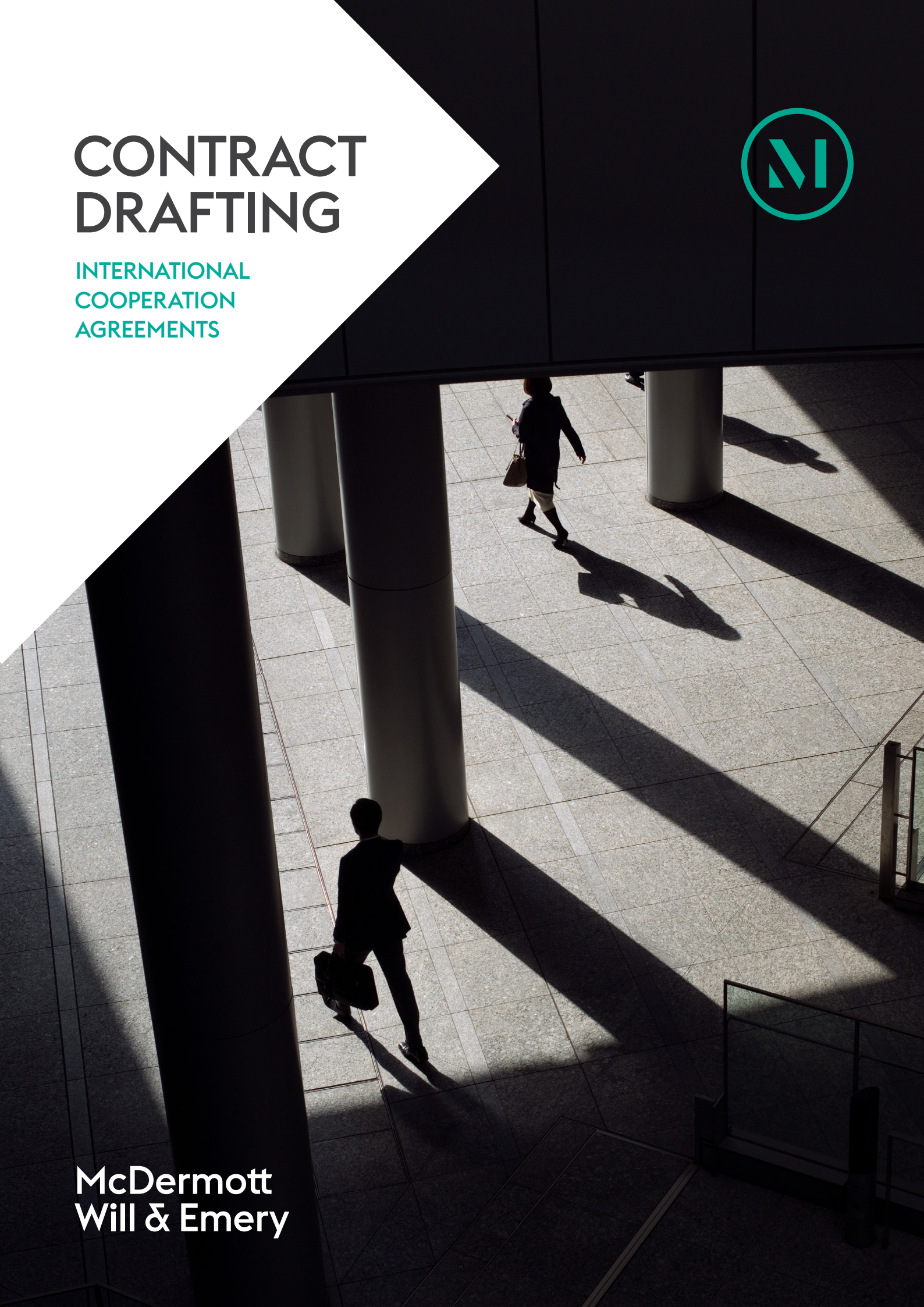
CONTRACT DRAFTING

INTERNATIONAL COOPERATION AGREEMENTS



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01 Structure and General Drafting Tips

02 **COMING SOON** First Steps in Assessing International Cooperation Agreements

03 **COMING SOON** The Preamble's Legal Significance in German-Law Contracts

04 **COMING SOON** How to Avoid Potential Pitfalls of "Representations" in German-Law Contracts

05 **COMING SOON** Contractual Mechanisms to Address Conflicts

06 **COMING SOON** RV Risk Allocation in Retail Cooperation Agreements

07 **COMING SOON** Types of Boilerplate Clauses in Cooperation Agreements

08 **COMING SOON** Contractual Termination Rights in Cooperation Agreements

09 **COMING SOON** The End of the Cooperation – Run-Off Principles and Survival Clauses

10 **COMING SOON** Executing Agreements in Compliance with German Form Requirements

STRUCTURE AND GENERAL DRAFTING TIPS

In this series, we provide advice on drafting English-language contracts that are governed by German law. We will refer to these as international cooperation agreements moving forward.

We focus on automotive finance contracts, such as factoring agreements for vehicle purchase price receivables, and white-label cooperation agreements between a financial services provider or a bank and a manufacturer. However, most of what we discuss can also be applied to other types of contractual arrangements. The series is intended for both external and in-house legal counsel as well as everyone involved in the negotiations of international contracts.

