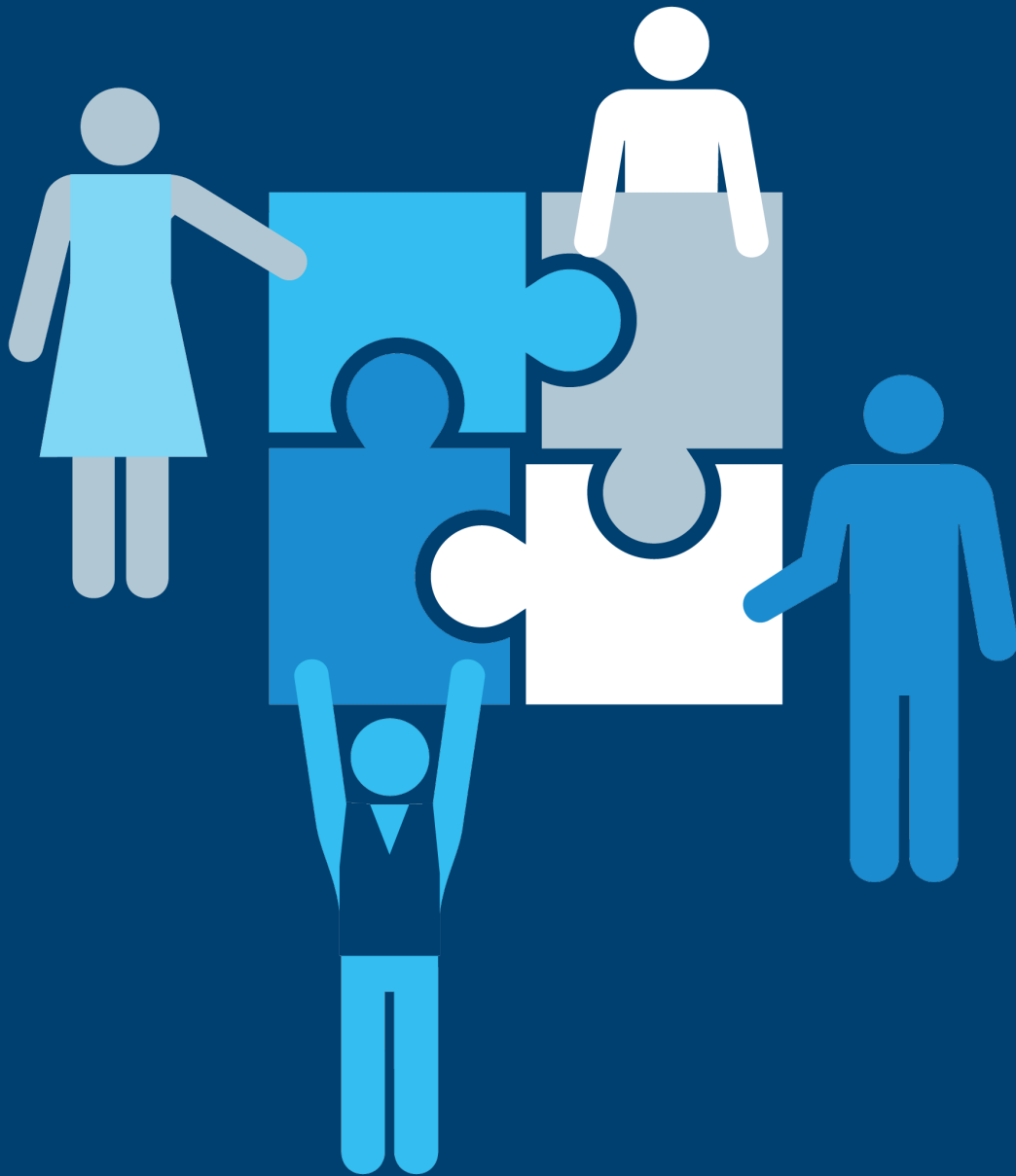


World Commerce & Contracting Principles



February 2021

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Introduction

These contracting principles have been developed under the auspices of and are endorsed by World Commerce & Contracting and are referred to as the **“World Commerce & Contracting Principles”** or just **“Principles.”**

They are intended to serve as an international cross-industry set of guidelines to support the drafting of applicable contract clauses and/or the negotiation of applicable terms and conditions between a customer and a supplier. These Principles are intended to reduce or eliminate the need for negotiation and shorten cycle time to signature.

Participants who accept these World Commerce & Contracting Principles are free to use them in their entirety or on a case by case basis as they deem appropriate; however, it is expected that the benefits of their use will be maximized when both parties to a transaction agree to rely on them and draft and negotiate the relevant clauses accordingly.

These Principles are not intended to constitute formal legal advice.

Alternative Dispute Resolution

The Principles



1. Although parties frequently have diverse views on the effectiveness or propriety of ADR strategies, all contracts should, at a minimum, require Direct Negotiation as a means of resolving disputes prior to utilizing other ADR processes or initiating litigation.



2. As compared to most forms of ADR, litigation takes more time due to courts' large caseloads and required pre-trial procedures, can be more costly, and can result in numerous appeals before a final actionable judgment is rendered. ADR is generally conducted in a private forum, which allows the dispute to remain confidential between the parties. Mediation and Arbitration allow the parties to choose specialized mediators or arbitrators who are familiar with the parties' industry(ies), and the technical and commercial complexities of the contract.



3. ADR processes should be specified in the relevant agreement so that there is no ambiguity as to intent. Arbitration must be specified in the agreement to be enforceable. If ADR is not contracted for in writing, then litigation becomes the default dispute resolution mechanism for the contract in most legal systems. Under applicable legal doctrine, arbitration clauses are considered independent agreements, separate from the contract in which they appear. ADR clauses should be clear and specific. For Mediation and Arbitration, the chosen ADR Institution's provided sample clauses should be customized and incorporated into the agreement when appropriate.



4. Regardless of what ADR process is used, parties should always have the right to seek equitable relief (e.g., temporary restraining orders or injunctions) to avoid irreparable harm while the dispute is being resolved.



Applying the Principles to contract terms

1. Direct Negotiation

Escalation as the first attempt to resolve a dispute

1.1. A dispute resolution clause in a commercial contract should require that the parties first attempt Direct Negotiation to resolve the dispute. If Direct Negotiation fails, then, if both parties so agree, Mediation should be pursued, and if the parties are still at an impasse by the end of Mediation, then binding Arbitration may be used.

Escalation process and time frames

1.2. Direct Negotiation provisions should require that the parties escalate the dispute to their designated management (both commercial and legal) for discussion and negotiation in the event of a dispute. The designated executives should be required to use all good faith efforts to resolve the dispute quickly, within a specified time frame (e.g., 6 months) which can be extended upon mutual agreement of the parties. Any resolved disputes should be memorialized in a settlement agreement.

2. Mediation

Mediation ground rules

2.1. For Mediation, in accordance with the chosen ADR Institution's sample clauses, the contract provisions should state the following:

- a)** The Mediation should be confidential and non-binding.
- b)** Name of mediator(s) (or mediator association) and payment method. The cost of the mediator should be split evenly between the contracting parties.
- c)** Duration of the Mediation.
- d)** Parties' requirements to mediate in good faith pursuant to an agreed upon time frame, until either party reasonably determines that it is fruitless to continue.
- e)** If agreement is reached in Mediation, it should be memorialized in a settlement agreement

3. Arbitration

Arbitration ground rules

3.1. For Arbitration, in accordance with the chosen ADR Institution's sample clauses, the contract provisions should consider specifying the following (especially as relevant to an ad hoc ADR process):

- a)** Which ADR Institution (or other organization if very specific technical expertise is needed) will process the Arbitration and which procedural rules of that ADR Institution will apply.
- b)** Whether the decision will be made by a panel of one or three arbitrators.
- c)** Place of arbitration.



- d) The required qualifications (if any) for the arbitrator(s) (e.g., require legal, finance or business experience, expertise in a particular industry, or nationality), the locale or jurisdiction where Arbitration is to take place (which will also determine applicable procedural law), language (especially if multilingual contracting parties), and choice of applicable law.
- e) Whether escrow is to be used to hold and protect funds, intellectual property or other items relevant to the dispute, until an Arbitration award can be made.
- f) Any award made in Arbitration shall be accompanied by a final award of the arbitrator(s) giving the reasons for the award and shall be binding upon the parties with no right of appeal. Judgment may be entered upon the Arbitration award in any court having jurisdiction thereof (or a specific court if preferred by the parties).

Defined Terms

Alternative Dispute Resolution, or ADR: the process for settling disputes without litigation. Arbitration, Direct Negotiation, and Mediation are all different forms of ADR.

Arbitration: a private dispute resolution process by which the parties submit their dispute to one or more appointed arbitrators authorized to reach resolution on the dispute by rendering a final and binding decision called an award.

ADR Institution: an organization commonly chosen to administer Mediations or Arbitrations, as applicable, between disputing parties (e.g., American Arbitration Association or the International Chamber of Commerce).

Direct Negotiation: the escalation of a contract dispute to each of the contracting parties' designated representative (typically, executive level) for resolution if the issues cannot be resolved at the working levels of the parties.

Mediation: a process by which a third-party neutral facilitator is engaged to facilitate discussions between the parties and to encourage compromise and settlement of the issues. If the parties settle the dispute during mediation, they will typically formalize it in a separate agreement.

Assignment and Novation

The Principles



1. Parties to a contract should avoid relying on the concepts of assignment and novation as defined in law with their specific effects, conditions and formal requirements. Instead, they should clearly delineate in their contract whether and under what circumstances a party can Transfer the contract to another party. The “assignment and novation” clause should therefore state, inter alia, the effects of any Transfer on the original parties and the new one(s), the consent conditions (including timing) and the formal requirements.



2. Except as set out in the next principle, the “assignment and novation” clause should as a principle exclude or limit the Transfer of contract unless the original counterparty has given its prior consent. A risk for suppliers and customers is ending up in a contract with an unknown party that might have different values, strategies and abilities, or with a competitor that can negatively affect their business.



3. A Transfer may be necessary to effect important changes in the business of suppliers or customers, such as corporate restructurings, company takeovers or sales of a business. Having commercial contracts that strictly restrict the right to Transfer might decrease the overall attractiveness (and value) of a company's business to a prospective buyer, as obtaining the required consent from the original counterparty may be difficult. The “assignment and novation” clause should therefore permit either party to Transfer the contract without the prior consent of the other party in certain pre-defined circumstances such as:

- a) a corporate restructuring, allowing the Transfer to an affiliated company under the same control as the original contracting party,
or
- b) a change of control transaction whether by merger, consolidation, sale of equity interests, sale of all or substantially all assets, or otherwise. In this case, the seller of a business should be able to Transfer the contracts with his customers and suppliers to the buyer and allow the buyer to carry on the business.



4. The validity under the relevant legal system of clauses giving prior consent for a Transfer in certain pre-defined cases should always be verified.



5. When clauses permit a party to Transfer the original contract in some pre-defined cases without the other party's prior consent, the Transfer should enter into force with respect to the incoming party when the Transfer agreed between the outgoing party and the incoming party is notified to the counterparty or when the counterparty so acknowledges.



6. Suppliers and customers may want to expressly exclude permitted Transfer in certain cases, as specified in the contract, such as when the transferee is an actual or potential competitor of the original counterparty or when the transferee is not capable of meeting obligations (technically or financially) or potential liabilities under the contract.

Applying the Principles to contract terms

1. Exclusion and Consent Conditions

Making Transfers conditional

- 1.1. The “assignment and novation” clause can have the effect of preventing or making conditional a Transfer, e.g. subject to the consent of the original counterparty.

Formal requirements for consent

- 1.2. When expressly requiring consent, the “assignment and novation” clause should specify the applicable formal requirements: e.g. the consent shall be provided in writing and prior to the effective Transfer.

Reasons for withholding consent

- 1.3. The clause could also specify whether prior consent, where required, can be withheld solely upon the discretion of the consenting party or whether it can only be withheld based on reasonable grounds.

2. Anticipated or Excluded Consent in Predefined Circumstances

Transfer always permitted

- 2.1. The “assignment and novation” clause can expressly specify the circumstances, under which the Transfer can occur without the prior consent of the other party.

When consent to Transfer not required

- 2.2. The clause can feature the right of Transfer without prior consent in predefined circumstances, either as unilateral (i.e., for the supplier or the customer only), or as reciprocal (i.e., for both parties). When focusing on this issue, the respective parties should consider various scenarios, e.g., continuity of business for the customer when the supplier Transfers the contract to another supplier, or, from a supplier perspective, creditworthiness when the customer Transfers the contract to another party. In Mediation, it should be memorialized in a settlement agreement.

