DIRITTO

Marco Bianchi

I CONTRATTI INTERNAZIONALI
DIZIONARIO DELLE CLAUSOLE CONTRATTUALI
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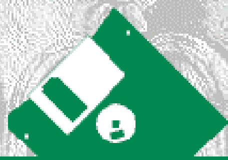

SOFTWARE IN AMBIENTE WINDOWS™

Il Sole 24 ORE

I CONTRATTI INTERNAZIONALI

DIZIONARIO DELLE CLAUSOLE CONTRATTUALI

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Marco Bianchi

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dedicato a mia moglie Alessandra e alla
memoria dell’amatissima zia Giannina

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Prefazione

Recentemente mi è capitato di leggere che in futuro i veri ricchi saranno coloro i quali avranno non soltanto quattrini, ma anche il tempo per spenderli. Non so se l'opinione possa essere condivisa, ma è certo che il tempo è un fattore sempre più prezioso nell'attività lavorativa di ogni giorno.

Guardando alla mia personale esperienza, spesso anche a me è capitato di trovarmi a redigere dei contratti internazionali, dovendo combattere contro il tempo; troppo spesso in tale circostanza mi sono poi ritrovato a cercare affannosamente, e a volte senza successo, quel precedente contrattuale di cui pure mi ricordavo, quella clausola in passato già sperimentata con successo per fattispecie analoghe, così da trarne spunto e ispirazione per la redazione dei nuovi contratti.

In questi casi lo scopo della ricerca non era, ovviamente, quello di traslare acriticamente in un nuovo testo contrattuale un certo articolo utilizzato in un precedente contratto, quanto piuttosto quello di verificare la possibilità di riproporre una soluzione già conosciuta, o quantomeno di trarre ispirazione da una esperienza passata, per «inventare» una nuova clausola contrattuale, per scoprire un modo più efficace per risolvere un determinato problema proprio di un certo tipo contrattuale. Infatti, se limitarsi a «copiare» è un errore capitale nella predisposizione di un contratto internazionale, «copiare con saggezza» può essere un modo intelligente per sfruttare le proprie esperienze precedenti, o, perché no, quelle altrui, uno strumento per meglio costruire un contratto internazionale idoneo allo scopo cui esso è destinato.

Una raccolta di clausole contrattuali non ha però esclusivamente valore per il singolo che può eventualmente sfruttarle nella redazione di uno specifico contratto internazionale. Infatti, da un diverso punto di vista, la collazione e la diffusione di possibili soluzioni contrattuali, e delle clausole che le racchiudono (fatto questo assai frequente nelle nazioni anglosassoni ma appena agli inizi in Italia), può anche rappresentare un contributo per diffondere e «codificare» gli usi e le consuetudini del commercio internazionale, in maniera tale da favorire la diffusione di soluzioni giuridiche uniformi ai medesimi problemi contrattuali, facilitando la

«comunicazione» tra parti pur appartenenti a sistemi giuridici diversi, e in ultima analisi, la stessa negoziazione dei contratti internazionali.

Così, per fare un esempio, diversi anni fa, avendo dovuto affrontare, a breve distanza l'una dall'altra, la negoziazione di due diversi contratti con due differenti multinazionali americane, rimasi assai sorpreso nel rendermi conto che nei contratti sottopostimi dalle controparti le clausole arbitrali, predisposte per un «arbitrato ad hoc*», erano assolutamente identiche tra loro; le due società americane appartenevano a gruppi totalmente diversi tra loro ma la circolazione dei modelli contrattuali in Usa era tale da far sì che entrambe avessero adottato, utilizzando pressoché le stesse parole, la medesima clausola contrattuale. Una graduale uniformazione delle soluzioni che possono essere adottate nella prassi dei contratti internazionali può quindi passare anche attraverso la consapevolezza, comune a entrambi i contraenti, seppur provenienti da nazioni diverse, dei metodi più comunemente utilizzati per risolvere problemi ricorrenti nei vari tipi contrattuali che disciplinano il commercio estero e le collaborazioni internazionali.*

L'obiettivo di questo libro è quello di mettere a disposizione dei lettori una vasta gamma di clausole e di definizioni contrattuali, ordinate in ordine alfabetico e precedute da una breve (o brevissima, a seconda dei casi) nota illustrativa. Tali clausole e definizioni sono tratte da svariati tipi di contratti internazionali (contratti di compravendita, contratti di somministrazione, contratti di appalto, contratti di agenzia e concessione, contratti di franchising*, contratti di licenza e di trasferimento di tecnologia, contratti di* joint venture*). Ove la clausola sia immediatamente riferibile a uno di tali tipi contrattuali, è reso riconoscibile dalla denominazione utilizzata per identificare le parti (così, per fare degli esempi, sono stati utilizzati* Seller *e* Buyer *nei contratti di compravendita e di somministrazione,* Franchisor *e* Franchisee *in quelli di* franchising*,* Licensor *e* Licensee *per i contratti di licenza e di trasferimento di tecnologia e via di seguito).*

Può capitare che nel corpo delle clausole vengano utilizzate delle parole che iniziano con lettera maiuscola: si tratta di termini con un significato convenzionale, delle definizioni. Per maggior comodità dei lettori, quando un termine convenzionalmente definito è utilizzato per la prima volta in una clausola (e sempreché non si tratti di una definizione del tutto peculiare al tipo contrattuale o di una definizione di immediata comprensibilità per il lettore), viene fatto espresso riferimento alla specifica definizione contenuta nella Parte Seconda del libro, dedicata per l'appunto alle più comuni definitions *utilizzate nelle clausole contrattuali illustrate nella Parte Prima.*

I Contratti Internazionali 3 - *Dizionario delle clausole contrattuali è stato pensato come il naturale proseguimento del discorso avviato con* I Contratti Internazionali 1 - Tecniche di redazione e clausole contrattuali*, scritto insieme a Diego Saluzzo, e al successivo* I Contratti Internazionali 2 - Tipologie e formule più ricorrenti. *Con* Contratti Internazionali 1 *abbiamo tentato di introdurre il lettore alle*

tecniche di redazione e alla comprensione delle clausole più utilizzate nei principali tipi contrattuali. Contratti Internazionali 2*, ove vengono illustrati i problemi peculiari dei contratti internazionali più comuni, offre al lettore una serie di testi contrattuali, in italiano e in inglese, da adattare e da completare alla luce delle specificità dell'azienda per cui si opera e del suo tipo di* business*.* Contratti Internazionali 3*, oltre che un ulteriore supporto, rappresenta una sfida, seppur del tutto amichevole, ai lettori fedeli, quelli che hanno già apprezzato i precedenti volumi dedicati ai contratti internazionali, ovverosia quella di verificare la loro capacità di «costruire» essi stessi i loro modelli contrattuali, utilizzando i commenti e le spiegazioni contenute nei due volumi precedenti e sfruttando, ma non vi è nulla di male in questo, l'esperienza e le soluzioni racchiuse nelle clausole qui offerte.*

In più di un'occasione mi è capitato di pensare che, al momento in cui si inizia a redigerlo, il contratto appare un poco come un puzzle*: soltanto avendo a disposizione tutte le tessere, e sapendo porle nella giusta disposizione è possibile ricomporlo. Le clausole qui offerte rappresentano un po' le tessere del* puzzle *e il commento a ognuna di esse dedicato spiega al lettore come utilizzarle per (ri)comporre il contratto.*

Le clausole di questo libro sono tutte tratte da contratti realmente negoziati e sottoscritti, anche se in alcuni casi, e per quanto possibile, esse sono state modificate per eliminare le peculiarità proprie del business *a cui si riferivano gli specifici contratti. Non sono state invece utilizzate clausole di modelli contrattuali predisposti da organismi internazionali (Orgalime, CCI, ECE/ONU) in quanto già ampiamente pubblicate in Italia.*

Ovviamente, all'atto della predisposizione di un qualsivoglia contratto internazionale, le clausole qui proposte potranno essere utilizzate soltanto dopo averne preventivamente accertato l'adeguatezza alle specifiche caratteristiche del business *a cui si riferisce il contratto, nonché la loro compatibilità con quanto in ipotesi previsto dalla normativa applicabile (o, come nel caso, per esempio, delle clausole dedicate ai contratti di agenzia e di concessione, dalla normativa comunitaria, per cui si rimanda comunque ai commenti offerti da* Contratti Internazionali 1 *e* Contratti Internazionali 2).

Last but not least*, desidero poi ringraziare la Dr.ssa Elisabetta Pernigotti per l'aiuto fornitomi nella correzione delle bozze del testo, nonché nella selezione di alcune delle clausole qui proposte.*

Torino, aprile 1999

Marco Bianchi

Parte prima
CLAUSOLE CONTRATTUALI

A

A.1 ACCEPTANCE

Nei contratti di compravendita di beni e servizi, così come nei contratti di appalto, l'interesse del venditore o dell'appaltatore è ovviamente quello di rendere l'accettazione la più semplice e «automatica» possibile, mentre invece il compratore/committente è spesso interessato a subordinare il pagamento del corrispettivo pattuito, in tutto o in parte, a una previa accettazione che accerti non soltanto la disponibilità dei beni e servizi richiesti ma anche la loro corrispondenza, in termini di funzionalità e affidabilità, alle specifiche tecniche contrattualmente previste.

Nella pratica l'opportunità di prevedere una specifica procedura di accettazione dei beni compravenduti dipende dal tipo contrattuale e dalla tipologia di tali beni o servizi. Così nei contratti di compravendita più semplici, o per beni il cui prezzo unitario è relativamente basso, l'accettazione di norma si presume alla consegna (rimanendo comunque per il compratore la possibilità di far valere successivamente eventuali vizi e difetti della merce) (☞ **Clausole A.1.1 e W.1.2**). Per beni particolarmente complessi o costosi (si pensi a macchinari industriali) o nei contratti internazionali di appalto spesso il compratore/committente si riserva invece il diritto di effettuare la verifica della merce, e di accettarne la consegna soltanto dopo averne accettato la conformità rispetto alle caratteristiche di cui al contratto (☞ **Clausola A.1.2**).

Una clausola di *acceptance* che offra al compratore troppe possibilità di rifiutare la consegna della merce è comunque potenzialmente assai pericolosa per il venditore, in quanto lo espone al pericolo di un rifiuto meramente strumentale da parte del compratore, non più interessato ad acquistare la merce a suo tempo ordinata. Nel predisporre una clausola di accettazione è quindi sempre essenziale, questa volta a tutela del venditore, identificare e delimitare in via preventiva, le circostanze in cui il compratore può legittimamente rifiutare i beni che il venditore intende consegnargli, nonché individuare i rimedi a disposizione del compratore (che normalmente non si limitano al solo rifiuto della merce ma prevedono anche la possibilità di farla riparare, a cura del compratore ma a spese del venditore) in caso di non conformità della merce.

Una possibile variante a questa clausola è rappresentata dalla c.d. *Pre-Delivery Inspection* (PDI) (☞ **Clausola P.3**), mediante cui il compratore si riserva il diritto di far ispezionare da propri incaricati i beni e le merci, presso gli stabilimenti del venditore, prima della consegna.

A.1.1 ACCEPTANCE

The Purchaser shall be deemed to have accepted all goods upon their delivery by the Seller to the address specified in the Order.

A.1.2 ACCEPTANCE

1. Issue of Acceptance Certificate - Subject to the provisions of Clause <...>, the Employer shall 1. During the continuance of this Agreement the Seller shall deliver the Products in accordance with the monthly orders issued in accordance with the provisions of Article <...>.

2. When so delivered any batch of Products shall be delivered together with a forwarding list describing the Products of the batch under delivery.

3. The Buyer reserves the right to verify that the Products received correspond to those required by the order and/or described in the forwarding list and that none of them are defective.

4. Should the Buyer discover any discrepancy between the quantity of Products actually delivered and the quantity set forth in the order and/or the forwarding list or identify a defect in any Products the Buyer shall notify the Seller accordingly within <...> (<...>) working days from the date of delivery of the concerned batch of Products. The notice shall be in writing and shall indicate whether the Products are detective, wrong or whether an excessive or insufficient quantity in relation to that ordered has been delivered.

5. In the event any of the Products of a specific batch are found defective, the nature of the defect shall be specified in the notice and the Buyer, at its discretion and by informing the Seller in advance, shall be allowed to return the whole batch of Products or repair the detective Products, provided always that all the relevant expenses shall be borne by the Seller in accordance with the rates set forth in Enclosure <...> and subject to the Seller's obligation to deliver additional Products to replace the defective batch within <...> working days.

6. Should the quantity of the delivered Products be:

6.1. in excess of the quantity set forth in the relevant monthly order the Buyer shall have the option either to return such Products at the expenses of the Seller or to accept them.

6.2. lower than the quantity set forth in the monthly order, the Seller shall be under the obligation to deliver the missing quantity by air mail delivery within <...> (<...>) from the date of the Notice, subject always to the provisions of Article <...> («liquidated damages»).

A.1.3 ACCEPTANCE

1. Buyer shall have a maximum of thirty (30) days from the date of its receipt of any shipment of Product to test for quality and quantity and to accept or reject such shipment. In the event Buyer does not notify Seller of acceptance or rejection within such thirty-day period, all of the Product in such shipment shall be deemed to be accepted.

2. If Buyer believes that any shipment of Product hereunder does not meet the specifications warranted by Seller as provided in Article <...> hereof, Buyer shall so notify Seller in writing indicating the particular lot, time of delivery and the defective nature of the Product. If Buyer notifies Seller of any defect in a shipment of Product, Seller shall have the right, but not the obligation, to send one or more quality control representatives to re-test such Product in co-operation with quality

control representatives of Buyer. Buyer shall store all shipments of the Product in accordance with storage specifications established by Seller.

3. In the event of a disagreement between Buyer and Seller regarding the quality of one or more shipments of Product, the Parties shall submit samples of the shipment in question to an independent testing laboratory (selected by mutual agreement of Buyer and Seller) to make a determination, which shall be binding upon the Parties, as to the compliance or lack of compliance of such shipment with the specifications warranted by Seller. Seller shall promptly credit Buyer for any defective shipments.

A.1.4 ACCEPTANCE

1. The Seller shall notify in writing to the Buyer its availability to perform the Acceptance Test on a specific batch of Products to be delivered to the Buyer, provided always that any of such notices shall be sent no later than <...> months prior to the expected delivery date of such batch of Products, as set forth in Enclosure <...>.

2. The Acceptance Test shall be performed at the Seller's premises in accordance with the acceptance criteria, specifications and procedure provided for in Enclosure <...>, at the presence of the Buyer's representatives.

3. Failing the Products submitted to the Acceptance Test to comply with the technical specifications referred to in Enclosure <...>, the Seller shall remedy any defect or lack of compliance with technical specifications and shall promptly arrange a second Acceptance Test to be performed within <...> weeks from the date of the first Acceptance Test.

4. If (a) the Seller is not capable to arrange a second Acceptance Test within <...> weeks from the date of the first Acceptance Test, or (b) the results of the second Acceptance Test are still negative, the Buyer shall have the right to reject the concerned batch of Products and to early terminate this Agreement, pursuant to the provisions of Article <...>.

5. In the event of a disagreement between Buyer and Seller regarding the results of the first or second Acceptance Test, the Parties shall submit samples of the batch of Products in question to an independent testing laboratory (selected by mutual agreement of Buyer and Seller) to make a determination, which shall be binding upon the Parties, as to the compliance or lack of compliance of such Products with the specifications warranted by Seller. Saving always the right of the other Party to claim further damages, costs for such independent test shall be borne by the Party who offered the opinion different from the determination of the independent testing laboratory.

6. If after the Seller's notice the Buyer does not attend to an Acceptance Test, the Seller shall be free to carry out the relevant Acceptance Test in the Buyer's absence and the result of such Acceptance Test shall be binding on the Buyer.

A.1.5 ACCEPTANCE

1. The Buyer, with the assistance of the Seller if so requested by the Buyer, shall examine and test each Product upon delivery to determine whether the Product conforms to the Specifications applicable to such Product.

2. The Buyer shall, within the acceptance period for each Product set forth in Exhibit <...>, either (i) accept the Product and so inform Buyer in writing; or (ii) reject the Product and provide Buyer with a written statement of Errors.

> 3. Notwithstanding the Payment Schedule, the Buyer shall not be obligated to pay for any Product for which the Buyer has submitted to the Seller a statement of Errors until the Seller has corrected such Errors to the reasonable satisfaction of the Buyer.
>
> 4. Within fifteen (15) working days after receipt of the statement of Errors, the Seller shall, as mutually agreed between the Parties, either (i) accept return of the Products and correct Errors in any Product as set forth in the Statement of Errors, or (ii) if practical, have the Seller's engineer(s) visit the Buyer's premises and correct any such Errors, or (iii) deliver new Products without Errors, or (iv) provide Buyer with a schedule and a plan for recovery («Recovery Plan») providing for the resolution of such Errors provided always that such schedule and plan shall be subject to the agreement of Buyer.
>
> 5. If Buyer fails to give a statement of Errors within the specified time, Buyer shall be deemed to have accepted the concerned Products.
>
> 6. If, within a reasonable time in any case not exceeding ninety (90) calendar days the Buyer is unable to correct the Errors or deliver new Products as provided in Article 4 above, or if the Parties are unable to agree upon a Recovery Plan or the Seller is unable to carry out such Recovery Plan, the Buyer may, in its own discretion and saving always the right to claim any further damage or exercise any additional remedy: (i) terminate this Agreement for cause pursuant to Article <...> below or (ii) suspend the performance under this Agreement until the Parties can mutually agree on a revised schedule, provided that after a further period of sixty (60) calendar days of suspension, the Buyer may enforce the early termination provisions set forth in Article <...>.
>
> 7. The Buyer shall make payments to the Seller in accordance with the Payment Schedule, provided that: (i) the Buyer has issued the necessary purchase orders to the Seller, (ii) the Buyer has accepted the Products. Such payments will be due net <...> calendar days from the later of Buyer's acceptance of the Products or Buyer's receipt of Seller's invoice. Buyer agrees to issue any necessary purchase orders required for payments in a timely manner to allow deliveries and payments as scheduled in this Agreement.

A.2 ACCOUNTING PROVISIONS

Solitamente una clausola così denominata viene utilizzata in due diverse circostanze: la prima è quella che ritroviamo in tutti quei contratti in cui uno dei contraenti si obbliga a pagare all'altro dei corrispettivi commisurati alle vendite effettuate in un certo periodo di validità del contratto. L'esempio più immediato è ovviamente quello dei contratti di licenza e/o di *franchising* ove il corrispettivo dovuto al licenziante/*franchisor* è usualmente rappresentato (anche) da *royalties* calcolate sul prezzo dei prodotti da questi venduti nella zona assegnatagli.

La seconda tipologia contrattuale in cui possiamo trovare una clausola di *accounting provisions* è quella delle *equity joint venture*, anche se qui i contenuti sono del tutto diversi. Nel primo caso (☞ **Clausole A.2.1 - A.2.3 - A.2.4**) la clausola serve infatti per imporre al licenziatario l'obbligo di tenere una contabilità separata ove vengano registrate le vendite dei *Licensed Products* su cui calcolare le *royalties* che maturano a favore del licenziante, nonché il diritto di questi di far verificare tale contabilità da propri rappresentanti, così da poter accertare in *qualsiasi mo-*

mento la correttezza dei corrispettivi di licenza pagati dal licenziatario al licenziante. Nel secondo caso (☞ **Clausole A.2.2 e A.2.5**) le parti identificano i criteri contabili che la *joint venture company* dovrà adottare nel tenere la propria contabilità, affiancando, ove sia il caso, degli *accounting criteria* concordati tra le parti (e normalmente identificati in uno specifico allegato) a quelli comunemente applicati nella nazione ove la *joint venture company* viene costituita.

A.2.1 ACCOUNTING PROVISIONS

1. Throughout the period of validity of this Agreement, and thereafter for a further period of <...> years the Licensee shall keep at its usual place of business a special register in which it shall record true entries of the number of Licensed Products assembled, delivered and sold to customers in the Territory, the serial numbers of such Licensed Products and any other information relevant for determining the amount of royalties and any other amount payable hereunder.

2. The Licensor shall have the right to appoint an accountant, approved by the Licensee, to verify the amount of royalties and other payments paid or payable under the terms of this Agreement. Said accountant may inspect the above-noted special registers during normal business hours and may request, and the Licensee shall provide, such other information as may be reasonably be necessary for purposes of such verification.

