

COMMERCIAL LAW

A BRIEF OVERVIEW OF SOME BASIC COMMERCIAL CONCEPTS AND TERMS

INCORPORATION

undertaking (business entity, business association, corporate entity, incorporation) – general terms for any type of legal person carrying out commercial activity (merchant), e.g. **sole-proprietor, partnership** (personal, unlimited liability), **company** (limited liability).

register	sole-proprietorship	by filing the required constitutional documents (memorandum of association, articles of association; articles of incorporation, bylaws, etc.), together with other statutory forms and fees, WITH the relevant authority (e.g. Commercial Register)
establish	partnership	
found	company	
set up		

CAPITALISATION

A company's capital is usually of two kinds: **share capital** and **loan capital**. Share capital is raised through the sale of shares to existing or new shareholders. Loan capital is commonly raised through **secured credits**, typified by the creation of possessory and non-possessory security interests. Typical examples of **possessory security interest** are the **mortgage** and the **pledge** (pawn), and of **non-possessory security interest** – the **charge**.

TRANSFORMATIONS

A company can undertake a number of transformations:

1. **merger** a) this is the legal term for a company transformation, often described as 'acquisition' of 'takeover', by which the **acquired company (target)** is absorbed into the **acquiring company (acquirer)** and ceases to exist as a legal entity;
2. **consolidation** b) this is the legal term for a company transformation by which two (or more) companies are blended together to form an entirely new legal entity;
3. **division** c) this is a general term for the transformation by which one company becomes two (or more) separate entities; this involves **spin-outs, spin-offs, split-offs, split-ups**, which reflect different share distribution schemes between the divided companies and different degrees of dependence of the newly formed entity from the parent company;
4. **conversion** d) transformation involving the change of legal form (or legal status) by which one type of company becomes another type.

LIQUIDATION

A company is terminated by liquidation. There are two general types of liquidation: A) **voluntary liquidation (voluntary winding up)** - this is when the shareholders decide to **put the company into liquidation**, and there are enough assets to pay all the debts of the company, i.e. the company is **solvent**. In this case a **liquidator** is appointed to **realise the assets of the company, meet the claims of the creditors, and distribute the remaining assets among the shareholders**. B) **compulsory liquidation (or compulsory winding up)** - this is when the court issues an order for the company to be wound up (a "**winding-up order**") on the petition of a creditor stating that he or she is owed a sum of money by the company and the company cannot pay, and appoints an **Official Receiver (OR)** and possibly an **Insolvency Practitioner (IP)**.

CONTRACTS

Commercial transactions are most commonly effectuated with the help of contracts. A contract is a **legally binding** exchange of promises or **agreement** between persons that results in an **enforceable legal relationship**. The **parties** to a contract are free to determine the **subject matter** and the **essential terms** and **provisions** of their **contractual relationship**, as long as they are legal and do not affect the **public interest**. **Rights** and **obligations** under a **valid** contract will be **enforced** by the law.

A contract is **modified, terminated, repudiated, revoked** or **rescinded** only with the **mutual consent** of the parties or in case of **breach**.

Generally, contracts are **made / concluded** to be **performed**. When parties **enter into** a contract / **contractual relationship** they do so in the expectation that its **provisions** will be complied with. Contracts can be **terminated, or brought to an end**, in four principal ways: a) **by performance**, b) **by mutual agreement**, c) **by the operation of law**, d) **by breach**. A **failure to perform** in accordance with the contract's terms and conditions (**non-performance**) may constitute a **breach of contract - entitling the non-breaching party** to an appropriate **remedy**, which will either **compel the breaching party's performance** or **provide that the injured party collect the relevant compensation / damages**.

PART OF A CONTRACT	EXAMPLE
1. HEADING – the main title of a contract	a. “AGREEMENT FOR SALE”
2. COMMENCEMENT AND DATE – the date of entering into contractual relationship, usually the same date on which the conditions of the agreement come into effect (become effective) ;	b. “This Agreement is made as of this [day] day of [month], [year]”
3. PARTIES – the parties to the contract are set out in closest detail in order to void any possible confusion;	c. “ Between: 1. [full name of the company], [type of the company] incorporated under the laws of [country], identification number: [number], with its seat at [address], registered in the [registrar/court], represented by [name] (hereinafter “[short name]”) and 2. [full name of the person], personal number: [number], identity card number: [number], issued from: [place], on [date] (hereinafter “[short name]”)”
4. PREAMBLE – also known as Background or Recitals, provide the reasons why the parties have agreed to conclude the contract;	d. “ Whereas: The Seller has agreed to sell and the Buyer has agreed to buy ...”
5. Beginning of the OPERATIVE PROVISIONS – sometimes referred to as Subject Matter of the Agreement, which forms the main part of the contract and contains the terms and conditions of the contractual relationship between the parties;	e. “ Now the Parties hereby agree as follows: ”
6. DEFINITIONS – this part specifies the meaning that is attributed to the terms used in the contract and conventionally capitalised, i.e. spelled with capital initial letter;	f. “In this Agreement, unless the context otherwise requires, the following words and expressions shall have the following meanings: Agreement means this agreement between the Parties, as amended, supplemented or restated from time to time, and “herein”, “hereof”, “hereto”, “hereunder” and similar expressions mean this Agreement and not any particular clause or provision...”
7. INTERPRETATION – this part provides rules for interpretation and construction of the contract;	g. “In this Agreement where the context admits words importing the singular number shall include the plural and vice versa and words importing individuals shall include corporations and partnerships and vice versa...”

8. BODY of the contract – this part differs from contract to contract but typically contains the **conditions precedent**, stipulates the **consideration** to be contributed by the parties, sets forth the **rights and obligations** of the parties, etc. h. “The buyer agrees to pay in consideration for the acquired [goods] the amount of [sum]...”
9. DURATION AND TERMINATION – this part specifies the **term** of the contractual relationship i. “This Agreement shall continue in full force and effect without limit in point of time until the earlier of the following events...”
10. GENERAL PROVISIONS – this part usually contains **standard clauses**, “**boiler-plate clauses**”, like:
- * TIME OF THE ESSENCE CLAUSE j. “Time is of the essence with respect to all provisions of this Agreement that specify a time for performance”
- * NOTICES CLAUSE k. “All notices and other communications under this Agreement shall be in writing and shall be delivered by hand or by courier and shall be deemed given on the date of delivery to the Parties at the following addresses”
- * SEVERABILITY CLAUSE l. “If any provision of this Agreement or part thereof is rendered void, illegal or unenforceable in any respect under any law, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.”
- * ENTIRE AGREEMENT CLAUSE m. “This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, promises, covenants, arrangements, communications, warranties, whether oral or written, by an executive, officer, director, employee or representative of either party hereto.”
- * ASSIGNMENT CLAUSE n. “None of the Parties hereto shall be entitled to assign any of its rights and delegate any of its obligations hereunder without the prior written consent of the other Parties.”
- * FORCE MAJEURE CLAUSE o. “Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.”
- * GOVERNING LAW CLAUSE or “forum selection clause” p. “This Agreement shall be construed and governed in accordance with the laws of [jurisdiction]”
11. End of the OPERATIVE PROVISIONS is usually followed by the signatures of the parties q. “In witness whereof this Agreement has been entered into the day and year first before written.”
12. SCHEDULES – this part contains the documents annexed to the Agreement. r. This final part of a contract contains all additional specific documents, which form an integral part of the contract, such as: charts, exhibits, plans, drawings, ancillary agreements, etc.