3. Effects of the Transfer

Clear impacts on the parties

- 3.1. The “assignment and novation” clause should clearly specify the effects of the Transfer on the original parties as well as whether the contract is binding on their successors and in general their permitted assigns.



Defined Terms

Transfer: the transfer of a contract, in whole or in part, by way of assignment, novation or otherwise, so that a third party stands in the shoes of one of the original parties to the contract with respects to rights, obligations or both. (Note: Assignment and novation are legal concepts with different meanings under common law and civil law).

Compliance with Laws

The Principles



1. Contracting parties already have a pre-existing, independent legal obligation to comply with Applicable Laws, regardless of what the contract says. A party should not be required to perform an express obligation in the contract if it would be prohibited under Applicable Laws.



2. Each party to a contract should be responsible and liable for its costs of complying with or failure to comply with Applicable Laws that relate to its business and operations, unless expressly agreed otherwise in the contract. Similarly, each party should be responsible and liable for the costs, fines and expenses associated with their respective failure to comply with their Applicable Laws and such other laws as may be agreed to under the contract.



3. Adding a covenant to comply with Applicable Laws relevant to either party will make it a breach of contract in the event a party fails to comply with them and can trigger certain rights and remedies as set forth in the contract if that failure damages the other party or causes the other party to violate Applicable Laws that apply to it. Depending on the materiality of the breach, remedies can include reimbursement or payment of fines, compensation for damages, and even termination of the contract.



4. The parties may also include references to specific laws that are relevant to a particular industry or to laws that are particularly significant or relevant to the transaction.



5. To the extent Applicable Laws may change during the term of the contract and may have a material impact on a party's costs or performance, the contract should provide a mechanism that enables the impact of these changes to be reflected by adjustment of the contract.

Applying the Principles to contract terms

1. What Applicable Laws Apply to Each Party

Compliance with laws applicable to you

- 1.1.** Each party should be obligated to comply with all Applicable Laws relating to its performance under the contract but should not be responsible for complying with Applicable Laws that apply solely to the other party unless that obligation is expressly set out in the contract.

Compliance with industry-specific laws

- 1.2.** If specific laws or regulations are more important to a contracting party because of the industry it is in or because of the specific applicability to the contracting activities, the contract should specify compliance with those specific laws and regulations and the consequences of failing to abide by those specific laws or regulations.

2. Failure to Comply

Consequences of non-compliance

- 2.1.** The consequences of a party's failure to comply with Applicable Laws should be spelled out in the contract. The party that did not comply with Applicable Laws should bear the cost of any fines or penalties (which should be deemed to be direct damages) and take reasonable steps to rectify the failure.

Liability for non-compliance

- 2.2.** The party responsible for the violation of Applicable Laws should be liable only to the extent damages are attributable to the failure to comply.

3. Indirect and Consequential Damages

Damages from violation of Applicable Laws

- 3.1.** The disclaimer of indirect and consequential damages should control on the issue of the applicability of the types of damages for which a party is responsible as a result of a violation of Applicable Laws.

Therefore, the parties should specify for what damages a party that violates Applicable Laws is responsible (e.g., fines and penalties and reasonable defense costs incurred and directly attributable to the other party's violation of Applicable Laws). Reputational impacts on a party due to the violation of Applicable Laws by the other party should be deemed to be a consequential damage.

4. Anti-Boycott Laws

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| Compliance | 4.1. Companies are required to comply with applicable anti-boycott laws. |
| International Contracts | 4.2. For international contracts, a company should specifically address compliance with anti-boycott laws in other areas of the contract or specifically exclude in the Compliance with Laws section compliance with any laws that would conflict with US anti-boycott laws. |

Defined Terms

Applicable Laws: laws, regulations, and edicts that apply to a party's business and its activities, rights, and obligations under a contract.

Confidential Information

The Principles



1. If parties intend to share Confidential Information in anticipation of, or during a business relationship, it should be subject to the protections of a separate non-disclosure agreement or of a confidentiality clause within the contract documenting the relationship (perhaps entered into subsequent to the NDA).



2. In a typical business relationship, the determination of what information is deemed to be Confidential Information is an issue in the absence of clear markings, particularly when information is conveyed verbally or when the parties do not want impediments to the free flow of information between the parties. Accordingly, the most efficient and practical approach is to define Confidential Information as being all information
 - a) that is disclosed in any form by one party to the other, or
 - b) of which one party has gained knowledge from the other party as a result of carrying out the Purpose.

Confidential Information **should not include** information that

- a) has already been made public by the Discloser or a third party;
- b) is independently developed by the Recipient without reliance on the Discloser's Confidential Information;
- c) was obtained by the Recipient from a third party without restriction; or
- d) the Discloser has expressly indicated as not confidential.



3. The Recipient must be given the right to hand over Confidential Information pursuant to a governmental or court order, provided that the Discloser is notified as soon as reasonably possible to take action to block the order or protect the information.



4. A Discloser's Confidential Information should only be shared with the Recipient's employees as required for the Purpose. In the event the parties contemplate that their respective affiliates or third parties (e.g., agents, consultants, subcontractors) will be involved in furtherance of the Purpose, Confidential Information should be shared with those entities only if
 - a) those entities use the Confidential Information to the same extent as the Recipient may under the agreement between the Discloser and the Recipient,
 - b) the Recipient ensures that those entities will comply with confidentiality obligations comparable to the ones contained in the agreement between the Discloser and the Recipient and
 - c) any necessary Discloser consent has been given.

In establishing disclosure rules applicable to third parties, the parties should also address any issues if the Recipient may be sharing Confidential Information with any competitors of the Discloser or if there are any anti-trust or collusion concerns.



5. The degree of care given by the Recipient for safeguarding a Discloser's Confidential Information should be no less than that it gives to its own similar confidential information.



6. The Recipient should also promptly notify the Discloser about all losses or wrongful disclosures and take measures to mitigate the effects of such events.



7. Violating confidentiality obligations can cause irreparable harm that goes beyond mere direct monetary damages and may include both indirect and consequential damages, loss of revenues, profits, or the like.



8. The duration of the confidentiality obligations should be a function of the expected period over which the Confidential Information continues to be of value to the Discloser if kept non-public. Factors to be considered include the pace at which technology is changing, whether the information is a trade secret, whether the information is expected to become stale or will likely become public at some point, and standards for the particular market segment or geography.



9. Parties often do not maintain corporate memory of documents that need to be returned at the end of discussions or an engagement, so a more practical approach to returning Confidential Information to the Discloser is to have the Discloser ask for the return of the information if it is of sufficient importance to take that step.



10. The same principles relating to assignments of obligations to third parties that are typically applied in transactional agreements should also apply in NDAs.



11. Personal data provided by one party to another is certainly Confidential Information but should be typically treated separately and with different standards of care given the laws and regulations that apply (See World Commerce & Contracting Principle – [Data Security and Privacy](#)).



12. Ownership of intellectual property rights in Confidential Information is not transferred as a result of mere disclosure and any license given to the Recipient to use the Confidential Information, including the intellectual property right therein, is limited to activities related to the Purpose.

Applying the Principles to contract terms

1. Defining Confidential Information

Broad categories of Confidential Information

1.1. If there is uncertainty as to the scope of Confidential Information that will be shared over the course of a relationship and one or both of the parties are reluctant to agree that all information shared is to be treated as confidential, it may be worthwhile to supplement the definition of Confidential Information with a list of examples, using the phrase “including, but not limited to, ...” to provide broad categories of likely information.

Specific types of Confidential Information

1.2. On the other hand, if, at the outset, specific information is expected to be shared and must be safeguarded, it is prudent to refer to them explicitly to avoid any doubt.

Exclusions from confidentiality obligations

1.3. The definition of Confidential Information should also include categories of information that will not be deemed to be Confidential Information or that lose any protections when certain events occur (cf. Point 2 of this Principle, above).

2. Obligations to Safeguard Confidential Information

Degree of care

2.1. The Recipient should protect the Discloser’s Confidential Information with the same degree of care and protection as it treats its own similar Confidential Information, and no less than a reasonable degree of safeguards.

Safeguard of Confidential Information in new documents

2.2. To the extent the other party’s Confidential Information is incorporated into documents created by the Recipient, the portions of new document containing the Confidential Information need to be protected pursuant to the non-disclosure obligations.

Flow-down of confidentiality obligations

2.3. The confidentiality obligations should be extended to any Recipient’s employees, agents, subcontractors, or other third parties to whom the Recipient is expressly authorized to disclose Confidential Information. The Recipient should be responsible for any acts or omissions (intentional or negligent) of those persons or entities if they fail to comply with the obligations as if the Recipient would have failed to comply with them.

Confidential Information disclosure to government

2.4. In the event that the Recipient is subject to a governmental subpoena or request for the Discloser’s Confidential Information, if the Discloser requires the Recipient’s assistance in efforts to obtain protection for the Confidential Information, the Recipient should cooperate to as reasonable, at the Discloser’s expense. Regardless of the outcome, the Recipient should not be expected to expose itself to penalty for violation of a legitimate order.

3. Duration of Obligations

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| Reasonable duration | 3.1. The obligation to protect Confidential Information should be for a set duration (e.g., 3 or 5 years) based on a reasonable expectation of how long information of that nature remains relevant and valuable to the Discloser. |
| Indefinite duration | 3.2. Trade secrets, consumer personal information, and proprietary software source code are examples of information that warrant indefinite protection. |
| Survival of non-disclosure obligations | 3.3. Note that an NDA typically has two terms: one for the period during which information will be transmitted between the parties for the Purpose, and a second for how long the information shall be treated as confidential by the Recipient(s). The latter could extend past the term of the NDA, in which case the obligations survive the agreement. |

4. Return of Confidential Information

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| Discloser's right to ask for return or destruction of Confidential Information | 4.1. The Discloser should have the right to ask the Recipient for the return or destruction of its Confidential Information at any time and can ask for a certification that any destruction of both originals and copies of the Confidential Information has taken place. |
| | 4.2. At the end of any relevant activity for the Purpose, documents (paper or electronic) containing Confidential Information should, upon the request of the Discloser, be returned or destroyed. In the absence of any such request, the obligations continue until the expiration of the term of confidentiality, as specified in the agreement. |
| Recipient's right to retain a copy | 4.3. The Recipient should have the right to retain a copy of the Discloser's Confidential Information for archival or regulatory purposes as long as the storage medium has appropriate safeguards. |
| Licensing or transferring ownership of Confidential Information | 4.4. In the event that ownership of or license to Confidential Information or underlying intellectual property is intended to be transferred from or granted by the Discloser to the Recipient during the course of a relationship, that must be expressly defined in the applicable contract along with any conditions, limitations, and/or compensation. |

5. Remedies for Breaches of Confidentiality

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| Uncapped liability in stand-alone NDAs | 5.1. Typically, stand-alone NDAs do not contain clauses that cap liability or exclude types of damages (e.g., indirect, consequential damages or lost profits) for breach of confidentiality. |
| Caps and exclusions in broader agreements | 5.2. With respect to confidentiality clauses contained within broader agreements, the applicability of the limitation of liability clause to a breach of confidentiality should follow generally accepted practices within a jurisdiction. Caps or exclusions on liability generally should not apply to such breaches (See World Commerce & Contracting Principle – Liability Caps and Exclusions from Liability). |

Right to seek
equitable relief

5.3. Given that monetary damages may not be an adequate remedy for the Discloser, it should be given the right to **seek** equitable relief (e.g., a restraining order) from a court having proper jurisdiction. (Any language that presupposes that the Discloser is entitled to that relief detracts from the Recipient's right to oppose that relief on the basis that it is not warranted.)

6. Assignment

6.1. In cases where either party is allowed to assign/novate its rights and obligations under an NDA, the assignee must have the capability to meet relevant obligations. This may be more difficult in cases where the assignor retains possession and control over documents containing the Confidential Information. Any assignment in that situation should account for the transfer of those materials or limit the obligations only to Confidential Information disclosed after the effective date of the assignment.

Defined Terms

Confidential Information: non-public information belonging to a party. As further explained in this Principle, parties will likely want to define Confidential Information with more particularity.

Discloser: the party providing Confidential Information to a Recipient during discussions or activities associated with a Purpose.

Purpose: means the specific activities to be undertaken by one or both of the parties for which or during which Confidential Information is shared.

Recipient: the party receiving Confidential Information from a Discloser.