3. The Licensor shall ensure and cause such accountant to keep confidential and not to disclose to any person, including the Licensor, any information secured by said accountant in the course of his verification from sources other than the special registers, except if said accountant deems that such information must be disclosed to the Licensor in order to fulfil his verification obligations to the Licensor.

4. The cost of any such inspection and verification shall be borne by the Licensor.

5. The Licensor shall notify the Licensee <...> (<...>) days in advance of any such inspection.

A.2.2 ACCOUNTING PROVISIONS

1. The Joint Venture Company shall keep all books and statements of account and prepare all financial reports in accordance with <*la legge della nazione ove è costituita la joint venture company*> law and with internal control practices, consistently applied, and shall prepare quarterly consolidated financial statements, copies of which shall be forwarded to each of the Venturer on a timely basis, in such form as shall be necessary to each Venturer in order to prepare its own required financial statements under applicable laws and regulations.

2. Each Venturer shall be entitled to obtain at any time complete information with respect to the activities and all accounts and financial reports including but not limited to all the Joint Venture Company's costs and expenditures. The representatives of the Venturers shall have the right to review the said information with respect to the activities and all accounts and financial reports, at each such Venturer's own expense.

A.2.3 ACCOUNTING PROVISIONS

1. During the continuance of this Agreement the Franchisee:

a) shall keep accurate account and record of all gross sales and purchase made by the Franchise in each month;

b) shall prepare in a form approved by the Franchisor a monthly financial statement and any other accounting and management report as set out in the Operating Manual in the form herein specified and shall deliver such statements and reports to the Franchisor within the terms referred to in the Operating Manual;

c) shall have the Franchise books of accounts and records audited by a qualified Accounting Firm, the appointment of which shall have to be previously approved by the Franchisor, and shall deliver a full set of such audited accounts and records which shall include a balance sheet and profit and loss account to the Franchisor within three months after the closing of each accounting year.

2. Additionally, during the continuance of this Agreement, and thereafter for a further period of one year, the Franchisee, at the reasonable request of the Franchisor, shall consent to the Franchisor, or its duly authorised representatives and accountants, at the Franchisor's expenses, to inspect those records and books of account.

A.2.4 ACCOUNTING PROVISIONS

1. On or before the thirtieth (30th) day after the end of each calendar quarter during the term of this Agreement, the Licensee shall submit to the Licensor a written report setting forth for such quarter a computation of the royalties due under Article <...>, including any minimum royalties.

2. The Licensee shall maintain at its principal place of business accurate records and books of account in respect of the sales of the Licensed Products on which royalties are payable under this Agreement. The Licensee agrees to make such records available for the inspection of an independent certified public accountant firm designated by the Licensor and acceptable to the Licensee, for the purpose of verifying, at the expense of the Licensor, the accuracy of the amount of royalty payments hereunder at reasonable times as agreed by the Parties, but no more than once a year. Such accountant firm shall only audit records and book of account for a reporting year within twelve (12) months after the end of that reporting year.

A.2.5 ACCOUNTING PROVISIONS

1. The fiscal year of the Joint Venture and each of the JV Entities shall be the Fiscal Year.

2. Each of the JV Entities shall keep at its respective principal place of business books and records typically maintained by Persons engaged in similar business and which set forth a true, accurate and complete account of the business and affairs of such JV Entity, including a fair presentation of all income, expenditures, assets and liabilities thereof.

3. Such books and records shall include all information reasonably necessary to permit the preparation of financial statements required by applicable law in accordance with general accepted accounting principles applied in the Country where the JV Entity is formed.

4. Each JV Entity shall bear the cost of providing financial and accounting information reasonably required by each of the Venturers in the preparation of such Venturer's own financial statements.

5. Each Venturer or its authorised representatives shall have the right at all reasonable times to have access to, inspect, audit and copy the original books, records, files, securities, vouchers, cancelled checks, employment records, bank statements, bank deposit slips, bank reconciliations,

> cash receipts and disbursement records, and other documents of the JV Entities, which shall at all times be kept at the respective principal offices of the JV Entities.
>
> 6. The JV Entities shall engage the Certified Public Accountants listed in Schedule C., which shall be a single independent accounting firm of international reputation which is capable of auditing the annual financial statements of the JV Entities for compliance with required general accepted accounting principles.
>
> 7. Within thirty (30) days after the close of each Fiscal Quarter, each JV Entity shall deliver to each Party (i) its balance sheet as of the end of such period and (ii) statements of its operating results and accumulated earnings and changes in its cash flows for such Fiscal Quarter.
>
> 8. Within sixty (60) days after the close of each Fiscal Year of the Joint Venture and each JV Entity, each JV Entity will deliver to the Parties (1) its balance sheet as of the end of such Fiscal Year and (2) statements of its income and accumulated earnings and changes in its cash flows for such Fiscal Year, in each case certified by the Certified Public Accountants.
>
> 9. Reports will be provided in such form as shall be necessary for each Party to prepare financial statements which it is required to prepare under applicable law. Each Party shall have the right to request audited financial statements in addition to those provided for in this Article <...> or other special audits; provided, however, that the Party making such request shall bear the cost and expense of such audits.

A.3 ADVANCED PAYMENT

Nei contratti di appalto internazionali l'appaltatore, prima ancora di avviare i lavori commissionatigli, è spesso tenuto a effettuare investimenti assai rilevanti per organizzare la gestione delle attività commissionategli nonché per approvvigionarsi e per spedire in loco i materiali e le attrezzature occorrenti per eseguire i lavori. In simili circostanze non è infrequente che una parte del prezzo contrattuale gli venga corrisposta in anticipo sull'esecuzione dei lavori, di solito entro un breve termine dalla data di sottoscrizione del contratto.

Peraltro tale *advanced payment*, a volte anche denominato *down payment*, è normalmente subordinato al rilascio di una corrispondente garanzia bancaria di analogo importo, con cui il committente si garantisce la restituzione dell'anticipo pagato nell'eventualità che l'appaltatore non esegua, o comunque non porti a compimento, le opere commissionategli, in relazione alle quali sia stato già corrisposto l'*advanced payment*.

A.3.1 ADVANCED PAYMENT

> 1. Within sixty (60) calendar days from the date of execution of this Agreement, and subject to the prior issuance of the Bank Guarantee referred to in Article 2 below, the Principal shall pay to the Company an advanced payment equal to thirty (30) per cent of the total Contract Price i.e. U.S. Dollars <...> (US$ <...>). Such payment shall be in the form of a bank cable (swift) transfer in favour of the Company at its Bank <...> Account No <...>.

> 2. Within thirty (30) days from the date of execution of this Agreement, the Company shall establish in favour of the Principal a Bank Guarantee covering the full amount of the down payment to be received by the Company in accordance to Clause 1.
>
> Such Bank Guarantee shall have to be issued by a leading European Bank and shall be substantially in the form enclosed hereto as Schedule <...>. The aforementioned Bank Guarantee shall automatically decrease proportionately according to the Company's Delivery Schedule of the initial thirty (30) per cent of the deliveries.

A.3.2 ADVANCED PAYMENT

> 1. On or before the thirtieth (30th) day after the execution of this Agreement the Principal shall pay to the Contractor the 20% of the whole Tender Price, that is to say Italian Lire <...> (Italian Lire <...>, subject to the Contractor having previously established a bank guarantee on first written demand in favour of the Principal for the same amount of the advance payment, such Bank Guarantee to be issued by a Bank, and in a form, accepted in advance by the Principal.
>
> 2. The remaining amount of the Tender Price shall be paid by instalments, pursuant to the provisional acceptance of the Works and in accordance with the detailed provisions of Article <...> below.

A.4 ADVERTISING

È questa una clausola spesso utilizzata nei contratti di concessione e di *franchising*. I contenuti e gli obblighi imposti all'una o all'altra parte per pubblicizzare i prodotti sono i più vari, anche se, qualora il contratto consenta al concessionario/*franchisee* di effettuare iniziative promo-pubblicitarie, è pressoché sempre costante la previsione di una previa approvazione da parte del preponente/*franchisor* al fine di evitare che il concessionario/*franchisee* possa adottare delle iniziative promozionali in contrasto con la *corporate image* del concedente/*franchisor* (☞ **Clausole A.4.1.3 e A.4.3.1**). Nei contratti di concessione un secondo problema che viene poi frequentemente affrontato in una clausola di *advertising* è quello relativo agli oneri connessi con le iniziative promozionali del concessionario, sia per quanto attiene alla ripartizione delle spese, sia per quanto riguarda eventuali impegni «minimi» di investimenti pubblicitari da porre a carico dell'una o dell'altra parte durante la vigenza del contratto. Nei contratti di franchising normalmente l'*advertising* è gestito dal *franchisor*, così da assicurare l'uniformità dei messaggi promozionali e della gestione dei marchi commerciali utilizzati dalla pluralità dei *franchisee* (☞ **Clausola T.10 Trade-Marks (Use Of)**), il quale utilizza a tal fine le *contributions* periodicamente corrispostegli dai singoli *franchisees* (☞ **Clausola A.4.5**).

A.4.1 ADVERTISING

1. Principal, at its own expense, will supply Distributor with general price lists and specification and application information for use by the Distributor's sales personnel in such quantities and to such of Distributor's locations as Principal shall deem reasonable. Principal will supply Distributor with additional quantities of such literature upon terms mutually agreeable to both Parties.

2. Principal will share in Distributor's advertising and sales promotion activities by contributing up to fifty (50) per cent of the cost of any approved expenditure.

3. All of Distributor's advertising and sales promotion plans for Principal Products must be submitted in advance for written approval by Principal.

4. To receive funds to cover Principal's share of Distributor's advertising and sales promotion activity, Distributor must invoice Principal. The invoice must be submitted with a copy(ies) of the applicable invoice(s) and other required support documentation showing proof of actual cost incurred by Distributor.

A.4.2 ADVERTISING

1. The Distributor agrees to provide advertising and sales promotion programs for Products with the frequency and extent required by the sales potential of the Distributor's Territory. The Distributor also agrees to make suitable use of the advertising and promotional programs and materials made available by the Principal.

2. The Principal may establish co-operative advertising plans from time to time. The terms and procedure of such plans shall be established by the Principal and offered to the Distributor, it being understood that they are offered as an assistance for advertising and promotion and not to underwrite all of the Distributor's advertising and promotion activities and that the Principal may change or withdraw any such plan at any time.

3. The Distributor also agrees that it shall maintain a current list of prospective purchasers of Products, in the Distributor's Territory, and shall, upon request by the Principal, make such list available to the Principal for developing advertising and sales promotional programs in which the Principal may participate.

A.4.3 ADVERTISING

1. The Parties shall co-operate in regard to the promotion and marketing of the Products, the Principal supplying the Distributor with samples of its own advertising styles and the Distributor arranging at its own expense and cost suitable promotional exercises for the Products and sending to the Principal examples of its proposed styles. Should the Principal disapprove of any style, the Distributor agrees to accept the Principal's views thereon.

2. The Principal and the Distributor shall agree the amount to be spent on advertising, and the Principal agrees during the first 2 years to allow the Distributor credit representing 25% of all advertising costs approved by the Principal.

A.4.4 ADVERTISING

1. The Supplier shall inform the Distributor of its policy of international publicity for the Products and the Distributor shall follow and adapt this policy to the requirements of its own markets within the Territory.

2. During September of every year the Distributor shall submit to the Supplier its suggestions for a joint advertising campaign during the following year, so that the Supplier can ensure that such sales methods do not adversely reflect on the Supplier's brands within the Territory. No advertisements, printed material or other promotional material shall be used in the Territory without the specific approval in writing of the Supplier.

3. From time to time the Supplier may provide the Distributor with any available material and information to assist the Distributor in organising its local advertising activities.

4. During September of every year the Supplier and Distributor shall agree a promotion budget, and the value of any material and information ordered by and supplied to the Distributor will be set against the Suppliers advertising budget.

5. The cost of publicity carried out in the Territory will be borne by the Distributor who will submit duplicate copies of receipts bills and vouchers to the Supplier for each budgeted period.

6. The Distributor will spend at least 5% of the FOB value of its purchases as invoiced by the Supplier who will contribute to the above-mentioned publicity budget by 5% from the same FOB value.

7. The Supplier's contribution shall be given under the form of a credit note to be balanced by goods supplied without payment from the Distributor and/or of advertising material supplied.

8. In the case of a special advertising campaign, contributions shall be agreed upon from case to case by both Parties.

A.4.5 ADVERTISING

1. The Franchisor shall promote the general public recognition and acceptance of the Franchisor Proprietary Marks by preparing yearly national advertising campaign, for the organisation of which the Franchisor shall be solely responsible.

2. In consideration of the yearly national advertising campaign arranged by the Franchisor, the Franchisee shall pay to the Franchisor within thirty (30) days after the expiry of each year an amount by way of advertising contribution equal to <...> per cent of Gross Sales achieved by the Franchisee during the previous year.

3. The Franchisor shall devote to the yearly national advertising programme the whole of the amount of the advertising contribution received by the Franchisee pursuant to Article 2 above, as well as any advertising contribution similarly received by other Franchisees operating in the Country. The Franchisor shall yearly provide an audited account of the national advertising income and expenditures.

4. Additionally to the advertising contributions provided for in Article 2 above, the Franchisee shall expend not less than <...> per cent of its Gross Sales for promoting local advertising in the Franchisee's Territory, provided always that such local advertising shall be submitted in advance to the Franchisor for prior approval.

5. Throughout the duration of this Agreement the Franchisor shall periodically make available to the Franchisee, at no cost, advertising materials, including commercial leaflets, posters, shops

> displays, stickers, cards and commercial papers and the Franchisee shall at its own expenses prominently display, use and distribute such advertising material.

A.5 AGENT (APPOINTMENT OF)

Lo scopo di questa clausola è quello di definire il mandato conferito all'agente, delimitando i poteri che il preponente intende a tal fine concedergli. Per far ciò occorre selezionare una serie di alternative a disposizione del preponente in tema di prodotti, territorio, esclusiva ed eventuale rappresentanza:

- **Prodotti**: i prodotti la cui promozione viene affidata all'agente sono normalmente descritti in un allegato. È però necessario chiarire nel testo contrattuale se il mandato riguardi tutti i prodotti del preponente o soltanto alcuni di essi (in questi riservandosi il preponente di nominare più agenti ognuno dei quali è incaricato di promuovere una sola linea di prodotti del preponente). Allo stesso modo è opportuno chiarire in questa clausola se il mandato conferito all'agente si estenda automaticamente anche a eventuali futuri prodotti che il preponente dovesse successivamente immettere sul mercato, in sostituzione o in aggiunta a quelli esistenti sul mercato, o se invece spetti al solo preponente la decisione di estendere/modificare la gamma dei prodotti contrattuali.
- **Territorio**: normalmente il mandato viene conferito in relazione a uno specifico territorio (o, con riferimento a specifiche categorie di clienti, nel qual caso il «perimetro contrattuale» del mandato conferito all'agente risulta comunque determinato, peraltro non sulla base di criteri geografici ma in considerazione della mera tipologia della clientela affidata all'agente) ove l'agente dovrà promuovere le vendite dei prodotti contrattuali.
- **Esclusiva**: il mandato conferito all'agente può essere esclusivo o non esclusivo. Nel primo caso il preponente si impegna a non nominare altri agenti nel medesimo territorio, escludendo al contempo, salva diversa pattuizione, la possibilità di avviare trattative dirette con i potenziali clienti residenti nel territorio dell'agente. Nel secondo caso ovviamente la libertà del preponente di nominare ulteriori agenti, o di promuovere direttamente la vendita dei propri prodotti contrattuali nella medesima zona contrattuale, non soffre limitazioni di sorta (☞ **Clausola A.5.2**).
- **Rappresentanza**: il preponente può affidare all'agente il compito di rappresentarlo presso la clientela, sottoscrivendo per accettazione gli ordini di acquisto trasmessigli dai clienti e incassando il relativo prezzo. Si tratta di una possibilità raramente utilizzata dal preponente; al contrario normalmente i contratti di agenzia espressamente prevedono che l'agente non possa rappresentare il preponente e, più in generale, assumere impegni e obbligazioni in nome e per conto di questi (☞ **Clausole A.5.2.3 e A.5.3.4**).

A.5.1 AGENT (APPOINTMENT OF)

1. The Principal hereby grants, appoints and authorises the Agent to be the Principal's sole and exclusive agent for the Products in the territory identified in Schedule <...> (the «Territory») and the Agent hereby accepts such appointment in accordance with the terms and conditions set forth herein. It is understood and agreed that for the term of this Agreement Principal may not appoint any other agent within the Territory in relation to the Products.

A.5.2 AGENT (APPOINTMENT OF)

1. Subject to the terms and conditions hereinafter set forth, the Principal hereby appoints the Agent as a non-exclusive independent commercial agent for the solicitation of orders for Products from customers located in the Territory and the Agent hereby accept such appointment.

2. The Principal reserves the right to appoint additional commercial agents, distributors and sales representatives for Products in the Territory and to sell any Product directly in the Territory, in each case without obligation to pay any commission or make other payments to the Agent.

3. Except for the solicitation of orders or the providing of customer service, the Agent shall not considered a representative of the Principal. The Agent is not granted and shall not exercise the right or authority to assume or to create any obligations, in name and in behalf of the Principal.

A.5.3 AGENT (APPOINTMENT OF)

1. The Principal hereby appoints the Agent, who accepts such appointment, as its agent for the promotion of the sale of the Products in the Territory.

2. During the term of this Agreement the Agent shall not promote the sale of other products similar to the Products or obtain orders from third parties relating to other products, materials or similar or related materials that may cause confusion with the Products or a conflict of interest with the Principal's interest.

3. The Agent shall use its best endeavours to obtain orders for, and promote the sale of the Products, on the terms and conditions hereinafter provided, throughout the Territory and shall promptly transmit to the principal all orders received in respect of the products.

4. Unless otherwise expressly stated the Agent shall have no authority:

(a) to pledge the Principal's credit;

(b) to enter into, execute, deliver, cancel or amend any agreement on the Principal's behalf;

(c) to collect any moneys from any customer without the Principal's prior written consent.

A.5.4 AGENT (APPOINTMENT OF)

1. The Principal hereby appoints the Agent to be the exclusive agent of the Principal in the Territory for the marketing and the promotion of the sale of the Products to customers resident or carrying on business in the Territory and for soliciting from such customers and transmission to the Principal of requests for quotations or orders for the Products for sale use or consumption within the Territory.

> 2. At any time during the continuance of this Agreement, the Principal, in its own discretion, may amend the Products list attached hereto as Schedule <...>, by deleting, replacing or adding additional products to be marketed and promoted by the Agent.

A.6 AGENT (DUTIES OF)

Il compito principale dell'agente è quello di promuovere, in maniera continuativa e con la dovuta diligenza, la vendita dei prodotti del preponente nella zona affidatagli. Nella predisposizione della relativa clausola contrattuale normalmente tale obbligo di carattere generale viene assai dettagliato: così solitamente si prevede che l'agente, nello svolgere il compito affidatogli, formuli le sue proposte di contratto ai potenziali clienti seguendo le indicazioni fornitegli dal preponente in merito a prezzi, politiche di sconto, termini di consegna e condizioni di vendita.

All'agente vengono poi spesso demandati dei compiti, per così dire, ancillari rispetto a quello di promuovere le vendite dei prodotti del preponente, quali per esempio l'obbligo di predisporre dei rendiconti in merito ai potenziali clienti visitati e alle trattative in corso, da inviare periodicamente al preponente così da consentirgli di poter valutare l'entità dei potenziali ordini che l'agente potrebbe riuscire a procacciare nell'immediato futuro e, più in generale, l'andamento del mercato.

A.6.1 AGENT (DUTIES OF)

> 1. For the duration of this Agreement, the Agent shall provide Principal within the Territory with the services described below and such other services as may be agreed in writing by both Parties.
>
> 2. The Agent shall use its best efforts to promote the sale of the Products in the Territory in respect of the public sector, quasi-governmental transactions and the private sector.
>
> 3. The Agent shall, as and when reasonably requested by the Principal, notify the Principal of the laws, regulations and sales practices of the Territory relating to the sale of the Products and of any chances in such requirements.
>
> 4. The Agent shall furnish the Principal with quarterly sales reports pertaining to the situation in the Territory regarding the Products.
>
> 5. The Agent shall keep confidential during the term of this Agreement all methods, devices, industrial or manufacturing knowledge, customer lists, financial information and other information (collectively the «Information») imparted to the Agent by the Principal. Upon termination hereof, the Agent shall return to the Principal all Information contained in writing.
>
> 6. The Agent shall comply with all national and local laws of the Territory in respect of matters pertaining to this Agreement.
>
> 7. The Agent shall distribute promotional materials as furnished from time to time by the Principal. The Agent shall not without the prior written consent of the Principal distribute any materials of a similar nature having a different form or content than that provided by the Principal.
>
> 8. The Agent shall not appear for, represent, act as agent for, sell or manufacture any products directly competitive with the Products, without the Principal's prior written consent so long, as this

> Agreement shall remain in full force and effect. This Agreement does not prevent either Party from fulfilling its obligations under already existing agreement.
>
> 9. The Agent shall perform services on behalf of Principal in an economical and efficient manner and exercise due diligence to promote, protect and safeguard the interests of Principal in all respects.

