

CONTENTS

<i>About AIJA</i>	xxi
<i>Officers of AIJA</i>	xxiii
<i>A Word from AIJA's President</i>	xxv
<i>A Word from the Publications Committee</i>	xxvii
<i>Foreword</i>	xxix
<i>List of Contributors</i>	xxxix
<i>Introduction</i>	xli

PART ONE

A view from the industry: the perspective of the contractors	3
<i>Paolo Flores</i>	
Introduction	3
Sub-contracting in the aeronautical sector	4
A view from the industry: the perspective of the sub-contractors	7
<i>Malcolm Paton</i>	
Introduction	7
The competitive advantage	8
General concepts of successful sub-contracting relationships	9
Joint venture in the PRC	9
Categories of customers	10
How to be a successful sub-contractor	11
Sourcing of components	12
Conclusion	12

Industrial sub-contracting: an introduction to the legal issues	15
<i>Roberto Pardolesi and Massimiliano Granieri</i>	
1. Industrial sub-contracting from a legal and economic perspective	15
2. Before industrial sub-contracting: the origins of the modern enterprise	16
3. The era of industrial sub-contracting: a tool of industrial reorganisation	17
4. Problems related to decisions of reorganisation: relevant legal issues in industrial sub-contracting	19
5. A particular issue: the delay in payments	21
6. Beyond industrial sub-contracting: partnerships, joint ventures and strategic outsourcing	23
Competition law aspects	25
<i>Aldo Frignani</i>	
1. Introduction	25
2. Commission Notice of 18 December 1978	27
2.1 Restrictions which are not caught by the prohibition of Article 81.1	27
2.2 Limits to immunity	28
2.3 Other permitted restrictions	28
3. EC Regulation No. 2790/1999	29
3.1 Scope of application	29
3.2 Conditions for exemption	30
3.3 Relevant market share	30
3.4 The black list	31
3.5 Applicability to sub-contracting agreements	32
4. The Italian provisions: the prohibition of abuse of economic dependency pursuant to Article 9 Law No. 192/98	34
4.1 The history of the provision	35
4.2 The drafting and insertion of the provision	36
4.3 The notion of economic power	36
4.4 The elements of abuse	39
4.5 Which is the relationship with general competition law?	39
4.6 The German and French experiences	40
4.7 Limited applicability of Italian Law No. 192/98 to cross-border sub-contracting	42
Quality control and product liability	43
<i>Jonathan Davey</i>	
1. Introduction	43
2. Comfort before contract – the importance of due diligence!	44
3. Standards	46
3.1 The ISO standard	46
3.2 The ISO and the WTO	47
3.3 The European Union	48
4. The contract	48

5. Policing the contract	50
6. Claims and the law	50
<i>International</i>	50
6.1 The Hague Convention on the International Sale of Goods	50
6.2 The Vienna Convention – United Nations Convention on Contracts for the International Sale of Goods	51
<i>European Union</i>	52
6.3 Europe: Product Liability Directive – (85/374/EEC)	52
6.4 The General Product Safety Directive (the GPS) (92/59/EC)	53
<i>Technical Harmonisation Directives</i>	53
Council resolution of 7 May 1995 – new approach to technical harmonisation and standards	53
Council decision of 22 July 1993	54
Appendix	55
Price, payment, guarantees of payment and price revision	57
<i>Pierre Ramquet</i>	
1. Preliminary notice: limits of the analysis	57
2. The price in synallagmatic contracts	58
2.1 Just price	59
2.2 Lawful price	60
2.3 Determinable price	60
3. Evolution of the price during the relationship and its accessories	63
3.1 Prices by unit and consequences	63
3.2 Indexation methods	65
3.3 Accessorial costs	67
3.4 Adaptation	68
4. The Euro and the price	70
5. Methods of payment	73
5.1 Obligation to pay	73
5.2 Time and place of payment	74
5.3 Refusal to pay	75
5.4 Methods of payment	76
5.5 Incidents in payment	78
6. The guarantees of payment	79
6.1 General remarks on the notion of guarantee in the international system	79
6.2 The independent guarantee	81
6.3 Stand-by letter of credit	82
6.4 Contract-related guarantee (<i>cautionnement</i>)	83
6.5 The comfort letter	84
7. Conclusion	84
Industrial and intellectual property law aspects	87
<i>Gonzalo de Ulloa y Suelves</i>	
1. Introduction	87