Customer Audit of Suppliers

The Principles



- 13.** The extent to which audit rights will be provided to a customer is a commercial issue that should be negotiated based on the size and scope of the deal, and the nature of the solution. The type and extent of audit rights granted should be memorialized in the contract based upon business-to-business discussions.



- 14.** Audits are a tool used by customers to verify that contractual commitments are being met. However, suppliers have a strong interest in ensuring that the scope of customer's audit rights are aligned with the suppliers' obligations so as to mitigate costs, confidentiality issues, disruption and other burdens to suppliers associated with the audit.



- 15.** Audit rights should not be unlimited, but should be prescribed based on legitimate customer needs that cannot be otherwise satisfied, and should not subject a supplier to undue hardship.



- 16.** Audit rights cannot require the supplier to violate its own legal or contractual obligations.

Applying the Principles to contract terms

2. General Audit Principles

Reasonable
audit rights

- 1.1.** All audit rights, whether for Financial Audits, Compliance Audits or Service Quality Audits, should be subject to
- a)** reasonable parameters on what can be audited;
 - b)** requirements to provide reasonable advance notice;
 - and**
 - c)** restrictions on frequency.

One reasonable audit parameter should be the exclusion of third party information, confidential information (unless proper protections are in place) and supplier highly sensitive information.

Time-bound
audit rights

- 1.2.** Audit rights should apply during the term and any other periods during which the supplier is contractually required to maintain the records subject to audit, but audits should not be permitted to go back further in time than the period for which a remedy is permitted under the contract.



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| Paying for audits | 1.3. Costs of an audit should be borne by the customer, unless the parties agree that the supplier should bear some pre-agreed portion of the reasonable audit costs if a Financial Audit discloses material over-billing on the part of the supplier or in the event of other material non-compliance. |
| Regulatory-driven audits | 1.4. Where customers need audit rights to comply with their own auditing and regulatory requirements, supplier's support obligations should be specified in the agreement and should be limited to its provision of services and/or products. |
| Finding faults | 1.5. If faults found during audit constitute a breach of the supplier's contract obligations, they should be treated the same as any other contract breach, e.g., the supplier should be given an opportunity to cure, and the customer should be entitled to the same remedies otherwise available under the agreement. |
| Audit processes | 1.6. Customers and suppliers should agree on audit methodology and on a process to review audit results, correct for disclosed deficiencies, and confirm corrections are completed. |
| Third-party auditors and confidentiality | 1.7. If customers request to use third party auditors, supplier and customer should ensure appropriate confidentiality obligations and use restrictions are established with that third party auditor, as well as that the third party auditor is not a competitor of supplier who could gain competitive advantage through the audit. Audit results should be shared with the supplier. |

Where feasible, the entity performing the audit should be required to destroy all data gathered during the audit.

3. Financial Audits

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| Appropriateness of Financial Audits | 6.1. Financial Audit rights are appropriate for all types of customer contracts, subject to the general audit principles described above. |
| Records retention | 6.2. For Financial Audits, records should be limited to those available under the supplier's record retention policies. |
| Audits of subcontractors' records | 6.3. The customer should not have Financial Audit rights to supplier's subcontractors. |

4. Operational Audits

Scope of Service Quality Audits	6.1. Service Quality Audits intended to determine compliance with service levels generally should be limited to relevant customer-specific operational data and should not include on-site audit rights.
Data security audits	6.2. Compliance Audits related to data security should be satisfied by supplier's provision of responses to security questionnaires and non-sensitive data security information, which may include internal audit reports, SSAE 16, ISAE 3402 or similar audit reports (redacted or summarized as appropriate). Certifications demonstrating achievement of industry standards or the equivalent should serve as validations of compliance with those industry standards.
Testing of security mechanisms	6.3. Audits should not include penetration or other real-time security testing, which could adversely affect suppliers' operations and their customers.

Defined Terms

Compliance Audit: investigation and examination of supplier records and premises for the purpose of verifying supplier's compliance with data security requirements, specific legal requirements, employee screening requirements, and/or other supplier contractual obligations (other than SLAs, which are covered by the Service Quality Audit).

Financial Audit: investigation and examination of financial records and other documents, for the purpose of verifying amounts charged (including any price changes as stipulated in the contract) and/or credited (e.g., SLA credits) by a supplier.

Service Quality Audit: investigation and examination of supplier records for the purpose of verifying that service levels are being met.

Data Security and Privacy

The Principles



1. A security environment should be designed based on the assumption that security or process failures may occur and that there needs to be multiple layers of protection to guard against Protected Data Losses.



2. Contract terms should reflect a balance of cost and benefit in the security environment. Customers and suppliers can more effectively reduce operational risks of Protected Data Losses by focusing on (and clearly delineating) their respective security obligations rather than by focusing solely on supplier liabilities in the event of a Protected Data Non-Compliance.



3. The extent to which a supplier will conform to particular industry security standards or will meet custom/more exacting requirements is a commercial issue that should be negotiated based on the size and scope of the deal (including particular security safeguards) and the nature of the solution (e.g., whether it is a standard service offering for a multi-customer environment or is a dedicated custom-built solution).



4. Liability for Protected Data Non-Compliance should be based on the same principles as applied for other contract breaches – liability should be based on sufficient proof of the breach, should be proportionate to fault, and should reflect a fair allocation of risk as agreed to by the parties. In addition, each party should have an obligation to mitigate damages.

Applying the Principles to contract terms

1. Scope of Protected Data Obligations

Defining uses of protected data

- 1.1. Contract terms should, where possible, provide specificity with regards to the types of Protected Data being exchanged and the access, use, sharing or re-transmission (collectively, “Use”) of the Protected Data by the supplier.

Supplier's data protection obligations

- 1.2. The supplier's data security obligations should be clearly and accurately described based on the role it will perform and should focus on functions and tasks, not outcomes.

Customer's protection of its data

- 1.3. The customer should undertake reasonable steps to safeguard their own Protected Data, such as encryption, firewalls or regular backups.



Supplier's compliance with industry standards

- 1.4.** The supplier should specify the security standards to which its operations adhere by reference to specific industry standards (such as ISO 27001, PCI-DSS, etc.) or otherwise, and the supplier should provide applicable certifications upon request.

2. Compliance with Laws and Regulations

Compliance with laws, regulations, industry standards

- 2.1.** Each party should comply with the data protection/privacy laws, regulations and mandatory industry standards (such as PCI-DSS) that apply to its own operations and activities.

Supplier's responsibilities

- 2.2.** The supplier's responsibilities with respect to data protection/privacy laws that apply specifically to the customer's operations and activities should be reflected as specific operational obligations rather than a general compliance with law obligation.

Customer's responsibilities

- 2.3.** When appropriate, the customer's data protection/privacy compliance activities that are included in the scope of supplier's services should be clearly stated within the contract to avoid misunderstandings or gaps in responsibilities.

Changes in data protection laws

- 2.4.** The contract should provide an equitable mechanism to modify the supplier's contract obligations (and charges, where appropriate) based on changes to data protection/privacy laws that have a material impact on the supplier and/or customer.

Providing evidence of supplier's compliance

- 2.5.** The supplier should not be expected to provide the customer with independent compliance audit reports that contain highly sensitive information and are generally not created for dissemination. Rather, the parties should adopt an alternative process by which their respective experts can meet to share appropriate information to give the customer assurances relating to security controls.

Regulators' review of supplier's compliance

- 2.6.** In cases where the customer has an obligation to provide regulators with the suppliers' compliance documentation or where laws or regulations permit regulators to audit the suppliers' compliance with security standards, the contract should address those situations and provide for appropriate safeguards for the supplier's information and operations.

3. Allocation of Liability for Protected Data Losses

Supplier's liability

- 3.1.** The supplier should be liable in the event of its Protected Data Non-Compliance, subject to reasonable limitations.

The supplier should be accountable only for Protected Data Losses that result from its Protected Data Non-Compliance.

If a Protected Data Loss results from multiple points of failure, the supplier should be held responsible only to the extent the loss is the result of its Protected Data Non-Compliance(s).

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| Standard liability caps for low-risk data | 3.2. For service offerings where the supplier has only incidental access to Protected Data (e.g., business contact information for customer employees) and the risk of damages are small, the supplier's liability for a Protected Data Non-Compliance should be subject to the standard contract limitation of liability (such as a cap at a fixed dollar amount or a multiple of annual charges). |
| Higher liability caps for high-risk data | 3.3. Where the supplier is operating within the customer's security environment or has significant access to Protected Data, it may be appropriate for the supplier to be subject to higher liability caps for a Protected Data Non-Compliance. |
| Unlimited liability for intentional or grossly negligent misuse of data | 3.4. The supplier should be subject to uncapped liability for a Protected Data Non-Compliance only if there was an intentional or grossly negligent misuse or release of Protected Data by the supplier. |
| General exclusions from liability | 3.5. The contract's general exclusion of indirect, consequential or other categories of damages (e.g., lost profits, revenues, goodwill) should apply in the case of Protected Data Non-Compliance.) |
| Specific types of damages | 3.6. However, it may be appropriate to identify discrete categories of covered damages for which the supplier will be liable (subject to caps), such as cost of breach notifications, credit monitoring, data recovery (unless the customer's failure to back up its data in a reasonable fashion gave rise to the loss), and regulatory fines. These exclusions and covered categories of liabilities should also apply to the supplier's indemnifications for third party claims attributable to a Protected Data Non-Compliance. |

Defined Terms

Protected Data: personal data (such as personally identifiable information and credit card information) and other highly sensitive data (such as passwords) of a customer or its clients that are in the possession of or accessible by the supplier. Depending on the originator, nature, and location of the data being processed, the definition of Protected Data may be modified to take into account applicable law (e.g., data subject to HIPAA, the European Data Privacy Directive, GDPR, or PIPEDA). (Other types of confidential information may be subject to contractual confidentiality obligations but are not considered Protected Data within the scope of this Principles document.)

Protected Data Non-Compliance: a failure by the supplier to comply with its obligations regarding the handling or safeguarding of Protected Data under the contract or under data protection/privacy laws or regulations applicable to the supplier.

Protected Data Loss: the accidental, unauthorised or unlawful destruction, loss, alteration or disclosure of, or access to Protected Data. (Not all Protected Data Losses result from a Protected Data Non-Compliance, such as where hacking takes place despite the supplier's good faith compliance with all applicable obligations.)

Force Majeure

The Principles



1. Performance of contract should be uninterrupted, and a supplier should have general obligations to maintain the appropriate level of contingency plans in place in order to ensure continuity of deliverables. However, either the supplier or the customer should be excused from performing their respective obligations when performance is prevented or delayed by events defined as Force Majeure. Force Majeure should allow contracts to adapt to specific circumstances that are beyond the reasonable control of a party.



2. Suppliers and customers should negotiate the Force Majeure clause as part of their risk allocation and in conformance with general industry practices and the level of risks in the applicable geographic areas of operations.



3. The generally narrow definition of Force Majeure provided by civil codes – circumstances outside the control of a party, which the party cannot prevent or overcome, and which it could not have reasonably foreseen when the contract was concluded – is a default definition that is usually adjusted by mutual agreement of the parties.



4. Suppliers and customers should agree upon a broader definition of Force Majeure that avoids the qualification of Force Majeure as “unforeseeable” in business and operative environments where the probability of disruptions is high and the costs to overcome them are very likely to become disproportionate with regard to the economics of the contract.



5. The preferred approach to avoid ambiguity as to what constitutes Force Majeure is to address types of “events” that are particularly relevant to the parties or the transaction and that might not typically be classified as Force Majeure.



6. When notifying Force Majeure to the other party, the affected party should provide all relevant information, describing at a reasonable level of detail the circumstances and the performance that is affected.



7. A Force Majeure event should relieve the affected party from liability for failure to perform, with the time for completion being suspended or postponed.



8. To nurture close and mutually beneficial commercial relationships between suppliers and customers, the contract should focus not only on contractual relief but also on securing business continuity and disaster recovery to some reasonable extent.

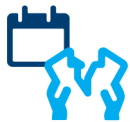


9. The affected party should also:

- 1) continually notify the other party while Force Majeure is ongoing, describing its plan, efforts and any timeline to resume performance to whatever extent possible, **and**
- 2) notify the other party upon the cessation of the event of Force Majeure.



10. Any notice of Force Majeure should conform to the notice provision of the contract, but should also go to the other party's operations contacts for them to offer their own mitigation suggestions.