A.7 ALTERNATIVE DISPUTE RESOLUTION (ADR)

L'insorgere di una controversia tra le parti di un contratto usualmente comporta per ognuna di esse l'onere di sopportare tempi lunghi e costi assai elevati, qualunque sia l'organo giudicante a cui è demandata la soluzione di detta controversia, tribunale ordinario piuttosto che collegio arbitrale. A ciò si aggiunge spesso la difficoltà (che è causa anch'essa del protrarsi dei tempi di giudizio e del conseguente aumento dei costi ad esso connessi) per i giudici o per gli arbitri di comprendere immediatamente le ragioni della controversia, spesso motivate da prassi commerciali prima ancora che da difformi interpretazioni di norme di diritto.

Proprio per evitare tempi e costi di un giudizio normale, dapprima negli Stati Uniti e poi gradatamente a livello mondiale, è invalso l'uso di risolvere le controversie contrattuali, ricorrendo a procedimenti alternativi a quelli tradizionali, arbitrato o procedimento giudiziale, genericamente ricompresi nella dizione *ADR - Alternative Dispute Resolution.*

Con tale termine si fa nella sostanza riferimento a procedure di conciliazione/mediazione che comportano, al pari dell'arbitrato o del procedimento avanti i tribunali ordinari, il coinvolgimento di un terzo, il cui compito, più che di giudicare, alla luce della legge applicabile al contratto, in merito alla fondatezza giuridica delle pretese dell'una o dell'altra parte, è quello di favorire la transazione della controversia, ricercando una soluzione capace di soddisfare le esigenze di entrambi i contendenti, così da risolvere sul nascere il dissidio insorto.

Tenuto conto di quanto appena detto, è del tutto ovvio che i metodi di *ADR* non sono realmente alternativi all'arbitrato o al ricorso alla giurisdizione ordinaria, in quanto nella pratica sono solitamente caratterizzati dalla non vincolatività del parere reso dal terzo incaricato dalle parti. Al contrario, essi solitamente rappresentano dei rimedi, per così dire, preliminari, falliti i quali è comunque necessario prevedere il ricorso all'arbitrato o alla competenza dei tribunali ordinari (☞ **Clausola A.7.3**).

A.7.1 ADR (EXPERT DETERMINATION)

> 1. Where under any provision of this Agreement any matter is to be determined by an Expert, the matter shall be referred at the instance of either Party to the President of the <...> Association of <Country/Town> or, if he is unable or unwilling so to act, such person as may be appointed by

agreement between the Parties or, in default of agreement, nominated on application of either Party by the President for the time being of the <...> Association of <Country/Town>.

2. Any person to whom a reference is made under Clause <...> shall act as an expert and not as an arbitrator and shall be entitled to appoint such technical expert or experts as he considers necessary to assist him in determining the matter referred to him. The decision of the Expert (which shall be given by him in writing stating the reasons therefore) shall be final and binding on the Parties.

3. Each Party shall provide any Expert with such information as he may reasonably require for the purposes of his determination.

4. The costs of any Experts (including the costs of any technical expert appointed by him) shall be borne in such proportions as the Expert may determine to be fair and reasonable in all the circumstances or, if no such determination is made by the Expert, by the Parties in equal proportion.

A.7.2 ADR (MEDIATION)

1. The Parties agree that any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination, or invalidity thereof, shall be resolved through negotiation and mediation. If a dispute arises between the Parties, and if said dispute cannot be resolved pursuant to Article <...>, the Parties agree to try in good faith to resolve such dispute by mediation administered by the <...> in accordance with its Commercial Mediation Rules.

2. The mediation proceeding shall be conducted at the location of the Party not originally requesting the resolution of the dispute.

3. The Parties agree that they shall share equally the cost of the mediation filing and hearing fees, and the cost of the mediator. Each Party shall bear its own attorney’s fees and associated costs and expenses.

A.7.3 ADR (EXPERT PROCEDURE)

1. Appointment of an Expert

If this Contract so provides, or if the Parties otherwise agree, that a controversy or dispute between them should be resolved by an expert, either Party may request that such controversy or dispute shall be resolved by such expert as provided herein and such costs shall be borne by the requesting Party.

2. Recourse to ICC

If any Party requests an expert determination the Parties shall attempt in the first instance to agree on a single expert to whom the matter shall be referred. If, within fourteen (14) days from receipt of such request, the Parties have failed to agree on the appointment of a single Expert, then the Parties agree to have recourse to the International Centre for Technical Expertise of the International Chamber of Commerce («ICC») in accordance with the ICC's Rules for Technical Experts.

3. Expert Procedures

The expert so appointed shall promptly fix a reasonable time and place for receiving submissions or information from the Parties and may make such other enquiries and require such other evi-

> dence as the expert deems necessary for resolving the matter. All information and data submitted by either Party as confidential shall not be disclosed by the Expert to third parties. The Parties shall have the opportunity to make representations to the expert.
>
> **4. Effect of Expert Decision**
>
> The expert shall be deemed not to be an arbitrator but shall render his decision as an expert, and no law or regulation relating to arbitration shall apply to such expert or his determinations or the procedure by which he reaches his determinations. The Parties shall rely on the determination of the expert, unless one or more of them believes in good faith that the determinations of the expert are incorrect or patently unfair or have been made as a consequence of misconduct on the part of such expert. In such event, either Party shall have the right to refer the dispute or controversy to arbitration in accordance with Article <...>.

A.8 AMENDMENTS

Questa clausola appartiene alle cosiddette *boiler-plate clauses*. Si tratta di clausole ormai sostanzialmente standardizzate, sempre poste nella parte finale del testo contrattuale, volte a disciplinare aspetti giuridici di carattere generale, comunque applicabili, a prescindere dalla specifica tipologia contrattuale cui pure si riferiscano. Possiamo citare tra le *boiler-plate clauses* più comuni commentate in questo libro le clausole *Assignment* (☞ **Clausola A.12**), *Enclosures* (☞ **Clausola E.2**), *Entire Agreement* (☞ **Clausola E.3**), *Non Waiver of rights* (☞ **Clausola N.1**), *Notices* (☞ **Clausola N.2**) e *Severability* (☞ **Clausola S.2**). A ben guardare molte di queste clausole sembrano ribadire dei principi assolutamente pacifici o, in alcuni casi, tanto ovvi da essere presumibilmente già riconosciuti dalla legge applicabile quale che essa sia. Il fatto che tali clausole siano comunque normalmente utilizzate in qualsivoglia contratto internazionale, quale che sia la sua tipologia, si spiega considerando che la tendenza affermatasi nella prassi del commercio internazionale è quella di predisporre contratti il più possibile completi e autosufficienti, «delocalizzati» rispetto alla normativa nazionale che pure li disciplina, a volte giungendo a confermare nel testo contrattuale disposizioni legali comunque applicabili, e ciò non fosse altro per assicurarsi che entrambe le parti siano consapevoli di quanto previsto dalle norme di legge in vigore.

Per quanto attiene alla clausola di *Amendments* qui commentata essa ha come specifico scopo di chiarire che eventuali comportamenti posti in essere dai contraenti e/o comunicazioni scambiate tra le parti successivamente alla sottoscrizione del contratto possono essere fatti valere come vere e proprie modifiche al testo originariamente sottoscritto soltanto qualora essi siano stati tradotti in un documento scritto firmato da rappresentanti autorizzati delle parti contraenti.

A.8.1 AMENDMENTS AND MODIFICATIONS TO THE AGREEMENT

> 1. Amendments to this Agreement or its Enclosures may be made only by a written agreement signed by a duly authorised officer of each Party.

A.8.2 AMENDMENTS AND MODIFICATIONS TO THE AGREEMENT

> 1. No verbal agreements of any nature relating to the subject matter of this Agreement shall be valid and enforceable, and no alteration, addition to, change in, modification of or deletion of any portion of this Agreement shall be valid or enforceable unless made in writing and executed by both Parties through duly authorised officers thereof.

A.8.3 AMENDMENTS AND MODIFICATIONS TO THE AGREEMENT

> 1. This Agreement may not be amended except by a written instrument signed by the Parties and stated therein to be an amendment or expansion hereof.

A.8.4 AMENDMENTS AND MODIFICATIONS TO THE AGREEMENT

> 1. The terms and conditions governing the supply relationship between the Seller and the Buyer are provided for exclusively in this Long-Term Supply Agreement and in no circumstances either Party shall be bound by any purported addition, amendment or modification to the terms and conditions herein referred to unless such additions, amendments or modifications are made in writing and duly signed by the authorised representatives of the Parties.

A.9 ANTI-DILUTION CLAUSE

Nei contratti di *equity joint venture*, le partecipazioni detenute dai *partners* nella società comune non devono essere necessariamente paritetiche, in quanto il contributo apportato da ognuno dei soci, seppur necessario e direttamente funzionale al raggiungimento del *joint target,* obiettivo per il quale la società comune è stata costituita, può anche avere un valore differente, attribuendo all'uno e all'altro dei *partners* una diversa partecipazione nel capitale sociale della *joint venture company*. Anche in una tale situazione di disparità delle rispettive partecipazioni azionarie detenute da una pluralità di *partners*, tutti i *venturers* hanno comunque l'esigenza, e l'interesse, di perseguire gli obiettivi congiuntamente affidati alla società comune e di condividere la gestione di tale società. In tal caso può accadere che uno dei *partner* di minoranza senta la necessità di tutelarsi dall'evenienza che il partner di maggioranza, o gli altri *partners*, ove la *joint venture* sia composta da

più *venturers*, trascorso un certo tempo, decida di «poter fare tutto da solo», via via riducendo il potere gestionale del partner di minoranza.

Una tale decisione può essere infatti perseguita dagli azionisti di maggioranza senza ricorrere alla precostituzione di eventuali situazioni di *deadlock* (☞ **Clausola D.2**) finalizzate da ultimo allo scioglimento della *joint venture* o senza esercitare possibili *call options* (☞ **Clausola C.1**) (in quest'ultimo caso i *venturers* che decidessero di esercitare tale opzione, acquistando la partecipazione del socio di minoranza, finirebbero comunque per pagargli il prezzo pattuito per tali azioni). Qualora volessero ridurre il potere di uno dei soci, gli altri *partners* potrebbero infatti decidere di far deliberare un aumento del capitale sociale della società comune, costringendo il socio di minoranza a una non facile decisione: effettuare ulteriori investimenti, non previsti e non preventivati, per sottoscrivere tale aumento di capitale o rinunciare a parteciparvi, diluendo la propria partecipazione nella *joint venture company* e presumibilmente diminuendo il proprio potere di influire sulle scelte gestionali della società comune.

Per porre rimedio a un tale possibile rischio le strade a disposizione del redattore del contratto di *joint venture* sono sostanzialmente due: ampliare l'elencazione delle decisioni che possono essere adottate dal consiglio di amministrazione, o dall'assemblea degli azionisti, soltanto con il consenso di una *Qualified Majority* (☞ **Definizione Q.1**), ovverosia con il voto favorevole di almeno uno o più rappresentanti di tutte le parti (☞ **Clausola B.1 Board of Directors**), includendovi anche la decisione di aumentare il capitale sociale della *joint venture company*, oppure, ove non sia possibile prevedere un'ampia applicazione del concetto di *Qualified Majority*, inserendo nel *joint venture agreement* un'*anti-dilution clause* quale quella proposta qui di seguito.

Tali clausole nella sostanza limitano il potere dei soci di maggioranza di deliberare un aumento del capitale sociale della società comune, senza avere prima ottenuto il consenso del *partner* di minoranza, confinandolo ad alcune ipotesi preventivamente individuate dal contratto o dalla legge applicabile.

A.9.1 ANTI-DILUTION CLAUSE

> 1. Until all of the Initial Minority Shares and Minority Shares have been subscribed or the right or the expiry of the fifth yearly term of validity of this Agreement, Venturer A and Venturer B shall procure that the Joint Venture Company, shall not, unless so authorised by a resolution of the Board of Directors approved by a Qualified Majority:
>
> (a) issue any Shares except in accordance with the Financial Plan;
>
> (b) increase its capital except in accordance with the provisions of this Agreement; or
>
> (c) change the nominal value of, or the rights attached to, any of its Shares; or
>
> (d) take any other action by amendment of its Articles of Association or through reorganisation, consolidation, sale of share capital, merger or sale of assets, or otherwise which might re-

sult in a dilution of the interest in the Joint Venture Company represented by the Minority Shares.

A.10 APPLICABLE LAW

Le nuove norme di diritto internazionale privato introdotte dalla legge 31 maggio 1995, n. 218 hanno liberalizzato la deroga alla legislazione italiana, prevedendo che essa possa essere convenzionalmente derogata (art. 4, comma 2, L. 218/1995) dalle parti a favore di un giudice straniero o di un arbitrato estero se la deroga è provata per iscritto e la causa verte su diritti disponibili. In tema di obbligazioni contrattuali, in caso di mancata previa identificazione della legge che regola il contratto, troveranno applicazione (art. 57 L. 218/1995) le disposizioni della Convenzione di Roma del 19 giugno 1980 in tema di legge applicabile alle obbligazioni contrattuali, secondo cui, in carenza di una previa individuazione della legge applicabile a opera dei contraenti, dovrà applicarsi la legge della nazione ove risiede la parte che deve fornire la prestazione caratteristica.

Nonostante l'espresso richiamo alla Convenzione di Roma disposto dalla L. 218/1995, è comunque sempre opportuno che i contraenti individuino subito nel testo contrattuale la legge regolatrice del contratto e ciò sia per poter verificare in via preventiva che le soluzioni ivi adottate siano effettivamente compatibili con la legge disciplinatrice del contratto, sia per evitare, in caso di controversia, i tempi e i costi connessi con l'esigenza di identificare, prima ancora che le ragioni dell'una e dell'altra parte, la legge alla luce della quale tali ragioni dovranno essere valutate e soppesate al fine di dirimere la controversia insorta tra i contraenti.

A.10.1 APPLICABLE LAW

1. This Agreement shall be construed, interpreted, enforced and governed by the laws of <...>.

A.10.2 APPLICABLE LAW

1. The validity, interpretation and performance of this Agreement shall be governed by the laws of Italy in any action brought by Party A against Party B and by the laws of Delaware in any action brought by Party B against Party A.

A.10.3 APPLICABLE LAW

1. The validity, interpretation and implementation of this Agreement shall be governed by and construed in accordance with the laws of Italy.

A.11 ARBITRATION

Il sostanziale disfavore per il ricorso ai tribunali ordinari, ha fatto sì che, almeno nella prassi del commercio internazionale, si sia diffuso il ricorso all'arbitrato che consente di ridurre i tempi lunghi della giustizia ordinaria e di affidare la soluzione della controversia a un organo giudicante formato da persone usualmente maggiormente esperte dei tecnicismi del commercio internazionale.

Per contro non si può non osservare come i costi di un arbitrato siano di norma assai elevati, mentre i tempi del procedimento, seppur normalmente inferiori a quelli della giustizia ordinaria, non siano sempre velocissimi, in particolare quando la procedura necessiti di una fase di *pre-trial discovery*, una fase istruttoria volta ad acclarare le circostanze di fatto connesse con la controversia. A ciò si aggiunga che i costi di un arbitrato potrebbero risultare del tutto sproporzionati al valore della controversia, fatto questo che potrebbe frequentemente verificarsi nei più semplici contratti di compravendita.

È questo forse uno dei motivi per cui negli ultimi anni si è sempre più diffuso il ricorso a procedure alternative (☞ **Clausola A.7 Alternative Dispute Resolution**), caratterizzate da un minor formalismo e da una maggior attenzione alla esigenza delle parti di porre rimedio alle controversie nel minor tempo possibile e senza dover distogliere risorse umane e denaro dalle normali attività aziendali.

Qualora si decida di inserire nel contratto una clausola arbitrale è peraltro opportuno accertare preventivamente che lo Stato della controparte, ove ipoteticamente la sentenza arbitrale dovrebbe essere eseguita, abbia aderito alla Convenzione di New York del 1958, assumendo così l'obbligo di rispettare eventuali convenzioni arbitrali sottoscritte tra le parti e di riconoscere e dare esecuzione alle sentenze arbitrali rese all'estero. Qualora la Convenzione di New York sia effettivamente applicabile sarà poi comunque necessario accertare che il contratto verta su materie per cui la normativa locale non escluda espressamente il ricorso a un arbitrato estero.

Dopo aver deciso di scegliere l'arbitrato quale strumento per la risoluzione delle eventuali controversie che dovessero verificarsi tra i contraenti, è poi necessario stabilire se far ricorso a un arbitrato gestito da una specifica Camera arbitrale (☞ **Clausole A.11.2 e A.11.3**), o utilizzare un arbitrato cosiddetto *ad hoc*, ove il procedimento si svolge con le modalità che i contraenti stessi hanno concordato, così come risulta dalla clausola arbitrale da essi appositamente predisposta (☞ **Clausola A.11.8**). Mentre nel primo caso le parti recepiscono il regolamento della Camera arbitrale da essi prescelta, usualmente utilizzando nel testo contrattuale la clausola arbitrale da questa suggerita, nel caso dell'arbitrato *ad hoc* è indispensabile una particolare attenzione nella redazione della clausola, così da accertare di aver contrattualmente definito tutte le modalità necessarie per l'instaurazione e la conduzione del procedimento arbitrale. In caso contrario, nell'arbitrato *ad hoc*, vi è il rischio che una delle parti, più o meno in mala fede, impedisca o dilazioni la co-

stituzione del collegio arbitrale, finendo così spesso per vanificare la possibilità di porre rimedio alla controversia, o quantomeno di porvi rimedio entro tempi, e a costi, ragionevoli.

Una *arbitration clause ad hoc* dovrebbe quindi prevedere le seguenti pattuizioni:

- le materie che possono essere sottoposte ad arbitrato;
- le norme procedurali applicabili (o il correlato diritto del collegio arbitrale costituito *ad hoc* di fissare esso stesso le regole procedurali da adottare nel corso dell'arbitrato);
- le modalità di nomina del collegio arbitrale (o dell'arbitro unico), con particolare riguardo all'ipotesi di disaccordo tra le parti, o tra gli arbitri da esse designati, in merito, rispettivamente, alla designazione dell'arbitro unico, o del terzo arbitro;
- il luogo dell'arbitrato;
- la lingua dell'arbitrato;
- l'efficacia della sentenza arbitrale.

Un'ulteriore questione cui dovrebbe essere prestata una particolare attenzione (che invece spesso viene trascurata nella redazione di una clausola arbitrale) è quella relativa alla possibilità che una delle Parti, in pendenza della procedura arbitrale, si rivolga al Tribunale competente per ottenere un qualche provvedimento cautelativo (quali, nel nostro sistema giuridico, quelli previsti dall'art. 700 c.p.c.) che all'atto pratico potrebbe ostacolare lo svolgimento dell'arbitrato o addirittura vanificarne i risultati. Può essere quindi opportuno, dopo aver verificato quanto previsto dalla normativa applicabile al contratto nonché dalle norme procedurali che regolano la procedura arbitrale, prevedere una specifica disciplina in merito al diritto di ognuna delle Parti di ricorrere a provvedimenti cautelari durante lo svolgimento dell'arbitrato (il più delle volte tale disciplina riducendosi alla rinuncia espressa delle Parti a fare ricorso a tali provvedimenti cautelari) (☞ **Clausola A.11.4.4**).

A.11.1 ARBITRATION

1. Consultation

In the event a dispute arises in connection with the interpretation or implementation of this Contract, the Parties shall attempt in the first instance to resolve such dispute through friendly consultations.

2. Arbitration

If the dispute is not resolved through friendly consultation within sixty (60) days after the commencement of discussions or such longer period as the Parties agree to in writing at that time, then notwithstanding any other provision of this Contract the Parties shall resolve the dispute in Stockholm, Sweden according to the arbitration rules of the Stockholm Chamber of Commerce («SCC»).

