Supply of goods Q&A: Spain

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Spain-specific information concerning the key legal and commercial issues to be considered when drafting a supply of goods contract.

This Q&A provides country-specific commentary on *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border* and *Practice note, Supply of goods: Cross-border overview*.

This Q&A forms part of *Cross-border commercial transactions*.

General contract law framework

1. What are the requirements under national law for a valid contract to exist? When does an agreement take effect?

In Spanish law, a contract exists from the moment when one or several persons consent to oblige themselves to give something or to provide a service to each other. The requirements for a valid contract to exist are:

- The consent of the contracting parties.
- A certain object as the subject matter of the agreement.
- The obligations contained in the contract fulfil a lawful cause or purpose.

(*Articles 1261-1277, Chapter II, Civil Code.*)

Otherwise, the contract will be null and void.

Consent

Contracts take effect by the mere consent of the parties, and from that moment on, the parties are bound:

- To the performance of the terms and obligations expressly agreed.

- By those implicit terms inherent to the nature of the contract and in accordance with good faith, custom and the law.

The parties' consent can be expressed orally, except where a specific formality (such as a public deed, or inscription in a registry) is required by law for that type of contract.

The parties must:

- Have legal capacity to enter into contractual obligations.
- Provide consent that is serious, spontaneous and free (so consent provided by mistake, under intimidation, violence or fraud will not be valid).

(*Articles 1263-1270, Civil Code.*)

Purpose

The purpose of the agreement may be either the aim or the means to achieve it, and may consist of the object of interest of the parties or the consideration to be performed or provided by one of the parties.

For the agreement to be valid, the purpose must be real or possible, lawful and identified or identifiable.

Since contracts take effect from the moment when both parties have provided their agreement to the contract's terms and conditions, in agreements of commercial nature, the fact of replying by accepting the proposal or the proposal along with any addenda is considered sufficient. Thus, when the offeror and the acceptor are in different places, it is considered that there is consent from the moment the offeror knows of the acceptance or, having been sent the acceptance by the other party, the offeror cannot ignore it without failing to act in good faith. The contract in these cases is presumed to have been concluded at the place where the offer was made.

2. Are there any limitations on the legal capacity of a company to enter into a supply of goods contract?

The capacity of a company to enter into a supply of goods agreement is limited by the activities provided for in the company's defined purpose (in its deed of constitution and in its articles of association).

Acceptance/signature of the agreement must be done by a natural person who either represents or is a member of the company's administrative body (for example, the joint directors or the board of directors), in the form provided for in the articles of association.

Express permission from a general meeting of shareholders may be required, depending on the value of the agreement. Approval in a general meeting is required for operations exceeding 25% of the value of the assets appearing in the company's last approved balance sheet (*Article 160.f, Corporate Enterprises Act*). The company's articles of association can only require approval in additional circumstances: they cannot disapply this statutory requirement.

3. Is it necessary for a contract for the sale of goods to be in writing for it to be valid? Are any formalities necessary?

A contract for the supply of goods can be concluded orally. However, in practice it is important to set out the terms in writing, and this is done either with specific contracts for the particular order, or under the formula of a framework agreement that establishes the general terms and conditions under which sale and purchase orders are placed. It should also be borne in mind that written form is also required insofar as other parties, such as agents, insurance companies and transporters, are involved in the contractual relationship.

4. How does national law treat acceptance of an offer which attempts to impose new terms?

Contracts are binding on the terms and conditions expressly agreed by the parties, and cannot be unilaterally modified, since their validity and performance cannot be left to the discretion of one of the contracting parties (*Article 1256, Civil Code*). As a result, unilateral modification is not permitted.

However, it is possible to request a modification of the contract when the "*rebus sic stantibus"* principle applies. This principle is implied in all contracts. It allows a contract to be revised when the following occur:

- Extraordinary and unforeseeable circumstances, that did not exist at the time of the contract's signing, arise.
- Consequently, the performance of some of the parties becomes excessively burdensome or onerous, altering the economic balance of the contract (note that performance need not be impossible, but just excessively onerous).

This concept has developed exclusively by means of case law, since it is not included in statute. As a result, it will not apply automatically; the interested party must request the courts, in the absence of agreement between the parties, for this implied clause to be applied to rebalance the contractual benefits.

5. Does national law require that special notice be given of any contract terms for them to be incorporated in a contract?

No, Spanish national law does not require any special notice for particular types of contract terms.

For any new terms or conditions to be validly incorporated in a contract, the parties must be guided by the principle of good faith and by mutual consent to those terms. This consent is usually expressed in writing, by means of an addendum to the contract signed by both parties.

6. Is the concept of a party acting in 'good faith' recognised in your jurisdiction (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 4.2*)?

The principle of "good faith" is recognised in the Spanish legal system. It is widely used in the different areas of the law.

Article 7 of the Civil Code describes good faith as a limit to the exercise of rights, and Article 1258 of the Civil Code recognises its implied applicability to all contracts (including those for the supply of goods).

It also applies specifically to business contracts, under Article 57 of the Commercial Code, which specifies that;

"Business contracts shall be implemented and fulfilled in good faith, pursuant to the terms under which they were made and drafted, without misinterpreting them through arbitrary constructions of the correct, proper and usual sense of the words said or written, or restriction of the effects naturally arising from the way in which the parties to the contract would have explained their will and contracted their obligations."
Additionally, Article 334 of the Commercial Code establishes that, while a commercial sales agreement will not be cancelled due to detriment to the other party, a party that has proceeded with malice or fraud in the execution of the contract or its performance must compensate the innocent party for damages and losses incurred.