11. If the Force Majeure event continues for a long period (as defined by the parties according to the criticality of the products or services being provided), each party should have the right to terminate the affected elements of the contract.



12. Generally, each party should bear its own costs arising from the Force Majeure event (which may be claimable under its insurance program).

Applying the Principles to contract terms

1. Definition of Events of Force Majeure

Illustrative and non-exhaustive definition

1.1. If a list of Force Majeure events is provided, the list should be clearly described as illustrative and non-exhaustive, as well as supplemented by a catch-all definition of Force Majeure, referring to any other circumstances beyond the affected party's reasonable control.

Reasonably detailed definition

1.2. The following are common examples of events entitling a supplier or a customer to be temporarily excused from their respective obligations:

- a) Acts of God, natural disasters, earthquakes, fire, explosions, floods, hurricanes, storms or other severe or extraordinary weather conditions, natural disasters,
- b) Sabotage, contamination, nuclear incidents, epidemics,
- c) War (civil or other and whether declared or not), military or other hostilities, terrorist acts or similar, riot, rebellion, insurrection, revolution, civil disturbance, or usurped authority),
- d) Strikes or other industrial disputes that affect an essential portion of the supplies or works, except with respect to workers under the control of the party asking for relief due to this event.

Examples of Force Majeure events

1.3. The list of Force Majeure events should be more elaborated when the contract is performed in relation to business and operative environments that are unstable, and may also include, if relevant:

- a) Non-availability or loss of export permit or license for the products/ solutions to be delivered, or of visas/ permits for supplier's personnel,

- b) Requisition or compulsory acquisition by any governmental or competent authority, embargo, or other sanctions,
- c) Currency restrictions, shortage of transport means, general shortage of materials, restrictions on the use of or unavailability or shortage of power or other utilities.

More detailed definition to meet specific needs

1.4. The list of Force Majeure events should be reasonably detailed so that it is clear which risks are borne by each of the supplier and the customer.

Force Majeure events and business continuity plans

1.5. When the affected party has committed to maintain an appropriate level of contingency plans in order to ensure continuity of meeting obligations under the contract, circumstances should be considered beyond the affected party's reasonable control if and when they cannot be prevented or overcome through specific and defined measures provided for in such contingency plans.

2. Notice of Force Majeure

Illustrative and non-exhaustive definition

2.1. If a party wishes to be excused from performing its obligations on account of an event of Force Majeure, it should give notice of the event to the other party as soon as practically possible after its occurrence.

3. Rights and Obligations Triggered by an Event of Force Majeure

Relief

3.1. An event of Force Majeure should relieve the affected party from liability for failure to perform its obligations according to the contract, and the consequences of a Force Majeure event should be clearly stated in the contract. Relief should apply as follows:

- a) The same relief should apply if an event of Force Majeure affects a subcontractor of a party.
- b) The relief should continue for as long as the Force Majeure event prevails. The parties should also use their reasonable efforts to mitigate the effects of the event of Force Majeure upon their performance of the contract. When the supplier is the affected party, it should implement contingency plans whenever feasible, keeping operations running to a reasonable extent and with necessary adjustments (e.g., for employees' safety) or rescheduling programs for the works or deliveries.
- c) During the period of relief, the contract should remain in force with performance thereunder temporary suspended or the affected party having the right to an extension of time for performance.
- d) The suspension or extension of time should be a reasonable period considering the ability of the affected party to resume performance and the interest of the other party to benefit from the performance in spite of the suspension or delay. The affected party should therefore resume performance as soon as reasonably practicable under the circumstances, including through other means or in another location when economically and operationally achievable.



- e) An event of Force Majeure should not relieve a party from liability for an obligation that arose before the occurrence of that event or from obligations not affected by the event.

Termination of contract

- 3.2. If the event of Force Majeure continues beyond a reasonable period depending on the criticality of the affected product or service delivery, or can definitively not be overcome, either party should have the right to terminate the contract, or part of it, immediately or after a reasonable notice period.

Neither party should be entitled to any compensation from the other party for costs or damages incurred as a result of a Force Majeure event. However, if the contract is terminated, the customer should pay the price of any products delivered or services completed up until the date of termination.



Indemnification of Third Party Claims (Excluding Intellectual Property Claims)

The Principles



1. Although parties to a contract generally recognize that their acts or omissions under the agreement may affect third parties – particularly where a supplier is enabling a customer to provide its products or services downstream – the supplier should only be expected to step into the shoes of the customer in taking on risks that directly relate to the supplier's acts or omissions under the contract.



2. Third parties should not be viewed as beneficiaries of an agreement between customers and suppliers unless expressly made so in the agreement.



3. Customers should be expected to undertake commercially reasonable efforts to shield themselves from liability (e.g., by including appropriate flow down terms in their own agreements with their end consumers or by means of appropriate insurance) and should not look to suppliers to act as insurers in the event those efforts are not successful in warding off claims.



4. The agreement is not the sole vehicle by which a party can hold the other party accountable for third party claims. A party can also join the other party as a third-party defendant in litigation initiated by a third-party plaintiff.



5. Indemnification obligations should extend only to the degree that the indemnifying party was responsible for the damages incurred. Proportionate liability should result from situations where multiple parties contributed to an event.



6. Supplier indemnification obligations should be tied to its own acts or omissions under the agreement as well as that of its subcontractors and agents.

Note:

Indemnification for intellectual property infringement claims is addressed in the World Commerce & Contracting Principle [Intellectual Property Rights and Indemnification for Third Party IP Claims](#).



Applying the Principles to contract terms

1. Scope of Indemnification Obligations

Indemnifications applicable to both parties	1.1. Each party should indemnify the other for third party claims relating to <ul style="list-style-type: none">a) bodily injury,b) death, and real or tangible property damage due to a party's negligence or wilful misconduct, andc) where relevant to the services provided, employment matters brought by employees of the indemnitor against the indemnitee.
Supplier indemnification for data breaches	1.2. Supplier should provide indemnification for Protected Data Losses to the extent resulting from supplier's Protected Data Non-Compliance (as such terms are defined in the World Commerce & Contracting Principle <i>Data Security and Privacy</i>).
Supplier indemnification for governmental fines	1.3. Supplier's indemnification for governmental or regulatory fines or penalties incurred by the customer should be limited to those that are a direct result of the supplier's breach of the agreement with respect to obligations to comply with applicable laws or regulations that apply to it.
Customer indemnification for customer's operations	1.4. Customers should indemnify suppliers for third party claims associated with the customers' business operations, data, or business content that gave rise to the claim except to the degree the suppliers' acts or omissions contributed to the damages.
Specifying indemnitees	1.5. The Indemnitees, which should be limited to the contracting party (and possibly also other directly related parties) should be specified in the agreement.

2. Conditions for Indemnification

Obligation to mitigate damages	2.1. The Indemnitee should have the same obligation to mitigate third party damages as it would to mitigate its own.
Preconditions for indemnification	2.2. Any obligation to indemnify for third party claims should be preconditioned upon the following: <ul style="list-style-type: none">a) The extent of liability for the claim should be proportional to the fault on the part of the Indemnitor vis-à-vis the Indemnitee or any other party.b) The Indemnitee must give prompt notice of the claim to the Indemnitor or relieve the latter for any incremental liability caused by the delay.c) The Indemnitee must provide reasonable support to the Indemnitor in defense of the claim.d) The Indemnitee has the right to engage its own counsel (at its own expense) to represent it, provided that the Indemnitor maintains control of the defense of the claim.



- e) The Indemnitor cannot admit to guilt or fault on the Indemnitee's part or agree to an obligation to be undertaken by the indemnitee without the express prior written consent of the latter.
- f) The Indemnitor cannot take any action in the course of the defense that would bring in to question the reputation or goodwill of the Indemnitee.
- g) In the event the Indemnitee demands the right to give prior consent to any settlement of the third-party claim, the Indemnitee should accept responsibility for any additional exposure caused by its failure to give consent to any settlement proposed by the Indemnitor.

3. Applicability of Liability Caps and Exclusions from Liability for Indemnification Obligation

Application of liability caps

- 3.1. Indemnification obligations should be subject to the same liability caps as would apply for similar claims made between the contracting parties (but see an exception under the World Commerce & Contracting Principle [Intellectual Property Rights and Indemnification for Third Party IP Claims](#)).

Third-party claims treated as direct damages

- 3.2. Third party claims should be treated as direct damages regardless of their nature (but see an exception under the World Commerce & Contracting Principle [Data Security and Privacy](#)).

Defined Terms

Indemnification: the indemnifying party ("Indemnitor") will defend and be responsible for a claim made by a third party against the indemnified party ("Indemnitee") to the extent that the Indemnitor expressly undertook the indemnification obligation with respect to the specific acts or omissions under the agreement that gave rise to the claim.

Intellectual Property Rights and Indemnification for Third Party IP Claims

The Principles



1. Intellectual property owned by a party remains that party's property unless expressly transferred under the contract.



2. A party's use of and rights to another party's intellectual property must be expressly specified in the contract.



3. Where services are provided by a supplier, the focus of the contract with the customer should be on the services and not on the intellectual property of the underlying components that are used in the provision of the services.



4. The supplier should stand behind all intellectual property incorporated into the services and indemnify the customer against third party claims that relate to the services and any elements thereof, subject to appropriate limitations.

Applying the Principles to contract terms

1. Intellectual Property Rights

Ownership of IPR

- 1.1. Each party owns the intellectual property it creates before, during and after the contract term, except as may be specifically provided in a contract or an attachment thereto.

Customer gets a license to deliverables

- 1.2. As between the parties to a contract, the party furnishing information or materials to the other retains its intellectual property rights in such information or materials, subject to any license rights that are granted by the furnishing party (or by a third-party licensor).

Generally, where services do not contemplate software development, "work-for-hire" and similar provisions allocating ownership rights are not applicable.



Scope of license	1.3. The customer should have the right to use the supplier's intellectual property as necessary to use the services for the customer's business needs throughout the duration of the contract.
Clear license terms	1.4. In circumstances where broader (or longer duration) license terms (e.g., to software or customer-specific deliverables) are appropriate, those rights should be specifically provided in the contract.
Transfer of IP ownership for custom work	1.5. As to customized unique content that is developed for a customer's sole use in accordance with the customer's specifications (e.g a custom software application), a provision granting the customer ownership or exclusive use of such content may be appropriate if the supplier is not retaining the right to re-use the content for other customers.
Third-party IP	1.6. Third-party software, services, and equipment are provided subject to the third party's license term.

2. Intellectual Property Infringement

Supplier indemnification of third-party claims	2.1. The supplier should be responsible for defending and paying/settling any third-party claim against the customer alleging that the supplier's services or products infringe the third party's intellectual property rights in any country in which the service or product is provided or where the services/deliverables are intended to be used.
Excluded third-party claims	<p>The supplier should not be responsible to the extent an infringement claim arises from the following ("Excluded Claims"):</p> <ul style="list-style-type: none">a) combination of the supplier's service or product with items provided by the customer or others not under the supplier's control,b) modification to the supplier's service or product by someone other than the supplier or others not under the supplier's control,c) the supplier's adherence to the customer's requirements,d) the customer's content, <p>or</p> <ul style="list-style-type: none">e) use of the service by the customer in breach of contract restrictions or in violation of law. <p>The customer should be responsible to defend and pay/settle any third-party claim against the supplier for Excluded Claims.</p>
No liability cap in IP claims	2.2. The obligation to indemnify for third party infringement claims should not be subject to any limitation of liability cap
Prompt notification of IP claims	2.3. The indemnified party should have the obligation to promptly notify the indemnifying party of any such claims, and the indemnified party will not be responsible for any losses attributable to a notification delay.
No additional warranties or representations	2.4. The indemnification of third-party claims is sufficient to protect the customer, and therefore, the supplier should not be expected to provide a warranty or representation that its services or products do not infringe third party intellectual property rights.



Supplier's
remedies for
infringing IP

2.5. If the supplier's service or product infringes a third party's IP (or is subject to a claim of infringement), the supplier may:

- a)** obtain from the third party the right for the customer to continue its use of the service or product,
- b)** modify the service or product so it is not infringing without materially reducing the functionality or performance of the service,
or
- c)** substitute another service or product having substantially the same functionality and performance criteria.

If the supplier is unable to implement any of these measures through commercially reasonable efforts, the supplier may cease providing the service or accept a return of the product that is subject to the third party claim and refund any prepaid charges or refund the current market value of the product, as the case may be.

Liability Caps and Exclusions from Liability

The Principles



1. A party's liability under an agreement should be solely related to a failure to meet obligations specified in the agreement.