Arbitration shall be conducted as follows:

(a) English Proceedings. All proceedings in any such arbitration shall be conducted in English and a daily transcript in English of such proceedings shall be prepared.

(b) One Arbitrator. There shall be one (1) arbitrator, fluent in English, appointed by the SCC.

(c) Award Binding. The arbitration award shall be final and binding on the Parties, and the Parties agree to be bound thereby and to act accordingly.

(d) Obligations to Continue. When any dispute occurs and when any dispute is under arbitration, except for the matters under dispute the Parties shall continue to exercise their remaining respective rights, and fulfil their remaining respective obligations under this Contract.

A.11.2 ARBITRATION

1. All disputes arising out of the present contract, including those concerning its validity, interpretation, performance and termination, shall be referred to a sole arbitrator according to the International Arbitration Rules of the Chamber of National and International Arbitration in Milan, which the Parties declare that they know and accept in their entirety.

2. The sole arbitrator shall decide according to the norms <...> (the Parties may indicate the norms applicable to the merits of the dispute; alternatively they may provide that the arbitrator decide *ex aequo et bono*).

3. The language of the arbitration shall be <...>.

A.11.3 ARBITRATION

1. Any dispute between the Parties shall firstly be referred to the respective Chief Executive Officers of Venturer A and Venturer B then in charge. If an amicable solution cannot be reached between the Parties within 3 (three) months after the relevant Party has notified the other Party of a dispute, such dispute shall be submitted to arbitration in accordance with the provisions set forth in Article A.11.2 et seq. hereunder.

2. If a dispute arises out of the execution, performance or interpretation of this Agreement, or breach thereof, and if that dispute cannot be settled through direct discussions, the Parties agree that any unresolved controversy or claim arising out or relating to this Agreement, or breach thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.

3. The arbitration shall be held in Geneva. The numbers of arbitrators shall be three, one of whom shall be appointed by each of Venturer A and Venturer B and the third of whom shall be selected by agreement between the first two arbitrators, if possible, within 30 (thirty) days of the selection of the second arbitrator and thereafter by the Chairman of the International Chamber of Commerce.

4. The language of the arbitration, including all arguments and briefs, shall be English. Any award rendered by all or a majority of the arbitrators shall be in writing and motivated and shall be final and binding on both Parties, without further possibility of appeal. The arbitrators may allocate fees and expenses, including attorneys' fees, incurred by the Parties in connection with such arbitration, as the arbitrators may deem appropriate, after taking into account the extent to which each Party has prevailed in such arbitration.

5. Judgement upon any award rendered by the arbitrators may be entered in any court of competent jurisdiction in any country, or application may be made to such court of a judicial acceptance of the award and an order of enforcement, as the applicable laws and regulations of such jurisdiction may require or allow.

6. Notwithstanding the foregoing, any Party hereto may bring a case of action against the other Party before any court of competent jurisdiction in the domicile of the defending Party, if and to the extent that any arbitral award rendered in the arbitration proceedings is unenforceable.

A.11.4 ARBITRATION

1. The Parties shall use all reasonable efforts to settle all disputes, controversies or claims arising in any way out or relating to this Agreement, or the breach, termination or invalidity thereof.

2. Any such disputes which are not settled amicably, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. There shall be one arbitrator, and the appointing authority shall be the London Court of International Arbitration. The place of arbitration shall be London, England and the English language shall be used throughout the arbitral proceedings.

3. The result of the arbitral proceedings shall be binding to all the Parties and each Party waive their right to any form of appeal or recourse from such arbitral proceedings to a court of law or other judicial authority.

4. Neither the arbitral tribunal nor any Party shall be authorised to seek from any judicial authority or take any interim measures of protection or provide any pre-award relief against any other Party, any provisions of the UNCITRAL Arbitration Rules notwithstanding.

A.11.5 ARBITRATION

1. Any dispute between the Parties related to this Agreement shall be settled exclusively by arbitration under the procedural rules of the Canton of Zurich, Switzerland, and the mandatory Rules of the Swiss Intercantonal Concordat. The Arbitration shall be held in Zurich, Switzerland and shall be ruled by three Arbitrators, one to be appointed by each Party and the third by agreement between the two Arbitrators so appointed or by the Chairman of the Zurich Court of Appeals, who will also choose the Arbitrator for any Party failing to do so within thirty days after being requested to do so by notice from the other Party.

A.11.6 ARBITRATION

1. Any dispute arising out of or related to this Agreement shall be finally settled by arbitration in accordance with the Rules on Conciliation and Arbitration of the International Chamber of Commerce. In event of any conflict between these Rules and this Article, the provisions of this Article shall govern. This arbitration shall take place in New York City, U.S.A.

2. Each of the Parties shall appoint one arbitrator and the two so nominated shall in turn choose a third arbitrator. If the arbitrators chosen by the Parties cannot agree on the choice of the third arbitrator within a period of thirty (30) days after their nomination, then the third arbitrator shall be appointed by the Court of Arbitration of the International Chamber of Commerce.

3. The arbitration shall be conducted in the English language. Relevant documents in other languages shall be translated into English if the arbitrators so direct. In arriving at their award, the arbitrators shall make every effort to find a solution to the provisions of the Agreement and give full effect to all parts thereof. However, if a solution cannot be found in the provisions of the Agreement, the Arbitrators will apply the domestic law of the State of New York, U.S.A.

4. The arbitrators shall state the reasons upon which the award is based. The award of the arbitrators shall be final and binding upon the Parties. Judgement upon the award may be entered in any court having jurisdiction.

A.11.7 ARBITRATION

1. If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor or the Engineer and the Contractor in connection with, or arising out of the contract, or the execution of the Works, whether during the progress of the Works or after the termination, abandonment or breach of the contract, it shall in the first place, be referred to and settled by the Engineer who shall, within a period of 90 days after being requested by either Party to do so, give written notice of his decision to the Employer and the Contractor.

2. Formal notice of arbitration must be given to the other Party, and where required, to the appropriate arbitration body, no later than 84 days after the issue of the Final Certificate of Payment. Subject to arbitration, as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor and shall forthwith be given effect to by the Employer and by the Contractor, who shall proceed with the execution of the Works with all due diligence whether he or the Employer requires arbitration, as hereinafter provided, or not.

3. If the Engineer has given written notice of his decision to the Employer and the Contractor and no claim to arbitration has been communicated to him by either the Employer or the Contractor within a period of 90 days from receipt of such notice, the said decision shall remain final and binding upon the Employer and the Contractor.

4. If the Engineer shall fail to give notice of his decision, as aforesaid within a period of 90 days after being requested aforesaid; or if either the Employer or the Contractor be dissatisfied with any such decision, then and in any such case either the Employer or the Contractor may within 90 days after receiving notice of such decision, or within 90 days after the expiration of the first-named period of 90 days, as the case may be, require that the matter or matters in dispute be referred to arbitration as hereinafter provided.

5. All disputes or differences in respect of which the decision, if any, of the Engineer has not become final and binding as aforesaid shall be finally settled by arbitration by three arbitrators in accordance with the UNCITRAL Arbitration Rules for the time being in force. The said arbitrators shall have full power to open up, revise and review any decision, opinion, direction, certificate or valuation of the Engineer. Neither Party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator on any matter whatsoever relevant to the dispute or difference referred to the arbitrator as aforesaid. The reference to arbitration may proceed notwithstanding that the Works shall not then be or be alleged to be complete, provided always that the obligations of the Employer, the Engineer and Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

6. The arbitration award shall be binding upon the Parties. The arbitration proceedings shall take place in London, England. The language of the arbitral proceedings shall be English.

A.11.8 ARBITRATION

1. Any dispute between the Parties that cannot be settled by mutual agreement and that relates to the interpretation, performance, breach, termination or enforcement of this Agreement or in any way arises out or is connected with this Agreement shall be settled exclusively by arbitration.

2. The Arbitral Tribunal shall consist of three arbitrators, one to be appointed by each Party and the third by agreement between the arbitrators so appointed or, failing such agreement, by <...>, who will also choose the arbitrator for any Party failing to do so within 30 (thirty) days after being requested to do so by notice in writing from the other Party.

3. The procedural rules to be applied during the Arbitral proceedings shall be the <...> Arbitration Rules (alternativa: «shall be determined by the Arbitral Tribunal»).

4. All proceedings of the arbitration, including arguments and briefs, shall be conducted in <...>.

5. The place of arbitration shall be <...>.

6. Any award of the Arbitral Tribunal shall be in writing in the <...> language and shall state the reasons upon which is based. The written decision of a majority of the arbitrators shall be final and binding on both the Parties, which hereby waive any right of recourse or appeal under any applicable law.

7. The cost of the Arbitration shall be borne by either or both Parties, as the Arbitral Tribunal may decide.

8. Judgement upon any award rendered by the arbitrators may be entered in any court of competent jurisdiction in any country, or application may be made to such court of a judicial acceptance of the award and an order of enforcement, as the applicable laws and regulations of such jurisdiction may require or allow.

A.12 ASSIGNMENT

Nella prassi dei contratti internazionali la *Assignment clause* viene utilizzata per disciplinare la possibilità per ognuna delle parti di cedere, parzialmente o nella loro globalità, i diritti e le obbligazioni ad essa derivanti dal contratto: la scelta più ricorrente sembra tuttavia quella di proibire l'*assignment*, o quantomeno di limitarlo esclusivamente a soggetti terzi che appartengano al medesimo gruppo societario, o siano comunque posseduti/controllati, dal contraente originario che intende procedere all'*assignment*.

In contratti di natura particolarmente complessa, o per i quali le caratteristiche e le capacità dei singoli contraenti hanno costituito un elemento importante nella decisione di procedere alla sottoscrizione del contratto, non è poi infrequente che anche l'*assignment* a società associate sia sottoposto a ulteriori condizioni, quali per esempio una garanzia solidale del contraente originario per l'eventuale inadempimento della società da esso controllata che gli sia subentrata negli obblighi e

nei diritti di cui al contratto, o l'obbligo della parte cedente di subentrare nuovamente al cessionario, qualora questi cessi di appartenere al gruppo di società a cui apparteneva il contraente originario.

A.12.1 ASSIGNMENT

1. Neither Party shall have the right to assign its rights or obligations under this Agreement without the prior written consent of the other Party hereto, other than an assignment to an Affiliate. Should any such rights or obligations be so assigned by either Party, the assigning Party shall remain responsible as guarantor for the correct performance by its assignee(s).

A.12.2 ASSIGNMENT

1. Either Party may assign any of its rights under this Agreement in any country to any Affiliates and, with the prior written consent of the other Party, may delegate its obligations under this Agreement in any country to any Affiliates; provided, however, that any such assignment shall not relieve the assigning Party of its responsibilities for performance of its obligations under this Agreement.

2. Either Party may assign all of its rights and obligations under this Agreement in connection with a merger or similar reorganisation or the sale of all or substantially all of its assets, or otherwise with the prior written consent of the other Party; provided, however, that Party B may not so assign its rights and obligations if it is not the surviving company and the acquirer of Party B is a direct competitor of Party A. This Agreement shall survive any such merger or reorganisation of either Party with or into, or such sale of assets to, another Party and no consent (except as otherwise set forth above) for such merger, reorganisation or sale shall be required hereunder.

3. This Agreement shall be binding upon and inure to the benefit of the successors and permitted assigns of the Parties.

A.12.3 ASSIGNMENT

1. The Distributor shall not assign, transfer or charge, or purport to assign, transfer or charge this Agreement, or its rights or obligations hereunder, or any part hereof, or appoint agents or subdistributors, without the prior written consent of the Supplier.

2. The Supplier reserves the right to assign its rights and obligations under this Agreement, either in whole or in part, to any associate corporation and in the event of such assignment it will be sufficient for the Supplier to give notice in writing thereof to the Distributor.

3. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the Supplier and (where the Supplier's written consent is given) the successors and assigns of the Distributor.

A.12.4 ASSIGNMENT

1. This Agreement and all the rights and obligations of the Franchisor hereunder may be assigned or transferred, in whole or in part, by the Franchisor for the benefit of the successors and assignees of the Franchisor.

A.12.5 ASSIGNMENT

1. This Agreement is personal to the Parties and neither Party may assign, transfer or sub-license any of its rights, or sub-contract or otherwise delegate any of its obligations under this Agreement, except with the prior written consent of the other Party.

B

B.1 BOARD OF DIRECTORS

Nei contratti di *equity joint venture*, ove il «veicolo» della collaborazione è rappresentato da una società comune a tal fine costituita, i *venturers* dettano una serie di regole in tema di *corporate governance*. Lo scopo di tali regole è quello di identificare i poteri attribuiti ad ognuno dei *venturers* in relazione alla gestione delle future attività della *joint venture company*. Ciò comporta in primo luogo la necessità di individuare le modalità di composizione degli organi sociali e del *management* aziendale, normalmente riservando a ognuno dei soci, in proporzione alla rispettiva quota di partecipazione nella società comune, il diritto di indicare un certo numero di componenti degli organi sociali, nonché dei principali *managers* della società. In secondo luogo i *venturers* identificano contrattualmente una serie di regole per disciplinare l'adozione di quelle decisioni che essi giudicano fondamentali per il buon andamento della società comune e per assicurarsi che essa persegua gli obiettivi che i *venturers* hanno concordemente identificato all'atto della costituzione della *joint venture*: ciò normalmente comporta che, a prescindere dalla diversa quota di partecipazione detenuta da ognuno dei *venturers*, determinate decisioni possano essere assunte dal consiglio di amministrazione della *joint venture company* soltanto all'unanimità. La scelta di quali debbano essere le decisioni per cui si renda necessaria l'approvazione unanime di entrambi i *venturers* deve essere effettuata con ragionevolezza in quanto più si allunga la lista delle decisioni che devono essere deliberate all'unanimità (o comunque per il tramite di quella che solitamente viene definita una *Qualified Majority* - ☞ **Definizione Q.1**), ovverosia una maggioranza che includa il voto favorevole di un numero predeterminato di consiglieri che rappresentino entrambi i *venturers*) e più si accentua il rischio di un possibile *deadlock* (☞ **Clausola D.2**).

Da un diverso punto di vista la definizione delle decisioni che possono essere assunte dal consiglio implica la necessità che i *venturers* si accordino preventivamente sul ruolo affidato al consiglio di amministrazione. Così se i *venturers* ritengono che il consiglio debba essere un mero organo di indirizzo e di controllo dell'attività operativa affidata ai *managers* della *joint venture company*, le materie per cui occorrerà una decisione preventiva del consiglio saranno relativamente poche e tutte di carattere strategico. Per contro le competenze del consiglio di amministrazione saranno più ampie qualora i *venturers* intendano invece affidare ai *managers* la mera gestione ordinaria della *joint venture company*, riservando al dibat-

tito tra i membri del consiglio designati da ognuno dei *venturers* la soluzione delle questioni più importanti o che comunque esulino dal *day to day business* della società comune.

Nella ☞ **Clausola B.1.2.2 (a)** il Board è definito come «la più alta autorità della società», in quanto la clausola è tratta da un contratto di *joint venture* in Cina, ove la *Sino-Foreign Equity Joint Venture Laws* non prevede tra gli organi sociali l'assemblea degli azionisti ma esclusivamente il consiglio di amministrazione. Trattandosi di una clausola «vera», tratta nella sua interezza da un contratto di *joint venture* realmente sottoscritto e operante, si è comunque preferito non modificarla.

B.1.1 BOARD OF DIRECTORS

1. The formation of the Board of Directors

1.1 The Board of Directors of the Joint Venture Company shall be composed of 6 (six) members, 3 (three) being respectively appointed by Venturer A and 3 (three) by Venturer B, and shall decide on the main issues of the Joint Venture Organisation, including, but not limited to, product strategy, investments, industrial localisation, commercial policies, export and industrial co-operation policies, in accordance with the provisions set forth in this Agreement and the Articles of Association of the Joint Venture Company.

1.2 The Chairman of the Board of the Joint Venture Company shall be selected by the Board of Directors among the directors appointed by Venturer A and the Deputy Chairman of the Board among the directors appointed by Venturer B. The term of office of the directors, Chairman and deputy Chairman shall be 3 (three) years and shall be renewable. At the end of the first term, the Chairman of the Board shall be selected by the Board of Directors of the Joint Venture Company among the directors appointed by Venturer B and the deputy Chairman among the directors appointed by Venturer A. Thereafter, at the expiration of each period of office, the chairs of Chairman and deputy Chairman of the Board of Directors of the Joint Venture Company shall rotate alternatively between Venturer A and Venturer B directors.

1.3 The Board of Directors of the Joint Venture Company shall meet quarterly, provided, however, that additional meetings may be called upon written request of at least two directors. Such written request shall be addressed to the Chairman of the Board of Directors, who, in turn, shall promptly call a meeting of the Board of Directors.

1.4 The Chief Executive Officer shall participate at the meetings of the Board of Directors of the Joint Venture Company, but shall have no voting rights (i.e. the Chief Operating Officer shall not be a member of the Board of Directors).

1.5 The Senior Officers may attend the meetings of the Board of Directors of the Joint Venture Company if so invited by the Chairman of the Board, but shall have no voting rights.

2. Decisions of the Board of Directors with respect to specific actions

2.1 The Board of Directors is, and shall be, the corporate body responsible for the governance of the Joint Venture Company and is, and shall be, entitled to take any decision concerning the exploitation of the Joint Venture Organisation, if not reserved by the Articles of Association to the Shareholders' Meeting.

2.2 During the term of this Agreement, the Joint Venture Company shall perform none of the following actions without prior approval by a Qualified Majority of its Board of Directors:

(i) approve the Joint Venture Company's yearly balance sheets, profit and loss accounts and other financial statements, it being understood that the final approval of the yearly accounts shall be effected by the Shareholders' meeting in accordance with applicable laws and regulations;

(ii) approve the Consolidated Business Plan, and thereafter, the Consolidated Yearly Updated Business Plan;

(iii) approve the Consolidated Yearly Budget;

(iv) propose to the Shareholders' meeting to approve additional capital contributions by the Parties;

(v) approve the branding policy to be adopted by the Joint Venture Company and to be applied by the Joint Venture Organisation;

(vi) appoint or remove the Chief Executive Officer or the Chief Operating Officer;

(vii) appoint or remove the Joint Venture Auditors, it being understood that the final appointment or removal of the Joint Venture Auditors shall be effected by the Shareholders' meeting in accordance with applicable laws and regulations;

(viii) entrust the Chief Executive Officer, the Chief Operating Officer and the Senior Officers of the Joint Venture Company with powers, duties and responsibilities not expressly provided for in this Agreement and the Articles of Association of the Joint Venture Company;

(ix) propose to the Shareholders the actual implementation of the dividend policy referred to in Article <...> hereunder;

(x) propose to the Shareholders to list the Joint Venture Company's shares on a stock exchange;

(xi) define new deadlock situations, if necessary, in addition to the Deadlock Situations referred to in Article <...> hereunder.

2.3 If the following actions were not provided and accounted for in the Consolidated Yearly Budget such actions shall require a Qualified Majority of the Board of Directors of the Joint Venture Company:

(i) approve the sale of any part or business in which the Joint Venture Company is engaged, or the acquisition of an asset, or the merger with any other business enterprise, provided that the total value of such transaction amounts to at least <...> (<...> hundred million <...>), or the equivalent in Euros, such threshold being however subject to modification pursuant to a decision of the Shareholders' meeting;

(ii) approve the closing of any plant of the Joint Venture Company Organisation, or the establishment of new plants;

(iii) approve the acquisition of companies or assets organised as an on-going concern, operating in the Joint Venture business field provided that the total value of the transaction amounts to at least <...> (<...> hundred million <...>) or the equivalent in Euros, such threshold being however subject to modification pursuant to a decision of the Shareholders' meeting;

(iv) approve the establishment of equity or contractual joint ventures or long-term cooperations with third parties;

(v) approve the creation of additional Companies for the exploitation of new markets; and

(vi) authorise the Joint Venture Company's representative(s) at the Shareholders' meetings of any Joint Venture Organisation's Company to modify and amend the Articles of Association or to increase the share capital of such Joint Venture Organisation's Company.

3. Preparation of the resolutions of the Board of Directors

3.1 The Chief Executive Officer of the Joint Venture Company shall forward to the members of the Board of Directors of the Joint Venture Company a copy of the proposed resolutions, together with all the appropriate documentation, at least 15 (fifteen) Business Days prior to the meeting of the Board of Directors during which such proposals shall be discussed and approved.