7. Is the concept of using 'best endeavours' recognised in your jurisdiction (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 5.2*)?

The concept of "best endeavours" is not recognised in this specific wording, but would apply in Spain through the requirements of good faith (see *Question 6*) and due diligence. Due diligence in this context ("*debida diligencia*") means the obligation on a party to perform an activity:

- With the aim of achieving the required result.
- With utmost care and according to the best of its knowledge.

The parties to any agreement bind themselves not only to the performance of the obligations established in the agreement, but also to any consequences arising from it (*Article 1258, Civil Code*), so the idea of "best endeavours"

would include that implicit obligation of the contracting parties to take any actions required to fulfil the purpose of the agreement, even if they were not expressly provided.

As an example, the liability of a supplier that delivers the goods in breach of a certain deadline agreed by the contracting parties could be reduced or even excused if the supplier conducts itself with due diligence and undertakes all additional actions necessary for the fulfilment of its obligations, and yet still fails to comply with the specified deadline for reasons or events outside its control.

8. Is the concept of 'material breach' recognised in your jurisdiction (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 16.1(a)*)?

The concept of "material breach" is recognised, and this term (or one akin to it) is usually included in supply of goods agreements.

A material breach is the breach of an essential obligation whose non-performance frustrates the purpose of the contract, and that grants the non-breaching party the right to terminate the agreement.

To avoid problems of interpretation in the event of conflict, we would always advise that the contract should define which obligations are considered essential so that their non-performance is understood to constitute a material breach for the purposes of terminating the agreement.

Incorporation of standard terms of business

9. How can a seller or buyer incorporate its standard terms of business in its contracts?

The standard terms and conditions of the business of any or both of the contracting parties can be incorporated by an express reference to the document containing those terms; however, it is standard practice that, for incorporation to be effective, contracting parties must know and understand those terms at the time of execution of the main agreement (the other party must have access to the document containing those terms, be able to read and understand them, and expressly consent to those terms and conditions, as if it was an annexe to the main agreement).

It is therefore recommended that the standard terms referred to be attached to the main agreement.

These standard terms will be automatically modified or completed by the specific terms and conditions of the main agreement, without any further action required, in a business to business contractual relationship.

10. If the seller's standard terms of business are being used, is it acceptable to limit the seller's liability for late delivery and/or non-delivery to the costs and expenses incurred by the buyer in obtaining substitute goods on the open market as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 7.5*?

Yes; where the seller's standard terms of business are being used, it is acceptable to limit the seller's liability for late delivery and/or non-delivery to the costs and expenses incurred by the buyer in obtaining substitute goods on the open market, but it must be regulated in the contract along with specific reference to the appropriate actions to be taken in particular scenarios.

For example, the Commercial Code establishes that a delay in delivery, or delivery of only half the goods, entails a breach and the buyer will not be obliged to accept the delayed or partial delivery. However, under the principle of contractual freedom, the parties can establish their own provisions in the agreement in such circumstances (for example, that in cases of late delivery, the buyer will benefit of a 5% discount for a delay of one week, a 10% discount for two weeks, and so on). The express contractual provision for certain situations and agreement on certain terms to limit the seller's liability and the course of action to be followed will mean that the parties do not need to negotiate such issues during the course during the course of the contract.

Pre-contractual misrepresentation

11. Can a seller be held liable for pre-contractual misrepresentation?

Yes; in Spanish law, a person who causes damage through fault or negligence is obliged to repair the damage caused, in all cases (no duty of case need be established). It is therefore possible for the seller to be held liable for misrepresentation pre-contractually.

Further, consent given as a result of error, duress, intimidation or malice will be null and void (*Articles 1265 and 1266, Civil Code*). Error in consent will invalidate the agreement if it affects the subject matter of the agreement, or the conditions that constituted the main reason to enter into the agreement.

12. Can statements made by sales staff or in promotional literature be construed as terms of a contract for which a seller may be held liable?

In general terms, relationships between businesses are governed by what has been agreed in the contract itself, so any pre-contractual statements not incorporated into the contract will not be construed as contractual terms.

However, pre-contractual misrepresentation can create liability for the misrepresenting party, and may invalidate the contract if it has caused an error in the other party's consent (see *Question 11*).

13. Are parties entering into a contract under any legal obligation of disclosure? Can silence constitute misrepresentation?

The duty of good faith (see *Question 6*) requires the parties to inform each other of any circumstances that may influence the decision of the other contracting party to give its consent.

In that regard, silence may constitute misrepresentation, if it leads one of the contracting parties to sign a contract which would have not otherwise done.

(See also invalidity due to error in consent, *Question 11* and *Question 12*.)

Main terms of a supply contract

14. Does national law imply any terms into business-to-business contracts for the supply of goods?

Business-to-business contracts for the supply of goods are constructed on the mutual agreement of the contracting parties.

However, some terms and conditions, such as good faith and quality or fitness for purpose of the goods, will be implied into the contract, to the extent required for the purpose of the agreement to be upheld.

In particular:

- The buyer must pay the price of the goods sold at the time and place set out in the agreement (*Article 399, Code of Commerce*) (or, where these conditions are not set, make the payment at the time and place where the goods sold are delivered) (*Article 1500, Civil Code*).
- When the buyer discovers a hidden defect, it can choose to terminate the agreement, or to demand a proportional reduction of the price from the seller, as determined by experts. If, in addition, the seller acts in bad faith, because it was aware of the hidden defects or faults in the goods sold, it will be bound to pay compensation for the damage caused, if the buyer opts to terminate the agreement (*Article 1486, Civil Code*). The time limit for exercising this right is six months from the delivery of the goods (*Article 1490, Civil Code*).

