Commercial Contracts 2020

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Commercial Contracts*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Armenia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Duncan Reid-Thomas of Baker McKenzie, for his continued assistance with this volume.

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Armenia

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CONTRACT FORMATION

Good faith in negotiating

1 | Is there an obligation to use good faith when negotiating a contract?

Armenian law does not currently recognise the obligation on contracting parties to use good faith when negotiating a contract.

'Battle of the forms' disputes

2 | How are 'battle of the forms' disputes resolved in your jurisdiction?

To conclude a contract, it is necessary to have two or more declarations of intent, both corresponding with one another. It is commonly accepted that a contract is concluded if the parties have reached a consensus on the essential conditions of the contract.

Under the Civil Code of Armenia, if an offer is made by one party, no contract is formed unless unconditional acceptance is given to all offer terms. If the terms of the response to the offer deviate from the offer in any manner, the response shall be treated not as an acceptance but a rejection of the offer and a counteroffer. It means that each party's reference to its own general conditions is considered a rejection of the other party's offer and treated as a counteroffer.

Under this law, the party that sent the last form is deemed to have made an offer, based on the terms of the document it sent, that was accepted by the other party's performance.

Language requirements

3 | Is there a legal requirement to draft the contract in the local language?

There is no legal requirement to draft the contract in Armenian. The parties are free to choose the language of the contract, with one exception: if the contracts are subject to be notarised, then it shall be in Armenian or multilingual, Armenian being the prevailing language. Tax legislation recognises that if the documents are in English or Russian those can be presented during inspections, while documents in other languages shall be accompanied by an Armenian translation. Also, the language of litigation or other official correspondence in the Republic of Armenia is Armenian, so any foreign-language documents, including contracts, proffered to an Armenian court as evidence must have a concomitant Armenian-language translation (which is not the case for bilingual or Armenian language documents).

Online contracts

4 | Is it possible to agree a B2B contract online?

The possibility to agree a B2B contract online is crucial nowadays not only because of globalisation but also because of covid-19. Armenian law is progressive in the acceptance of electronic signatures, which are generally considered valid for the legal execution of documents.

Under Armenian law a contract may be entered into in a written form upon signature of parties through drawing up a single document, as well as through exchanging information or a communication (document) via means of postal, telegraphic, facsimile, telephone, electronic or other communication that make it possible to confirm its authenticity and accurately establish that it comes from the contracting party.

At the same time, we still lack a comprehensive judicial practice on the online contracts. Currently, the courts hear a number of cases on online loan agreements and their enforceability. A number of issues, including on incorporation of arbitration agreement and enforceability of the online agreements are heard in national courts, but no final decision with regards to this has been achieved and it is not known how the Court of Cassation (the supreme court decisions whereof have precedential effect) will interpret these regulations.

STATUTORY CONTROLS AND IMPLIED TERMS

Controls on freedom to agree terms

5 | Are there any statutory or other controls on parties' freedom to agree terms in contracts between commercial parties in your jurisdiction?

As a general rule, under Armenian law the parties are free to enter into contracts and to agree on the terms of contract freely, except for the cases where certain imperative rules on the content of the relevant condition is prescribed by law. There are a number of instances (based on the peculiarities of a certain contract or types of relations, such as damages) where imperative norms are determined and amendment thereof under the agreement results in the contract being declared invalid or void.

The Civil Code of Armenia does determine dispositive norms to govern the relationships of the parties if no agreement on specific conditions is agreed. The law further allows the parties to reach an agreement on excluding, amending or supplementing such dispositive norms by their agreement. Respectively, where there is no such agreement, the condition of the contract will be determined by a dispositive 'default' norm.

Furthermore, where the condition of a contract is not prescribed by the agreement of the parties or by a dispositive rule, the relevant condition may be deemed as agreed or interpreted in accordance with the customary business practices applied with respect to these relations of the parties.

Standard form contracts

6 | Are standard form contracts treated differently?