4. Implementation of the resolutions of the Board of Directors

4.1 The Chief Executive Officer of the Joint Venture Company shall ensure that the Board of Directors of each Joint Venture Organisation's Company adopts yearly budgets, business plans, policies and criteria in conformity with the plans and resolutions of the Board of Directors of the Joint Venture Company.

B.1.2 BOARD OF DIRECTORS

1. The Formation of the Board

(a) Composition. The Board shall consist of five (5) directors, two (2) of whom shall be appointed by Party A and three (3) of whom shall be appointed by Party B. At the time this Contract is executed and each time directors are appointed, each Party shall notify the others of the names of its appointees.

(b) Term and Replacement. Each director shall be appointed for a term of four (4) years and may serve consecutive terms if reappointed by the Party which originally appointed him. If a seat on the Board is vacated by the retirement, resignation, illness, disability or death of a director or by the removal of such director by the Party which originally appointed him, the Party which originally appointed such director shall appoint a successor to serve out such director's term.

(c) Chairman. The Chairman of the Board shall be appointed by Party B, and the Vice Chairman shall be appointed by Party A. The Chairman of the Board shall be the legal representative of the Company. Whenever the Chairman of the Board is unable to perform his responsibilities, he shall authorise the Vice Chairman to exercise the Chairman's responsibilities.

(d) Additional Attendees. Reflecting the importance of close communications between the Board and the management of the Company, the General Manager may attend Board meetings upon invitation of a majority of the Board but shall not vote unless he is a director in his own right. Other managers, including the Financial Controller, as well as other parties that are not directly related to the Company or either Party, may attend such meetings upon the invitation of a majority of the Board.

2. Meetings and Powers of the Board

(a) Powers. The Board shall be the highest authority of the Company. It shall discuss and determine all major issues regarding the Company.

(b) Meetings. The first Board meeting shall be held as soon as possible within sixty (60) days after the date of issuance of the Business License. Thereafter, regular meetings of the Board shall be held at least two times each year. Upon the written request of three (3) or more of the directors

of the Company specifying the matters to be discussed, the Chairman of the Board shall call a meeting of the Board.

(c) Notice and Agenda. Board meetings shall be held at the registered address of the Company or such other address in China or abroad as may be designated by the Chairman. Meetings shall be held on twenty-one (21) days notice to the directors if held in China and thirty (30) days notice if held abroad, provided that the directors may waive such notice by unanimous written consent. A notice of a Board meeting shall cover the agenda, time and place for such meeting. The Chairman of the Board shall be responsible for convening and presiding over such meetings. The General Manager shall assist the Chairman in preparing an agenda for each Board meeting.

(d) Proxies. In case a Board member is unable to participate in a Board meeting in person, he may issue a proxy and entrust another person to participate in the meeting on his behalf. The proxy holder shall have the same rights and powers as the Board member. A representative shall be permitted to serve as a proxy for up to three (3) Board members appointed by the same Party as such representative. If a Board member fails to participate or to entrust another to participate, he will be deemed as having waived such right.

(e) Quorum. Four (4) directors present in person or by proxy shall constitute a quorum which shall be necessary for the conduct of business at any meeting of the Board.

(f) Voting. Each director present in person, by proxy or at a meeting of the Board of Directors shall have one vote.

(g) Unanimous Votes. Resolutions involving the following matters may only be adopted at a duly constituted and convened meeting of the Board of Directors upon the unanimous affirmative vote of each and every director of the Board voting in person, by proxy or by telephone at such meeting:

(i) the amendment of the Articles of Association;

(ii) the merger of the Company with another organisation;

(iii) termination and dissolution of the Company; and

(iv) the increase or assignment of the Company's registered capital.

(h) Super Majority. Resolutions involving the following major matters may only be adopted at a duly constituted and convened meeting of the Board of Directors upon the affirmative vote of four (4) directors of the Board voting in person, by proxy or by telephone at such meeting:

(i) the formulation of, or changes, to the management structure of the Company;

(ii) the formulation of policies and plans relating to the recruitment of employees, employees wages, welfare and compensation, as well as the formulation of labour management rules; and

(iii) the appointment, dismissal, limitations on authority and compensation of Management Personnel, except the Executive Vice General Manager.

(i) Simple Majority. Other issues that require resolutions by the Board may be raised at a duly convened meeting of the Board and must be adopted by the affirmative vote of three (3) of the directors present in person, by proxy or by telephone at such meeting where a quorum is present.

(j) Action without a Meeting. Any action by the Board may be taken without a meeting if all members of the Board consent in writing to such action. Such written consent shall be filed with the minutes of the Board proceedings and shall have the same force and effect as a unanimous or majority vote, as the case may be, taken by members physically present.

> (k) Expenses. The Company shall be responsible for the reasonable travel, lodging and meal expenses incurred by appointed directors or their proxy in attending Board meetings.

B.2 BUY-OUT CLAUSES

Sotto questa generica denominazione possono essere ricomprese tutte quelle clausole che, combinando *call options* (☞ **Clausola C.1**) e *put options* (☞ **Clausola P.9**), offrono a uno o a entrambi i soci di una *joint venture company* la possibilità di porre fine alla collaborazione da essi avviata, mediante l'acquisto, o la vendita, delle azioni di uno dei *venturers* all'altro socio, o, in alcuni casi a società terze disponibili a rilevare la partecipazione societaria messa in vendita dal *venturer* che intende esercitare il diritto di uscire dalla *joint venture.*

A differenza delle call options e put options generalmente queste clausole (alla cui categoria appartengono anche la Russian Roulette Clause - ☞ **Clausola R.6** e la Texas Shoot - Out Clause - ☞ **Clausola T.7,** il cui contenuto, ormai codificato dalla prassi internazionale, ne consente una trattazione separata) presuppongono meccanismi più complessi sia per la determinazione del prezzo di cessione, sia per l'individuazione della parte destinata a uscire dalla joint venture. All'atto della sottoscrizione della joint venture company, e soprattutto nel caso di joint venture paritarie o comunque ove le partecipazioni dei venturers siano sostanzialmente comparabili (i.e. 49-51%), non è infatti sempre facile per ognuna delle parti decidere se riservarsi un ipotetico diritto di uscita o se sia invece preferibile avere il diritto di acquisire la quota dell'altro venturer, in quanto nella pratica la convenienza dell'una o dell'altra opzione dipenderà dall'andamento e dai risultati della joint venture company.

Non potendo predeterminare quale sia l'opzione più conveniente all'atto della dissolution della joint venture, spesso è altrettanto difficile per il singolo contraente determinare il prezzo di cessione delle partecipazioni azionarie che dovranno essere compravendute. In tali situazioni la scelta più comune che si presenta al redattore del testo contrattuale è quella di rinviare entrambe le decisioni (acquistare o vendere, e a quale prezzo) al momento in cui sorga l'effettiva necessità di ricorrere al diritto di buy-out.

Le clausole qui di seguito offerte abbracciano un'ampia gamma di situazioni che possono dar luogo a un buy-out: inadempimento dell'altra parte (☞ **Clausola B.2.2**), deadlock (☞ **Clausola B.2.3**), fallimento di una delle parti (☞ **Clausola B.2.4**), buy-out come conseguenza di un change of control (l'acquisizione dell'altro venturer da parte di una società concorrente dell'altro partner - vedi definizione C.4.1) (☞ **Clausola B.2.5**), la mera volontà di una delle parti, dopo che sia trascorso un periodo di tempo non breve (**Way Out** ☞ **Clausole B.2.1 e B.2.6**), di uscire dalla joint venture.

Nei casi in cui il motivo della dissolution della joint venture, il triggering event che avvia il procedimento per determinare il prezzo delle azioni e per effettuarne la cessione, sia attribuibile a uno dei venturer (come per esempio nella ☞ **Clausola B.2.2 Buy-Out as a Consequence of Breach**), è normale prevedere che spetti all'altro partner, il venturer incolpevole, decidere se acquistare le azioni dell'altro venturer o se invece vendere a quest'ultimo le proprie azioni. Considerato però che in questo caso il triggering event è attribuibile a uno dei partners, la clausola qui proposta prevede che il prezzo di cessione sarà diverso a seconda che la scelta sia di acquistare o di vendere. Così qualora il venturer in bonis decida di acquistare la partecipazione azionaria dell'altro la pagherà l'80% del suo valore, così come determinato con la procedura di cui si dirà appresso, mentre nell'eventualità che la decisione sia quella di vendere le proprie azioni della joint venture company al partner inadempiente al 120% del loro valore. La diversità del prezzo di cessione non è tanto, o soltanto, dovuta alla volontà di «punire» il partner inadempiente, quanto piuttosto tesa ad evitare che uno dei venturers, volendo porre fine ai propri rapporti con l'altro socio della joint venture company, decida volontariamente di rimanere inadempiente a una delle sue obbligazioni all'unico scopo di provocare la dissolution della joint venture.

Il meccanismo suindicato non può funzionare quando il triggering event non sia, invece, specificatamente attribuibile alla «colpa» di uno dei venturers (☞ per esempio la **Clausola B.2.3 Buy-Out as a Consequence of a Deadlock**). In questo caso, la clausola qui di seguito proposta prevede che, qualora i venturers non trovino un accordo in merito a chi debba cedere le proprie azioni della società comune, le parti ricorrano a una sealed bids procedure (offerta a buste chiuse): a «vincere» sarà il venturer che avrà indicato per le azioni il prezzo più alto.

Fatta eccezione per il caso in cui la dissolution della joint venture venga decisa attraverso le offerte a buste chiuse dei venturers, resta comunque da affrontare la questione della determinazione del valore delle azioni della joint venture company, da cui far derivare il loro prezzo di cessione: negli esempi di clausole qui proposte si fa quasi sempre riferimento al Fair Market Value (☞ **Definizione F.1**), l'equo valore di mercato che una terza parte sarebbe disponibile a pagare per acquistare le partecipazioni oggetto della compravendita, così come determinato da un esperto indipendente (Appraiser), solitamente una banca d'affari.

In uno degli esempi sotto indicati (☞ **Clausola B.2.5 - Buy-Out as a Consequence of Change of Control**) il Fair Market Value è soltanto uno dei valori presi a riferimento per definire il valore delle azioni. L'altro è il Net Asset Value (☞ **Definizione N. 1**) il valore del patrimonio netto della società.

Fair Market Value e Net Asset Value sono soltanto due tra i tanti possibili metodi che possono essere utilizzati per accertare il valore di una società, ma rappresentano, per così dire, i due estremi della gamma di scelte a disposizione. Utilizzando il Net Asset Value ci si limita a fotografare la situazione patrimoniale

della società così come esistente ad una certa data, mentre prendendo a riferimento il Fair Market Value si utilizza un criterio di valutazione reddituale, in quanto si tiene conto anche dell'avviamento e della penetrazione commerciale della società sui mercati ove già opera nonché, almeno in parte, anche delle potenzialità di ulteriore crescita della joint venture company.

B.2.1 BUY-OUT («WAY OUT»)

> 1. Buy-Sell Procedure. Each Venturer shall have the right to offer to purchase all the Shares in the Joint Venture of the other Venturers at any time after the expiry of the fifth anniversary of the registration of the Joint Venture Company. The Venturer desiring to buy out the others («Offeror») shall exercise this right by giving written notice («Notice») to the other Venturers («Offeree(s)») of its intent to purchase all the Shares of the Offeree(s) at a purchase price as set forth in that Notice, with final closing to occur not later than ninety (90) days from the date of the Notice.
>
> 2. In the event that any of the Offeree(s) desires not to sell its Shares to the Offeror on the terms specified in the Notice, that Offeree(s) shall have the right, but not the obligation, to acquire all of the Joint Venture Shares of the Offeror at the purchase price, as stated in the Offeror's notice. If more than one Offeree elects to purchase the Offeror's Joint Venture Shares, their participation in that acquisition shall be proportional based on the Joint Venture Shares owned by each of them (or in such other proportions as are agreed upon by them).
>
> 3. If the Offeree(s) does not close on the purchase of the Offeror's Joint Venture Shares within 90 days after the date of the Offeror's Notice, then the Offeror has the right, within 30 days thereafter to acquire all of the Joint Venture Shares of the Offeree on the terms as set forth in the Offeror's Notice.

B.2.2 BUY-OUT AS A CONSEQUENCE OF BREACH

> **1. Buy-Out Notice**
>
> 1.1 Within 20 (twenty) Business Days after a Termination Notice for Breach has been notified in accordance with the provisions set forth in Article <...> hereabove, the Notifying Party may, at its own discretion, further deliver a Buy-Out Notice to the Receiving Party, declaring its willingness to appoint an independent internationally recognised investment bank in order to undertake the assessment of the Fair Market Value. The Buy-Out Notifying Party shall also propose a panel of three internationally recognised investment banks to the Buy-Out Receiving Party for the assessment of the Fair Market Value of the Shares.
>
> 1.2 The Buy-Out Receiving Party shall have 10 (ten) Business Days to select one investment bank from the panel proposed by the Buy-Out Notifying Party. Failing the Buy-Out Receiving Party to choose one investment bank from the panel of banks proposed by the Buy-Out Notifying Party within such period, the Buy-Out Notifying Party shall be entitled to select one of the three investment banks proposed to the Buy-Out Receiving Party. The investment bank finally selected by the Buy-Out Receiving Party or the Buy-Out Notifying Party, as the case may be, for the assessment of the Fair Market Value shall be referred to as the Appraiser for purposes of this Article.

2. Appraisal procedure

2.1 The Parties shall give reasonable assistance to the Appraiser, and require the officers and the Auditors of the Joint Venture Company to provide such assistance. The Parties may make written representations to the Appraiser, but the Appraiser will not be obligated to take such representations into account in its assessment of the Fair Market Value.

2.2 Within 50 (fifty) calendar days after his appointment (or as soon as possible pursuant to his appointment), the Appraiser shall deliver to the Parties the Fair Market Value as assessed by such Appraiser together with a copy of a written appraisal report prepared by such Appraiser in connection with the determination of such Fair Market Value.

2.3 The assessment of the Fair Market Value, as determined by the Appraiser, shall be final and binding upon both Parties, it being explicitly understood that the assessment of the Fair Market Value shall not entitle any Party to enforce the provisions set forth in Article <...> hereto concerning settlement of disputes and arbitration.

2.4 All fees and expenses incurred in connection with the assessment of the Fair Market Value shall be borne one-third by the Buy-Out Notifying Party, and two-thirds by the Buy-Out Receiving Party. The mandate as well as the fees and expenses of the Appraiser shall be negotiated by the Joint Venture Company, taking into account the common interests of the Parties.

3. Call option and put option

3.1 Upon completion of the assessment of the Fair Market Value, the Buy-Out Notifying Party shall have the right, at its own discretion, (i) to buy all the Shares owned at that time by the Buy-Out Receiving Party, in which case, the Buy-Out Receiving Party shall be bound to sell all of its Shares to such Buy-Out Notifying Party, or (ii) to sell all its Shares to the Buy-Out Receiving Party, in which case, such Buy-Out Receiving Party shall be bound to acquire all the Shares owned by the Buy-Out Notifying Party.

For this purpose, within 25 (twenty-five) calendar days after the delivery of the Fair Market Value, as determined by the Appraiser, to the Parties, the Buy-Out Notifying Party shall notify in writing the Buy-Out Receiving Party of its intention to buy, or to sell, as the case may be, the Shares.

3.2 The price of the Shares shall depend on the option actually exercised by the Buy-Out Notifying Party:

(a) If the Buy-Out Notifying Party decides to buy all the Shares owned by the Buy-Out Receiving Party, the price shall be equal to 80% (eighty per cent) of the Fair Market Value, as assessed by the Appraiser prorata to the actual number of Shares owned by the Buy-Out Receiving Party; or

(b) If the Buy-Out Notifying Party decides to sell all of its Shares to the Buy-Out Receiving Party, the price shall be equal to 120% (one hundred twenty per cent) of the Fair Market Value, as assessed by the Appraiser prorata to the actual number of Shares owned by the Buy-Out Receiving Party.

3.3 Within 30 (thirty) calendar days from the notification by the Buy-Out Notifying Party to the Buy-Out Receiving Party of its willingness to buy the Buy-Out Receiving Party's Shares, or, as the case may be, to sell its Shares to the Buy-Out Receiving Party, the Party bound to sell its Shares shall transfer to the other Party the ownership of all such Shares free of any lien, pledge or other third party rights, and the Party bound to purchase such Shares shall transfer to the selling Party the price of such Shares, determined pursuant to the provisions set forth in Article 3.2 (a) and (b) hereabove.

3.4 The purchase and sale of the Shares shall be closed and consummated at the registered office of the Joint Venture Company. The selling Party shall execute and deliver all documents and instruments to the acquiring Party as reasonably deemed appropriate to effect the transfer of the Shares.

B.2.3 BUY-OUT AS A CONSEQUENCE OF DEADLOCK

1. Buy-Out Notice and Assessment of the Fair Market Value

1.1 Within 10 (ten) Business Days after a Termination Notice for Deadlock has been notified in accordance with the provisions set forth in Article <...> hereabove, the Notifying Party may further deliver a Buy-Out Notice to the Receiving Party, declaring its willingness to appoint an independent, internationally recognised investment bank in order to undertake the assessment of the Fair Market Value. The Buy-Out Notifying Party shall also propose a panel of three internationally recognised investment banks to the Buy-Out Receiving Party for the assessment of the Fair Market Value of the Shares.

1.2 The Buy-Out Receiving Party shall have 10 (ten) Business Days to select one investment bank from the panel proposed by the Buy-Out Notifying Party. Failing the Buy-Out Receiving Party to choose one investment bank from the panel of banks proposed by the Buy-Out Notifying Party within such period, the Buy-Out Notifying Party shall be entitled to select one of the three investment banks proposed to the Buy-Out Receiving Party. The investment bank finally selected by the Buy-Out Receiving Party or the Buy-Out Notifying Party, as the case may be, for the assessment of the Fair Market Value shall be referred to as the Appraiser for purposes of this Article.

2. Appraisal procedure

2.1 The Parties shall give reasonable assistance to the Appraiser, and require the officers and the Auditors of the Joint Venture Company to provide such assistance. The Parties may make written representations to the Appraiser, but the Appraiser will not be obligated to take such representations into account in its assessment of the Fair Market Value.

2.2 Within 50 (fifty) calendar days after his appointment (or as soon as possible pursuant to his appointment), the Appraiser shall deliver to the Parties the Fair Market Value as assessed by such Appraiser together with a copy of a written appraisal report prepared by such Appraiser in connection with the determination of such Fair Market Value.

2.3 The assessment of the Fair Market Value, as determined by the Appraiser, shall be final and binding upon both Parties, it being explicitly understood that the assessment of the Fair Market Value shall not entitle any Party to enforce the provisions set forth in Article <...> hereto concerning settlement of disputes and arbitration.

2.4 The fees and expenses incurred in connection with the assessment of the Fair Market Value (i) shall be equally borne by the Parties in case a buy-out is executed pursuant to the provisions set forth in this Article or (ii) shall be exclusively borne by the Party accepting the other Party's position for resolving the Deadlock Situation pursuant to the provisions set forth in Article B.3.1.(a).

3. Initial Buy-Out Procedure

3.1 Pursuant to the determination of the Fair Market Value by the Appraiser, the Parties shall consult each other for a period that shall not exceed 30 (thirty) calendar days in order to determine (a) if one of the Parties is willing to resolve the Deadlock Situation by accepting the other Party's

position and solution with respect to such Deadlock Situation, in which case the other Party shall lose its rights to enforce the buy-out provisions set forth in this Article, or (b) if one Party is willing to purchase all the Shares of the other Party and if the other Party is willing to sell all its Shares to such Party.

3.2 In the event one of the Parties is a willing purchaser and the other Party is a willing seller of the Shares, promptly after the expiration of the 30 (thirty) calendar day consultation period the Party willing to sell its Shares shall transfer all its Shares free of any lien, pledge or other third party rights, and the Party willing to purchase such Shares shall pay to the selling Party the price of such Shares. The price of the Shares shall be the Fair Market Value as assessed by the Appraiser, unless otherwise agreed upon between the Parties. The purchase and sale of the Shares shall be closed and consummated at the registered office of the Holding Company.