15. In your jurisdiction, what terms may be implied by law in relation to a sale of goods by sample?

The sale of goods by sample is dealt with in Article 327 of the Commercial Code (in this context, "sample" means a portion of the goods that serves to determine the object of the sale).

If the goods provided under the contract do not conform to the sample, this will constitute a breach of contract.

However, if the goods conform to the sample, the buyer cannot refuse to receive them. If the buyer refuses to receive the goods, a single appraiser will be appointed by both parties. The appraiser will decide whether or not the goods are fit to be received:

- If the appraiser determines that the goods are fit to be received, the sale will be deemed to have concluded.
- If the appraiser determines that the goods are not fit to be received, the agreement will be void (in this case, the buyer can request termination of the contract or can demand performance, regardless of any compensation to which it may be entitled).

16. What liability exists for breach of an express term of a contract?

A person who, in the performance of their obligations, causes damage through malice, negligence or default, or through any contravention of their obligation, is liable to provide compensation for those damages (*Article 1101, Civil Code*).

Where one of the parties does not fulfil its obligation under an agreement with reciprocal obligations, the non-breaching party has an implied right to choose between rescinding the agreement or demanding performance of the obligation (*Article 1124, Civil Code*).

These provisions must be considered in relation to Article 1256, which states that the validity and performance of a contract cannot be left to the discretion of one of the parties. This means that one party cannot unilaterally determine the terms and conditions of an agreement, both the expressed in the document and those considered inherent to it. Also, that one party cannot unilaterally decide on how the conditions of the agreement are to be carried out.

In addition to the statutory provisions regarding liability, the parties will be bound by the consequences for breach provided by the contract itself (for example, penalty clauses and interests in arrears, among other things).

17. What liability exists for breach of an implied term of a contract?

It would depend on the circumstances, but in general the breaching party is obliged to mitigate or compensate the damages or the consequences created by its breach.

Performance obligations

18. Does national law imply any terms into a contract in relation to price? Can a seller increase the price after the contract has been made?

For the agreement to be valid, the price must always be expressly established, as this is an essential element of this type of agreement (*see below*).

National law provides for the following terms in relation to price for the supply of goods:

- The price can be reduced where the buyer accepts a partial delivery (*Article 330, Commercial Code*).
- The price can be reduced if the goods perish or deteriorate while in the custody of the seller (*Article 335, Commercial Code*).

The price may be fixed or variable and, depending on the nature of the goods, may be subject to rates imposed by the relevant public authorities.

The seller can never unilaterally increase the price, since the price is a main condition of a sale and purchase agreement and, for the contract to exist, the parties must agree on:

- A specific price.
- A realistic mechanism to determine the price (for example, price per quantity).

- Determination by a third party expressly appointed by the parties for this purpose.

(*Article 1450, Civil Code*.)

Also, to be valid, any modification to an agreement requires the consent of both parties, as the validity and performance of the agreement cannot be left to the unilateral discretion of just one of the parties (*Article 1256, Civil Code*).

Where the agreement relates to the supply of agricultural products, Law 12/2013 should be considered. Among other things, this law requires that the price of agricultural goods cover the effective cost of production (ensuring that companies do not export products at a price lower to that of the country of their nationality).

19. What import licences or other consents may be required when:

- importing goods into your jurisdiction; and
- exporting goods from your jurisdiction?

  Which party usually bears the costs of obtaining these (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 6.8*)?

Import and export licences may be required, depending on the type and destination/use of goods. For example, the exporter of goods that qualify as dual-use items (software and/or technology that can be used for both civil and military applications) need a special type of export licence, requiring assurance that these goods will not be used for purposes other than those designated.

The person who has to bear the cost of obtaining these licences will be the importer or the exporter of record, depending on the specific version of the Incoterms (International Commercial Terms) agreed between the parties. Licences should be submitted together with the customs declaration.

In the absence of any express agreement on costs, the cost of delivery of the goods in business sales will be borne by the seller until they are made available to the buyer (*Article 338, Commercial Code*).

20. In the absence of a specific clause in the contract, will the price of goods be inclusive or exclusive of any VAT or service tax, see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 11.2*?

According to the recent jurisprudence of the Spanish Supreme Court, where a contract for the sale of goods or services is silent as to VAT, and the seller or supplier of the service is liable for the VAT due, the VAT will be considered to be included in the agreed price if the seller can no longer recover/receive it (Decision of the Spanish Supreme/High Court of 19 February 2018).

21. Can the parties include a clause in the contract that provides for the seller to be able to invoice the buyer at any time after the seller is ready and willing to deliver the goods as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 11.3*?

Standard document, Supply of goods agreement: Cross-border: clause 11.3 would be permissible, but in the case of conflict over the interpretation of these provisions, the provisions of the Code of Commerce shall apply.

The buyer's obligation of payment begins once the goods are made available to the buyer to its satisfaction (*Article 339, Commercial Code*).

However, where the supply of goods is between a business in Spain and another business in an EU member state, the invoice must be issued before the 16th day of the month following to that in which the tax accrues. The tax accrues at the time of "dispatch"; that is, when the transport of the goods begins (*Article 11, Royal Decree 1619/2012, which approves the Invoicing Regulations*).

