

CPO

# Reviewing & drafting contracts

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# Before

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- National or international?
- The importance of correctly qualifying the contract:
  - Qualification determines legal framework.
  - Essential for understanding:
    1. The scope of parties' legal rights and obligations;
    2. Whether to what extent parties should and may deviate from legal provisions.
- Mixed contracts pose specific challenge if one or more parts is/are subject to specific legal regimes (e.g. distribution & commercial agency).
- Dutch law: if mixed contract cannot be separated in two or more independent agreements, the legal provisions apply in conjunction unless ...

# Preliminary stage

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- Pre-contractual information:
  - Incorrect/inadequate information may constitute a wrongful act or result in error (*dwaling*).
  - Error may allow a party to nullify an agreement or to require a court to revise the contract to compensate for the consequences of the error.
  - Pre-contractual liability may be covered by exemption clause.
- Obligations arising out of negotiations:
  - Parties are free to terminate negotiations unless such is *unacceptable* in connection with the other party's justified expectations that a contract would emerge or other circumstances of the case.
  - 'Unacceptable' is strict and restrained standard (exceptional)
  - Regulate parties' negotiation position (e.g. LOI / e-mail): right to terminate / negotiation costs / confidentiality / conditions for any binding contract to emerge.

# Structure & content

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- Parties:
  - Identify correct parties: national or international?
  - Representation
- “More parties” contract (e.g. affiliated companies involved in contract as beneficiary parties or ‘direct’ contracting parties):
  - Joint & several obligations?
  - Termination rights: only for entitled party / only vis-à-vis breaching party?
- Recitals:
  - Background of transaction, goals and expectations.
  - May impact interpretation / scope of rights & obligations.

# Structure & content

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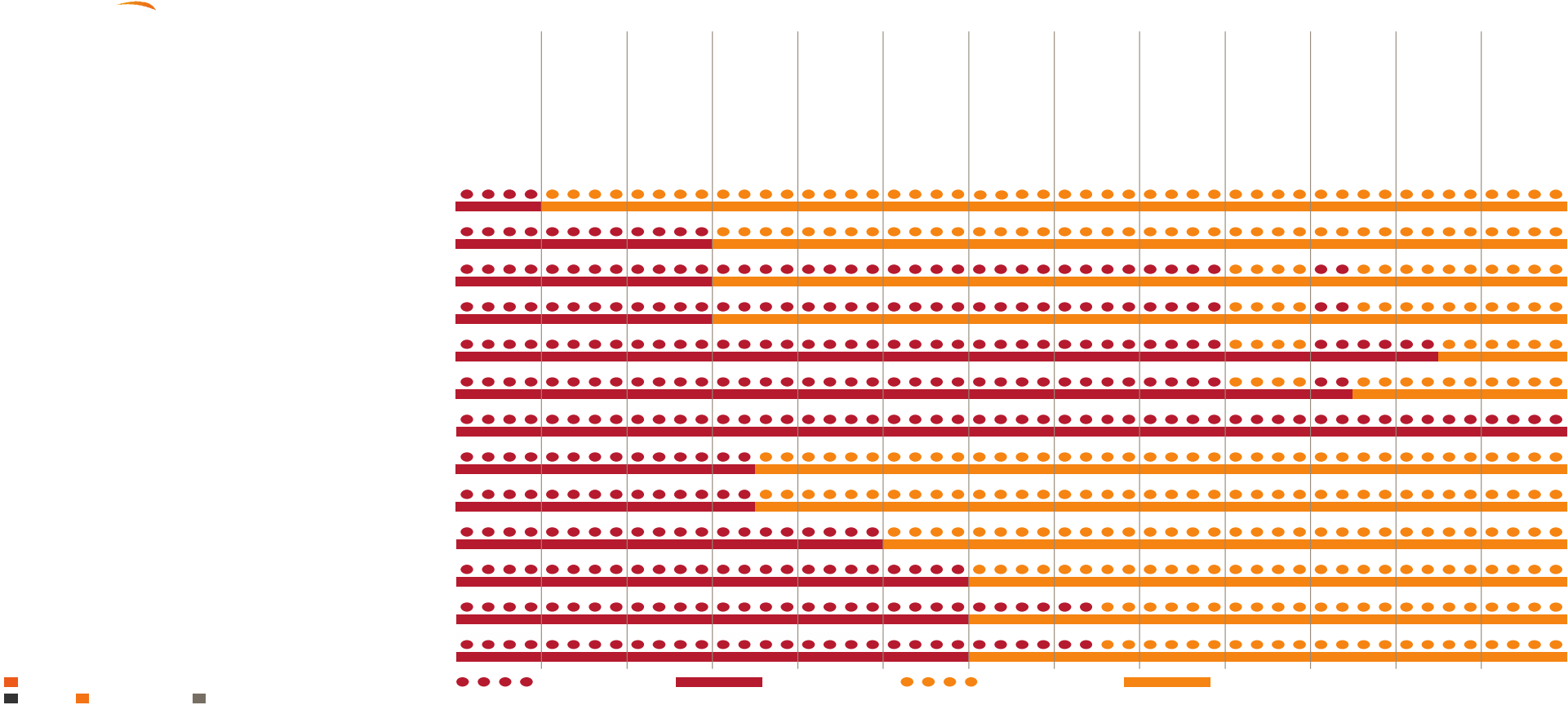
- Definitions:
  - May avoid need for repetitive descriptions
  - Definitions often used to limited/expand legal meaning of relevant term (e.g. definitions of Force Majeure or Damages).
  - Beware of using Anglo-American legal language without defined meaning under Dutch law (e.g. warranty / termination / consequential damage).
- Conditions precedent / subsequent.
  - Have ‘automatic’ legal effect without statement of nullification being required.
  - Often paired with the right of a party ‘to waive’ a certain condition.
  - Be descriptive rather than relying on general wording like ‘subject to board approval’, ‘subject to contract’.