2. A party seeking damages pursuant to an agreement has the burden of proof for the amount of those damages unless the agreement specifies liquidated damages in the particular situation.



3. The parties to a commercial relationship owe duties to their respective stakeholders to limit their risks and exposure to a reasonable and foreseeable degree to maintain their fiscal integrity. The Liability Cap in an agreement, typically set at a level proportional to the value of the deal, is a key way for the supplier – and even the customer – to protect itself from catastrophic financial impacts that far exceed that value.



4. A damaged party should have the responsibility to mitigate its damages to the extent reasonable under the circumstances. This obligation should be either pursuant to governing law or explicitly stated in the agreement.



5. Damages caused by the contributory acts or omissions of both parties should be apportioned to both parties, and each should be liable only for those flowing from its fault (including negligence).



6. Exclusions from Liability are generally accepted as a standard in commercial agreements, although exceptions to those exclusions may be carved out for particular breaches. Possible carve-outs are breach of confidentiality* (where the main damages that flow from the breach would otherwise be excluded in their entirety) and some indemnifications (where the indemnitor should be obligated to deal with the applicable claims whatever they may be).



7. In many jurisdictions, public policy prohibits parties from limiting their liability in certain instances where parties are expected to take full responsibility for their acts or omissions, such as bodily injury or death, or for damages proximately caused by a party's gross negligence or wilful misconduct.

Note:

Liability Cap and Exclusions from Liability associated with indemnifications of third party claims are also addressed in the World Commerce & Contracting Principles [Indemnification of Third Party Claims](#) and [Intellectual Property Rights and Indemnification for Third Party IP Claims](#).

See also the World Commerce & Contracting Principle [Data Security and Privacy](#).

* Data breaches are addressed in the World Commerce & Contracting Principle [Data Security and Privacy](#).

Applying the Principles to contract terms

1. Reasonable Liability Caps

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| Liability Cap proportional to value of deal | 1.1. The monetary Liability Cap in an agreement should have proportionality to the monetary value of the applicable scope, generally specified in larger transactions (perhaps over \$1M in value) as the greater of a multiple of annual revenues paid (or payable) during the six or twelve months preceding a claim, or a fixed dollar amount. During the first year of the relationship, the parties may specify a revenue number based on the anticipated volume of business following any ramp-up. For smaller deals, a fixed dollar Liability Cap should suffice. |
| Liability Cap options | 1.2. The Liability Cap may be either on a per incident basis or over a period of time (annual or life of the contract) or can be a set of co-existing Liability Caps per incident and for the time period as a whole. |
| Liability Cap not a defence against paying invoices | 1.3. Customers should not rely on a Liability Cap as a defense against supplier claims for non-payment of invoices, nor should suppliers do the same with respect to SLA credits or reversals of billing errors. |
| Higher Liability Cap for egregious conduct | 1.4. Higher Liability Caps may be warranted for certain breaches that may reasonably result in direct damages that exceed the overall Liability Cap in the agreement and where particular breach(es) would likely have a catastrophic effect on the customer and is recognized as resulting from egregious conduct by the supplier. |
| Liability Cap survives contract | 1.5. The Liability Cap clause should survive any termination of the agreement to apply to claims raised post-termination. |

2. Exclusions from Liability

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| Exclusions from liability | 2.1. Except as set out in section 3 below, parties to the agreement should not be subject to claims for damages listed in the Exclusions from Liability clause. |
| Exclusion for lost revenue not a defence against non-payment of invoices | 2.2. Claims for payment of charges under the agreement should not be rejected by a customer by relying on a clause excluding liability for lost revenues. |
| Exclusions from liability survives contract | 2.3. The Exclusions from Liability clause should survive any termination of the agreement to apply to post-termination claims. |



3. Exceptions to Liability Caps or Exclusions from Liability

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| No Liability Cap or exclusions for breach of confidentiality or IP infringement claims | 3.1. Unless the agreed upon clauses for confidentiality and indemnification for intellectual property infringement claims pose unusual risk to a party, claims for breaches of those provisions should not be subject to either the Liability Cap or the Exclusions from Liability clauses. |
| Wilful misconduct and gross negligence | 3.2. The liability of the parties for wilful misconduct and (if it cannot be limited under applicable law) gross negligence should not be subject to the Liability Cap or the Exclusions from Liability. |
| Bodily injury, death, damages to property | 3.3. Liability for bodily injury and death and damages to real or tangible personal property (not including data) should not be subject to the Liability Cap, but should be subject to the Exclusions from Liability. |
| Additional exceptions to liability | 3.4. Additional exceptions from Liability Caps and/or Exclusions from Liability may also be considered in specific situations (e.g., data breach subject to a separate Liability Cap, compliance with applicable laws, or compliance with tax obligations). |

Defined Terms

Exclusions from Liability: categories of damages for which a party is not contractually liable. Examples include consequential, punitive and other indirect damages that do not flow proximately from the breach. Damages such as lost profits, loss of business revenues, loss of anticipated savings, and loss of goodwill are also typically excluded.

Liability Cap: the monetary cap placed on a party's liability for damages arising under an agreement. Generally, the agreed upon Liability Cap will be:

- a) a fixed amount,
- b) a percentage of charges invoiced and/or paid over a period of time under the agreement, or
- c) a combination of a) and b) (e.g., whichever is greater).

Unlimited Liability: the monetary Liability Cap (or, in some cases, the Exclusions from Liability) does not apply to specified breaches of the agreement or there is no Liability Cap designated for a party.

Non-Solicitation

The Principles



1. Non-Solicitation provisions are appropriate in cases where one party is providing professional services or other services requiring unique skills to another party and wants to prevent those resources from being taken away by the other party.
The service provider may wish to use a Non-Solicitation provision to ensure it has resources to provide continuity of services to all of its customers and to prevent losses related to intellectual property, confidential information, and investments it has made hiring and training its Employees. Similarly, a customer may seek a Non-Solicitation clause to prevent a supplier from enticing people with industry knowledge or other marketable skills to benefit the supplier.



2. Non-Solicitation provisions may be unilateral or mutual. While seeking mutuality may help ensure the language is drafted fairly, there may be a rationale for unilateral terms. In case of using a unilateral Non-Solicitation provision, it may be useful to briefly indicate:

- 1) that all parties agree that the unilateral provision is a fair requirement considering the nature of the transaction/purpose of the contract between the parties; and

- 2) brief description as to why a unilateral provision is necessary.

Crafting of a unilateral provision in this manner may avoid challenges by the other party (under the non-solicitation obligation).



3. Non-Solicitation clauses should not prohibit a party from hiring people who respond to a General Solicitation or as a result of an individual seeking employment on his or her own initiative. Often companies do not have safeguards in place to comply with the terms of a Non-Solicitation provision that prohibits those sorts of activities in the job market. Further, such a restrictive covenant may not be enforceable if it restricts competition or the ability of Employees to have reasonable employment opportunities.

Applying the Principles to contract terms

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| Restriction of Solicitation | 1.1. The word solicit means to ask and non-solicitation may refer to a number of different activities. Accordingly, the contract should clearly define Non-Solicitation as restricting a party from employing, seeking to employ, or otherwise enticing away the Employees of the other party. To increase the likelihood that a Non-Solicitation provision is enforceable, the language should be narrowly crafted to meet the business purpose. For example, a Non-Solicitation provision may be limited to a specific group of key Employees, such as the Employees that are providing particular services under the agreement. |
| Non-Solicitation Period | 1.2. The Non-Solicitation Period should be clearly defined in the agreement. Typically the period of time will be the term of the agreement and a reasonable period of time after the termination of the agreement, such as six months or a year. |
| Severability | 1.3. Even a carefully drafted Non-Solicitation provision may be found to be unenforceable. Therefore, it is important to have a sufficient severability clause in the Agreement to cover that situation, or else the Agreement may be considered to be voidable/void/invalid. |
| Liquidated Damages | 1.4. In some cases, the parties may wish to define liquidated damages related to a breach of a Non-Solicitation provision. The damages could be stated as a flat amount or as a percentage of the salary to be paid to the individual by the soliciting party. |

Defined Terms

Direct Solicitation: the act of one party actively seeking to hire, or hiring, a particular person or group of people to work for that party, either as direct hire or as a contractor, through a directed communication.

Employee: an employee, independent contractor, agent or other similar personnel of a contracting party and its subcontractors.

General Solicitation: using a general or widely distributed method to solicit or hire people or groups of people to work for a party, such as posting a general advertisement for hire or using a third-party intermediary hiring agency without focusing on particular individuals.

Non-Solicitation: contract terms that prohibit a party from employing, seeking to employ, or otherwise enticing away the Employees of the other party.

Non-Solicitation Period: the period of time that one party must refrain from soliciting the Employees of another party.

Payment Terms

The Principles



1. Payment Terms should specifically address when payment is due, invoicing requirements, early payment discounts, invoice dispute resolution procedures, method(s) of payment and acceptable currency(ies), supplier protections against late and non-payments, and any applicable Setoff Rights.



2. Payment terms should be fair and balanced, taking into account the financial interests of both supplier and customer and the criticality of the goods or services provided to the customer.

a) A supplier has an interest in minimizing its financial exposure by reducing the amount of time between delivery of goods or services and time of payment, so as to reduce the time to recoup its investment in the provided goods and services and pay any related expenses.

b) A customer has an interest in extending the period of time between delivery and payment, so as to provide customer with additional time to use the available monies for other business activities and to inspect and test the goods or services to confirm they are satisfactory.



3. Suspension or termination or even a formal allegation contending breach of contract should be a last resort to late or non-payment, and should be used only after all other remedial actions (e.g., written notice of breach, escalation) have been exhausted.



4. Remuneration should be due after the customer has an opportunity to inspect the goods or services to ensure they conform to specifications set forth in the contract or, if none are stated, to generally accepted standards.



5. Significant recurring payments for ongoing services should preferably be made in such manner as to provide the supplier with a neutral cash flow (i.e. the time of payment receipt closely approximates to the time the supplier needs to make payments for resources used to provide the services), which helps the supplier to provide its best pricing. Invoicing and payments for charges for one-off services (e.g., time and material) or usage-based services (e.g., user-based licenses or minutes-of-use charges) should be in arrears.



6. Advance payment provisions (such as for deposits or one-time payments) are appropriate for circumstances such as when a supplier needs the funds to offset the costs of special parts or equipment it needs to provide the goods or services, or when a supplier is providing custom goods with limited resale value.



7. Optional advance payment provisions may be used to provide benefits to both supplier and customer, especially if the customer is given a payment discount or other preferential terms in exchange for the optional advance payment.

Applying the Principles to contract terms

1. Payment Terms

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| Clear timing for payments | 1.1. The contract should state a fixed period of time (e.g., 30 days) for when invoices are due following the customer's receipt of the invoice or a defined period of time after the invoice is sent. |
| Electronic Invoicing | 1.2. When possible, invoices should be sent electronically in a trackable receipt format. If not sent electronically, the parties may contractually agree that the supplier will notify the customer when the invoice is sent, and the customer will notify the supplier when the invoice is received. If the customer does not notify of receipt or of failure to receive, then the invoice should be deemed received within the predefined period of time after being sent. |
| Invoice details | 1.3. Invoices should reference applicable purchase order(s) and be clear so as to provide sufficient detail for the customer to identify the goods and services to which the billed amounts (and taxes and surcharges as applicable) relate. A clear linkage between the invoiced amounts and the applicable contract or order will minimize disputes and hasten payment. |

2. Dispute Rights

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| Right to dispute invoices in good faith | 2.1. Customer should always have the right to dispute invoiced amounts in good faith and for a reasonable time period as agreed in the contract. To exercise this right, customer should provide written notice or as otherwise determined in the contract (e.g. dispute resolution clauses) of the disputed amount and the basis for the dispute. All amounts which are not disputed should be paid within the required contract period. |
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3. Interest and Late Payment Charges

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| Supplier right to charge interest on late payments | 3.1. To protect against late payments, supplier should have the right to assess a reasonable interest charge on undisputed late payment amounts after all notification obligations are exhausted. The rate of interest set forth in the contract must be clearly stated and cannot violate applicable Usury Laws. |
| Supplier right to recover collection costs | 3.2. Supplier should also have the right to recover its substantiated and reasonable costs to collect the late payments; provided that such collection costs are reasonable and customary for the type of debt owed. |

4. Additional Assurances



- Supplier right to demand proof of ability to pay
- 4.1. Where appropriate, the supplier should have protection rights for when the supplier has reasonable uncertainty about customer's ability to pay (e.g., history of late payments, negative change in customer's credit rating). The supplier should have the right to demand adequate assurances that payment will be made based on the facts and circumstances that gave rise to the uncertainty.
- Examples of assurances
- 4.2. Examples of such assurances are:
- a) The customer issuing a letter of credit to respond to the supplier's concerns about customer's financial situation;
 - b) The supplier requesting a guaranty from customer's parent company or investor if customer's creditworthiness is at issue;
and
 - c) The customer's payment of all outstanding invoices and payment of future invoices in an abbreviated payment period, if customer has a history of chronic late or non-payments. Once customer shows it can timely meet its payment obligations, the customary payment period can be reinstated.