22. Does national law imply any obligations into a supply of goods agreement in relation to payment by the buyer?

If no terms relating to payment are specified in the agreement, the buyer must pay the lump sum price or instalments agreed with the seller, once the goods are made available to the buyer to its satisfaction (or once they have been judicially deposited, in the case of unjustified refusal of receipt by the buyer) (*Article 339, Commercial Code*).

Moreover, in relation to time and place, if such terms are not specified in the agreement, the buyer must make the payment at the time and place at which the goods sold are delivered) (*Article 1500, Civil Code*).

In addition, a cash payment limit came into force in 2012; this prohibits cash payments in excess of EUR2,500 euros when one of the parties involved is a professional or a company (*Law 7/2012 of 29 October*).

Any payments made must always be considered as being payments towards the purchase price and in evidence of ratification of the agreement, except if expressly agreed to the contrary by the parties (*Article 343, Code of Commerce*).

23. Does national law permit a seller to charge interest on late payment as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 11.5(a)*?

Yes. The seller can charge the buyer interest on late payment for the goods (*Article 341, Commercial Code; Article 1501, Civil Code*).

However, if the interest on late payment is configured as a penalty, the courts could limit it if they considered it disproportionate. *Standard document, Supply of goods agreement: Cross-border: clause 11.5(a)* risks being seen as a penalty.

Even if a mechanism for interest on late payment is not expressly agreed by the contracting parties, once the seller gives the buyer notice that payment is due, interest accrues from that moment automatically at either:

- The contractually agreed rate.
- (If there is no contractually agreed rate), the statutory rate for late payment (determined annually in the General Estate Budgetary Law).

24. Does the seller have the right under national law to sue the buyer for the price of the goods if they are not paid for by the payment date specified in the contract (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 11.4*)?

Yes, the seller can sue the buyer for the price of the goods if they are not paid for on the date specified in the agreement.

However, the usual practice is to give the buyer notice of the default in payment, stating the outstanding amount and a deadline by which the payment must be made, before any dispute resolution mechanism is triggered.

25. Is set-off permitted in your jurisdiction (see *Standard document, Supply of goods agreement: Cross-border (with contract details cover sheet): clause 11.6*)? If not, is there any concept which is broadly similar or equivalent and could be referred to in the contract?

The ability of one or both parties to set off any amounts owed to each other during the performance of the agreement can be agreed in the contract, as in *Standard document, Supply of goods agreement: Cross-border: clause 11.6*.

However, for set-off to be effective:

- Both debts must consist of an amount of money (or, if the debts owed are fungible, they must be of the same type or same quality, if this has been specified).
- Both debts must be due and payable.
- There must be no attachment or dispute initiated over any of the debts by any third party and duly notified to the debtor.

(*Article 1196, Civil Code.*)

26. Please state how delivery is defined under the laws of your jurisdiction?

The seller will fulfil its obligation to deliver if it performs all the acts necessary for the buyer to take possession of the goods sold; that is, making it available to the buyer at the agreed time and place, and delivering the goods in full quantity and quality (*Article 1462 and following, Civil Code*).

Delivery can in some cases be effected without actual physical delivery of the asset, but by means of granting a public deed or the delivery of the keys of the place where the asset is kept; however, this would only apply to circumstances where the asset cannot be moved (for example, real estate) or is already in possession of the buyer.

In practice, for contracts for the supply of goods, delivery is commonly subject to the Incoterms, which govern the moment and the terms on which the seller enables the buyer to take possession of the goods.

27. Does national law imply any obligations into a supply of goods agreement in relation to delivery of the goods by the seller?

If the date for delivery of the goods sold has not been stipulated, the seller must make them available to the buyer within the 24 hours following formation of the contract (*Article 337, Commercial Code*).

Where not expressly otherwise agreed, the expense of delivery of the goods will be borne by the seller until they are made available to the buyer, and those of their receipt and collection at the place of delivery will be borne by the buyer (*Article 338, Commercial Code*).

28. Please set out what laws in your jurisdiction may apply to the sale and supply of goods with delivery by instalments (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 7.8*).

The provisions relating to sale and purchase agreements for movable property contained in the Commercial Code and the Civil Code may also be of subsidiary application, where there is no express agreement of the parties.

Therefore, the parties must comply with the express provisions contained in the agreement, and, on a subsidiary basis, with the statutory alternatives.

According to the Commercial Code, the buyer can reject the goods in the case of a partial delivery (which may occur if some of the goods are not delivered on time or, if the goods are delivered on time, but some do not comply with the amount, quality and conditions specified).

However, since the nature of the supply of goods is that of the purchase with delivery by instalments, these provisions will not apply where they would contravene the purpose of the agreement.

Nevertheless, the buyer may secure a minimum sales volume in the sense that, if the seller were not to comply with the required volume of goods, the buyer could be entitled, if expressly agreed, to compensation from the seller.

29. Is the concept of 'time is of the essence' understood in your jurisdiction? Please also consider the validity of *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clauses 7.4*, *11.4* and *16.2* in relation to this question.

While it is not usual practice to use the expression "time is of the essence" in supply of goods agreements, the Commercial Code treats the failure to deliver the goods on time as a total breach of the agreement, so the buyer may request performance or termination of the agreement, and claim damages.

As a result, *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clauses 7.4* valid.

The parties can also agree contractually to make time of the essence in relation to payment as well as delivery; *clauses 11.4* and *16.2* will also be valid.