2.	Issues on IP rights: copyright, trade marks, patents and know-how	88
2.1	Notions	88
2.2	Registration requirements	89
3.	Exclusivity and exhaustion of distribution rights	90
3.1	General issues: scope of the licence	90
3.2	On the revision of the exhaustion of rights theory under Community law, specifically addressed to trade-mark rights	91
3.3	Exhaustion of rights on the Internet and other related issues	93
4.	What conditions should a well-drafted IP Rights Agreement meet?	94
4.1	General issues	94
4.2	Specific advice	95
5.	One approach to TRIPS Agreements	96
5.1	Control of anti-competitive practices in contractual licences	96
6.	Special attention to the most important clauses in these agreements	96
6.1	Know-how clauses	96
6.2	Confidentiality clauses	97
6.3	Ownership clauses	97
6.4	Liability clauses	98
6.5	<i>Excursus</i> : on the patents of 'business methods'	98
	Labour law aspects	101
	<i>Mary-Daphné Fishelson</i>	
1.	Introduction	101
2.	Labour law rules applicable to French enterprises using foreign sub-contractors	102
3.	Labour law rules applicable to the employees of a French enterprise which is the sub-contractor of a foreign enterprise	103
4.	European law	104
5.	Labour law rules applicable in the context of the posting of employees in another country	105
6.	Social security legislation	106
	Insolvency law aspects: a French perspective	107
	<i>Hervé Chemouli</i>	
1.	Introduction	107
2.	The requirement for all creditors to declare their claims	108
3.	Insolvency of the contractor: the guarantees of the sub-contractor	109
3.1	Conflict of laws in sub-contracting	109
3.2	Special protection under French law of 31 December 1975	109
3.3	Right of retention (<i>droit de rétention</i>) under French law	110
4.	Insolvency of the sub-contractor: the guarantees of the contractor	111
4.1	Reservation of title clause in sub-contracting agreements	111
4.2	The options open to the receiver between performance and termination of an existing sub-contracting agreement	115

Insolvency law aspects: a Nordic perspective	117
<i>Pekka Jaatinen and Peter Salovaara</i>	
1. General comments about the problems occurring in connection with insolvency situations	117
2. International bankruptcy law	118
2.1 General	118
2.2 The Nordic Bankruptcy Convention 1933	118
2.3 Harmonisation within the European Union	119
3. Preparing for a possible bankruptcy in sub-contracting agreements	120
3.1 General	120
3.2 Continuation of agreements	120
3.3 Damages resulting from early termination of agreement	121
3.4 Claims and receivables	121
3.5 Securing the contractor's property	122
3.6 Securities	123
3.7 Securing a right for damages	124
Customs law aspects: a European and international perspective	125
<i>Robert M. MacLean and Sarah Davis</i>	
1. Why are customs rules important in international sub-contracting?	125
2. The main impact of customs laws on sub-contracting activities	128
2.1 Measuring exposure to customs laws and related measures	128
2.2 Quantifying the costs of customs laws exposure	128
3. Spotting the opportunities for sub-contracting presented by the preferential/non-preferential distinction	129
4. Unlocking the benefits of preferential schemes – rules of origin	132
4.1 The European Union	132
4.2 The North American Free Trade Association	135
5. Other schemes to maximise customs benefits of sub-contracting	135
5.1 Inward processing arrangements	135
5.2 Outward processing arrangements	136
6. Potential pitfalls	136
6.1 Anti-dumping measures	137
6.2 Anti-subsidy measures	137
7. Conclusions and observations	138
International tax law aspects	139
<i>Charles Duro</i>	
1. Introduction	139
2. Tax definition of income	140
2.1 The economic components of a contract	140
2.2 Rules of classification	141
3. Income tax	144
3.1 The business contract	145
3.2 Royalties	148
3.3 The provision of services	150