BASIC STRUCTURE

International cooperation agreements are strongly influenced by English-law contract drafting practices. The basic structure is often as follows:

- Preamble
- Definitions and interpretation provisions
- Core provisions, such as the receivable purchase mechanism in factoring agreements or key performance obligations in white label cooperation agreements
- Representations and general obligations
- Termination and duration provisions
- Miscellaneous provisions
- Schedules

Note: These provisions will be discussed in more detail in subsequent articles. This article will focus on general considerations and some basic aspects that are always relevant when drafting such contracts. For more detailed guidance, particularly on the mechanics of the contract, please refer to the literature references provided below.

As a general rule, use short sentences. Consider whether the parties have actually reached a commercial agreement and ensure that the person responsible for documenting the commercial agreement in writing understands what has been agreed upon. While there are situations in which the parties to a contract prefer to leave certain provisions somewhat loose (leaving room for interpretation and subsequent discussion after execution), the person drafting the contracts should point out any ambiguity in the contract to the parties.

GENERAL REMARKS

German-law restrictions of general terms and conditions

If German law applies to a contract and some (or all) of its provisions are to be considered as general terms and conditions (Allgemeine Geschäftsbedingungen), they must comply with the check for general terms and conditions under German law. General terms and conditions are pre-formulated contractual terms and conditions intended to be used for a large number of contracts and unilaterally imposed by one party on its counterparty when concluding a contract. In contrast to many jurisdictions, this also applies to business-to-business (B2B) contracts under German law. Entire contracts or certain provisions thereof are often deemed to be general terms and conditions more quickly than many parties expect; this may come as a surprise in cases where the parties do not consider conducting a review under German law because the contract is written in English.

It is often argued that because the contracts are negotiated in detail, their terms are therefore not unilaterally imposed by one party and therefore do not qualify as general terms and conditions. In some cases, this may indeed be the case. However, it is often advisable – if only out of an abundance of caution – to carry out a quick check to determine whether provisions comply with the general terms and conditions regime pursuant to Sec. 305 et seq. of the German Civil Code (BGB). This may be relevant, for example, with respect to provisions on the duration of the contract, termination options, burden of proof, contractual penalties and ancillary price agreements.

English-law terminology

In the case of English-language contracts using English legal terms, particular attention and sensitivity is advisable in order to avoid that not only the English terminology, but also the legal concepts and related legal consequences connected with such terminology under English law are inadvertently included in the agreement. Otherwise, some contractual provisions may have legal consequences that are not intended by the parties.

If the parties agree to enter into an agreement governed by German law, the rules of interpretation under German law will apply (Article 12 (1) of the Rome I-Regulation). Under German law, the interpretation of the contract is based on the intentions of the parties as they appear from the perspective of an objectified recipient (Sec. 133, 157 BGB). Because many international contracts, such as the Loan Market Association (LMA) model contracts for financing agreements, are heavily influenced by English law (even if they are governed by the laws of another jurisdiction), they contain legal terms that have specific meaning under English law without a corresponding equivalent in German law (such as “representations” or “warranties”) or have a completely different meaning in English law (such as “condition”).

For example, if a dispute arose over a clause containing the term “condition” and was brought to court, a German court would be tasked with determining whether the parties intended to create a conditional obligation that would only become effective upon the occurrence of specific circumstances, or whether they instead intended to apply English law principles and wanted to agree that the term designated as a condition was fundamental to the contract and that its breach – even without fault – would give rise to a claim for damages by the other party. This illustrates how different the potential legal consequences can be. In the event of a dispute, the outcome is often difficult to predict, because a court’s interpretation of a clause depends heavily on the individual case and may vary from judge to judge.

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As a result, international cooperation agreements typically contain provisions such as the following:

“This Agreement is made in the English language only. For the avoidance of doubt, the English-language version of this Agreement prevails over any translation of this Agreement. However, where a German legal term or concept has been used in this Agreement, such German legal term or concept (and not the English legal term or concept to which it relates) is authoritative for the purposes of construction."

To avoid consequences such as those described above, the German term must then always be added in brackets to critical terms, e.g., “condition (Bedingung)”. Such efforts can be time-consuming; it is therefore advisable to add the following to the sample wording provided above:

"It is the Parties’ intention not to apply English law concepts to this Agreement."

Clear and consistent use of essential terms (e.g., “shall” versus “will”).

The correct use of auxiliary verbs is particularly important when drafting contracts in English. We refer to the literature that is available on the use of “shall”, “will”, “must”, “may”, “may not”, “is to” and “would” (see the bibliography below).

However, two things are important: 1) these auxiliary verbs cannot be used synonymously, and 2) they are not interchangeable. Rather, they have different meanings in international cooperation agreements. When obligations are to be created, “shall” is usually used, not “will”. When translating a German-language contract into English, it is important to be aware that the use of “shall” creates an obligation for one party. If “shall”, “will” and “must” are used interchangeably, it will be completely unclear which provisions of the contract are intended to create obligations.

BIBLIOGRAPHY

If you want to dive deeper, you might want to look into the following literature:

- Adams, *A Manual of Style for Contract Drafting*
- Triebel, *Englisch als Vertragssprache: Fallstricke und Fehlerquellen*
- Moes, *Vertragsgestaltung*
- Ostendorf, *Englisches Recht in der Vertragsgestaltung*

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