4. Sale and purchase of the Shares by sealed bids

4.1 If during the 30 (thirty) calendar day consultation period referred to in Article 3.3.1 hereabove, the Parties are unable to agree on the purchase and sale of the Shares, the Parties may elect to entrust an independent, internationally recognised investment bank in order to find a third party willing to acquire all the Shares owned by both Parties. If however both Parties are simultaneously willing to purchase or to sell, as the case may be, the Shares, each Party shall submit sealed bids to an independent notary, which shall be jointly appointed by the Parties (hereinafter the Notary), and the procedure set forth in Articles 4.4.3 *et seq.* shall apply.

4.2 In case (i) the Parties fail to agree on an internationally recognised investment bank for finding a third Party willing to purchase all the Shares owned by both Parties within 30 (thirty) calendar days pursuant to the expiration of the consultation period referred to in Article 3.3.1. hereabove, (ii) the Parties fail to agree on the price of the Shares to be sold to a willing third party acquirer or do not agree on the third party acquirer in case of the existence of several willing third party acquirers of the Shares, (iii) the Parties decide not to proceed with the sale of their Shares to a third party, or (iv) the selected investment bank is unable to find a willing third party acquirer within a 180 (one hundred and eighty) calendar day period starting on the date of the investment bank's appointment, each Party shall submit a sealed bid containing the amount, in <currency>, at which the Party is a willing purchaser or a willing seller of its own Shares to the other Party.

4.3 The sealed bids shall be submitted to the Notary within 21 (twenty-one) calendar days after the expiration of the 30 (thirty) calendar day period referred to in Article 3.3.1 hereabove or upon the occurrence of any event referred to in Article 4.4.2 (ii), (iii) and (iv) hereabove. If a Party fails to submit its bid within such time period, such Party shall be deemed to have submitted a bid for an amount equal to 0 (zero).

4.4 The two sealed bids shall be disclosed simultaneously by the Notary at the registered office of the Joint Venture Company within 7 (seven) Business Days after the Notary received the last sealed bid.

4.5 If both Parties are willing purchasers, the price of the Shares shall be the highest bid and shall be paid in cash. The Party acquiring the other Party's Shares shall be the Party who submitted the highest bid, and the selling Party shall be the Party who submitted the lowest bid.

4.6 If both Parties are willing Sellers, the price of the Shares shall be the lowest ask price and shall be paid in cash. The Party acquiring the other Party's Shares shall be the Party having asked for the highest price and the selling Party shall be the Party having asked for the lowest price.

4.7 Within 30 (thirty) Business Days after the disclosure of the two sealed bids by the Joint Venture Company Auditors, the selling Party shall transfer to the acquiring Party all its Shares free of any lien, pledge or other third party rights, and the acquiring Party shall transfer to the selling Party the price of such Shares, as determined pursuant to the provisions of Articles 4.4.5. and 4.4.6. hereabove.

B.2.4 BUY-OUT AS A CONSEQUENCE OF THE BANKRUPTCY OF ONE OF THE PARTIES

1. Buy-Out Notice: Call option

1.1 Upon delivery of a Termination Notice for Bankruptcy by the Notifying Party as a consequence of the other Party having commenced proceedings under applicable insolvency or bankruptcy laws and regulations as referred to in Article <...> hereabove, the Notifying Party not affected by the commencement of insolvency or bankruptcy proceedings (hereinafter the «Non-Affected Party») shall be entitled to notify a Buy-Out Notice to the Party affected by the beginning of such bankruptcy proceedings (hereinafter the «Affected Party») simultaneously or within 5 (five) Business Days after the delivery of the Termination Notice for Bankruptcy.

1.2 The Non-Affected Party shall have the option to acquire all the Shares of the Affected Party, and such Affected Party shall be bound to sell all its Shares to the Non-Affected Party, pursuant to and in accordance with the provisions of this Article 2.4.

2. Assessment of the transfer price of the Shares

2.1 The transfer price to be paid by the Non-Affected Party to the Affected Party for all his Shares shall be the Net Asset Value, if such Net Asset Value is positive, as assessed by the Joint Venture Company Auditors as of the date of delivery of the Buy-Out Notice. If the Net Asset Value, as assessed by the Joint Venture Company Auditors, is negative, the transfer price of the Shares shall amount to <...> 1 (one <...>).

3. Sale and transfer of the Shares

3.1 The assessment effected by the Joint Venture Company Auditors shall be completed within a period which shall not exceed 60 (sixty) Business Days pursuant to the notification of a Buy-Out Notice by the Non-Affected Party, and shall be final and binding upon the Parties, it being explicitly understood that such assessment shall not entitle any Party to enforce the provisions set forth in Article <...> hereto (Settlement of Disputes).

3.2 Within 30 (thirty) Business Days after the delivery of the assessment of the Net Asset Value by the Holding Auditors, the Affected Party shall transfer to the Non-Affected Party all its Shares free of any lien, pledge or other third party rights and the Non-Affected Party shall transfer to the Affected Party the price of such Shares, as determined by the provisions set forth in Article 2.1 hereabove. The purchase and sale of the Shares shall be closed and consummated at the registered office of the Holding Company.

B.2.5 BUY-OUT AS A CONSEQUENCE OF CHANGE OF CONTROL

1. Buy-Out Notice, assessment of Net Asset Value and Fair Market Value

1.1 Upon delivery of a Termination Notice for Change of Control by the Notifying Party to the Party affected by the change of Control in accordance with the provisions set forth in Article <...> hereabove, the Notifying Party not affected by such change of Control shall be entitled to notify a Buy-Out Notice to the Party affected by the change of Control simultaneously or within 10 (ten) Business Days after the delivery of the Termination Notice for Change of Control.

1.2 Within 20 (twenty) Business Days after the notification of the Buy-Out Notice (i) the Joint Venture Company Auditors shall proceed with the assessment of the Net Asset Value as of the date of delivery of the Buy-Out Notice and (ii) the Buy-Out Receiving Party shall select an Appraiser for assessing the Fair Market Value. For this purpose, the Buy-Out Notifying Party shall propose a panel of 3 (three) investment banks to the Buy-Out Receiving Party, and such Buy-Out Receiving Party shall be entitled to select one investment bank proposed by the Buy-Out Notifying Party within 7 (seven) Business Days from the receipt of such proposition.

1.3 Failing the Buy-Out Receiving Party to choose one investment bank from the panel of banks proposed by the Buy-Out Notifying Party within such period, the Buy-Out Notifying Party shall be entitled to select one of the three investment banks proposed to the Buy-Out Receiving Party.

1.4 The Joint Venture Auditors shall complete their assessment of the Net Asset Value within 60 (sixty) Business Days starting from the date of their appointment and shall submit to the Parties such assessment of the Net Asset Value together with a copy of a written report describing the determination of such Net Asset Value.

1.5 The appraisal of the Fair Market Value shall be conducted and completed by the Appraiser in accordance with procedure set forth in Article B 2.2.2 hereabove, with the only exception of Article B 2.2.2.4 that shall not apply.

1.6 Both the results of the assessment of the Net Asset Value and the appraisal of the Fair Market Value shall be final and binding upon both Parties, it being explicitly understood that such assessment of the Net Asset Value and the appraisal of the Fair Market Value shall not entitle any Party to enforce the provisions set forth in Article <...> hereto (Settlement of Disputes).

1.7 The fees and expenses incurred in connection with the assessment of the Net Asset Value and the appraisal of the Fair Market Value shall be borne by the Party affected by the change of Control.

2. Sale and purchase of the Shares, acceptance of the Change of Control

2.1 Upon completion of both the assessment of the Net Asset Value and the appraisal of the Fair Market Value, the Buy-Out Notifying Party shall have the option to (i) either acquire all the Shares owned at that time by the Party affected by the change of Control or (ii) to sell its Shares to the Party affected by such change of Control and such affected Party shall be bound to either (x) sell all its Shares to the Buy-Out Notifying Party or (y) acquire all the Shares owned at that time by such Buy-Out Notifying Party. In addition, the Buy-Out Notifying Party shall have the option to accept the change of Control of the other Party and therefore continue to be a Shareholder.

2.2 The price of the Shares shall be the average between the Net Asset Value, as assessed by the Joint Venture Company Auditors, and the Fair Market Value, as determined by the Appraiser.

2.3 Within 15 (fifteen) Business Days after the later of either the delivery of the assessment of the Net Asset Value or the appraisal of the Fair Market Value, the selling Party shall transfer to the acquiring Party all its Shares free of any lien, pledge or other third party rights and the acquiring Party shall transfer to the selling Party the price of such Shares, as determined by the provisions set forth in Article 2.5.2.2 hereabove. The purchase and sale of the Shares shall be closed and consummated at the registered office of the Holding Company.

B.2.6 BUY-OUT («WAY-OUT»)

1. Way-Out Notice

1.1 Upon the expiration of the 12th (twelfth) calendar year from the Closing, starting as of January 1, 2011, each Party may decide, at its own discretion, to leave the Joint Venture Company, by exercising the Way-Out Option set forth in this Article <...>.

1.2 Any Party willing to exercise the Way-Out Option shall notify in writing the other Party of its decision to leave the Joint Venture Company, by addressing a Way-Out Notice to such other Party.

1.3 Immediately after the notification of the initial Way-Out Notice, the Way-Out Receiving Party shall select an Appraiser in accordance with the provisions set forth in Articles <...>. and <...> hereabove in order to assess the Fair Market Value in accordance with the provisions set forth in Article <...>.

1.4 The fees and expenses incurred in connection with the assessment of the Fair Market Value shall be equally borne by the Parties in case a way-out is executed pursuant to the provisions set forth in this Article.

2. Way-Out Procedures

2.1 Offer to the Way-Out Receiving Party

2.1.1 The Way-Out Notifying Party shall first offer to the Way-Out Receiving Party to acquire all its Shares at the Fair Market Value, as assessed by the Appraiser.

2.1.2 The Way-Out Receiving Party shall have the option (i) to either acquire the Shares of the Way-Out Notifying Party at the Fair Market Value, as assessed by the Appraiser, in which case such purchase and sale shall be closed and consummated in accordance with the provisions set forth in Article <...> hereunder, or (ii) to refuse to acquire the Way-Out Notifying Party’s Shares, in which case such Way-Out Notifying Party shall be entitled to proceed with the way-out procedures described in Article 2.2 hereunder.

2.1.3 Failure by the Way-Out Receiving Party to reply to the Way-Out Notifying Party within 30 Business Days from the receipt of the Way-Out Notice shall be deemed to constitute a refusal of such offer.

2.2 Offer to a third party

2.2.1 The Way-Out Notifying Party shall have 6 (six) months to find a third party willing to acquire all its Shares at a price that shall be freely negotiable between itself and such third party. In such case, the Way-Out Notifying Party shall send a new Way-Out Notice to the Way-Out Receiving Party immediately after receiving a letter of intent from the third Party expressing its willingness to purchase all the outstanding Shares or, in the alternative, all the Shares of the Way-Out Notifying Party, and stating a price per Share (hereafter the «Offer»).

2.2.2 The Way-Out Receiving Party shall have the option to either: (i) accept the purchase of the Way-Out Notifying Party's Shares by the said third party, in which case such purchase and sale shall be consummated and closed in accordance with the provisions set forth in Article <...> hereunder, it being explicitly understood that if the purchase price contained in the Offer was higher than the Fair Market Value as assessed by the Appraiser, the final purchase price of the Shares agreed upon between such third party and the Way-Out Notifying Party shall under no circumstances be lower than the Fair Market Value as assessed by the Appraiser; (ii) to purchase the Way-Out Notifying Party's Shares at the Offer price, in which case such purchase and sale shall be consummated and closed in accordance with the provisions set forth in Article <...> hereunder; (iii) to request from the potential acquiring third party to acquire its own Shares in addition to the Way-Out Notifying Party's Shares at the Offer price or (iv) to refuse any of these solutions, in which case the Way-Out Notifying Party shall be entitled to proceed with the way-out procedures described in Article 2.3 hereunder.

2.3 Public Offering

2.3.1 The Way-Out Notifying Party may propose to the Way-Out Receiving Party (i) to list all the Shares held by both Parties on a public stock exchange or (ii) to list only its own Shares on such stock exchange, on terms to be agreed between the Parties at that time and in order to comply with applicable laws and regulations.

2.3.2 The Way-Out Receiving Party shall have the option (x) to either accept the listing of all the Shares held by both Parties on a stock exchange, in which case both Parties shall list all their Shares on such public stock exchange on terms and conditions to be agreed upon the Parties at that time or (y) to keep its Shares and to accept the listing of the Way-Out Notifying Party's Shares on a stock exchange, in which case such Way-Out Receiving Party shall have a call option on the Way-Out Notifying Party's Shares that may have not been sold on such stock exchange during the course of the public offering at the price of introduction of such Shares.

2.3.3 In case the Way-Out Receiving Party refuses the proposals made by the Way-Out Notifying Party in sub-Clauses 2.3.1. (i) and (ii) hereabove, such refusal shall be considered as a Deadlock Situation to be resolved pursuant to and in accordance with the provisions set forth in Article <...> herein.

2.4 General Way-Out

2.4.1 In case both Parties decide to leave the Joint Venture Company, such Parties shall decide upon the most appropriate way, taking into account the common interests of the Parties, to implement such decision on terms and conditions to be agreed upon between the Parties at that time.

2.4.2 If the Parties are unable to find a common solution within a 12 (twelve) month period pursuant to the Parties' respective notification stating their intention to leave the Joint Venture Company, the Joint Venture Company shall be liquidated in accordance with the provisions set forth in Article <...> hereto.

C

C.1 CALL OPTION

(*vedi anche* **«DEADLOCK»**, **«PUT OPTION»**, **«RUSSIAN ROULETTE CLAUSE»** *e* **«TEXAS SHOOT OUT CLAUSE»**)

In un contratto di *joint venture* societaria il diritto di opzione, riservato a uno degli azionisti, per l'acquisto delle azioni della società detenute dall'altro socio è detta *Call Option*. Lo scopo di tale pattuizione contrattuale è quello di concedere all'azionista in favore del quale è pattuita, la facoltà, senza attribuirgliene l'obbligo, di «chiamare» le azioni del *partner*, così da rimanere l'unico azionista della *joint venture company*. La clausola di *Call Option* (a volte collegata a una corrispondente clausola di *Put Option* in favore dell'altro socio - ☞ **Clausola P.9 Put Option**) viene utilizzata per porre fine alla *joint venture*: la risoluzione del rapporto tra i *venturers* può essere meramente eventuale (e in questo caso le clausole di *Option* rappresentano l'estremo rimedio a un disaccordo che i partners non sono riusciti a risolvere e che è divenuto ormai insanabile (☞ **Clausola D.2 Deadlock**), oppure preventivamente pattuita tra i *partners* all'atto della sottoscrizione del contratto di *joint venture*.

In questo secondo caso spesso la *joint venture* è, per così dire, fasulla, mascherando nella sostanza un'acquisizione societaria, seppur differita nel tempo. Ciò in quanto in tale evenienza le parti, prevedendo una clausola di *Call Option*, di norma accompagnata da una corrispondente *Put Option Clause*, hanno già definito tempi e modalità per l'uscita di uno dei soci dalla *joint venture company*. Nell'un caso e nell'altro nel predisporre una *Call Option* occorre prevedere i termini di validità dell'opzione («a decorrere da»/«entro il») e le modalità di esercizio dell'opzione stessa, individuando nel contempo il prezzo di cessione o quantomeno le modalità di determinazione di tale prezzo (senza il quale la clausola sarebbe nella pratica del tutto inapplicabile e, in molti sistemi giuridici, addirittura nulla).

C.1.1 CALL OPTION

> 1. <Upon the occurrence of the events referred to in Clause D.1 (deadlock)> <Upon the expiry of the fifth anniversary of the date of establishment of the Joint Venture Company and thereafter for a further period of two years from the date of such fifth anniversary> Venturer A shall have the option to require Venturer B to sell all, but not part only, of the Shares held by Venturer B in the Joint Venture Company and Venturer B shall be bound to sell the Shares to Venturer A, according to the terms and conditions provided below.

2. Venturer A may exercise the Call Option provided for in Clause 1 above by delivering a written notice to the other Party stating the election to exercise the Option («the Option Notice»). Any Option Notice when delivered in accordance with the terms stated in Clause 1 above shall be irrevocable.

3. Within <...> days from the date of delivery of the formal audit referred to in Clause 4. below Venturer B shall duly transfer any and all the Shares to Venturer A (or to any other party as Venturer A may direct) upon full payment to Venturer B of the price consideration assessed in accordance with Clause 7 below.

4. Should the Option referred above be enforced by Venturer A, within <...> days from the forwarding date of the Option Notice, Venturer A and Venturer B shall jointly appoint and entrust a Merchant Bank with the task to evaluate and assess the transfer value of the Shares.

5. Failing Venturer A and Venturer B to agree on the name of the Merchant Bank, or failing either Party to express its formal consent to such Merchant Bank, within the terms referred to in Clause 3 above, the most diligent Party, or the other Party, as the case may be, shall have the right to appoint and entrust a Merchant Bank chosen between the three merchant Banks listed in Enclosure <...> (including any successor or assignee of such Merchant Bank) .

6. The appointment of the Merchant Bank selected under Article 5 above shall be conditional on the acceptance from such Merchant Bank (a) to execute its formal audit for the assessment of the price consideration of the Shares to be transferred from Venturer B to Venturer A in accordance with the accounting criteria stated in Enclosure <...>, and (b) to complete and deliver to Venturer A and Venturer B such final audit within <...> from the date in which the formal appointment has been delivered as per Clause 4 above.

7. <The price consideration for the transfer of the Shares from Venturer B to Venturer A shall be the value of the Shares as stated in the audit delivered by the Merchant Bank> <The price consideration for the transfer of the Shares from Venturer B to Venturer A shall be the value of the Shares as stated in the audit delivered by the Merchant Bank adjusted in accordance with the criteria set forth in Enclosure <...>.

C.2 CLOSING

(*vedi anche* **«CLOSING TEAM»** *e* **«CONDUCT OF BUSINESS BEFORE THE CLOSING»**)

Il termine *Closing*, o l'analogo *Completion* (☞ **Definizione C.1 Closing**) viene utilizzato nei contratti di *joint venture* per indicare il momento in cui:

a) si siano verificate tutte le condizioni sospensive dell'entrata in vigore del contratto, avendo effettuato i *venturers* tutto quanto necessario per la costituzione della *joint venture company*, ed essendo state ottenute le eventuali autorizzazioni previste dalle norme applicabili e
b) la *joint venture company* sia dunque operativa e pronta ad iniziare la propria attività e a sottoscrivere con ognuno dei *venturers* gli eventuali contratti operativi.

Spesso un articolo dedicato al *Closing*, come meglio illustrato negli esempi di clausole qui proposte, si presenta suddiviso in più parti: la prima è quella dedicata

alle condizioni al cui avverarsi è subordinato il verificarsi del *Closing* (☞ **Clausola C.2.2 Conditions to the Obligations of Both Venturers**), la seconda all'organizzazione del *Closing* (luogo e data) (☞ **Clausola C.2.3 Closing Place**) e l'ultima alle *Closing Action*s, quelle azioni e quegli adempimenti che devono essere effettuati al momento del *Closing* (quali per esempio la nomina degli organi sociali e dei *managers* della *joint venture company;* ☞ **Clausola C.2.4 Corporate Actions at the Closing**).

Nei contratti di compravendita di partecipazioni azionarie o in quelli di compravendita di rami di azienda la data del *Closing* è spesso anche presa a riferimento per predisporre un bilancio di cessione, il cui scopo è quello di consentire all'acquirente di accertare che il capitale netto della società *target* sia effettivamente quello sulla base del quale i contraenti hanno determinato il prezzo di cessione della partecipazione (☞ **Clausola C.2.1 Closing Accounts**). Qualora il bilancio di cessione, predisposto *ad hoc* dagli *auditors* del venditore e dell'acquirente o da una società di revisione indipendente, accerti degli scostamenti rispetto al valore di riferimento concordato tra le parti, si darà luogo a un riaggiustamento del prezzo di cessione, in diminuzione o in aumento secondo quanto accertato nel bilancio di cessione.

Giova ricordare che per l'acquirente la predisposizione di specifici *Closing Accounts* rappresenta una garanzia meramente contabile, che deve essere integrata e rafforzata da apposite clausole di *representations and warranties* (☞ **Clausola R.2 Representations and Warranties**) e di *indemnifications* (☞ **Clausola 1.2.5**), attraverso le quali il venditore si impegni a tenere l'acquirente manlevato e indenne qualora, successivamente al perfezionarsi del *Closing* ma entro un tempo determinato, dovessero essere accertate:

a) delle sopravvenienze passive, non accertate, o non accertabili, nei *Closing Accounts* ma originate da circostanze antecedenti al *Closing*, quando la gestione della società *target* era di esclusiva competenza del venditore;
b) da insussistenze di attivo contabilmente accertato nei *Closing Accounts;*
c) la non correttezza di quanto dichiarato e garantito nelle *Representations and warranties*.