5. Setoff Rights

- Setoff Rights
- 5.1. Contractual Setoff Rights are appropriate where supplier and customer are engaged in multiple transactions, and supplier and buyer have mutual payment obligations (i.e., where supplier regularly sells to and buys from customer).
- Exercising Setoff Rights
- 5.2. If Setoff Rights are permitted, the contract should include what debts may be setoff, the amount of notice required to effectuate the setoff, and the procedure for setting off amounts if different currencies are used.
- Waiver of Setoff Rights
- 5.3. If a Setoff Right is not to be used, the contract might include an express waiver of the parties' common law and statutory Setoff Rights (a.k.a. no setoff provision) to make it clear those rights are not intended to apply.

Defined Terms

Payment Terms: the terms applicable to how and when a customer pays the charges for goods or services provided by a supplier and they may address penalties for late or non-payment.

Setoff Right: the right of either party, as applicable, to set off and keep any payment that is otherwise owed to the other party against amounts that are owed to the paying party.

Usury Laws: the laws of the applicable territory which limit the amount of interest that may be imposed on late payments in the course of business-to-business transactions.

Prices and Charges

The Principles



1. The parties to a contract must clearly document how much will be charged for goods or services; when and where the charges will be invoiced; the currency that will be invoiced and paid; and when the invoices must be paid. These elements can be specified in the contract (typically, Pricing Schedules) or in orders or Statements of Work that are executed pursuant to the contract.



2. Suppliers should not have the right to change Charges during a fixed term of the contract, except under circumstances explicitly stated in the contract. Appropriate prior notice should be given to the customer in the event of any increase in Charges, giving the customer reasonable time to migrate the products or services to a different supplier at the end of the current term if it chooses not to accept the increases. The parties may choose to agree on a cap on the size of any increase in any specified period (perhaps linked to a specified inflation index) or to periodic adjustments (typically at intervals of no more than twelve months).



3. The ability of a supplier to backbill for Charges that were erroneously omitted from past invoices as well as the ability for a customer to contest Charges in past invoices should be restricted to specified timeframes (perhaps linked to the frequency of audits, per the bullet below), and, in fairness to both parties, should be the same period for both sides.



4. Customers should have a right to review and audit supplier records to confirm the accuracy of invoiced amounts. Similarly, suppliers should have an audit right if Charges are volume dependent, such as number of users. Any such reviews or audits should be conducted pursuant to mutually agreed processes, scopes, and times and should be limited to once per year unless the customer has good reason based on criteria set forth in the contract. The parties should decide on who bears any audit costs (e.g., each party bears its own costs unless errors in excess of an agreed level are found). Audit provisions should also allow for audits conducted by regulators, if applicable.



5. To the extent a supplier has a right to charge a customer for certain items, but the specific amounts are not known in advance (such as travel, costs of refurbishing supplier equipment after customer's misuse, or requests for activities not within the original scope of the contract), the customer should be given as much prior notice as possible of the imposition of those Charges and an estimate of how much they will be. In some cases, change control processes can apply so that the customer is able to approve the exact additional Charges in advance.

Applying the Principles to contract terms

1. Structure of Charges

Clear explanation of Charges

1.1. A clear explanation of how Charges will be calculated will minimize uncertainty and disputes when the customer receives invoices from the supplier. Invoices should have appropriate supporting documentation as required by the contract. In addition, if certain events trigger the imposition of Charges, those should be clearly defined. (E.g., are Charges for goods invoiced upon shipment, delivery, installation, or acceptance? Are Charges invoiced in advance of the provision of services or in arrears?)

Use of explanatory examples

1.2. If there is any degree of complexity in calculating the charges, examples in the pricing schedules or exhibits will provide clarity.

Types of Charges

1.3. Charges often fall into several categories, which should be clearly set forth in the contract:

- a)** Those that are one-time (e.g., installation Charges, purchase price for goods, up-front software license fees that are not dependent on user or other variable quantities, milestone payments, or termination Charges).
- b)** Those that are recurring and fixed for periods of time, e.g., monthly, quarterly, or annually.
- c)** Those that are based on volumes that vary during each billing cycle, e.g., usage fees or variable software license fees based on the number of users.
- d)** Charges that are variable but follow a pre-set mechanism, e.g., a base monthly fee but one that increases if the number of users exceeds a certain threshold; or Charges that follow a step function (increasing or decreasing when a different pricing band applies).

Prompt notice of one-off Charges

1.4. When an event would trigger Charges, unless it is an event readily apparent to the customer, the contract should require prompt notice to the customer that the event has taken place so that the customer can anticipate the Charges and ensure the invoice will be handled appropriately when it arrives.

2. Taxes and Other Governmental Fees

Applicable taxes

2.1. Although not within the scope of this Contracting Principle, tax language is typically linked to the Charges clause in contracts. Here, too, the contract should be clear on where invoices will be issued and delivered and what tax obligations apply.

3. Exchange Rates

Currency conversions

3.1. If billing will be in a different currency than the Charges listed in the contract, order, or Statement of Work, the parties should agree on how the conversion is to take place. Is the exchange rate fixed for a certain period or will the exchange rate be calculated for every invoice based on a rate published by a particular bank when the invoice is created? The customer's accounts payable department should be

able to confirm that the right amount is being invoiced based on documentation provided to it either in the governing documents or in the invoice itself.

4. Central vs Local Billing

Location of
invoicing

4.1. Customers may want to stipulate where they receive invoices (and whether they are to be submitted physically or electronically) and whether they want to have subsidiaries invoiced directly for the goods and services they receive. This may require a local country agreement between the respective local entities of the customer and supplier or, at least, a local order that flows down the terms of a global contract to the local affiliates.

Consequences
of cross-border
billing

4.2. The parties should fully understand the tax consequences of central vs local billing and whether cross-border billing creates an unintended taxable presence on the part of the supplier within a country. Similarly, Charges may be dependent on whether goods flow between countries or where cloud-based services are provided.

Defined Terms

Charges: any prices and charges that will be invoiced by the supplier to the customer during the term of a contract, whether on:

- a)** a one-time basis (e.g., installation or termination Charges);
- b)** a per-event basis (e.g., time and material, milestone, or consulting Charges); volume-based (e.g., usage or user license Charges); or
- c)** an ongoing basis (e.g., flat monthly recurring Charges).

As used in this Contracting Principle, Charges exclude applicable value added, sales and use, and similar taxes, governmental fees and surcharges, etc.

Service Level Agreement Remedies

The Principles



1. While suppliers intend to provide high quality services, SLA Failures can occur over time given the complex nature of technology services. SLA Failures should not be deemed to rise to the level of a breach of contract.



2. SLAs are intended to underscore supplier's efforts to maintain the service, proactively identify potential problems, and quickly resolve any SLA Failures.



3. SLA targets and SLA Credits should be set at levels that drive high performance but do not create financial windfalls for customers or unreasonable financial exposure for suppliers.



4. SLA performance targets should be measurable and verifiable and should reflect minimum acceptable levels of supplier performance, focusing on critical service elements that are essential to the value of the service being provided.

Applying the Principles to contract terms

Reporting	1.1. Suppliers should make performance reports available on a regular basis.
SLAs tailored to services	1.2. SLAs should take into account both the complexity and the criticality of the services.
SLA credits based on quantitative standards	1.3. SLA Credits should be based on quantified performance standards set out in the contract.
SLA credits not penalties	1.4. It should be agreed by the parties that SLA Credits are not penalties, which are not enforceable in some jurisdictions.
SLA remedies are sole and exclusive	1.5. SLA Credits should be the sole and exclusive remedy available to the customer for Service Level Failures, except for Chronic SLA Failures.
Termination as a remedy	1.6. In the event of a Chronic SLA Failure, customers should have the additional right to terminate the affected service without penalty, following executive escalation.



Exclusions from
SLA
responsibilities

1.7. An SLA Failure should not be deemed to have occurred in situations where the failure is due to a customer-controlled issue or is otherwise out of the control of the supplier. Examples are when an SLA is not met due to:

- a) a force majeure event,
- b) acts or omissions on the part of customer or any other third party over which the supplier has no control,
- c) scheduled maintenance by the customer or entities under the customer's direction or control,
- d) scheduled maintenance by the supplier or its subcontractors within maintenance windows,
- e) lapses of service or performance issues related to non-supplier-provided and/or maintained equipment at a customer site,
- f) customer's use of the services in violation of the agreement, which violation caused the problem,
and/or
- g) customer's use of non-standard products and services not approved for use by supplier.

Defined Terms

Chronic SLA Failure: repeated or persistent SLA Failures, the occurrence of which is agreed by the parties to justify a remedy or remedies in addition to the award of SLA Credit(s), such as termination of the impacted services.

Service Level Agreement or SLA: the contractual quantitative standards set for service performance by the parties (e.g., response time, service quality, uptime).

SLA Credit: the credit provided by a supplier to a customer for an SLA Failure.

SLA Failure: the failure of supplier to meet its obligations under an SLA.

Subcontracting

The Principles



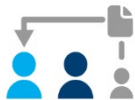
1. As solutions to customers' needs and the breadth of offerings become more complex and require expertise and technology not necessarily resident in one single supplier, it is common for suppliers to "team" or "partner" with other companies to meet those customer requirements. However, customers rightfully look to suppliers to serve as their sole contracting party (i.e., prime contractor) with respect to the entire solution or scope of work being provided.



2. The supplier should take full responsibility for ensuring that the entire solution works or the entire scope of work is delivered and performed as contracted for, including those elements provided by Subcontractors, as if the supplier was providing the solution/scope of work entirely by itself. Accordingly, the supplier should accept liability (subject to the applicable limitations and exclusions) for all acts and omissions of Subcontractors in connection with the transaction.



3. In the event that the customer and supplier have agreed to certain terms that apply, either explicitly or implicitly, to Subcontractors, it is the supplier's responsibility to ensure that those terms are flowed down to the Subcontractors as appropriate. Similarly, terms mandated by a Subcontractor may have to be flowed up to the customer to ensure that the supplier, who may be liable to the Subcontractor for acts or omissions of the customer, is not in breach of the Subcontractor contract.



4. With respect to software licenses, it may be appropriate for Subcontractor licenses to flow directly to the customer, in which case those licenses create contractual privity between the customer and the Subcontractor for that limited purpose.



5. Except as set forth in Principles 6 through 10, as far as possible, the sharing of responsibilities between the supplier and its Subcontractors should be transparent to the customer, and the customer should not have to undertake any role in overseeing the activities of Subcontractors.



6. The extent to which a customer should have the right to pre-approve Subcontractors should be a function of the access any Subcontractor has to the customer's sensitive information or internal networks or databases or if the Subcontractor will be badged or given the freedom to work in a customer location on an unescorted basis. Customers may also have a right to pre-approve any Subcontractor if it will be providing a very large proportion of the overall solution or work. However, if the supplier will be unable to provide its solution/services/product without the use of certain Subcontractors, then it is important that the supplier should request for pre-approval of the use of such sub-contractors in the contract (and state that without use of that Subcontractor it may be impossible/difficult for the supplier to provide the solution/service/product to the customer.)



7. A customer should have a right to approve or reject a Subcontractor if it is a competitor to the customer (albeit in some cases the customer may not have a choice but to approve a competitor if it is the only provider of a key component of the solution, in which case it is fair that the customer impose additional confidentiality safeguards to protect its interests).



8. Customers have a right to impose the same requirements on Subcontractor employees as they do on supplier employees (e.g., background checks, adherence to confidentiality obligations, prohibitions to human trafficking and child labor, compliance with security policies) if the Subcontractor personnel will be performing particular functions or activities that are the subject of those requirements under the customer-supplier contract.



9. A customer should have the right to require the supplier to remove and replace a Subcontractor or a Subcontractor's employee if either engages in activities that violates applicable customer policies or procedures or that are illegal.



