory throughout the duration of this contract.”]*

*[Alternative (When exclusivity has not been granted to the Agent): “11.1 Unless when the right to commission has been expressly excluded by the Parties, the Agent is entitled to the commission provided for in schedule 4 on all sales of the product(s) (or service(s)) made within the territory throughout the duration of this contract which have been generated by the Agent.”]*

*[Option 11.2 (Commission on post contractual sales): “The Agent shall also be entitled to commission on sales concluded on the basis of offers/orders transmitted to or received by the Principal after the termination of this contract, provided the Agent informed the Principal in writing of the pending negotiation upon termination of the contract.”]*

11.3 The Agent shall acquire the right to commission as soon as the orders have been accepted by the Principal.

*[Alternative: “11.3 The Agent shall acquire the right to commission upon full payment by the customer(s) of the invoiced product(s) or (service(s)). In case of partial payment by the customer(s), made in compliance with the sales contract, the Agent shall be entitled to a proportional commission.”]*

11.4 In any event, no commission shall be due in respect of offers/orders accepted by the Principal, which could not be executed for reasons beyond the Principal’s control.

## 12. Method of calculating commission and payment

12.1 The commission shall be calculated on the net amount of the sale invoiced by the Principal to the customers, clear of any additional charges and

of all taxes of any kind, and provided that such additional charges and taxes are separately stated in the invoice.

12.2 The commission shall cover any and all costs and expenses incurred by the Agent in fulfilling its obligations under the present contract.

12.3 The commission shall be calculated in the currency of the contract of sale on which the commission is payable, unless otherwise agreed by the parties.

12.4 Any taxes imposed in the Agent's country on its commission shall be for the Agent's account, including whenever applicable, any withholding taxes payable by the Principal on the Agent's behalf.

12.5 The commission shall be paid to the Agent not later than on the last day of the month following each quarter *[specify any other period]* in which it became due.

12.6 If payment is not made on the due date, the Agent shall be entitled, without limiting any other rights it may have, to charge interest on the outstanding amount (both before and after any judgment) at the rate of *[specify]* % per annum.

*[Comment: The Parties should take into consideration that in some legal systems payment of interest is unlawful, or is subject to a legal maximum rate, or there is provision for statutory interest on late payments.]*

12.7 The Principal shall provide the Agent with a statement of the commissions due in respect of each quarter and shall set out all the business in respect of which such commission is payable.

12.8 The Agent shall be entitled to demand that it be provided with all the information, and in particular an extract from the books, which is available to its Principal and which it needs in order to check the amount of the commission due.

### **13. Financial responsibility (Option)**

*[Comment: Should the Parties wish to include a Del Credere clause, they should pay attention to the legal provisions applicable in the country where the Agent is established, as some countries have mandatory requirements on Del Credere obligations.]*

13.1 The Agent shall satisfy itself, with due diligence, of the solvency of customers whose orders are transmitted to the Principal. The Agent shall not take orders from customers whose financial standing and capacity of meeting their financial commitments towards the Principal are questionable without informing the Principal in advance of such a fact.

*[13.1 (Option) The Agent shall act as a Del Credere Agent according to the conditions stated in schedule 5.*

*In this respect, the Agent hereby undertakes to reimburse to the Principal the total (or partial) amount of the unpaid sums that the Principal is entitled to receive from customers and which have not been paid for reasons for which the Principal is not responsible.*

*The Del Credere obligation does not cover the expenses incurred by the Principal for recovering its credits.]*

## 14. Term, termination and consequences of termination

14.1 This contract shall enter into force at the date of its signature (or at the date of the latest signature if signed by the Parties at different dates) and shall continue for an indefinite period. Each party may terminate the present contract at any time by giving a *[specify figure]* months written notice to the other party.