The Civil Code of Armenia regulates the adhesion contract.

Under Armenian law, a standard form contract or a contract of adhesion is a contract, where the terms and conditions of the contract are set by one of the parties in printed forms or other standard forms, and the other party has no ability to negotiate more favourable terms and is, thus, asked to 'take it or leave it'. However, the party joining to the contract has the right to demand the rescission or change of the contract if the contract of adhesion, although does not contradict a statute or other legal acts, deprives this party of rights usually given under contracts of such type, excludes or limits the liability of the other party for the violation of obligations or contains other terms clearly burdensome for the adhering party, that it, on the basis of its reasonably understood interests, would not have accepted if it had the possibility of participating in the determination of the terms of the contract.

In the case of the above-mentioned circumstances a demand for the rescission or change of the contract made by the party that adhered to the contract in connection with the conduct of its entrepreneurial activity is not subject to satisfaction if the adhering party knew or should have known on what terms it was concluding the contract.

Implied terms

7 | What terms are implied by law into the contract? Is it possible to exclude these in a commercial relationship?

Under Armenian law, the parties are free to set any conditions on quality.

In the case of absence of any conditions on the quality of goods in a purchase and sales contract, the seller shall be obliged to transfer to the purchaser goods suitable for the purposes for which the given type of goods is normally used.

Where the purchaser, while entering into the contract, has informed the seller of the specific purposes for acquiring the goods, the seller shall be obliged to transfer to the purchaser the goods suitable for use in conformity with those purposes.

While selling goods by sample and by description, or both, the seller shall be obliged to transfer to the purchaser goods conforming to the sample and description, or both. Where mandatory requirements for the quality of goods for sales are envisaged as prescribed by law, the seller involved in carrying out entrepreneurial activity shall be obliged to transfer to the purchaser the goods conforming to those mandatory requirements. Goods, meeting requirements of higher quality as compared to mandatory requirements envisaged as prescribed by law, may be transferred upon agreement between the seller and the purchaser.

Vienna Convention

8 | Is your jurisdiction a signatory to the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention)?

Yes, the United Nations Convention on Contracts for the International Sale of Goods entered into force in Armenia on 1 January 2010.

Good faith in entering and peforming

9 | Is there an obligation to use good faith when entering and performing a contract?

Armenian law does not directly recognise a universal implied duty on contracting parties to perform their obligations in good faith, but this obligation is presumed from several articles of Civil Code of Armenia, including due to the obligation of the parties to comply with the terms of contract, and the right of parties to claim damages caused due to misrepresentation or warranties of the other party.

In particular, the person whose rights have been breached is entitled to claim compensation of damages from the person who has caused the damage. This general rule is applicable to the damages caused under the contract as well. Moreover, if that non-performance or improper performance of an obligation occurred by fault of both parties, the court shall accordingly reduce the amount of liability of the debtor. The court also shall have the right to reduce the amount of liability of the debtor if the creditor intentionally or by negligence facilitated an increase in the amount of losses caused by the non-performance or improper performance, or did not take reasonable measures to reduce it.

Therefore, the law requires both the parties to act in good faith and in compliance with the agreement and the law, even though that responsibility is not directly provided by law.

LIMITING LIABILITY

Prohibition on exclusions and limitations

10 | What liabilities cannot be excluded or limited by a supplier in a contract?

Under Armenian law, liabilities cannot be excluded or limited by a supplier if the obligation has been violated intentionally. An agreement concluded in advance for eliminating or limiting liability for the intentional violation of an obligation is null and void. Furthermore, the Civil Code of Armenia explicitly prohibits limitation of liability in contracts (including supply contracts) concluded with consumers. Particularly, in cases when the creditor is a consumer, the agreement on limitation of liability is null and void.

Financial caps

11 | Are there any statutory controls on using financial caps to limit liability for breach of contract?