Additionally, on-time delivery should be established as essential if a termination for non-performance is to be justified in case of late delivery, otherwise the mere delay would probably not justify to terminate the agreement. While the Commercial Code establishes late delay as a material breach, in practice, a mere delay may not directly justify a termination of the agreement; the specific circumstances and consequences of the delay in question should be analysed. For example, if the delay defeats the purpose for which the goods were purchased, it would justify the termination. In order to avoid a dispute on this matter, it is recommended that the parties expressly regulate the right to terminate for late delivery.

30. In relation to contractual obligations (that is, the buyer paying for the goods and the seller delivering the goods) even if the contract does not expressly state it:

- Is time for performance normally considered to be fundamental to the contract?
- Can a party terminate the contract for failure of the other party to perform the obligations within a specified time?

Failure to deliver the goods on time, in a commercial sales and purchase agreement, could be considered to be a total breach of the agreement only if provided for as such in the agreement, and this would entitle the buyer to either request performance or termination of the agreement, and claim corresponding damages (see *Question 29*).

This is the also case in relation to the buyer's obligation to pay for the goods (the other side of the mutual obligations of performance).

31. What remedies are available to a seller where the buyer fails to accept delivery under the laws of your jurisdiction? Would *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clauses 7.6* and *11.3* be permitted in your jurisdiction?

If the buyer refuses, or negligently fails to accept, delivery of the goods without a proper reason, the seller can request performance or cancellation of the agreement (and, if requesting performance, must leave the goods in judicial

deposit) (*Article 332, Commercial Code*). In this case, the expenses arising from judicial deposit will be borne by the buyer, since it has created the situation.

However, if the goods are perishable and therefore a judicial deposit is not possible, the seller can either:

- Dispose of the goods, terminate the agreement and claim for any damages incurred as a result of the buyer's breach of its obligation to receive the goods.
- Demand performance and still claim damages and payment of interest.

(*Article 1124, Civil Code.*)

32. Under the laws of your jurisdiction what remedies are available to a buyer against a seller for any delay in delivery? Would *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 7.5* be permitted in your jurisdiction?

Where the seller does not deliver the goods within the term stipulated, the buyer can request performance or cancellation of the supply agreement, with compensation, in either case, for the damages that may have been caused by the delay (*Article 329, Commercial Code*). While the Commercial Code establishes late delay as a material breach, in practice, a mere delay may not directly justify a termination of the agreement; the specific circumstances and consequences of the delay in question should be analysed (see *Question 29*).

The buyer will not be obliged to receive only a part of the amount of goods agreed on, even under promise of delivery of the rest. If the buyer were to accept a partial delivery, the buyer would still be entitled to request fulfilment of the contract or its cancellation with regard to the rest of the goods (*Article 330, Commercial Code*).

Standard document, Supply of goods agreement: Cross-border: clause 7.5 would be permitted in Spain.

33. Under what circumstances does national law permit a buyer to reject goods? Can the right to reject be lost?

The right to reject goods may be exercised by the buyer in the following cases:

- In the case of sales by sample, if the goods do not comply with the characteristics of the sample.
- In purchases of goods that are neither visible or on display, nor can be classified according to a specific quality known to the trade; where the buyer has the right to examine the goods after delivery and freely

cancel the contract if the goods are not suitable for it; where the parties have expressly agreed the buyer's right to try the goods.

- If the goods were delivered in breach of the agreed term or deadline.
- In cases of partial delivery, where the buyer can refuse receipt of either all or the delayed part of the goods.
- If the goods are not of the agreed quality or condition.

A buyer who examines the content of the goods at the time of receipt and accepts them, will not be entitled to reject the goods and bring any claim against the seller for an alleged flaw or defect in the quantity or quality of the goods that would have been identifiable on inspection.

34. Does national law allow a seller to provide tolerance limits, permitting the seller to deliver less (or more) than the contract quantity?

Yes. Even though the buyer has a statutory right to reject goods in case of a partial delivery (delivery of less than the agreed quantity) under Articles 330 of the Commercial Code and 1469 of the Civil Code, the application of this statutory right can be overridden by contractual agreement between the parties.

Inclusion of a clause indicating the percentage of tolerance in the delivery of less or more of the quantity agreed is not only possible, but common practice in Spanish supply of goods agreements.

Title

35. When does national law provide that title to and risk in goods will pass? Is a seller able to separate the passing of title and the passing of risks in the goods as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clauses 9.1* and *9.2*?

The statutory position under the Commercial Code (which can be overridden by contractual agreement) is that generally the risks are borne by the seller up to the time of delivery of the goods, even where there is a supervening event. However, if the buyer refuses delivery, or delays receipt of the goods, then the buyer assumes the risk in the goods, except in cases of fraud or negligence on the part of the seller.

Delivery will be deemed not to have taken place yet, and the seller will remain the owner of the goods, where:

The sale was made by number, weight or measure, or the goods sold were not certain and determined, with marks and signs identifying them.

- If by express agreement or by usage of the trade, given the nature of the goods sold, the buyer can verify or examine them for damage and losses.
- If the contract provides that delivery will not take place until the goods meet a stipulated condition.

In Spanish law, passing of title and risk occurs at the same time unless otherwise agreed by the parties. It is common practice to use the Incoterms, which can provide contractually for any scenario chosen by the parties, including split passing of risk and title.

Standard document, Supply of goods agreement: Cross-border: clauses 9.1 and *9.2* would be valid.