*[Alternative (Fixed term): “14.1 This contract shall enter into force at the date of its signature (or at the date of the latest signature if signed by the Parties at different dates) and, shall expire on [specify date].”]*

14.2 If the Agent is a physical person, this contract will end automatically at the death of the Agent.

14.3 Each party may terminate this contract with immediate effect by written notice in case of:

14.3.1 A substantial breach by the other party of its obligations which could be qualified as gross negligence or wilful misconduct;

14.3.2 Exceptional circumstances beyond the control of the Parties, which render the continuation of this contract impossible;

14.3.3 Failure to remedy to any other breach by the other party of its obligations under this contract, after a 15 days written notice to remedy to such breach.

14.4 The termination of this contract for any reason shall not affect:

14.4.1 Each party’s accrued rights, remedies or liabilities, including payments due at the effective date of termination; or

14.4.2 The application of provisions of this contract that are meant to survive after the expiration of this contract.

14.5 At the end of this contract, the Principal shall pay all and any commissions due to the Agent.

14.6 At the end of this contract, the Agent shall return to the Principal any advertising material and other documentation provided free of charge to the Agent as well as any products and samples which are still in its possession.

## 15. Indemnity or compensation on termination

*[Comment: In some jurisdictions there exist mandatory legal provisions of public policy that are binding upon the Parties. Such is the case in the European Union where the EC Directive 86/653/EEC of 18 December 1986 grants the Agents the right to claim a termination indemnity subject to certain conditions.]*

15.1 At the end of this contract, the Agent will be entitled to receive a termination indemnity which will be equivalent to (one or two years’ commissions *[specify]* based on the average annual commissions paid to the Agent over the preceding 3 years.

15.1.1 In order to receive this termination indemnity, the Agent will have to notify the Principal in writing its wiliness to receive same within one year after the end of the contract. Failure to do so

will result in the Agent losing its right to receive the termination indemnity.

15.1.2 The termination indemnity shall be due in the event of the Agent's death and payable to the Agent's heirs.

15.1.3 The Agent shall have no right to receive the termination Indemnity in the following cases:

- When the Principal has terminated the contract for the reasons set out in paragraph 14.3 above.
- When the Agent has terminated the contract, unless such termination was caused by the breach of the Principal's obligations, or by the age, infirmity or illness of the Agent, which render the continuation of this contract impossible.
- When, with the agreement of the Principal, the Agent assigns its rights and duties under the present contract to another person.

*[Alternative: "15.1 No right to indemnity (inconsistent with the EC Directive of 18 December 1986 and mandatory legal provisions of countries which have implemented the EC Directive or which have adopted similar provisions): No termination indemnity or compensation shall be payable to the Agent at the end of this contract."]*

15.2 The above provision shall not affect the Agent's right to claim damages for breach of contract by the Principal.

## **16. Force majeure – excuse for non-performance**

16.1 "*Force majeure*" means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of this contract or to have avoided or overcome it or its consequences.

16.2 A party affected by *force majeure* shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent that the delay or non-performance is due to any *force majeure* of which it has notified the other party in accordance with Article [16.3]. The time for performance of that obligation shall be extended accordingly, subject to Article [16.4].

16.3 If any *force majeure* occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.

16.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by *force majeure* for a continuous period in excess of three [*specify any other figure*] months, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the *force majeure*.

*[Alternative: “16.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of three [specify any other figure] months, the Parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 [specify any other figure] days, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the force majeure.”]*

## **17. Change of circumstances (hardship)**

*[Comment: The Parties should be free to consult each other in the event of a major change in circumstances – particularly one creating hardship for a particular party. However, an SME should only include the option at the end of Article 17.4 (right to refer to the courts/arbitral tribunal to make a revision or to terminate the contract) if (i) the SME considers that it is not likely to be used against that party’s interests by a party in a stronger tactical position or (ii) the right to refer to a court/tribunal is already an existing right under the applicable governing law in the event of hardship.]*

17.1 Where the performance of this contract becomes more onerous for one of the Parties, that party is nevertheless bound to perform its obligations subject to the following provisions on change of circumstances (hardship).