The Civil Code of Armenia determines the concept of 'penalty' as a form of ensuring performance of obligations under the contract. Particularly, the parties are entitled to determine a penalty clause for non-performance or improper performance under the contract. Moreover, the parties are not obliged to prove that they have borne damages when claiming payment of the penalty under the contract.

Yet, the law further determines a maximum amount of such penalty.

Pursuant to the Civil Code of Armenia, the maximum annual amount of the penalty determined under the contract may not exceed fourfold the bank interest rate set by the Central Bank of the Republic of Armenia, unless otherwise provided by law. Currently, this rate is 12 per cent. The total amount of all damages determined by the contract may not exceed the principal amount of the debt at the respective moment.

Any agreement that does not comply with the mentioned rules shall be null and void.

Moreover, the law determines cases when the court or the Financial System's mediator may deduct the penalty, when the penalty is disproportionate with the amount of the debt and further conditions determined under the law are satisfied.

Indemnities

12 | Are there any statutory controls on indemnities used to cover liability risks in contracts?

There are no such controls.

Liquidated damages

13 | Are liquidated damages clauses enforceable and commonly used in your jurisdiction?

The concept of 'liquidated damages', per se, is not regulated under Armenian legislation. Armenian law suggests a penalty be deducted, which may be applicable when the relevant party has reached any of its obligations under the contract, including for delay of performance. Moreover, in the cases when the damages have not been fully compensated under the contract, the breaching party shall be obliged to compensate the damages for the exceeding amount. However, the law allows the parties to 'limit' the liability of the breaching party to the amount of the penalty.

On a separate note, the general rule on damages (article 17 of the Civil Code of Armenia) determines that a person who has suffered damages shall be entitled to be fully compensated for his or her damages unless otherwise agreed under the agreement. Respectively, this further proves that the parties may limit their liability under the contract. In the meantime, the above-mentioned rules of prohibiting limitation in certain instances shall be borne in mind.

As a final remark, it is safe to say that such penalty provisions are widely used in the commercial contracts concluded under Armenian law.

PAYMENT TERMS

Statutory time limits on payments

14 | Are there statutory time limits for paying invoices? Is it possible to agree a different payment period?

No, there is no statutory time limit for payment of invoices. The buyer has the general obligation to make payment by the date specified in the contract. If the parties have not specified a date, the buyer must make payment within a reasonable period of time after the payment obligation has arisen. The actual term of 'reasonable time' is not specifically determined under the Code, neither by court practice, and it shall be determined each time taking into consideration the essence of the obligation, and relevant economy standard, and the trade customs.

Still, if the obligation has not been completed within a reasonable period of time, or the obligation of payment is based on demand by the creditor, the obligation shall be performed within seven days following the day when a demand on making the payment has been made by the creditor. This rule acts, unless for the specific contract type or payment obligation different payment term follows from a statute, other legal acts, the terms of the obligation, the customs of trade or the nature of the obligation.

Late payment interest

15 | Is statutory interest charged on late payments? Is it possible to agree a different rate of interest?

Yes, statutory interest charged on late payments, unless otherwise provided by the contract. The rate of interest shall be determined by the accounting rate of bank interest existing on the day of performance of the monetary obligation or the corresponding part of it. The amount of interest provided by the contract may not exceed twice the interest rate established by the Central Bank of the Republic of Armenia (currently the standard rate is 12 per cent)

Civil penalties

16 | What are the civil penalties for failing to comply with statutory interest rate or late payment of invoices?

The Civil Code of Armenia determines the consequences for late payment under any monetary obligations. The law further allows to alter this provision under the agreement, provided that the imperative cap determined under the law is complied with.

TERMINATION

Implied terms

17 | Do special rules apply to termination of a supply contract that will be implied by law into a contract? Can these terms be excluded or limited by including appropriate language in the contract?

Generally, the Civil Code of Armenia defines the cases when a party may unilaterally terminate the contract. There are two separate processes that may result in termination of the contract (other than based on the mutual agreement of the contract).