C.2.1 CLOSING («CLOSING ACCOUNTS»)

1. The Vendor shall procure that the Vendor's Auditors prepare:

(a) closing accounts of the Target Company as at 1st October 1998 (the «Closing Accounts») comprising a balance sheet, profit and loss account and relevant enclosures and complying in all respects with the accounting standards, practices and policies of the Target Company as were applied to, or used in connection with, the preparation of the Target Company's accounts prior to the execution of this Acquisition Agreement;

(b) a certificate setting out the Net Equity of the Company as at 1st October 1998;

2. The Vendor undertakes to the purchaser that the Net Equity of the Target Company as at 1st October 1998 revealed by the Closing Accounts and the Certificate shall be FF. 10.000.000 (French Francs ten million) and that the Closing Accounts shall not include any borrowings or indebtedness whatsoever (other than the loans referred to in Schedule <...>)

3. The Vendor shall use its best endeavours to procure that the Closing Accounts and the Certificate are completed by the Auditors and delivered by the Purchase and the Purchaser's Auditors as soon as possible after 1st October 1998 and in any event by no later than 30th November 1998.

4. The Purchaser shall procure that the Purchaser's Auditors shall, as soon as possible after receipt of the Closing Accounts and the Certificate and in any event by no later than 20th December 1998, confirm to the Purchaser and to the Vendor whether or not they consider the Closing Accounts and the Certificate to be accurate.

5. Any points of difference arising as a result of the said confirmation in sub-Clause 4 shall be discussed between the Auditors and the Purchaser's Auditors and, where possible, agreed by them. If they are unable to reach agreement, any points outstanding shall be referred to an independent accounting firm, agreed between the Parties or failing agreement, appointed on the application of either Party by the President for the time being of the <...>.

6. In settling any such points of difference the said independent firms shall act as experts and not as arbitrators, their decision shall be final and binding on all concerned Parties, and their costs shall be borne equally between the Vendor and the Purchaser.

7. Within thirty days of confirmation by the Purchaser's Auditors to the Purchaser and to the Vendor that they consider the Completion Accounts and the Certificate to be accurate, or within thirty days of the resolution of any point of difference in accordance with the procedure set out in sub-Clause 5 above:

(a) In the event that the Net Equity set out in the Certificate shall be less than FF 10.000.000 the Vendor shall pay to the Purchaser by way of liquidated damages the difference between FF 10.000.000 and the Net Equity;

(b) In the event that the Net Equity set out in the Certificate shall be more than FF 10.000.000 the Purchaser shall pay to the Vendor by way of a supplement to the consideration for the Shares an amount equal to the difference between the Net Equity and FF 10.000.000, it being expressly agreed that such supplement shall in no event exceed FF 2.000.000.

8. With respect to the matters provided for in the Clause, the costs of the Auditors shall be borne by the Vendor and costs of the Purchaser's Auditors shall be borne by the Purchaser.

C.2.2 CLOSING («CONDITIONS TO THE OBLIGATIONS OF BOTH VENTURERS»)

1. Conditions common to both the Venturers

1.1 The obligations of the Venturers hereto to effect the Closing are subject to the satisfaction, or waiver, prior to the Closing of the following conditions:

(i) all required approvals from the Commission of the European Communities (herein after the «Commission») shall have been obtained;

(ii) the transfer of all assets, as referred to in Article <...> hereto, to the Appropriate Joint Venture Organisation's Companies, shall have been completed;

(iii) the transfer of all existing Dealership/Distribution Agreements, as referred to in Article <...> hereto, shall have been completed;

(iv) all required actions in order to properly incorporate the Joint Venture Company shall have been taken;

(v) a Shareholders meeting of the Joint Venture Company shall have adopted the Joint Venture Company's Articles of Association, substantially in the form attached as Annex <...> hereto; and

(vi) an extraordinary Shareholders meeting of the Joint Venture Company shall have been conveyed in order to approve the first capital increase of the Joint Venture Company's share capital to <...> <...> as provided for in Article <...> hereto.

2. Conditions to the obligations of Venturer A

The obligation of Venturer A to effect the Closing is subject to the satisfaction, or waiver, prior to the Closing of the following conditions:

(i) incorporation of the Venturer A Company; and

(ii) transfer and assignment of Venturer A's Industrial Property and Trademarks to the Venturer A Company.

3. Conditions to the obligations of Venturer B

The obligation of Venturer B to effect the Closing is subject to the satisfaction, or waiver, prior to the Closing of the following conditions:

(i) incorporation of the Venturer B Company; and

(ii) transfer and assignment of Venturer B's Industrial Property and Trademarks to the Venturer B Company.

4. Notifications

4.1 For the purpose of obtaining the required authorisations, the Venturers shall jointly prepare a notification to the Commission of the European Communities (hereinafter the «Commission») with respect to the proposed Project, in accordance with applicable European Merger Regulations.

4.2 The law firm of <...>, appointed by Venturer A, and the in-house legal department of Venturer B shall jointly prepare and file with the Commission within 8 (eight) days after the date of execution of this Agreement the appropriate notification required by European Merger Regulations.

4.3 In the event the Commission objects to any provisions of this Agreement and/or the Project Agreements, the Venturers shall negotiate in good faith alternative solutions capable to meet such objections without jeopardising the targets of the Project, provided, however, that if the modifications required by the Commission should have a Material Adverse Effect on the Project, each Venturer may decide not to proceed with the Closing, without any liability to the other Venturer.

4.4 Each Venturer shall bear its own expenses in connection with the preparation and submission of the notification of the Project to the Commission.

C.2.3 CLOSING («CLOSING PLACE»)

1.1. The Closing of the transactions contemplated hereby shall take place at the offices of the Joint Venture Company at <...> or such other place as shall be agreed upon between the Venturers, and shall be effective as of 6:00 p.m. Central European Time on that day.

C.2.4 CLOSING («CORPORATE ACTIONS AT THE CLOSING»)

1. Extraordinary Shareholders meeting of the Joint Venture Company

The Venturers shall cause the Joint Venture Company to call an extraordinary Shareholders meeting for the Closing Date with a view to adopt the following corporate actions:

(a) appointment of the new Board of Directors of the Joint Venture Company, pursuant to and in compliance with the provision of Article <...> hereabove. For the purpose of enabling each of the Shareholders to properly appoint the Board of Directors, each Venturers shall submit to the other the names and qualifications of its nominees prior to such Shareholders meeting;

(b) increase of the share capital of the Joint Venture Company up to <...> <...>, to be equally paid-in by each of the Parties, by contributing the capital contributions referred to in Article <...> hereabove;

(c) appointment of the Holding Auditors; and

(d) appointment of the secretary (member or not) of the Board of Directors.

2. Board of Directors meeting

Immediately after the conclusion of the extraordinary Shareholders meeting, the Board of Directors of the Joint Venture Company shall convene a Board meeting to approve the following resolutions:

(a) appointment of the Chairman and Deputy Chairman of the Board of Directors;

(b) appointment of the Chief Executive Officer, the Chief Operating Officer and the Senior Officers of the Joint Venture Company;

(c) appointment of proxy-holder(s) to attend to the shareholders meetings of each Joint Venture Organisation's Company to appoint the Board of Directors and the Auditors of such Joint Venture Organisation's Companies;

(d) approval of the Updated Feasibility Report and Business Plan; and

(e) approval of the Project Agreements to be executed by and between the Joint Venture Company and each of the Shareholders respectively.

3. Execution of the Project Agreements

Upon the conclusion of the meeting of the Board of Directors the Chief Executive Officer of the Joint Venture Company shall execute and deliver substantially in accordance with the forms set forth in Annexes <...> to <...> hereto each of the following agreements:

(a) Venturer A Supply Agreement

(b) Venturer B Product Distribution Agreement

(c) Venturer A Trademark License Agreement

(d) Venturer B Trademark License Agreement

(e) Venturer A Service Agreement
(f) Venturer B Service Agreement

C.3 CLOSING TEAM

Come già accennato nel commento all'articolo dedicato al *Closing*, con tale termine nei contratti la cui entrata in vigore è sottoposta a una condizione sospensiva, e in particolar modo nei contratti di *equity joint venture*, si indica il momento in cui si sono verificate tutte le condizioni sospensive della validità del contratto di *joint venture* precedentemente sottoscritto dalle parti.

Entrambi i contraenti hanno ovviamente interesse ad assicurarsi che nel periodo intercorrente tra la sottoscrizione del contratto e il *Closing* vengano correttamente e puntualmente effettuate tutte le azioni necessarie per far sì che si verifichino le condizioni sospensive della validità del contratto. Da un diverso punto di vista ognuna delle parti ha interesse a controllare che nel tempo intercorrente tra la sottoscrizione e il *Closing* l'altra parte non ponga in essere comportamenti o azioni che possano vanificare alcuni dei presupposti sulla base dei quali le parti erano pervenute alla decisione di firmare il *joint venture agreement*. È questo il motivo per cui sovente le parti costituiscono un *joint team*, formato da rappresentanti di ognuno dei contraenti, il cui compito è quello di assicurare e controllare l'esecuzione di tutto quanto indispensabile per arrivare al *Closing*. In alcuni casi, per esempio nei contratti di acquisizione societaria, ove una delle parti sia destinata ad acquisire una partecipazione societaria in una società controllata dall'altro contraente («società target»), al *Closing Team* possono essere affidati veri e propri compiti gestionali, attribuendogli il potere di decidere in merito alle iniziative e alle attività svolte dalla società *target*, dopo la sottoscrizione del contratto ma prima del *Closing*, ove tali iniziative e attività trascendano l'*ordinary course of business,* la normale attività imprenditoriale della società.

C.3.1 CLOSING TEAM

1. In order to facilitate the fulfilment of the actions contemplated herein prior to the Closing, the Parties shall appoint a closing team, to be formed by the persons listed in Annex <...> hereto (hereinafter the «Closing Team») promptly after the execution of this Agreement.

2. The Closing Team (a) shall make recommendation and provide advice and assistance to the Parties and to the Joint Venture Company in order to ensure a smooth transition from the original Venturer A activities and Venturer B activities to the Joint Venture operations, (b) co-ordinate the overall relationship of the Parties with any governmental authority or the EU Commission in order to obtain all approvals, authorisations, consents, exemptions and statements that may be necessary to complete the transactions contemplated herein, (c) prepare an updated Business Plan which shall be approved by the Joint Venture Company's Board of Directors at Closing, (d) implement all the interim actions provided for in this Agreement in order to render the Joint Venture

Company established and fully operational, in accordance with the operational structure set forth herein, at Closing.

3. The Closing Team shall be dissolved at the Closing.

C.3.2 CLOSING TEAM

1. Promptly after the execution of this Joint Venture Agreement, Venturer A and Venturer B shall designate persons familiar with the operations to be assumed by the Joint Venture Company, including by way of example, legal affairs, sales, financial matters, personnel, supply, information systems and manufacturing to constitute the Closing Team.

Venturer A or Venturer B, from time to time, may change the persons designated by it or them to serve on the Closing Team by giving written notice to the other Party.

2. It shall be the purpose of the Closing Team to make recommendations and to provide assistance concerning the establishment of the operation of the Joint Venture Company and to prepare the implementations of the actions provided for in this Joint Venture Agreement and into the Ancillary Agreements to be executed at the Closing Date by and between the Joint Venture Company and each of the Venturers.

3. In addition, the Closing Team shall advice the Venturers on the appropriate actions to adopt in order to obtain from the European Commission and any other competent authority such approvals, consents, exemptions or statement of inaction as may be necessary to complete the transactions contemplated herein.

4. Venturer A and Venturer B shall make their respective designees available to the Closing Team during normal business hours, and shall be responsible for the salaries, employee benefits and out-of-pocket costs and expenses of their respective designees.

5. The Closing Team shall begin to function promptly following the execution of this Joint Venture Agreement and shall continue to operate for the period ending three (3) months following the Closing Date.

C.4 COMMISSION

Con il termine *commission* si fa usualmente riferimento alla provvigione che il preponente riconosce all'intermediario (agente, procacciatore di affari) che ha procurato la conclusione di un qualche contratto tra il preponente e un cliente.

Nel contratto è possibile prevedere che l'entità delle provvigioni sia diversa, a seconda dei prodotti e/o dei servizi che formano oggetto del contratto procacciato dall'agente, o a seconda della quantità di contratti procacciati/prodotti venduti in conseguenza dell'opera dell'intermediario. Nel predisporre la clausola contrattuale è essenziale porre particolare attenzione alla definizione di quando maturi il diritto dell'intermediario al pagamento della provvigione pattuita: la scelta che meglio cautela il preponente è chiaramente quella di subordinare il pagamento della provvigione all'avvenuto integrale pagamento al preponente del prezzo pattuito da parte del cliente e non già alla mera sottoscrizione del contratto procacciato dall'intermediario.

Se quelli sopra indicati sono i contenuti «minimi» della clausola in commento, altri argomenti sono usualmente affrontati nel predisporre l'articolo dedicato alle *commissions*:

- *provvigioni e vendite dirette del preponente*: è questo un argomento direttamente connesso con l'ambito del mandato affidato all'agente. Anche qualora il mandato sia esclusivo, il preponente, con un'apposita pattuizione contrattuale, può infatti riservarsi il diritto di effettuare esso stesso delle vendite dirette nella zona affidata all'agente, senza per questo dover riconoscergli alcuna provvigione. In mancanza di tale patto il diritto alla provvigione maturerà in favore dell'agente su tutti gli affari conclusi nella zona assegnatagli, anche se non conclusi in conseguenza di una qualche attività specificamente svolta dall'agente;
- *modalità di pagamento delle commissioni*: le modalità di pagamento delle commissioni variano secondo la tipologia del *business* che l'agente è chiamato a promuovere. Così si può prevedere che la provvigione venga pagata dopo la conclusione del singolo affare, oppure che il pagamento avvenga periodicamente, in funzione delle provvigioni maturate a favore dell'agente nel periodo precedente;
- *provvigioni per affari conclusi dopo la scadenza del contratto di agenzia*: al venire meno del rapporto di agenzia, uno dei possibili motivi di disaccordo tra agente e preponente è rappresentato dalla sorte di quei contratti che siano stati, nella sostanza, procacciati dall'agente, ma si siano perfezionati soltanto dopo la scadenza del contratto di agenzia. In ambito europeo l'art. 7 della Direttiva 86/653 (ma si tratta di una norma che può essere liberamente derogata dalle parti) prevede il diritto dell'agente al pagamento della provvigione per quegli affari che, seppur conclusi entro un termine ragionevole dalla conclusione del contratto, siano soprattutto dovuti all'attività dell'agente prima del venire meno del mandato conferitogli. Si può concludere che le soluzioni a disposizione del redattore della clausola contrattuale (a prescindere dal fatto che il mandato di agenzia sia in ambito UE o per una qualche nazione extraeuropea) sono due: o escludere espressamente il diritto dell'agente a qualsivoglia provvigione per contratti che siano stati sottoscritti dal preponente dopo la cessazione del contratto di agenzia, oppure adottare la soluzione suggerita dalla Direttiva 86/653, avendo cura di indicare esattamente quale sia il «termine ragionevole» entro cui sopravviva il diritto dell'(ex) agente al pagamento delle *commissions*.

Quale che sia il motivo per cui un contraente debba pagare una provvigione all'altro contraente occorre sempre ricordare che di norma le provvigioni sono sottoposte a ritenuta d'acconto (*withholding tax*): è quindi sempre opportuno precisare che la commissione contrattualmente pattuita si intende al lordo delle trattenute fiscali previste dalla legge a cui sottostà la parte che ne effettua il pagamento.

In questo senso tutte le clausole qui previste, se utilizzate, dovrebbero essere integrate con il paragrafo 6 della **Clausola C.4.4**.

C.4.1 COMMISSION

1. Unless otherwise agreed by the Parties, the Principal shall pay to the Agent in consideration for its performance of this Agreement a commission (the «Commission») on sales of all Products destined for the Territory (whether exported to the Territory by the Principal or a third party supplied by the Principal regardless of the manner in which the business is channelled), based on the FOB price of each separate contract awarded to the Principal and affiliated and/or subsidiary companies, as set forth in Schedule C annexed to this Agreement and incorporated as a part hereof.

2. The Agent's right to a Commission shall arise upon the commencement of negotiations leading to a sale, notwithstanding that a final contract is only concluded or that payment is only made after termination of this Agreement. The Agent shall be entitled to a Commission on all projects which can be reasonably be said to have originated from promotion done during the period of representation, even if concrete negotiations are only commenced after termination of this Agreement.

3. All payments to the Agent shall be paid in <...>, within ten (10) business days of the Principal's receipt of payment. In case of receipt of partial payment, a pro rata portion of the Commission shall be paid.

C.4.2 COMMISSION

1. Throughout the validity of this Agreement the Principal shall pay to the Agent the following commissions, to be computed on the Net Sales Price of the Products sold by the Principal:

a) <...>% (<...> per cent) with respect to orders from Class A Customers which were promoted by the Agent and accepted by the Principal;

b) <...>% (<...> per cent) with respect to orders from Class B Customers which were promoted by the Agent and accepted by the Principal;

2. The Principal shall not be liable to the Agent for any commissions or damage whatsoever for any order which it may refuse.

3. Any commission referred to in Article 1 above, shall become payable upon receipt by the Principal of the full amount of the price of the Products sold by the Principal in execution of an order promoted by the Agent.

4. Notwithstanding the foregoing the Principal shall be liable to pay commissions to the Agent for any contract in which the contractual price was not paid, fully or in part, as a consequence of a Principal's default.

5. No commission shall be due by the Principal to the Agent for sales of Products in the Territory by third parties unrelated to the Principal.

6. At the end of each calendar month the Principal shall submit to the Agent a statement of the commissions accrued in the previous month, which shall contain a due extract account, detailing the name and the address of the customer, the Products sold and delivered, and the date in which the Principal received the payment due in respect of such Products. Such accrued commissions shall be credited to the agent within the 15th day of the month following the month of issuance of the statement of account.

C.4.3 COMMISSION

1. Unless as otherwise agreed upon by the Parties, the Principal shall pay to the Agent a <...>% (<...> per cent) commission on the sales executed in the Territory as a consequence of the Agent’s promotion activities, such commission to be computed on the Net Sales price of the Products (the «Commission»).

2. The Principal shall pay the Commission to the Agent in the Territory and in the same currency as the currency of payment of the Products for the sale of which the Commission became due.

3. The Agent’s right to receive the Commission in respect of any contract executed as a result of the Agent promotion activities shall accrue when the Principal receives and cash the payment from the customer of the agreed contractual price for the Products. In case of partial payment, a pro rata portion of the Commission shall be paid to the Agent.

4. Any Commission accrued in favour of the Agent shall be paid within <...> (<...>) days after the cashing of the payment by the Principal.

C.4.4 COMMISSION

1. The Principal shall pay to the Agent the compensations referred to in Schedule <...>, to be computed on the Net Sale Price of the Products sold by the Principal to customers in the Territory in execution of orders solicited by the Agent.

2. The Principal shall be under no obligation to reimburse to the Agent costs and expenses incurred in performing its obligations hereunder.

3. The right to the above mentioned commissions shall arise and the commission shall then become due and payable to the Agent only when the Principal has received the full price for the Products from the customer, provided always that the full commission shall be due and payable also in the event that the customer refused to pay, fully or partially, the price of the Products as a consequence of the Principal's failure to duly comply and fulfil the sales transaction executed with such customer.

4. The Principal shall pay to the Agent the commission accrued in its favour not later than the <...> day of the month following the <...> in which such commission have become due.

5. At any time during the continuance of this Agreement, the Agent shall have the right to receive from the Principal all the information concerning the Products sold in the Territory, including excerpt from the Principal's books of accounts, in order to verify the correctness of the amount of the commissions paid by the Principal.

6. The commissions accrued hereunder are intended gross from any tax, if due under applicable law, including but not limited to withholding taxes, the amount of which shall be actually deducted from any amount to be paid by the Principal to the Agent, provided that the Principal shall provide the Agent with adequate evidence of the deduction or withholding and the occurrence of the tax deducted or withheld in order to consent to the Agent to claim a fiscal credit for the occurred deduction or withholding. Should the Principal does not deliver to the Agent such evidence, or the < the Country of the Agent> Fiscal Authorities does not accept such evidence the Parties shall agree upon the best course of action to safeguard the interests of the Agent.