17.2 If, however, after the time of conclusion of this contract, events occur which have not been contemplated by the Parties and which fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations (hardship), that party shall be entitled to request revision of this contract provided that:

- 17.2.1 The events could not reasonably have been taken into account by the affected party at the time of conclusion of this contract;
- 17.2.2 The events are beyond the control of the affected party; and
- 17.2.3 The risk of the events is not one that, according to this contract, the party affected should be required to bear.

17.3 Each party shall in good faith consider any proposed revision seriously put forward by the other party in the interests of the relationship between the Parties.

*[Option [delete if not applicable or not enforceable under the law governing the contract – see Comment at beginning of Article 17]:*

*“17.4 If the Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 25; the [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances, or to terminate this contract at a date and on terms to be fixed.”]*

## **18. No partnership**

Nothing in this contract shall be deemed to constitute a partnership in law between the Parties.

## 19. Assignment and appointment of sub-Agents

*[Comment: Some countries have mandatory requirements on the appointment of sub-Agents. Therefore the Parties should check the situation under the relevant law before deciding which option to choose.]*

19.1 This contract is personal to the Parties and *[include only where relevant, except to the extent necessary for the collection of outstanding bills through a factoring Agent,]* neither party shall without the prior written approval of the other:

19.1.1 Assign, mortgage, charge or otherwise transfer or deal in, or create any trust over, any of its rights; or

19.1.2 Subcontract or otherwise delegate the whole or any part of its rights or obligations under this contract to another person.

*[Alternative: 19.1 The Agent may subcontract or otherwise delegate the whole or any part of its activity or any other of its obligations under this contract to a third party. The Agent shall be responsible for the activities of its sub-Agents or delegates.]*

19.2 The Parties agree not to engage sub-Agents, delegates and/or employees of the other party.

## 20. Notices

20.1 Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified in Article 20.2 below, in a manner that ensures receipt of the notice can be proved.

20.2 For the purposes of Article 20.1, notification details are the following, unless other details have been duly notified in accordance with this Article:

- .....
- .....

## 21. Entire agreement

21.1 This contract sets out the entire agreement between the Parties. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. *[Option, add where relevant: “This contract supersedes any previous agreement or understanding relating its subject matter”.]*

21.2 This contract may not be varied except by an agreement of the Parties in writing (which may include e-mail) (add where Article [17.4] or equivalent is included: Or in accordance with Article [17.4].)

## 22. Effect of invalid or unenforceable provisions

If any provision of this contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this contract shall continue to be valid as to its other provisions and the remainder of the



affected provision, unless it can be concluded from the circumstances that, in the absence of the provision found to be null and void, the Parties would not have concluded this contract. The Parties shall use all reasonable efforts to replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

## 23. Confidentiality

23.1 Both parties understand and acknowledge that, by virtue of the present contract, they may both receive or become aware of information belonging or relating to the other party, its business, business plans, affairs or activities, which is confidential and proprietary to the other party and/or its suppliers and/or customers and in respect of which they are bound by a strict duty of confidence (“Confidential Information”).

23.2 In consideration of such Confidential Information being disclosed or otherwise made available to either party for the purposes of the performance of the present contract, both parties hereby undertake that they will not at any time, either before or after the termination of the present contract, and either directly or indirectly, disclose, divulge or make unauthorized use of any Confidential Information, except to the extent to which such Confidential Information:

23.2.1 Is publicly known at the time of its disclosure or is being made available to them.

23.2.2 After such disclosure or being made available to them, becomes publicly known otherwise than through a breach of this undertaking.

23.2.3 Is required by law, regulation or order of a competent authority (including any regulatory or governmental body or securities exchange) to be disclosed by one of the Parties, provided that, where practicable, the other party is given reasonable advance notice of the intended disclosure.

23.3 Upon the earlier of a request from the other party or the termination of this contract, each party shall return to the other all documents or records in any medium or format containing any Confidential Information which are in its possession or control and will not retain any copies of them.

23.4 This undertaking, and the obligations contained herein, will continue without limit of period.

*[Add where relevant:]*

## 24. Authorizations

24.1 This contract is conditional upon the following authorizations first being obtained *[specify the authorization(s) or other conditions required e.g. of governmental or regulatory authority]*.