First, a party may submit a claim to the court with a request to terminate a contract due to the material breach of the contract by the other party. This process is imperative for any contracts and may not be excluded under the contract. The parties may yet agree on further grounds based on which an agreement may be unilaterally terminated in judicial manner.

Second, the Civil Code of Armenia has the concept of 'rescission from the Contract'. Literal translation of this clause reads as refusal to perform obligations under the contract. If a party chooses to rescind from the contract (fully or partially) the agreement shall be deemed as respectively changed or terminated under law. Both parties may opt to rescind from the contract in their agreement for convenience (irrespective of any grounds) or for cause. Furthermore, certain grounds for rescission of the contract are determined for specific contracts or relations under the law itself.

Under the Civil Code of Armenia the parties to a supply contract have the right to terminate a supply contract under certain circumstances. Particularly, pursuant to the Code the parties are entitled to unilaterally (without the need of consent of the other party) make amendments in the contract and rescind from whole or part of the contract in the case of a material breach of the contract by either of the parties.

Breach of the contract of supply by the supplier is presumed substantial in the following cases:

- supply of goods of improper quality with defects that cannot be eliminated within time period acceptable to the buyer; and
- repeated failure to meet the deadlines for supply of goods.

Breach of the contract of supply by the buyer is presumed to be substantial in the following cases:

- repeated failure to pay for goods on time; and
- repeated failure to collect goods.

Although parties may not exclude any of the above-mentioned grounds based on their agreement, they are entitled to agree on further bases for unilateral change or rescission of the contract.

Notice period

18 If a contract does not include a notice period to terminate a contract, how is it calculated?

Armenian law does not define a specific notice period to terminate a contract. In certain cases, however, the law sets a default provision for such notice periods; for example, in the case of a supply contract, it is envisaged that an agreement shall be deemed as changed or terminated (due to rescission of either of the parties) from the moment when notice has been served to the other party. A different period may be indicated in the notice or agreed mutually by the parties.

Furthermore, when a party intends to claim unilateral termination of the contract due to the material breach of the other party, a demand for change or termination of a contract may be made by a party to the court. Prior to bringing such a claim to the court, the terminating party shall send a notice to the other party with a respective proposal to change or terminate the contract. The claim can be brought to the court only after the latter rejects such an offer or fails to answer within a 30-day period (or within the time period indicated in the proposal).

Automatic termination on insolvency

19 Will a commercial contract terminate automatically on insolvency of the other party?

Insolvency of the party is not grounds for automatic termination of a commercial contract. However, in certain cases the Civil Code of Armenia does determine that the insolvency may lead to termination of such contracts, including the Contract of Commission, the Agency Contract, the Contract of Entrusted Management of Property and the Franchising Contract.

In other cases, while the fact of insolvency itself is not a ground for automatic termination of the contract, the consequences of that insolvency, including the failure or impossibility to perform under the contract may still be a valid ground for termination thereof.

Termination for financial distress

20 Are there restrictions on terminating a contract if the other party is in financial distress?

Neither financial distress nor insolvency are default grounds for termination of contracts (except for certain types of contract, when the law explicitly determines such grounds). Still, grounds for termination of a contract may rise, as a consequence of financial distress or insolvency and the other party may be entitled to request unilateral termination from the court or rescind from performance under the contract, in compliance with specific conditions and requirements applicable to the respective contract.

Force majeure

21 Is force majeure recognised in your jurisdiction? What are the consequences of a force majeure event?

Under Armenian law, unless otherwise provided by a statute or contract, a person who has not performed an obligation or has performed an obligation in an improper manner in the conduct of entrepreneurial activity shall bear liability unless it proves that proper performance became impossible as the result of force majeure, namely, extraordinary and unavoidable circumstances in the given circumstances. Such circumstances do not include violation of obligations by contract partners of the debtor, absence in the market of goods necessary for performance, nor the debtor's lack of the necessary monetary assets.