10. The supplier should ensure that any audit rights a customer may have under the contract are extended to its Subcontractors who are performing functions or have obligations that fall within the scope of permitted audits.

Applying the Principles

1. Back to Back Contracting

Aligning liability and performance

- 1.1. It may not be practical for a Subcontractor to be liable to the supplier to the same degree that the supplier would be liable to the customer if a Subcontractor fails in its obligations (such as a failure to meet SLA performance targets, and the credits to the customer are more than the credits the supplier gets from the Subcontractor). Typically, the supplier is receiving more revenue from the customer than the Subcontractor is receiving for its part of the deal, so the at-risk amounts could be different, and therefore the supplier and Subcontractor may want to take this into account when allocating liabilities. However, there may be situations where the Subcontractor's role is so critical to the overall success of the transaction that the supplier and Subcontractor agree for the latter to indemnify the former for a failure to deliver that essential element.

Aligning timeframes

- 1.2. When setting timeframes for certain actions that will require involvement of Subcontractors (e.g., notice of cancellations, change orders, relaying of key information among the parties), it is prudent for the supplier to take into account internal turnaround times and the time needed to communicate with a Subcontractor when committing to contractual deadlines (*e.g., within x days, supplier shall...*)

Aligning compliance

- 1.3.** If the supplier-Subcontractor contract is under a different governing law than the customer-supplier contract or if the Subcontractor is subject to rules or regulations that are inconsistent with the obligations under the customer-supplier contract, those aspects of the relationships must be recognized and built into the relevant contracts so as not to cause incompatibilities down the road.

2. Categorizing Subcontractors

Categorizing Subcontractors

- 2.1.** In order to balance a customer's desire to pre-approve Subcontractors with suppliers' need for flexibility in selecting Subcontractors without the added time to get those pre-approvals, it may be prudent to divide Subcontractors into categories: those in sensitive/strategic roles where pre-approvals are critical for customers, and those that do not pose any concerns to customers. In this way, additional levels of scrutiny and governance would apply only to the first subset.

Flow-downs dependent on Subcontractor type

- 2.2.** The categorization of Subcontractors may also be useful in determining which flow-downs should apply to each subset. Subcontractors who provide commodity items or who never access customers' sensitive information may not need to be subject to many of the security, background checks, and audit requirements that apply to the supplier itself. Nonetheless, a Subcontractor's adherence to regulations or customer policies that are directly related to its activities should still be required.

Pre-approvals of Subcontractor assignments

- 2.3.** The differentiation of Subcontractors may also be relevant if and when a Subcontractor wants to assign its obligations to a third party. The supplier-Subcontractor contract typically deals with that situation in the Assignment clause, but the extent to which a customer would want to pre-approve such an event should be a function of that Subcontractor's role and whether it is characterized as a sensitive/strategic Subcontractor.

3. Changes to Subcontractors

Grounds to request removal of a Subcontractor

- 3.1.** The right of customers to demand the removal or replacement of a Subcontractor or a Subcontractor employee or representative should be limited to lawful and reasonable grounds. If the reason for the demand is not due to the wrongdoing of the supplier or could not have been reasonably foreseen by the supplier, the parties should agree, in good faith, on a reasonable transition to a new Subcontractor (including any applicable pre-approval by customer, training, hiring of personnel, etc.) without penalty to the supplier during this period if there is a reasonable disruption to performance. In addition, if the new Subcontractor represents a change in costs to the supplier, the parties should agree to an equitable impact on prices.

Supplier responsibilities in changing Subcontractors

- 3.2.** If the supplier wants to change Subcontractors, mandated pre-approvals, if any, should be processed, and the supplier should be responsible for ensuring that the handover does not materially impact its obligations under the customer contract. Any required return or destruction of customer confidential information held by the old Subcontractor must be enforced by the supplier.

- Step-in rights **3.3.** If a customer has “step-in rights,” (i.e., the customer can take over a supplier’s function such as maintenance if the supplier – or its Subcontractor – fails to perform) both the customer-supplier and the supplier-Subcontractor contracts should deal with the potential situation when the trigger event is caused by the Subcontractor. To what extent are the supplier’s financials affected? How do the customer and supplier begin to collaborate on the solution or SOW? What is the Subcontractor’s liability for the reduction in revenue that the supplier experiences?

4. Solicitation of Employment of Subcontractor Personnel

- Non-solicitation must be explicitly agreed **4.1.** A customer’s right to solicit supplier employees for employment either during or after the contract term should not be assumed to apply to Subcontractor employees. That must be dealt with explicitly in the contract and must be consistent with the terms of the supplier-Subcontractor contract.
- Permitted solicitation to maintain customer business continuity **4.2.** Particularly in outsourcing situations, a customer may need certain personnel to move into the supplier’s organization at the beginning of the relationship and/or move into the customer’s or successor supplier’s organization at its end to maintain business continuity for the customer. Subcontractors or their employees may be involved in those movements of people, and local laws such as TUPE in the UK, may be relevant. These all must be set forth explicitly in both the customer-supplier contract and in the supplier-Subcontractor contract.

Defined Terms

Subcontractor: a third party, working under the direction and control of a supplier, who provides a product or service that makes up part of the solution or scope of work being provided to a customer.

In these Principles, Subcontractors do not include entities that a customer contracts with directly even though that entity’s offerings may form part of the overall solution (e.g., the customer is contracting directly with Company A, a software vendor, for an application to be used with equipment provided by an OEM – Company A is not a Subcontractor of the OEM). Nor does the definition include vendors or service providers who provide goods and services to suppliers for internal consumption and are not under contract for any specific customer (e.g., an OEM purchases hard drives from Company A for inclusion in computers it is selling to the customer – Company A is not deemed a Subcontractor in the *Subcontracting* Principle).

Suspension Rights

The Principles



1. Customers should have an expectation of continual provision of the services or goods for which they contracted as long as they do not materially breach the contract. Suspension is a very serious step and should not be invoked unless all other remedies have been exhausted, including use of governance and dispute resolution principles, and exploration of creative cures for the breach. Suspension should only be considered if it is necessary under the circumstances or is a preferred alternative to contract termination.



2. Suspension should only be undertaken by the supplier under circumstances that are not reasonably capable of mitigation or other remedies, or when instructed by the customer (either when the supplier is in breach of its obligations or for the customer's own convenience reasons). If a customer suspends for convenience, then the customer should pay for all suspension costs and some agreed upon portion of the charges that would have otherwise been due to the supplier so that the supplier is kept whole.



3. Suspension rights may not be exercisable in certain situations, such as in the case of bankruptcy proceedings wherein a stay has been issued, or may not be fair to exercise during other situations, such as formal contract dispute proceedings.



4. The interests of both the customer and supplier should be balanced when defining the circumstances under which Suspensions are permitted under the contract, particularly when the applicable services or goods are mission critical to the customer.



5. Causes for Suspensions should be expressly set forth in the contract and should not be left to the unlimited discretion of the supplier.



6. A Suspension should not come as a surprise to the customer, except in emergency situations where there is an imminent threat of harm to the supplier or others.



7. The duration of prior notice of a Suspension should be balanced between the reasonable time needed by the customer to prepare for the Suspension (particularly when the service or good is mission critical) with the urgent need for the supplier to avoid or eliminate damages.



8. A Suspension could be appropriate even if the underlying cause was outside the control of one party or the other or even of both parties.



9. Any notice of a Suspension should be pursuant to the notice provision of the contract but should also be to the customer's operations contacts so as to speed the customer's internal responses.



10. Any notice should contain the specific services or goods that are suspended, clear reasons for the Suspension, and the events that would lead to performance restoration.

Applying the Principles

1. Grounds for Suspension

Examples of grounds for Suspension

- 1.1. The following are examples of situations in which a supplier should have a right to temporarily suspend:

- a) Acts by a customer or its employees or agents that
 - i. are in material breach of the contract (including but not limited to a violation of an Acceptable Use Policy or similar contractual rules applicable to use of the service)
- and
- ii. pose a material threat of harm to the supplier or its other customers.
- b) Customer's use of service or goods that is a violation of Applicable Laws (cf. World Commerce & Contracting Principle [Compliance with Laws](#)).
- c) Any customer breach of the contract for which a monetary claim is not available as a remedy to the supplier (e.g., the breach would significantly damage supplier's goodwill or reputation).
- d) The Suspension is ordered by a governmental or regulatory body.
- e) For non-payment of applicable non-disputed charges or fees, after all attempts at collection have failed.
- f) For potential harm to property (including supplier assets) or persons that cannot be avoided otherwise.

Grounds for Suspension should be listed in the contract

- 1.2. All potential grounds for a Suspension should be expressly set forth in the contract.

Scope of Suspension

- 1.3. Only relevant services or goods should be suspended as a result of an enumerated breach or event. Services or goods that are not affected by or associated with the breach should not be subject to Suspension.

2. Notice of Suspension

Scope of Suspension	2.1. Except for emergency situations where the risk of harm is material and imminent or when the supplier is precluded from giving prior notice by a governmental body, the supplier should give a customer a reasonable opportunity to cure or mitigate the basis for the Suspension prior to the actual Suspension.
Prompt notification of Suspension	2.2. Where a cure is not possible or not relevant to the situation, reasonable prior written notice of the Suspension should be given. However, if there is ongoing damage to the supplier or its other customers or there is a material risk of imminent damage to any of them, the supplier should have the right to take immediate action to suspend but should still provide written notice as quickly as possible thereafter.

3. Obligations During Suspensions

Prompt resumption of delivery	3.1. Except for emergency situations where the risk of harm is material and imminent or when the supplier is precluded from giving prior notice by a governmental body, the supplier should give a customer a reasonable opportunity to cure or mitigate the basis for the Suspension prior to the actual Suspension.
Payment during Suspension	3.2. The customer should be obligated to continue to pay for the services or goods suspended if the Suspension was due to customer's breach of the contract. If the underlying cause was outside the control of the customer or its employees or agents, payment obligations should also be suspended for the relevant period.
Mitigation of causes	3.3. If the underlying cause is outside the control of the parties, the parties should use reasonable efforts to mitigate the effects of the cause that has led to Suspension.
Suspension ordered by a regulator	3.4. If the Suspension is due to a governmental or regulatory order prompted by an act or omission of the supplier, the Suspension of service should be treated as any other disruption of service caused by the supplier under the contract (e.g., pursuant to any SLA and <i>not as a force majeure event</i>). The supplier should have an obligation to keep the customer informed of efforts to resolve the basis for the Suspension and of the expected timeline for resolution. Customer's termination rights would remain available.

Defined Terms

Applicable Laws: laws, regulations, and edicts that apply to a party's business and its activities, rights, and obligations under a contract.

Suspension: a temporary cessation of performance by the supplier, as permitted under a contract. (A Suspension may lead to a permanent termination if the grounds for the Suspension are not mitigated, cured or removed.)

Termination Assistance

The Principles



1. Termination rights and obligations, including high-level principles for Termination Assistance, should be addressed in the contract so that entire life cycle of services and/or the relationship – from start to finish – is addressed in a comprehensive manner and so that the customer does not perceive that its key operations may be placed in jeopardy at the end of the relationship.



2. The extent of Termination Assistance that is appropriate will vary based on the type of services being provided and the environment in which they are provided (e.g., business process outsourcer, multi-supplier environment) during the service term.



3. The goal of Termination Assistance is to secure business continuity by making transition as seamless as possible for both supplier and customer. The assistance should enable the customer to take over the services directly or obtain them through a replacement third party in an orderly fashion.



4. Supplier should be able to recover any of its physical assets that were on the customer's premises following the completion of the termination services, unless the parties agree that title to them passes to the customer (with any applicable payment as agreed).



5. The contract (or Exit Plan) must clearly specify if there are any assets (e.g., intellectual property, confidential information, data or personnel) that were transferred by one party to the other during the course of the contract or were created by the supplier during the relationship that must be returned to the customer or supplier, as the case may be, during the Exit Plan. This may be particularly critical to the customer if its ongoing operations are dependent on return of data that it owns and for which there is no internal back-up.



6. Any information, personnel, licenses, and/or customer-specific equipment that the parties agree will be given to customer as part of Termination Assistance may also have to be provided to customer's replacement supplier. The supplier has a right to require that appropriate confidentiality safeguards have been put in place with the new supplier before any confidential information is handed over. The disclosure obligation to the new supplier should be limited to the specific items that are necessary for continued services.