24.2 The relevant party shall use all reasonable efforts on its part to obtain such authorizations and shall notify the other party promptly of any difficulty encountered.

## 25. Dispute resolution procedure

Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of *[specify the arbitration institution]* by *[specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators]* appointed in accordance with the said rules. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.

*[The following are alternatives to a specified arbitral institution under Article 25:*

*Alternative 1: Ad hoc arbitration*

*“Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of UNCITRAL *[specify other rules]* by *[specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators]* appointed by *[specify name of appointing institution or person]*. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.”*

*[Alternative 2: State courts*

*Any dispute, controversy or claim arising out of or relating to this contract, in particular its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled by the courts of *(specify place and country)* which will have exclusive jurisdiction.”*

## 26. Applicable law

*[Specify national law]* law shall apply to the contract.

*[Add where relevant:]* If the Agent has its place of business and/or performs its activity within the European Union, the mandatory provisions of the EC Directive of 18 December 1986 shall also apply.

**Schedule 1: Minimum orders**

(Article 4.1)

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**Schedule 2: Fairs and exhibitions**

(Article 5.2)

The parties shall participate in the following fairs or exhibitions within the territory:

The Agent	The Principal

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**Schedule 3: List of non competing products (or service(s))  
represented, manufactured, distributed or sold by the agent**

(Article 7.4)

At the time of the conclusion of the present contract, the agent represents (manufactures, distributes or sells) the following product(s) (or services):

- .....
- .....
- .....
- .....
- .....

### Schedule 4: Agent's commission

(Article 11.1)

### Schedule 5: Del Credere (Optional)

(Article 13.1)

The agent undertakes a Del Credere obligation according to the terms and conditions stated hereafter

1 In this respect, the agent shall be responsible for:

*[Option 1: Any transaction transmitted by the agent.*

*Option 2: Only for the transactions for which the Del Credere undertaking has been expressly agreed on a case-by-case basis.]*

2 In case of non payment by the customers, the agent hereby undertakes to reimburse to the principal the following amount:

*[Option 1: The total amount of the sums not recovered.*

*Option 2: No more than . . . . % [specify figure] of the sums not recovered.*

*Option 3: No more than the commission which would be due on such transaction.*

*Option 4: No more than . . . . times [specify figure] the commission which would be due on such transaction.]*

3 The Del Credere obligation does not cover the expenses incurred by the principal for recovering its credits.

4 The agent shall be entitled to an extra commission of . . . . % *[specify figure]* on all business on which the agent has granted a Del Credere.

5 No Del Credere is due if the loss is due to reasons for which the principal is responsible.

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#### DATE AND SIGNATURE OF THE PARTIES

	Agent	Principal
Date . . . . .	. . . . .	. . . . .
Name . . . . .	. . . . .	. . . . .
	Signature	Signature

## Chapter 8

# International Supply of Services

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## Introduction

This Model Contract is a **framework for the supply of services**, an agreement under the terms of which the Client requests the service provider (“The Supplier”) to supply certain services.

1. As most of the Model Contracts of this handbook, this Model Contract provides a series or “menu” of possibilities depending on the background and the nature of the production. Many provisions may not be relevant to the particular contract and should, if not relevant, be deleted.
2. As far as the *duration of performance* is concerned, the Model Contract provides for two main schemes (Article 1.4): In the main option, the services have to be provided on a specific date. In the alternatives, it is contemplated that the services will be provided on different dates and/or during a certain period of time.
3. Article 5 deals with the *duration of the contract* and has to be consistently aligned on the scheme provided for in Article 1.4. An option (not addressed in the model) could be that the contract has a specific term with subsequent renewal requiring mutual agreement.
4. As far as *damages* are concerned (Article 4), the Parties may wish to include liability of the Supplier for lost profit suffered by the Client as a consequence of any breach by the Supplier of his obligations under the contract. Article 4.3 should be amended accordingly.

This Model Contract is a general framework only and must be tailored to the circumstances of the particular collaboration.