Respectively, the commercial person who has breached its rights due to a force majeure will not be liable for such a breach. Moreover, if a penalty under the agreement is determined under the contract, the relevant party is not obliged to pay the penalty if the improper performance or non-performance has arisen due to a force majeure event. In either case, the parties are free to alter these provisions under their agreement, including through extending the scope of force majeure or excluding its impact.

SUBCONTRACTING, ASSIGNMENT AND THIRD-PARTY RIGHTS

Subcontracting without consent

22 May a supplier subcontract its obligations under the contract without seeking consent from the other party?

As a general rule, the Civil Code of Armenia envisages the right of a debtor to place performance of its obligation on a third person, unless a duty of the debtor to perform the obligation personally follows from a statute, other legal acts, the terms of the obligation, or its nature. Thus, unless it specifically derives from the agreement that the supplier shall exclusively provide the goods personally or that in case of a subcontract the consent of the buyer must be sought, such an obligation may be subcontracted to a third party.

Statutory rules

23 Are there any statutory rules that apply to subcontracting in your jurisdiction?

The debtor is entitled to subcontract its obligations to a third party, unless it explicitly derives from the contract or the nature of obligation that the obligations must be carried out personally. Still, the debtor shall be responsible for the non-performance or improper performance of an obligation by a third party before the main creditor. Particular conditions are further determined within certain types of contract, such as in the case of a work contract.

Assignment of rights and obligations

24 May a party assign its rights and obligations under the contract without seeking the other party's consent?

A right (claim) may be assigned to another person, provided that it does not contradict with applicable laws or the underlying contract. However, an assignment of a claim under an obligation in which the personality of the creditor has a substantial significance for the debtor is not allowed without the consent of the debtor.

As to the assignment of obligations, the transfer by a debtor of its debt to another person is allowed only with the consent of the creditor.

25 What statutory controls apply to the assignment of rights or obligations under a supply contract?

The Civil Code of Armenia regulates the relations of the parties in the cases when a right or obligation is being assigned to a third party.

In the case of assignment of rights, the debtor has the right not to perform an obligation to the benefit of the new creditor unless it has received a proof of the transfer of the rights (claim) to this person. A creditor who has assigned a claim to another person has the duty to transfer to it documents confirming the right of claim and to report information that is material to exercising of the claim.

As to the defences of the debtor, it has the right to raise any claims against the new creditor, that it would have against the initial creditor at the time of receipt of notice of the transfer of rights under the obligation to the new creditor.

Finally, the initial creditor who has assigned a claim is liable to the new creditor for the invalidity of a claim transferred to it but is not liable

for the non-performance of this claim by the debtor except when the initial creditor has provided a guarantee for the performance by debtor before the new creditor.

Turning to the assignment of obligations, the new debtor also keeps the right to bring any claims or defences against the creditor that are based on the relations of the creditor and the former debtor.

Enforcement by third party

26 | How may a third party enforce a term of the contract?

Under Armenian law, when an agreement has been concluded to the benefit of a third party, it has the right to enforce that agreement. A contract for the benefit of a third person is a contract in which the parties have established that the debtor undertakes the duty to make performance not to the benefit of the creditor but to a third person whether specified or not in the contract. Under such agreements the third person has the right to enforce the contract.

Once the person has expressed its intent to benefit from the contract, the parties shall not have the right to change or rescind from the contract without the consent of the third person unless otherwise provided under the law or the contract. Furthermore, the debtor is entitled to raise any claims against the respective third person, that it would have against the initial creditor.

DISPUTES

Limitation periods

27 | What are the limitation periods for breach of contract claims? Is it possible to agree a shorter limitation period?

The Civil Code of Armenia allows actions for breach of contract to be brought within three years. The law does not entitle the parties to agree on alternative limitation periods.

For individual types of claims a statute may establish special limitation period of actions reduced or longer in comparison with the general limitation period. For example, the limitation period of actions for claims made in connection with improper quality of the work done under a work contract is one year; and with respect to buildings and structures, it is three years.