With regards to the passing of the title in particular, the Spanish jurisdiction applies the theory of the title and the means (*Article 609, Civil Code*). For ownership to be considered validly and completely transferred from one party to another, there are two requirements:

- The "title", which means the formalities necessary to validly reflect the transfer (in this case, the contract).
- The "means", which will also depend on the nature of the object whose ownership is being transferred, but refers to the actual transfer of the object to the acquiring party (in this case, the delivery of the goods at the place and by the means agreed).

36. Can a seller elect to transfer title in the goods as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 9.5* so that the seller may sue the buyer where title has passed or the date for payment has passed but no payment has been made by the buyer?

Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 9.5 would be very unusual practice, and may not be valid under Spanish law. The ability for one party to unilaterally determine the validity of the performance or validity of the agreement is not valid under Spanish law.

While a deposit agreement (that is, that the goods are delivered to the buyer but ownership is not transferred) may be included in the relationship, *clause 9.5* would be likely to be seen as containing the potential for arbitrary and unilateral decision by the seller to transfer the title at its convenience, triggering the payment obligation; this is not likely to be valid, as the validity and performance of the agreement cannot be left to the unilateral discretion of just one of the parties (*Article 1256, Civil Code*) (see *Question 18*).

Usually, if deposit and supply are regulated in the same contractual relationship, the end of the former and beginning of the latter will be specified in the agreement, to ensure compliance and remedies in case of breach.

37. To what extent is a retention of title clause as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clauses 9.2* and *9.3* (which seeks to provide protection to the seller for the price of the goods) valid under national law?

A retention of title clause like those in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clauses 9.2* and *9.3* is valid under Spanish law.

The parties can expressly agree that delivery will not (at least for the time being) transfer ownership of the goods to the buyer. The ownership of the sold goods then remains with the seller until the moment the buyer pays the price.

The Spanish Supreme Court has declared a retention of title clause to be valid, as it is neither prohibited by law nor contrary to morality (*Decision of the Supreme Court, 10 June 1958*).

38. Can the parties include a clause in the contract such that the seller is granted a licence to enter the buyer's premises to recover the goods where the buyer has not paid for them as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 9.4*?

No; in Spanish law, a clause granting the seller a licence to enter the buyer's premises to recover the goods where the buyer has not paid for them is prohibited.

The impossibility of the seller's entry into the buyer's premises to recover the goods in the event of non-payment is due to the constitutional right to the inviolability of the dwelling (*Article 18.2, Spanish Constitution*). A judicial order will always be required in order to enter the premises of another party.

39. Would the seller still be able to obtain possession of the goods from the buyer as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 9.4* if the buyer was in financial difficulties or became insolvent?

A declaration of bankruptcy does not affect the validity of the contracts to which the insolvent entity is a party (*Article 62, Bankruptcy Act*).

Generally, a supply of goods contract continues to be in force after the declaration of insolvency, and is not affected by the declaration. For those goods that have entered into the buyer's possession but over which full ownership has not been yet acquired, the bankruptcy administrator can arrange appropriate measures for their return to the seller.

Termination

40. In your jurisdiction, can the parties terminate the agreement for all the reasons set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 16*?

The parties can terminate the agreement for some of the reasons provided in *Standard document, Supply of goods agreement: Cross-border: clause 16*; *clause 16.1(a)* is valid.

However, *clauses 16.1(b)*, *(c)* and *(d)* are not valid as automatic triggers of termination. The agreement cannot be terminated by the non-breaching party unless a material breach has occurred as a result of the situation (*Article 61.2, Bankruptcy Act*); these situations would not be viewed as inherently constituting material breaches.

Voluntary liquidation is not a valid cause for termination.

41. What other rights of termination, if any, could the parties have under the laws of your jurisdiction in addition to those set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 16*?

None.

Excluding liability

42. To what extent does national law permit the use of terms which limit or exclude the liabilities of a party to a business-to-business contract for the sale of goods? Consider in particular the following and *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 14*:

- Excluding or limiting liability with respect to a breach of an express contract term.
- Excluding or limiting liability with respect to a breach of an implied contract term for example, description, quality, fitness for purpose title.
- Excluding or limiting liability for a particular type of loss, for example, death or personal injury.
- Setting out an overall cap on liability (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 14.2(b)*).
- Restricting remedies or imposing procedural and evidential restrictions.
- Excluding or limiting liability for defective products under product liability laws.
- Excluding or limiting liability for misrepresentation (if applicable).
- Excluding or limiting liability to third parties.

Spanish law allows the parties to agree on terms and conditions that limit or exclude the liabilities of a contracting party to a business-to-business contract for the sale of goods; any of these conditions would be valid, subject to the statutory limitations on free contract (see *Question 43*). If the limitations or exclusions on liability are set out in standard terms then certain requirements must be fulfilled (see *Question 9*).

43. Is there any reasonableness test or other requirement for any exclusion or limitation of certain claims or liabilities under the laws of your jurisdiction as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 14*?

Parties' freedom to include any terms and conditions that they deem appropriate to their business-to-business contractual relationship is limited by the following statutory limitations on contractual terms:

- The terms and conditions must not defeat the purpose of the agreement.
- The contracting parties can establish any covenants, clauses and conditions they deem convenient, provided they are not contrary to law, morals or public policy (*Article 1255, Civil Code*).
- The validity and performance of contracts cannot be left to the discretion of one of the contracting parties (*Article 1256, Civil Code*).
- The terms must not cause a detriment to third parties (*Article 6.2, Civil Code*).

44. In your jurisdiction, are losses separated into (a) direct and (b) indirect or consequential losses? Can loss of profits be a direct and indirect loss (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 14.2(a)*)?