## ITC MODEL CONTRACT FOR THE INTERNATIONAL SUPPLY OF SERVICES

***PARTIES:***

***Supplier***

Name (name of company) . . . . .

. . . . .

Legal form (e.g. limited liability company) . . . . .

. . . . .

Country of incorporation and (if appropriate) trade register number . . . . .

. . . . .

Address (address of place of business of the Supplier, phone, fax, e-mail) . . . . .

. . . . .

. . . . .

Represented by (surname and first name, address, position, legal title of

representation) . . . . .

. . . . .

. . . . .

***Client***

Name (name of company) . . . . .

. . . . .

Legal form (e.g. limited liability company) . . . . .

. . . . .

Country of incorporation and (if appropriate) trade register number . . . . .

. . . . .

Address (address of place of business of the Client, phone, fax, e-mail) . . . . .

. . . . .

. . . . .

Represented by (surname and first name, address, position, legal title of

representation) . . . . .

. . . . .

. . . . .

Collectively “the Parties”

## Background

- A. The Client carries on business in the *[field/provision/supply of – specify]*.
- B. The Supplier undertakes as part of its business the provision of services in relation to *[specify]*.
- C. The Client wishes to engage the Supplier to provide such services in relation to the Client’s business, and the Supplier is willing to provide such services accordingly, on the terms of this contract.
- D. *[If necessary, give an additional short explanation of the reason for the contract. If not necessary, delete this sub-section D.]*

## Operative provisions

### 1. Supply of the service – Qualifications of the Supplier

1.1 The Supplier shall provide the following service(s) to the Client, subject to the terms agreed in this contract and the more detailed specifications contained in schedule 1: *[describe the service(s)]*

- .....
- .....
- .....

1.2 The Supplier represents that it has all necessary capacity and qualifications to supply the services the aforementioned services.

1.3 The service(s) to be provided to the Client by the Supplier under this contract shall be rendered at/in *[specify place(s) of performance – delete sub-clause if not relevant]*:

- .....
- .....

1.4 The service(s) to be provided to the Client by the Supplier under this contract shall be rendered on *[specify date/time of performance]*.

*[Alternative 1: If the service(s) are to be provided during a certain time:*

*“1.4 The service(s) to be provided to the Client by the Supplier under this contract shall be rendered between . . . . . and . . . . . [specify timeframe/duration of performance], with the following intervals . . . . . [specify if necessary].”*

*[Alternative 2: If there are different times/timeframes for the various services to be provided:*

*“1.4 The service(s) to be provided to the Client by the Supplier under this contract shall be rendered pursuant to the following schedule:*

*1.4.1 Service [to be specified] shall be provided on [specify date/time].*



1.4.2 Service [to be specified] shall be provided between . . . . . and . . . . . [specify timeframe/duration of performance]. with the following intervals . . . . . [specify if necessary].”]

1.5 The service shall be provided subject to the terms of this contract and in accordance with the specifications listed in schedule 1, [and otherwise in accordance with the Supplier's current brochure or other published literature relating to the service from time to time – to be deleted if not relevant/not applicable].

1.6 The Supplier may at any time without notifying the Client make any changes to the service(s) which are necessary to comply with any applicable safety or other statutory requirements, or which do not materially affect the nature or quality of the service(s).

1.7 The Client may order additional services or ask for amendments/alterations of services already agreed with the Supplier, or give instructions to the Supplier which result in an amendment, alteration, reduction or extension of the services already agreed with the Supplier. In such case, the amended, altered, reduced or extended services must be expressly specified in an addendum to schedule 1, and the possible impact of the Client's orders or instructions on the fees and expenses to be paid to the Supplier must be expressly agreed by and between the Parties in an addendum to schedule 2 before the services are performed.