C.5 CONDITION PRECEDENT

Con il termine *condition precedent* si fa riferimento alle condizioni sospensive della validità del contratto o di una singola obbligazione contrattuale. Pur essendo tratte da due distinte tipologie contrattuali, rispettivamente un contratto per la cessione di ramo d'azienda (☞ **Clausola C.5.1**) e un contratto per la costituzione di una *joint venture company* (☞ **Clausola C.5.2**), la struttura delle clausole qui di seguito offerte è sostanzialmente la medesima: l'efficacia del contratto è subordinata al verificarsi, entro una data prestabilita dalle parti, della condizione sospensiva. Qualora tale condizione non si sia verificata, le parti, a ognuna delle quali compete l'onere di fare tutto quanto necessario per far sì che la condizione si verifichi, possono, alternativamente, estendere il termine originariamente pattuito o risolvere il contratto.

C.5.1 CONDITION PRECEDENT

> 1. The obligations of the Parties hereunder to complete the sale and purchase of the Assets are subject to and do not become binding until the fulfilment of the conditions referred to in Schedule <...>.
>
> 2. If the conditions set out in Schedule <...> shall not be fulfilled (or waived in writing by the Parties hereto) prior to the <date> or such other date as may be agreed between the Parties, then each Party shall be entitled at any time thereafter by notice in writing to the other to terminate this Agreement whereupon this Agreement shall be deemed to be rescinded *ab initio* and of no further force or effect and no Party shall have any further responsibility or obligation to the other.
>
> 3. The Vendor and the Purchaser shall use their respective best endeavours to ensure that the conditions referred to in Article 1 shall be satisfied by the date referred to in Article 2.

C.5.2 CONDITION PRECEDENT

> 1. The provisions of this Agreement, other than this Clause and Clause <...> («Costs suffered by the Parties in connection with the preparation, negotiation and execution of this Agreement») are conditional on the obtaining of investment authorisation from the Treasury Department of the <...> Ministry of Economy and Finance on or before <...> and if this condition has not been fulfilled by that date, or such later date as the Parties shall agree, the provisions of this Agreement (other than this Clause and Clause <...>) shall have no effect and no Party shall have any liability under them.

C.5.3 CONDITION PRECEDENT

> 1. The Parties agree that this Agreement in its entirety is subject to the written approval of the South African Reserve Bank being granted within 120 (one hundred and twenty) days from the date of the last signature hereof or within such extended period as the parties may from time to time agree in writing. Should such approval not be obtained this Agreement shall be of no force or effect and the Parties shall have no claim against each other arising out of or in connection with

this Agreement. Furthermore the Parties shall endeavour to agree on any and all the actions required to restore the status quo ante.

C.6 CONDUCT OF BUSINESS BEFORE THE CLOSING

Con questa clausola ognuna delle parti si impegna, per tutto il periodo che intercorre tra la firma del *joint venture agreement* e il *Closing*, a non assumere decisioni o intraprendere iniziative che abbiano come effetto di mutare sostanzialmente le situazioni di fatto e di diritto esistenti all'atto della firma del contratto di *joint venture*. Lo scopo ovviamente è quello di impedire che una delle parti in tale periodo assuma degli obblighi o alieni dei diritti tali da modificare le *assumptions* sulla base di cui l'altra parte si era convinta a sottoscrivere il contratto e ad assumere gli impegni ivi previsti. Sovente le parti affidano a un comitato congiunto, formato da rappresentanti di entrambi i contraenti e variamente denominato (*Closing Team*, *Transition Team*) il compito di controllare che nel periodo intercorrente tra la sottoscrizione del contratto e il *Closing* non venga posta in essere alcuna iniziativa che possa pregiudicare l'equilibrio degli accordi già raggiunti tra le parti, giungendo anche, in alcuni casi, ad affidare al *Closing Team* il potere di decidere in merito a eventuali iniziative che debbano necessariamente essere assunte da una delle parti o dalla società (società *target* in caso di acquisizioni e *merger* o *joint venture company*) prima del *Closing* (☞ **Clausola C.3 Closing Team**).

C.6.1 CONDUCT OF THE BUSINESS BEFORE THE CLOSING

1. Except as permitted by the terms of this Agreement or as Buyer may otherwise consent in writing, from the date hereof and until the earlier of the Closing Date or the termination of this Agreement (in accordance with the terms thereof), the Company will conduct the Business and its and the Subsidiaries' affairs in the ordinary course in substantially the same manner as presently conducted and consistent with its existing business plans and budgets (the «Ordinary Course of Business») and will use its reasonable commercial efforts consistent with past practices to preserve existing relationships with customers, suppliers and others with whom the Company deals in connection with the Business.

2. Except as provided in this Agreement, from and after the date of this Agreement and until the earlier of the Closing Date or the termination of this Agreement (in accordance with the terms hereof), without the prior written consent of Buyer (which consent shall not be unreasonably withheld or delayed), the Company will not and will not permit any Subsidiary to:

(a) make any material change in the conduct of the Business;

(b) make any sale, assignment, transfer or other conveyance of any of its assets, except for transactions pursuant to existing contracts or otherwise entered in the ordinary course of business consistent with past practice;

(c) hire any new employee other than in the ordinary course of business consistent with past practice and, if such employee's annual salary shall be greater than $ <...>, after consultation with Buyer;

(d) increase the salary or benefits of any employee or officer of the Company or any Subsidiary, except as may be required by any existing agreement or by applicable law and except for salary or benefit increases to employees consistent with past practice at the times when such increases would have normally been granted or amend any employment agreement of any employee or officer;

(e) fail to maintain all policies of insurance listed in Section <...> of the Disclosure Schedule (and such additional policies as may be necessary to comply with applicable laws) or replacement policies on terms no less favourable to the Company in full force and effect, at its sole expense, and at least at such levels as are in effect on the date hereof, through and including the Closing Date; or cancel any such insurance, or take, or fail to take any action that would enable the insurers under such policies to avoid liability for claims arising out of occurrences prior to the Closing Date;

(f) acquire or agree to acquire by merging or consolidating with, or by purchasing the stock or a substantial portion of the assets of, or by any other manner, any business or any corporation, partnership, association or other business organisation or division thereof or otherwise acquire or agree to acquire any assets (other than inventory, machinery and equipment in the ordinary course of business) which are material, individually or in the aggregate, to the Company and the Subsidiaries, taken as a whole;

(g) except as contemplated by any provisions of this Agreement, modify, amend or terminate any lease or similar agreement with respect to any of the leased property or any Contract listed in the Disclosure Schedule;

(h) sell, transfer, license or otherwise dispose of, or compromise or permit the lapse of the right to use, any of the Intellectual Property;

(i) acquire a material amount of assets other than inventory in the ordinary course of business from, or make any investment in, any other Person;

(j) incur any indebtedness for borrowed money (other than pursuant to the terms of existing revolving credit facility agreements), enter into any capital lease or modify or amend any agreement relating to existing indebtedness for borrowed money or capital leases;

(k) declare or make any distribution or other payment to the Company's partners or their Affiliates or enter into any new, or amend or modify any existing, relationship or transaction with any of the Partners or their Affiliates, other than payments pursuant to those agreements listed in the Disclosure Schedule in accordance with the terms of such agreements (provided that no advance payment may be made); or

(l) agree to commit to do any of the foregoing.

C.6.2 CONDUCT OF THE BUSINESS BEFORE THE CLOSING

1. Until Closing:

1.1 Except as otherwise expressly provided for in this Agreement or as the Parties shall otherwise agree in writing in advance thereto, the Vendor covenants and agrees to act, in its capacity as the sole shareholder of the Target Company and to the extent permissible under applicable laws and regulations, in a way to cause any director of such Target Company to act in his capacity as a member of the board of directors prior to the Closing to vote, in order to (x) cause such Target

Company to conduct its businesses in the ordinary course of business consistent with past practice, and (y) cause such Target Company not to:

(i) change or amend its statuts or other organisational documents, except as required by applicable laws and regulations;

(ii) merge or consolidate with any other Person or acquire a material amount of assets or stock of any other Person other than in the ordinary course of business consistent with past practice or pursuant to existing agreements or commitments as fully disclosed in Annex <...>;

(iii) sell or otherwise dispose of or encumber voluntarily any material portion of its respective properties or assets relating to its operations other than in the ordinary course of business consistent with past practice or pursuant to existing agreements or commitments as fully disclosed in Annex <...>;

(iv) change materially the Target Company's investment and liability policies, the management or other material business policies in any respect, except as required by applicable laws and regulations;

(v) enter into, extend materially, modify or terminate any material contract or incur any liabilities with respect to its operations other than in the ordinary course of business consistent with past practice, pursuant to existing agreements or commitments as fully disclosed in Annex <...>;

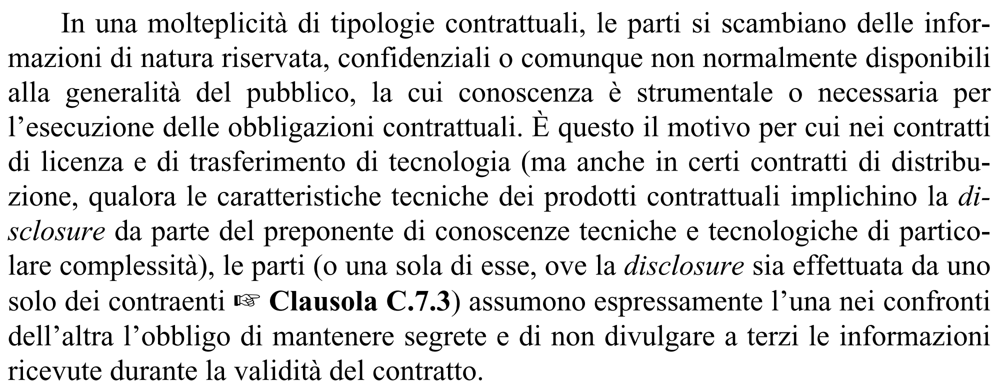
(vi) modify the authorised or issued share capital of the Target Company;

(vii) grant any stock option, warrant, or other right to purchase shares of the share capital of the Target Company;

(viii) issue any security convertible into the share capital of the Target Company.

1.2 Vendor shall continue to manage the Target Company in the ordinary course of business, provided, however, that if the Target Company is subject to a Material Adverse Effect prior to the Closing, it shall consult in advance with the other Buyer in order to assess the compliance of such change with the principles and the obligations set forth herein.

C.7 CONFIDENTIALITY



In una molteplicità di tipologie contrattuali, le parti si scambiano delle informazioni di natura riservata, confidenziali o comunque non normalmente disponibili alla generalità del pubblico, la cui conoscenza è strumentale o necessaria per l'esecuzione delle obbligazioni contrattuali. È questo il motivo per cui nei contratti di licenza e di trasferimento di tecnologia (ma anche in certi contratti di distribuzione, qualora le caratteristiche tecniche dei prodotti contrattuali implichino la *disclosure* da parte del preponente di conoscenze tecniche e tecnologiche di particolare complessità), le parti (o una sola di esse, ove la *disclosure* sia effettuata da uno solo dei contraenti ☞ **Clausola C.7.3**) assumono espressamente l'una nei confronti dell'altra l'obbligo di mantenere segrete e di non divulgare a terzi le informazioni ricevute durante la validità del contratto.

C.7.1 CONFIDENTIALITY

1. Each Party agrees to keep confidential and to not use for any purpose other than as set forth herein all technical information and materials supplied by the other Party hereunder and any information a Party may acquire about the other or its activities as a result of entering into this Agreement, provided that such obligation shall not apply to technical information or material which:

(i) was in the receiving Party's possession without restriction prior to receipt from the other party or its Affiliates; or

(ii) was in the public domain at the time of receipt; or

(iii) becomes part of the public domain through no fault of the receiving party; or

(iv) shall be lawfully received from a third party with a right of further disclosure; or

(v) shall be required to be disclosed by any applicable law or regulation.

2. Except as may be otherwise provided herein, the confidentiality obligations as set out in this Article shall continue so long as this Agreement remains in force and thereafter for a period of seven (7) years.

3. Each Party shall cause its Affiliates and Sublicensees to abide by the obligations of confidentiality with respect to unpublished information related to, or contained in, the Patents and Technical Information.

4. Any confidential information relating to the subject matter of this Agreement delivered to the other party Prior to the execution of this Agreement shall be considered to fall under the terms of this Agreement.

C.7.2 CONFIDENTIALITY

Each Party acknowledges that, after the execution of this Agreement and during the course of preparing any and all the actions required for the occurrence of the Closing, such Party may be provided with and obtain access to confidentiality information belonging to the other Party. No Party hereto shall disclose to any third party, until Closing and thereafter, any confidential information received from the other Party.

C.7.3 CONFIDENTIALITY

1. Except to the extent expressly authorised by this Agreement or otherwise agreed in writing, the Parties agree that, for the term of this Agreement and for a three year period thereafter, the receiving Party shall keep confidential and shall not publish or otherwise disclose or use for any purpose other than as provided for in this Agreement any Know-How Information and other information and materials furnished to it by the other Party pursuant to this Agreement (collectively, «Confidential Information»), except to the extent that it can be established by the receiving Party that such Confidential Information:

(a) was already known to the receiving Party, other than under an obligation of confidentiality, at the time of disclosure by the other Party;

(b) was generally available to the public or otherwise part of the public domain at the time of its disclosure to the receiving Party;

(c) became generally available to the public or otherwise part of the public domain after its disclosure and other than through any act or omission of the receiving Party in breach of this Agreement;

(d) was disclosed to the receiving Party, other than under an obligation of confidentiality, by a Third Party who had no obligation to the disclosing Party not to disclose such information to others; or

(e) was subsequently developed by the receiving Party without use of the Confidential Information as demonstrated by competent written records.

2. Each Party may disclose Confidential Information hereunder to the extent such disclosure is reasonably necessary in filing or prosecuting patent applications, prosecuting or defending litigation, complying with applicable governmental regulations provided that if a Party is required by law or regulation to make any such disclosure of the other Party's Confidential Information it shall give reasonable advance notice to the other Party of such disclosure requirement and, except to the extent inappropriate in the case of patent applications, will use its reasonable efforts to secure confidential treatment of such Confidential Information required to be disclosed. In addition, each Party shall be entitled to disclose, under an obligations of confidentiality containing provisions as protective as those of this Article C, Confidential Information to consultants, potential sublicensees and other third parties only for any purpose provided for in this Agreement.

3. This Article shall survive the termination or expiration of this Agreement for a period of three years.

C.8 CONSIDERATION

Il termine *consideration* si riferisce a una categoria giuridica propria del diritto inglese che indica un requisito necessario del contratto, per certi versi avvicinabile al concetto di causa del contratto proprio del diritto italiano.

Nei contratti internazionali ove una delle controparti è un soggetto di diritto inglese, o dove l'avvocato di controparte sia un legale inglese, può capitare di trovare un articolo denominato *consideration*. In questi casi il termine viene usato per indicare il corrispettivo della prestazione contrattuale. Considerato che nel diritto inglese la *consideration* è essenziale per la validità contrattuale, ma non deve essere necessariamente proporzionata all'entità della prestazione di cui rappresenta il corrispettivo, può capitare di trovare dei contratti sottoposti al diritto inglese ove la *consideration* è meramente nominale.

C.8.1 CONSIDERATION

1. In consideration of the sum of one pound sterling paid by Party A to the warrantor (the receipt whereof is hereby acknowledged) the Warrantor undertakes that if any matter the subject of any of the Warranties is not as warranted or represented, the Warrantor shall pay to Party A the amount necessary to compensate it for the loss or damage which it sustains as a result thereof.

C.8.2 CONSIDERATION

> 1. The consideration payable by the Purchaser to the Vendor for the Shares at Completion shall be the sum of <...> in cash.

C.9 CURRENCY

Il problema della valuta di pagamento si pone ogniqualvolta un qualche corrispettivo contrattuale sia calcolato in una certa valuta, ma debba essere pagato in una valuta diversa. Il caso forse più evidente è quello delle *royalties* nei contratti di licenza (☞ **Clausola R.3 Royalties**) stipulati nei PVS: essendo di solito calcolate sul fatturato netto di vendita realizzato dal licenziatario sul proprio mercato esse sono calcolate necessariamente in valuta locale; per contro il licenziante usualmente non ha alcun interesse nel ricevere dei pagamenti in valuta locale, quanto piuttosto a ottenere delle rimesse in valuta liberamente convertibile (dollari, marchi e, in futuro, anche euro). Ciò comporta la necessità di stabile contrattualmente quale sia il tasso di cambio da adottare nel convertire l'importo delle *royalties* maturate in favore del licenziante, che come si è visto devono essere calcolate in valuta locale, nell'importo da pagare, in valuta convertibile al licenziante. Scartata evidentemente l'idea di adottare un tasso di cambio fisso per tutta la durata del contratto (che in presenza di importanti variazioni di cambio potrebbe avere degli effetti devastanti tanto per il licenziante quanto per il licenziatario, a seconda dell'andamento delle fluttuazione del cambio tra la valuta locale e la valuta di pagamento), le opzioni a disposizione dei contraenti sono sostanzialmente due: utilizzare il cambio medio (*average exchange rate*) maturato nel periodo intercorrente tra un pagamento e l'altro o fare riferimento al tasso di cambio dei giorni immediatamente precedenti alla data di pagamento. La prima soluzione sembra peraltro preferibile in quanto essa consente di attenuare, se non di eliminare, per entrambe le parti, licenziante e licenziatario, i rischi connessi con eventuali forti e rapide oscillazioni nella fluttuazione dei cambi (☞ **Clausola C.9.4**).

Nel commentare questa clausola si è fatto riferimento ai contratti di licenza e alle *royalties*; il problema del tasso di cambio da applicare a pagamenti effettuati da una parte all'altra si pone anche in altre situazioni. Così, per esempio, nei contratti di *equity joint venture* la medesima questione si verifica in relazione al rapporto di cambio da utilizzare nel pagamento dei dividendi dovuti per il *foreign partner* (☞ **Clausola D.10.3**). Occorre da ultimo ricordare che, da un diverso punto di vista, l'andamento delle fluttuazioni valutarie nei contratti di somministrazione può pure incidere sull'adeguatezza del prezzo pattuito.

C.9.1 CURRENCY

1. All payments made under this Agreement shall be in United States currency. Conversion of any payments resulting from Licensee direct sales in a currency other than United States Dollars shall be at the exchange rate as quoted in the United States edition of the Wall Street Journal on the last business day of the month for which payments accrued.

C.9.2 CURRENCY

1. All capital contributions to be made to, and dividends to be paid by, a JV Entity pursuant to this Agreement or any Shareholders Agreement shall be made in the currency or currencies specified in the applicable Business Plan.

2. The Board of Directors of a JV Entity may, by majority vote, determine that a particular capital contribution made to, or dividend payable by, such JV Entity shall be in a currency or currencies other than the currency specified in such Business Plan, provided that (i) such JV Entity shall inform its JV Entity Shareholders in writing of such other currency or currencies at least thirty (30) days prior to the date such capital contribution or dividend is to be paid; and (ii) subject to applicable law, such other currency or currencies shall be U.S. Dollars, Deutsche Marks, French Francs or European Currency Units.

C.9.3 CURRENCY

1. Except as otherwise provided for in this Agreement, whenever this Agreement provides that an amount to be paid by one Party to another Party will be payable in U.S. Dollars, the paying Party may pay such amount in Deutsche Marks, French Francs or European Currency Units by giving written notice to the payee Party at least ten (10) days before the payment is to be made. Such notice shall specify the other currency in which the payment shall be made.

2. On the date such payment is due, the paying Party shall pay an amount of such other currency which would purchase the amount of U.S. Dollars payable on such payment date if such other currency was to be converted into U.S. Dollars, at the closing rate of exchange on the second Business Day immediately prior to the date of payment as published in The Wall Street Journal (European Edition) on such Business Day.

C.9.4 CURRENCY

1.The Licensee shall pay quarterly the accrued royalties to the Licensor in US Dollars, within the end of each month of March, June, September and December. The exchange rate to be applied when the amount of the royalties accrued in <local currency> is converted in US Dollars, shall be the average of the exchange rates <local currency>/US Dollars of the quarter preceding the payment date, as published by <...>.