Under the Civil Code, compensation for damages comprises both:

- Direct loss (the value of the loss suffered).
- Indirect loss or *lucrum cessans* (the profits that the non-breaching party has failed to obtain due to a breach of the obligations under the agreement).

Loss of profits constitutes an indirect loss.

The breaching party that acts in good faith will only be liable for those damages that could be foreseen at the time of contracting and which are a direct consequence of the breach of its obligations.

However, in the absence of good faith, the debtor will be liable for all damages actually arising as a consequence of its failure to perform the obligation.

Case law regarding damages requires that:

- They are real and affect the innocent party.
- They are economically assessable.
- They can be identified and determined.
- There be a causal relationship between the failure to perform and the damage caused.

The burden is on the claiming party to prove that all these requirements are met.

45. In your jurisdiction, are there legal obligations to inform the relevant authority when a defective product has been identified (see *Standard document, Supply of goods agreement: Cross-border (with contract details cover sheet): clause 10*)?

In the Spanish jurisdiction, in general terms, there are no legal obligations to inform any specific authorities when a defective product has been identified. However, specific rules may apply where defective products may affect public health (for example, in the food industry).

Warranties and indemnities

46. Does national law draw a distinction between protection by warranty and protection by indemnity? How does national law control the use of indemnities in supply contracts as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 12*? Are any indemnities implied into supply of goods contracts?

There are no specific provisions drawing a distinction between protection by warranty and protection by indemnity: there is no difference between them under Spanish law.

Spanish national law does not control the use of indemnities in supply contracts as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 12*.

No indemnities are implied into supply of goods contracts.

47. Are there any laws in your jurisdiction governing indemnities in relation to the infringement of third party IP rights by a party that causes loss or damage to the other party (see *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clauses 6.2* and *12.1*)?

There are no specific provisions governing indemnities in relation to the infringement of third-party IP rights by a party that causes loss or damage to the other party. The parties can include any provisions they choose in the contract, by mutual agreement.

48. Does national law imply a duty on the indemnified party to mitigate their losses as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 12.3*?

Article 17 of the Insurance Contract Law, which also applies outside the context of insurance, can be seen as placing a general duty on the party harmed by a breach of the other party's obligations under the agreement to mitigate the negative effects.

The courts can release the breaching party from the requirement to pay compensation (in whole or in part), if it is proved that the person who suffered the damage aggravated it by their negligent conduct (including a lack of effort in mitigating the losses). This is because the causal link between the breaching party's actions and the damages suffered by the harmed party can be considered broken in these circumstances; some or all of the damage can be considered to be the result of the negligence of the harmed party and not of the actions of the breaching party (see *Question 44*).

49. Can express remedies be included in the contract for repairing or replacing the goods instead of offering a refund to the buyer for breach of warranty as set out in the first option of *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 8.2*?

Yes, express remedies for repairing or replacing the goods instead of offering a refund to the buyer for breach by the seller of warranty may be established in the contract by mutual agreement of the parties.

50. Could the pre-conditions in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 8.2* and the exclusions in *clause 8.3* affect the enforceability of *clause 8* as whole?

No; these terms would be acceptable, to the extent that they do not breach the statutory limitations on contractual terms (see *Question 43*). As they are set out, we would not expect them to be deemed to breach those limitations.

51. Does national law allow a seller to exclude their liability for failure to comply with warranties such as delivering damaged goods or for failure to deliver as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 8.3*? Can the buyer be prevented from claiming damages for breach of warranty as set out in the first option of *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 8.2*?

The contracting parties are free to agree on the terms and conditions that they deem appropriate, such as the exclusion of the liabilities of the seller or any limits to the buyer's right to claim damages, provided that they do not breach the statutory limitations on freedom of contract (see *Question 43*).

As a result, the seller's liability may not be excluded in some cases, such as:

- Where to do so would affect the interests of third parties.
- Where to do so would also exclude non-contractual liability.
- Where the consumer's interests are affected and the manufacturer/seller is responsible.

Standard document, Supply of goods agreement: Cross-border: clauses 8.2 and *8.3* would be acceptable under Spanish law.

52. Can a seller's warranty in a contract also apply to any repaired or replacement goods supplied by the seller, as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 8.4*?

Yes, the seller is liable to the purchaser for the lawful and peaceful possession of the goods sold; and for any hidden defects they have, and this warranty can be (and usually is) extended contractually to repaired and replaced goods. Where there is no express contractual provision in this regard, the buyer has six months to exercise this right (*Article 1472, Civil Code*).

However, when the defect is of such gravity that it makes the goods entirely useless for its purpose, then the seller will be liable under the principle of "*aliud pro alio*"; a claim under this can be brought within the much longer timescale of five years.

Force Majeure

53. Are there any legal controls on the use of force majeure clause in a supply contract as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 17.1*?

Force majeure is dealt with in Article 1105 of the Civil Code. For a force majeure clause to apply, the event (either unforeseen, or foreseen but unavoidable):

- Cannot be attributable to the customer.
- The obligation must involve the performance of an impossible act.
- Must be the cause of the non-performance of the obligation.

Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 17.1 would be valid; it is common practice to set a term after which the non-breaching party will be entitled to terminate the agreement (generally, it is market practice for this to be six months).

Entire Agreement

54. Is it common to have an 'entire agreement' clause (under which, typically, a seller excludes liability for any representations or warranties made during the course of negotiations that are not included in the agreement) as set out in *Standard document, Supply of goods agreement: Cross-border (with contract details cover sheet): clause 17.4*? Are there any circumstances in which an entire agreement clause may be unenforceable?