*[Alternative: The scope of the agreed services may not be changed, altered, amended, reduced or extended, and the Client may not give any instruction to the Supplier that would result in such an amendment, alteration, reduction or extension of the services already agreed with the Supplier.]*

## 2. Payment of fees

2.1 The Client shall pay the fees and expenses agreed with the Supplier, as specified in schedule 2, and any additional sums which are agreed between the Supplier and the Client for the provision of the service or which, in the Supplier's sole discretion, are required as a result of the Client's additional or amended instructions or lack of instructions, the inaccuracy or inappropriateness of any material provided by the Client or any other cause attributable to the Client.

2.2 The Supplier shall be entitled to invoice the Client following the end of each month in which the service is provided, or at other times agreed with the Client.

2.3 The Supplier's standard charges and any additional sums payable shall be paid by the Client (together with any applicable value added tax, and without any set-off or other deduction) within 30 [specify any other figure] days of the date of the Supplier's invoice.

## 3. Late payment and interest

If payment is not made on the due date, the Supplier shall be entitled, without limiting any other rights it may have, to charge interest on the outstanding amount (both before and after any judgment) at the rate of [specify] % per annum.

*[Comment: The Parties should take into consideration that in some legal systems payment of interest is unlawful, or is subject to a legal maximum rate, or there is provision for statutory interest on late payments.]*

#### **4. Warranties and liability**

4.1 The Supplier warrants to the Client that the service will be provided using such care and skills as is customary for the provision of similar services on the Client's market *[Option: In the Client's country]*. The service will be provided in accordance with the specification agreed in schedule 1, and on the time *[Option: At the intervals and within the times]* expressly agreed in Article 2.3. Where the Supplier supplies in connection with the provision of the service any goods supplied by a third party, the Supplier does not give any warranty, guarantee or other term as to their quality, fitness for purpose or otherwise, but shall, where possible, assign to the Client the benefit of any warranty, guarantee or indemnity given by the person supplying the goods to the Supplier.

4.2 The Supplier shall have no liability to the Client for any loss, damage, costs, expenses or other claims for compensation arising from any material or instructions supplied by the Client which are incomplete, incorrect, inaccurate, illegible, out of sequence or in the wrong form, or arising from their late arrival or non-arrival, or any other fault of the Client, provided the Supplier has duly notified the Client within *[specify time]* days of receipt of such material or instructions.

4.3 Except in respect of death or personal injury caused by the Supplier's negligence, the Supplier shall not be liable to the Client for any loss of profit or any indirect, special or consequential loss, damage, costs, expenses or other claims (whether caused by the negligence of the Supplier, its servants or agents or otherwise) which arise out of or in connection with the provision of the service or their use by the Client, and the entire liability of the Supplier under or in connection with the contract shall not exceed the amount of the Supplier's fees for the provision of the service.

#### **5. Term, termination and consequences of termination**

5.1 This contract shall take effect on the date of its signature by both parties or, if signatures do not occur simultaneously, when the latest signature is given. Unless sooner terminated pursuant to Articles 5.2 or 5.3, this contract shall continue for a period of *[specify – to be in line with Article 1.4]*.

5.2 The Supplier may forthwith terminate this contract by giving written notice to the Client, if the latter fails to pay any sum payable by it under this contract within 7 *[specify any other figure]* days of the due date for payment.

5.3 Either party may (without limiting any other remedy) at any time terminate the contract by giving written notice to the other if the other commits any breach of this contract and (if capable of remedy) fails to remedy the breach within 10 *[specify any other figure – note that some countries may impose longer deadlines]* days after being required by written notice to do so, or if the other goes into liquidation, becomes bankrupt, makes a voluntary arrangement with its creditors or has a receiver or administrator appointed.

For the purposes of the present sub-clause, a breach of any provision of this contract shall be considered capable of remedy if the party in breach can comply with the provision in question in all respects other than as to the time of performance [*check that this clause is valid under the laws applicable to the contract, and the laws of any country where enforcement of this contract may be sought*].

5.4 The termination of this contract for any reason shall not affect:

5.4.1 Either party's accrued rights, remedies or liabilities including payments due at the effective date of termination; or

5.4.2 The coming into force or the continuance in force of any provision of this contract which is expressly or by implication intended to come into or continue in force on or after termination.