# Structure & content

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- Structure & exhibits
  - **Arrange hierarchy between the main body of the contract and the exhibits.**
  - **‘Conflict’ clause not always adequate.**
- The transaction:
  - What, who, where, when, how.
  - **Delivery of goods: INCOTERMS 2020: 11 forms of delivery developed by the ICC for different forms of transport (e.g. FOB, FCA, CFA, DDP).**
- Term:
  - Commencement and term.
  - Contracts expire by completion / expiration of time (fixed term) / notice?
  - Fixed term: complicates contract: justification?

# Incoterms 2020: example



# Structure & content

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- **Arrange what applies if parties tacitly continue their relation despite of fixed term.**

- 1. This Agreement is entered into for a period of two years and shall expire on December 31, 2022, unless Parties have reached a prior written agreement to extend this Agreement after that date.*
- 2. However, in the event that Parties continue their co-operation after December 31, 2022 in absence of a written agreement to that effect, this Agreement shall be deemed continued for an indefinite period of time on the same conditions, whereby each Party shall have the right to terminate this Agreement at any time at its absolute discretion and without any liability, by giving the other Party three months written notice of termination.”*



# Structure & content

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- Price & payment:
  - Currency (see: Art. 6:121 DCC for monetary debts and relevance of place of payment).
  - **Including/excluding:** taxes, insurance, transport, installation, commissioning, delivery, packaging, payment costs, import duties.
  - Price increases for agreed deliveries / future deliveries: indexation / actual cost increases / general right to increase prices.
  - Payment term: EU: max. 60 days.
  - Interest for late payment: ‘normal’ legal interest / commercial legal interest (EU: for goods & services delivered) / contractual interest
  - More & less work: right to reduce scope of work / approval for more work / consequences of delays pending approval