Applying the Principles

1. Services to be Provided During Termination Assistance

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| Same scope of services | 1.1. As long as it is reasonably able to do so, supplier should provide the same services to customers during Termination Assistance as during the term of the contract for a period that is mutually agreed by the parties as being sufficient for transition by the customer to a replacement supplier or alternate solution. |
| Customization of Termination Assistance | 1.2. The customer should be able to choose the specific Termination Assistance needed for its unique situation and should not have to elect a one-size-fits-all approach, provided that there is a meeting of the minds of what can be reasonably accomplished at fair cost. Volume commitments should not apply during any transition. |
| Application of SLAs | 1.3. To the extent services continue to be provided during the Exit Plan as was the case previously, particularly if the services are mission-critical to the customer, SLAs should continue to apply as they are explicitly set forth in the Exit Plan, except that any outages due to transition activities should not give rise to remedies such as credits. |

2. Contractual Obligations/Rights During Termination Assistance

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| Supplier's right to require additional terms | 2.1. If termination is due to a material breach of the customer, including non-payment, then supplier should have the right to require additional terms to ensure compliance prior to providing any Termination Assistance services. |
| Force Majeure | 2.2. Force majeure provisions should be applicable to termination assistance obligations. |
| Fair commercial terms | 2.3. Termination Assistance should be on commercial terms similar to what supplier offers for the same type of services to other customers of similar size to customer, based on the volume and nature of the services as they are reduced over the life of the Exit Plan. Supplier should receive fair remuneration for Termination Assistance that is not otherwise covered in the normal course of providing the services. These additional costs should be specified in the Exit Plan. |
| Unexpected contingencies | 2.4. The parties should agree in the contract on contingencies for Termination Assistance to handle events such as a supplier's bankruptcy, liquidation, change in control etc. Examples of areas to cover are relevant documentation, plans and code to be held in escrow with regular updates and releases to the customer upon the happening of a triggering event so that the customer is ensured of service continuity. |

3. Transition Activities During Termination Assistance

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| New supplier's confidentiality obligation | 3.1. If Customer requests supplier to provide the services or process production elements directly to a replacement supplier, then customer should be first obligated to ensure the replacement supplier maintains the confidentiality of all information received and cannot use it to gain a competitive advantage over supplier. |
| Transfer of data and work product | 3.2. Customers should have access to all data and work product that relates to customer's use of the services for purposes of knowledge transfer and training. All such data and work product should be transferred in an agreed format to avoid unnecessary data entry or conversion costs. |
| Transfer of personnel | 3.3. The Exit Plan may designate those supplier personnel, if any, who customer may recruit for itself or the alternate supplier. In this case, supplier should agree to waive any non-compete provisions with respect to those identified personnel. |
| Transfer of equipment, software, licenses and IP | 3.4. The Exit Plan should designate the equipment, software and other intellectual property that will be provided to customer. The Exit Plan should also designate both customer's and supplier specific license or ownership rights with respect to software or other intellectual property as well as customer's rights to pass confidential product or service information on to other suppliers. |
| Assignment of third-party contracts | 3.5. The parties should agree in the Exit Plan which third party contracts will need to be assigned to customer as part of termination assistance. Generally, third-party contracts that are used by supplier to support multiple customer accounts or which contain provisions against assignment should be exempt from assignment. Where exempt, supplier should provide reasonable assistance to customer in engaging those third parties directly. |
| Knowledge transfer and training | 3.6. The Exit Plan should specify knowledge transfer and documentation to be given to customer so that customer and its new supplier can reasonably assume service provisioning. The applicable Exit Plan should set out the specific wind-down terms applicable to each stage of the Termination Assistance, including how volume changes will affect the services provisioning. |

Defined Terms

Exit Plan: the written disengagement or termination assistance plan agreed upon by the parties.

Termination Assistance: the efforts made by a supplier, in conjunction with the customer, to enable the customer to migrate from a service being terminated (for whatever reason) to another supplier's service so as to minimize any disruption to the customer's business activities that relied on that service.

Warranties

The Principles



1. The contract should reflect Express Warranties for the applicable products, software, or services (where applicable) that are reasonable in light of the characteristics of the products, software, or services (where applicable).



2. Well-defined Express Warranties should not be in the form of a promise that the product or service will be free of all defects (which does not reflect reality) but rather should focus on the specific remedies to be provided by the supplier in case of defects or non-conformity with the specifications that are provided.



3. Express Warranties should define a reasonable time frame for the customer to notify the supplier of a defect or non-conformity.



4. The Express Warranty period should be calculated from the delivery to the customer of the product, software, or services (where applicable), according to the agreed delivery terms; from the acceptance of the product, software, or services (where applicable) as agreed in the contract; or from first usage of a product or software (where applicable). For major equipment, it is typical for the Warranty period to apply from the date when the equipment is first put into full in-service operation.



5. The duration of the Warranty period will generally be shorter for software than for tangible products (equipment or hardware), as software versions have a shorter lifetime and software suppliers typically request their customers to implement the newest software versions.



6. In principle, a supplier is not entitled to retain full payment it has received for products, software, or services found to be defective or nonconforming before the defect or nonconformity is remedied, and that the customer is entitled to an appropriate refund pending the proper correction of the defect or nonconformity.

Applying the Principles

1. Express Warranty

Avoiding unintended Express Warranties

- 1.1. Care should be taken to avoid unintended Express Warranties. The term “warrant” does not need to be used to create an Express Warranty. Instead, any statement in a contract that is a future promise about the products, software or, services that is understood to create the basis of the contract may be considered to be an Express Warranty.

Types of Express Warranties

1.2. Express Warranties should be clearly stated in the contract:

Product Warranty: Express Warranties for products and product deliverables should address all requirements related to the products or product deliverables, such as quality, condition, functionality, quantity, or performance. To ensure the Express Warranty is clear and aligned with product or deliverable requirements, it is a best practice to warrant that the products or product deliverables will perform in accordance with the agreed specifications attached to the contract. When enhancements of already delivered software functionalities are provided, the supplier does not generally provide any warranty regarding such enhancements, and support services regarding such enhancements should be specified in a separate services contract.

Service Warranty: Express Warranties for services will be promises generally aligned with the manner in which the services will be performed. As an illustration, the parties may agree to reference industry standards or other terms that have been interpreted by case law, such as that the services are to be performed in a timely, professional, and workmanlike manner.

Other Warranties: Depending on the contract subject matter, parties may seek warranties that are relevant to the products, software, or services to be delivered, such as: non-infringement of third party rights; fitness for a particular purpose; promises to obtain licenses; and authority to operate.

Express Warranty conditions

1.3. Parties may wish to agree that certain conditions must be met for an Express Warranty to apply, such as:

- a) Parties may wish to agree that certain conditions must be met for an Express Warranty to apply, such as:
- b) The product, software, or service deliverable is used and maintained under normal conditions and in accordance with the documents, information, and advice furnished by the supplier;
- c) The customer has given supplier written notice of defects, non-conformities, or deviations from the agreed specifications before the expiration of the applicable Warranty period;
- d) Any defect, non-conformity, or deviation was not caused by inter-working products or software not supplied under the contract;
- e) The customer has given supplier the opportunity to inspect and remedy the defect, non-conformity, or deviation;
- f) The customer has implemented, within a reasonable time period, the software updates provided from time to time by supplier during the Warranty period;
- and**
- g) A failure is not caused by modification of the product, software, or service deliverable without supplier's written approval.

2. Notice and Warranty Period

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| Clear process to provide notice | 2.1. A Warranty provision should address any specific process requirements for providing notice of a breach or non-conforming delivery and for claiming remedies. |
| Reasonable Warranty period | 2.2. The Warranty period during which the customer may give notice of any breach or non-conforming delivery should be aligned with a reasonable time period, in light of the type and characteristics (technical, functional, visual, etc.) of product, software, or service deliverable. |

3. Disclaimers of Warranty

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| Content of disclaimers | 3.1. Disclaimer of Warranties should specify that the parties are only relying on the Express Warranties and are not relying on any other representations (oral or written), course of dealing, or course of performance. |
| Specific and conspicuous disclaimers | 3.2. To be enforceable, a Warranty disclaimer must be specific and conspicuous. For example, it is a best practice for disclaimers of Warranties to be in all capitals in some common law jurisdictions and explicitly disclaiming any Implied Warranties, such as the Implied Warranty of Merchantability, fitness for a particular purpose, or title. |

4. Remedies

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| Repair or replacement | 4.1. A common remedy for breach of a Warranty or for a non-conforming delivery is repair or replacement of the defective products, software, or services deliverables. If the parties agree that the appropriate remedy is to repair, the terms of the agreement should set forth parameters for the reasonable amount of time it takes to repair or the number of times the supplier may attempt to correct the defective or nonconforming product, software, or services deliverables before the customer can avail itself of another remedy, such as termination of the sales contract, recovery of costs of having others effect the correction, or refund. |
| Warranty service commitments | 4.2. Should the customer want to obtain any commitments on specific response times or performance levels in order to supplement supplier's Warranty undertakings, such commitments should be specified in a separate service level agreement. The supplier should take care, however, to ensure that a failure to meet a certain agreed standard does not give rise to the customer having two remedies – one for the failure to satisfy the service level agreement and another for breach of an Express Warranty. |
| Other remedies | 4.3. Other remedies may include a refund, addition of products in the event of quantity issues, cost for cover, indemnity for intellectual property infringement, or termination for material breach. |
| Sole and exclusive remedies | 4.4. It is common for the parties to negotiate whether such recourse will be the sole and exclusive remedies for breach of Warranties or non-conformity with delivery obligations. |
| Customer choice of remedy | 4.5. In principle, the customer is entitled to choose the remedy it intends to seek. However, limiting the types of remedies and transferring the right to choose the remedy to the supplier are typical in sales contracts between companies. |

Who bears
Warranty costs

4.6. It is typical for the parties to agree on who bears costs related to breach of Warranty, such as transportation costs, and risk of loss incurred with respect to the repair or replacement of defective or nonconforming products, software, or services deliverables.

Remedies for
breach of
Warranty

4.7. It may be appropriate to limit the remedies and liabilities for breach of Warranty or non-conforming delivery, given the nature of the products, software, or services (where applicable). Unless otherwise limited by contract, potential recourse for breach of contract may include a number of remedies, such as specific performance and restitution and not just compensation for damages. Inappropriate remedies can be avoided by specifying the types of damages that can be claimed and expressly excluding unwanted recourse.

5. Liability Clauses

Limitation of
liability for
breach of
Warranty

5.1. Liability clauses should be aligned with the Warranties and may include limitations of liability related to breach of Warranty or non-conforming delivery obligation, as set out in the World Commerce & Contracting Principle [Liability Caps and Exclusions from Liability](#).

Defined Terms

Warranty: under these Contracting Principles encompasses both common law and civil law definitions¹.

a) In common law, a warranty is a promise, typically made by the supplier, about the character or quality of a tangible product (equipment or hardware), software, or a service.

b) In civil law, the statutory warranty is not a promise but an obligation for the supplier to deliver products, whether tangible (equipment or hardware) or intangible (software), free of defects. Defects can be either:

- 1)** material defects, which are visible (patent) or hidden (latent), or
- 2)** legal defects as to the right to use the products or software.

With regard to services, a statutory warranty can only cover results of services or deliverables resulting from those services.

¹ While the legal definitions may differ between common law and civil law systems, there is a great degree of freedom in drafting individual contracts between parties so that claims for defects can be expanded or restricted to meet the needs of both parties or, in some cases, precluded. Accordingly, these Contracting Principles apply in both common law and civil law jurisdictions.

Cont. →

Defined Terms (continued)

Express Warranty: a Warranty explicitly set forth in the contract terms.

Implied Warranty: a Warranty established by law and does not need to be expressly set forth in the contract terms. Applicable Implied Warranties will depend on a number of factors, including: the type of product, software, or services; negotiated prices; applicable laws; and understandings between the parties about how the products or software may be used. The Implied Warranties that usually apply to sales of products may include the following, unless otherwise expressly excluded in the contract:

a) **“Implied Warranty of Merchantability”** generally applies to the sale of most products and allows the customer to rely on the products being of average quality and fit for ordinary purposes.

b) **“Implied Warranty of Fitness for a Particular Purpose”** will apply if the supplier knows the intended use for the product and allows the customer to rely on the supplier having knowledge that the products are to be appropriate for that use.

c) **“Implied Warranty of Title and Against Infringement”** allows the customer to rely on the supplier having all rights necessary to sell the products without liens or encumbrances (or with only those liens and encumbrances that were declared by the supplier at the time of the sale) and without claims that the products infringe any third-party rights.