## 6. Confidentiality

6.1 Both parties understand and acknowledge that, by virtue of the present contract, they may both receive or become aware of information belonging or relating to the other party, its business, business plans, affairs or activities, which information is confidential and proprietary to the other party and/or its Suppliers and/or customers and in respect of which they are bound by a strict duty of confidence ("Confidential Information").

6.2 In consideration of such Confidential Information being disclosed or otherwise made available to either party for the purposes of the performance of the present contract, both parties hereby undertake that they will not at any time, either before or after the termination of the present contract, and either directly or indirectly, disclose, divulge or make unauthorized use of any Confidential Information, except to the extent to which such Confidential Information:

6.2.1 Is publicly known at the time of its disclosure or being lawfully made available to them;

6.2.2 After such disclosure or being made available to them, becomes publicly known otherwise than through a breach of this undertaking;

6.2.3 Is required by law, regulation or order of a competent authority (including any regulatory or governmental body or securities exchange) to be disclosed by one of the Parties, provided that, where practicable, the other party is given reasonable advance notice of the intended disclosure.

6.3 Upon the earlier of a request from the other party or the termination of this contract, each party shall return the other all documents or records in any medium or format containing any Confidential Information which are in its possession or control and will not retain any copies of them.

6.4 This undertaking, and the obligations contained herein, will continue without limit of period.

## 7. Force majeure – excuse for non-performance

7.1 "Force majeure" means war, emergency, accident, fire, earthquake, flood,

storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of this contract or to have avoided or overcome it or its consequences.

7.2 A party affected by *force majeure* shall not be deemed to be in breach of this contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this contract to the extent that the delay or non-performance is due to any *force majeure* of which it has notified the other party in accordance with Article 7.3. The time for performance of that obligation shall be extended accordingly, subject to Article 7.4.

7.3 If any *force majeure* occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this contract, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.

7.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by *force majeure* for a continuous period in excess of three [*specify any other figure*] months, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the *force majeure*.

*[If preferred, replace 7.4 with the following alternative:*

*“7.4 If the performance by either party of any of its obligations under this contract is prevented or delayed by force majeure for a continuous period in excess of three [*specify any other figure*] months, the Parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this contract or alternative arrangements as may be fair and reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 [*specify any other figure*] days, the other party shall be entitled to terminate this contract by giving written notice to the party affected by the force majeure.”]*

## **8. Change of circumstances (hardship)**

*[Comment: The Parties should be free to consult each other in the event of a major change in circumstances – particularly one creating hardship for a particular party. However, an SME should only include the option at the end of Article 8.4 (right to refer to the courts/arbitral tribunal to make a revision or to terminate the contract) if (i) the SME considers that it is not likely to be used against that party’s interests by a party in a stronger tactical position or (ii) the right to refer to a court/tribunal is already an existing right under the applicable governing law in the event of hardship.]*

8.1 Where the performance of this contract becomes more onerous for one of the Parties, that party is nevertheless bound to perform its obligations subject to the following provisions on change of circumstances (hardship).

8.2 If, however, after the time of conclusion of this contract, events occur which have not been contemplated by the Parties and which fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the Parties in the performance of its contractual obligations (hardship), that party shall be entitled to request revision of this contract provided that:

- 8.2.1 The events could not reasonably have been taken into account by the affected party at the time of conclusion of this contract;
- 8.2.2 The events are beyond the control of the affected party; and
- 8.2.3 The risk of the events is not one which, according to this contract, the party affected should be required to bear.

8.3 Each party shall in good faith consider any proposed revision seriously put forward by the other party in the interests of the relationship between the Parties.

*[Option [delete if not applicable or not enforceable under the law governing the contract – see comment at beginning of Article 8]:*

*“8.4 If The Parties fail to reach agreement on the requested revision within [specify time limit if appropriate], a party may resort to the dispute resolution procedure provided in Article 15. The [court/arbitral tribunal] shall have the power to make any revision to this contract that it finds just and equitable in the circumstances, or to terminate this contract at a date and on terms to be fixed.”]*

**9. No partnership or agency**

Nothing in this contract shall (i) be deemed to constitute a partnership in law between the Parties, (ii) constitute either party the agent of the other for any purpose or (iii) entitle either party to commit or bind the other (or any member of its respective group) in any manner.