It is common to include an "entire agreement" clause in a Spanish supply of goods agreement.

However, there may be some limits to the enforceability of *Standard document, Supply of goods agreement: Cross-border (with contract details cover sheet): clause 17.4* in respect of certain conditions not specifically provided for but reasonably expected by any of the parties; for example, it does not cover usage of the trade, such as the quality of the product which, even if not specified in the contract, might be considered acceptable quality for that product according to trade usage.

Any agreement between the parties will always be limited to the extent that it is not contrary to the law, morals and public order (see *Question 43*). The wording of the clause is likely to be acceptable as it stands.

Competition law

55. Do supply contracts give rise to any competition law issues in your jurisdiction?

In Spain, the National Commission for Markets and Competition (CNMC) is the entity that guarantees free competition and regulates all markets and productive sectors of the economy, in a bid to protect consumers. However, as Spain is an EU member state, the European Commission's competition law decision-making prevails over that of the CNMC.

Among others, the following conducts are investigated:

- Agreements between competitors which aim to restrict competition (collusion or cartel).
- Abuse of dominant position.
- Vertical restrictions (agreement between supplier and customer).
- Refusal to sell.
- Predatory pricing (below cost of production), which discourages the entry into the market of new competitors.
- Narrowing of margins (if the company's profit percentage has fallen excessively, for example, because of predatory pricing).
- Mergers and acquisitions, which may lead to monopolies or oligopolies.

In view of the above, the clauses of supply agreements most likely to be potentially relevant

56. Do sellers often ask for a minimum purchase commitment from the buyer as set out in *Standard document, Supply of goods agreement (with contract details cover sheet): Cross-border: clause 3*?

Yes. A minimum purchase commitment clause is often included in supply of goods agreements. Some other similar terms are commonly found in this kind of agreement, such as:

- Minimum sales volume.
- Discounts based on purchase or sales volume thresholds.

General

57. Are there any compliance obligations on either party under your local laws in relation to the supply of goods?

There are no Spanish laws specifically relating to compliance obligations in relation to the supply of goods. Spanish law also does not oblige the parties to a contract to include any specific compliance obligations.

The laws relating to anti-money laundering and anti-terror compliance are unlikely to have any relevance to most supply of goods contracts. However, it is usual practice to include in the agreement a clause regarding data protection compliance, and the parties may also refer to:

- Their company internal compliance manuals.
- Compliance of any activities with any legal obligations in relation to those activities.
- Their commitment to comply with all legislation, regulations and collective bargains that may apply to them.

58. How does this agreement need to be executed in order to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

As a general rule, no execution or registration formalities are required for a supply of goods agreement to be valid and enforceable. However, from a practical perspective, to ensure the enforceability of a supply of goods agreement the parties should sign a written contract containing at least the fundamental details required for a valid contract (being price, the object of the contract and its purpose (see *Question 1*)), and their signatures or those of their representatives to express their consent.

The agreement can also be notarised to have proof of its date and capacity of the parties.

Additionally, the buyer's obligation to pay established in a notarised document may be enforceable by summary judicial procedure in the event of non-compliance, rather than the seller having to bring a claim on the full facts. Once notarised, the agreement can be apostilled or legalised for it to be recognised abroad for the purposes of, for example, proving the buyer's status as a distributor before a foreign authority (although not all countries are signatories to the Hague Convention that recognises apostilling).

59. Are there any clauses in the supply of goods agreement that would not be legally enforceable or not standard practice in your jurisdiction?

None apart from those discussed in previous answers.

60. Are there any other clauses that would be usual to see in a supply of goods agreement and/or that are standard practice in your jurisdiction?

The exclusivity clause. There are two kinds of exclusivity: that granted by the seller to the buyer, and that granted by the buyer to the seller. In the first case, the seller, directly or through other buyers/distributors, will not compete with the buyer/distributor by selling the same products in the defined territory. In the second case, the buyer/distributor may not sell other products that compete with the seller's products in the defined territory. Please note that exclusivity, insofar as it restricts free competition, is always subject to restrictive interpretation, so the clauses must be very defined and detailed.

Subcontractors. The seller will be liable for all the acts and omissions performed by any of its employees and subcontractors, agents and other people involved, and all work undertaken by them will be in compliance with the main agreement entered into by the seller and the buyer. The seller may also commit to be up to date with all payments and obligations of any kind regarding its employees and subcontractors. The seller may also specifically state that it will not take any action that would lead any third party or the employees of the subcontractors to think that there is a labour relationship between the subcontractor and/or its employees with the buyer.

Inspections. The right of the buyer to conduct inspections of the seller's premises by itself or by means of external inspectors may be included in the agreement and may even include the right to inspect the subcontractors' premises.

Change of control. The parties may commit to notifying the other party, with a minimum prior term, of any changes in the ownership (partners or shareholders) of their company. A change of control may also be included among the causes for termination.

Arbitration or mediation clause. The parties may include an arbitration clause in the agreement; they may specifically choose an arbitration entity specialised in their trade. The parties may also establish mediation as means to achieve conflict resolution (see *clause 18(3)* and *(4)*).

Quality control. The contracting parties may include an express reference to the quality controls that the sold goods require. They may agree on the exact extent and features of the quality controls to be performed by each of them, both at the moment immediately before departure from the premises of the supplier and after delivery at the buyer's facilities.

Advances. The parties may agree on the financing of the production by the buyer as consideration, meaning that the buyer may pay for the goods in advance, in order to permit the supplier to finance the production of those goods.

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