# Structure & content

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- Forecast & orders:
  - Binding or non-binding / effort or result obligation?
  - Call-off (under one umbrella order) or separate successive orders?
  - Consequences of falling below or exceeding forecast.
  - Rights to cancel / adjust forecasted orders.
- Termination without breach:
  - **Right to give notice: beware of extensive termination rights of principal (under DL) for assignment /construction agreements also for fixed term contracts (unless excluded).**
  - Notice period: how much time needed to adjust business?
  - Termination date: e.g. end of month / seasonal products.
  - **Rights & obligation during notice period: e.g. ordering of additional products, notifications to market / adjusted forecast.**

# Structure & content

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- Termination for breach / cause (*ontbinding & opzegging met grond*):
  - **Expanding / restricting / specifying legal termination rights (e.g. for ‘material’ breach or every breach v. for breach of sufficient weight).**
  - Specific termination rights: (e.g. change of control, bankruptcy): termination for breach (*ontbinding*) or cause (*opzegging*)?
  - Termination for breach (*ontbinding*) triggers obligation to undo performed obligations (Art. 6:271): not a liability!
  - Clarify whether contractual arrangement replaces or supplements legal termination rights

# Structure & content

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- Consequences of termination:
  - **Duties upon termination: (e.g. payment, outstanding orders, use of IP rights and domain names, delivery of consumables & spare parts, non-compete, non-hiring, service obligations, transfer of data, transfer of activities, customers, stock, assets and/or employees (TUPE!).**
  - **Compensation of exit costs, goodwill, investments.**
- Warranties:
  - Supplementing or replacing legal obligations.
  - Conformity or remedies.
  - Warranty term: for original product / replaced or repaired products/parts.
  - **Scope of warranty obligations: repair / replace / credit.**
  - **Consider operational aspects of warranty obligations**
  - **Interaction with exemption clauses and force majeure.**

# Structure & content

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- Exemption clauses:
  - **Source of liability: late performance, defects, other.**
  - **Nature of liability: contractual / non-contractual**
  - **Restricting damages: kind of damages ('direct/indirect/consequential'), monetary amount per breach and/or overall cap**
  - **Liability of employees, partners, other 'third' parties**
  - **Insurance: deductible, non-covered events, linked to actual payment rather than insured amount.**
  - **Exemption clause normally covers liability only and not obligation to undo, to indemnify or to perform.**

# Structure & content

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- Indemnification:
  - **Shifting, extending or creating obligation to compensate.**
  - **Not a liability!**
  - **Interaction with exemption clause?**
- Force Majeure:
  - Force Majeure takes away liability for breach (but not right of other party to terminate for breach).
  - Force Majeure clauses often extend scope of legal concept of force majeure.
- Notice clause:
  - Why?
  - Must meet operational reality
  - Distinct between 'legal' notifications and other?

# Structure & content

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- Other:
  - Targets: result or effort obligation: consequences.
  - Investments: responsibility for investments made / not recuperated
  - Licenses, taxes, premiums, registrations.
  - Quality: certifications, facilities, training, employees, capacity.
  - Code of conduct.
  - Privacy & data protection.
  - Reporting (usefulness?).
  - Use of IP Rights / domain names.
  - Confidentiality / publicity
  - **Interpretation clause?**
  - Boilerplates....

# Structure & content

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- Applicable law
  - Considered choice; applicable law may significantly impact parties' position especially in regard to specific commercial contracts (e.g. commercial agency, lease, franchise, distribution).
  - Local check upon completion of legal negotiations?
  - CISG.
- Dispute settlement:
  - Escalation / ADR
  - Arbitration or courts: quality of local courts, enforcement possibilities, **speed**, language, confidentiality, expertise, **costs**.
- General:
  - 'Floating' choices: possible, but trigger complications.
  - Connect applicable law & court.



# Afterwards

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- Archive:
  - Archive contract version signed by all parties (appears not always a matter of course)
  - **Archive entire contract history** (e.g. drafts, e-mails, RFP, internal/external legal advice) for complex/valuable contracts.
  - Register and guard essential dates (e.g. notice dates)

# Questions?