**10. Assignment and subcontracting**

10.1 This contract is personal to the Parties and *[include only where relevant, except to the extent necessary for the collection of outstanding bills through a factoring agent,]* neither party shall without the prior written approval of the other:

- 10.1.1 Assign, mortgage, charge or otherwise transfer or deal in, or create any trust over, any of its rights; or
- 10.1.2 Subcontract or otherwise delegate the whole or any part of its rights or obligations under this contract to another person.

**11. Notices**

11.1 Any notice under this contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified in Article 11.2 below in a manner that ensures receipt of the notice can be proved.

11.2 For the purposes of Article 11.1, notification details are the following, unless other details have been duly notified in accordance with this Article:

- .....
- .....

**12. Entire agreement**

This contract sets out the entire agreement between the Parties. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. *[Add where relevant: This contract supersedes any previous agreement or understanding relating its subject matter.]*

This contract may not be varied except by an agreement of the Parties in writing (which may include e-mail) *[Option, add where Article 8.4 or equivalent is included: “or in accordance with Article 8.4”.]*

**13. Effect of invalid or unenforceable provisions**

If any provision of this contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, this contract shall continue to be valid as to its other provisions and the remainder of the affected provision, unless it can be concluded from the circumstances that, in the absence of the provision found to be null and void, the Parties would not have concluded this contract. The Parties shall use all reasonable efforts to replace all provisions found to be null and void by provisions that are valid under the applicable law and come closest to their original intention.

**14. Authorizations**

14.1 This contract is conditional upon the following authorizations first being obtained *[specify the authorization(s) or other conditions required e.g. of governmental or regulatory authority]*.

- .....
- .....
- .....

14.2 The relevant party shall use all reasonable efforts on its part to obtain such authorizations and shall notify the other party promptly of any difficulty encountered.

**15. Dispute resolution procedure**

Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of *[specify the arbitration institution]* by *[specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators]* appointed in accordance with the said rules. The place of arbitration shall be *[specify]*. The language of the arbitration shall be *[specify]*.

*[The following are alternatives to a specified arbitral institution under Article 15:*

*Alternative 1: Ad hoc arbitration*

*“Any dispute, controversy or claim arising out of or relating to this contract, including its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled under the rules of UNCITRAL [specify other rules] by [specify the number of arbitrators, e.g. sole arbitrator or, if appropriate, three arbitrators] appointed by [specify name of appointing institution or person]. The place of arbitration shall be [specify]. The language of the arbitration shall be [specify].”*

*[Alternative 2: State courts*

*“Any dispute, controversy or claim arising out of or relating to this contract, in particular its conclusion, interpretation, performance, breach, termination or invalidity, shall be finally settled by the courts of (specify place and country) which will have exclusive jurisdiction.”*

## **16. Applicable law**

*[Specify national law]* law shall apply to the contract.

### Schedule 1: Specifications of the service(s) to be performed

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### Schedule 2: Fees and expenses

The following services shall be charged on the basis of the time spent by the Supplier at an hourly rate of .....

- .....
- .....
- .....

The following services shall be charged for a total amount of ....., regardless of the time spent.

- .....
- .....
- .....

The Supplier shall not be entitled to vary the Supplier’s standard charges.

Alternative: The Supplier shall be entitled to vary the Supplier’s standard charges from time to time by giving not less than *[three]* months’ written notice to the Client from time to time.

All charges quoted to the Client for the provision of the service are exclusive of any value-added tax (VAT), for which the Client shall be additionally liable at the applicable rate from time to time.

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#### DATE AND SIGNATURE OF THE PARTIES

Supplier	Client
Date .....	.....
Name .....	.....
Signature	Signature



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United Nations Sales No. E.10.III.T.1

USD 70  
ISBN 978-92-9137-381-9