Choice-of-law clauses

28 | Do your courts recognise and respect choice-of-law clauses stipulating a foreign law?

While the parties cannot choose a foreign law governing their relations within a domestic contract (ie, when no foreign element is included), in case when either of the parties are foreign, they are free to choose the governing law for the contract.

A choice of the law to be applied may be made by the parties to the contract at any time, both at the conclusion of the contract and later. The parties may also – at any time – agree on changing the law applicable to the contract.

29 | Do your courts recognise and respect choice-of-jurisdiction clauses stipulating a foreign jurisdiction?

The parties may freely refer their dispute to arbitration, including to international arbitration. Armenian laws further determine the processes for recognition and enforcement of both international arbitral awards (Armenia is a member to New York Convention) and foreign courts.

However, even when jurisdiction of a foreign court has been indicated in the contract, the parties may still be able to bring claims before the local Armenian courts, particularly pursuant to the Civil Procedure Code of Armenia.

When there is a foreign party to the dispute, the Civil Procedure Code determines the following: the general rule is that the courts shall hear the cases with participation of foreign entities when, at the initiation of the case, the respondent foreign individual resides in Armenia or the respondent entity is in Armenia. Furthermore, the courts may hear civil cases with foreign participation, among other times:

- if there is an agreement between the parties to the dispute;
- in a proprietary dispute, if the respondent has property in Armenia;
- in cases of damage to health, honour, dignity or reputation if the damage has been caused in the territory of Armenia;
- in cases of damage to property, if the grounds for bringing the claim or other circumstance have happened in Armenia;
- if the branch or representative office of the foreign entity is located in Armenia; and
- if the claim has arisen from an agreement, the performance whereof has happened or should have happened in Armenia.

Efficiency of local legal system

30 | How efficient and cost-effective is the local legal system in dealing with commercial disputes?

Although in Armenia there are no specialised commercial courts, commercial disputes may be solved by an impartial arbitral tribunal without undue delay or expenses.

The parties are free to agree on the procedure of dispute resolution, subject only to limitations as defined by law.

The parties are free to define by agreement qualifications for serving as arbitrator, which also may support faster and more qualitative dispute resolution.

New York Convention

31 | Is your jurisdiction a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Which arbitration rules are commonly used in your jurisdiction?

Armenia is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This convention entered into force for Armenia on 29 March 1998. While arbitration agreements are not very common in Armenia, in certain sectors, such as in banking agreements, there are common rules choses by the parties. Particularly, the disputes arising from banking contracts are usually referred to the local arbitration court 'Optimus Lex' or the Arbitration court of the Banks Union. As to the commercial contracts, governing the relations (especially in cases of Ad Hoc Arbitration) with UNCITRAL arbitration rules is common.

REMEDIES

Available remedies

32 | What remedies may a court or other adjudicator grant? Are punitive damages awarded for a breach of contract claim in your jurisdiction?

The court, based on the motion of the persons engaged in the judicial proceedings, may take measures to secure the action, if the failure to take such measures can make the execution of the court act impossible or difficult or can lead to a change in the factual or legal status of the property that is the subject of the dispute or can cause a significant damage to the person submitting the motion.

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant such interim measures, as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure for the purpose of preventing or compensating the potential losses to be incurred to the other party through application of interim measures.

The applicant must satisfy the arbitral tribunal that harm not adequately reparable by an award of damages is likely to result if the measure is not granted and the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted.

The punitive damage as a form of compensation for damages is not adopted in Armenian legislation.

UPDATE AND TRENDS

Recent developments

33 | Are there any other current developments or emerging trends that should be noted?

Generally, there have been no major or noteworthy developments in this sector. One issue that is relevant is the fact that the local courts are currently hearing several cases on the enforceability of agreements (particularly loan agreements) concluded with mobile applications or online. The approach of the courts is still unclear, but once precedential decisions on this matter are adopted it is likely to have a significant impact on mobile and online loans, as well as agreements concluded online or via telecommunications.

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