4. Multinational enterprises and transfer pricing	152
4.1 Conditions for the application of the transfer pricing mechanism	153
4.2 Determination of the free competition price	153
4.3 Correlative adjustments	156
5. International transactions and VAT	157
5.1 Rules applicable with regard to VAT	157
5.2 Intra-Community transactions	159
5.3 Operations taking place outside of the Community	159
5.4 The regime of deductions	160

Mediation in cross-border sub-contracting agreements 163

Thierry Garby

1. Introduction	163
2. The advantages of mediation in cross-border sub-contracting	163
3. Conflict resolution through mediation	165
4. The avoidance of disputes through mediation	166
5. A few precautions to be taken in establishing a mediation mechanism within the framework of a cross-border sub-contracting agreement	168

PART TWO

General Report 173

Carlo H. Mastellone

Introduction	173
Formation of agreement	174
<i>Registration requirements</i>	174
<i>Formalities</i>	174
<i>Consents and Licences</i>	174
<i>Validity</i>	175
Payment terms and stock	175
<i>Terms required by law</i>	175
<i>'If and when' clauses</i>	175
<i>Interest and penalty</i>	175
<i>State and public authorities</i>	176
<i>'Just in time' clauses</i>	176
Competition law aspects	176
<i>Non-competition clauses</i>	177
<i>Post-termination restrictions</i>	177
<i>Abuse of economic power</i>	177
<i>Other clauses</i>	179
Rules of origin	179
Labour law	180

<i>Employment of children</i>	180
<i>Workforce</i>	181
Corporate law aspects	181
Industrial and intellectual property rights	181
<i>Registered user agreement</i>	181
<i>Know-how and confidentiality agreement</i>	182
<i>Breaches</i>	183
Guarantees and product liability	183
<i>Guarantees</i>	183
<i>Exclusion of liability between parties</i>	184
<i>Exclusion of liability with third parties</i>	185
<i>Action against sub-contractor</i>	186
Termination and its effects	186
<i>Termination</i>	186
<i>Notice for termination</i>	187
Bankruptcy	187
<i>Bankruptcy of sub-contractor</i>	187
<i>Assignment</i>	188
<i>Damages</i>	188
<i>Collection of machinery, etc. by contractor</i>	188
<i>Bankruptcy of contractor</i>	189
Dispute resolution	189
Governing law	190
Questionnaire for national reports	193
1. Local law	193
2. Formation of agreement	193
3. Payment terms and stock	194
4. Competition law aspects	194
5. Origin of Products	195
6. Contractor's machinery	195
7. Labour law	195
8. Corporate law aspects	195
9. Industrial and intellectual property rights	195
10. Guarantees and product liability	196
11. Termination and its effects	196
12. Bankruptcy	197
13. Non-assignment	197
14. Dispute resolution	197
15. Governing law	198
Belgium	199
<i>Hamida Reghif</i>	
1. Introduction	199
2. Formation of agreement	200
3. Payment terms and stock	202

4. Competition law aspects	203
5. Origin of products	204
6. Contractor's machinery	204
7. Labour law	204
8. Corporate law aspects	205
9. Industrial and intellectual property rights	206
10. Guarantees and product liability	208
11. Termination and its effects	210
12. Bankruptcy	211
13. Non-assignment	213
14. Dispute resolution	213
15. Governing law	214
China (People's Republic)	215
<i>Yuan Jie</i>	
1. Introduction	215
2. Formation of agreement	216
3. Payment terms and stock	217
4. Competition law aspects	217
5. Origin of products	218
6. Contractor's machinery	219
7. Labour law	219
8. Corporate law aspects	219
9. Industrial and intellectual property rights	220
10. Guarantees and product liability	220
11. Termination and its effects	221
12. Bankruptcy	222
13. Non-assignment	223
14. Dispute resolution	223
15. Governing law	224
Czech Republic	225
<i>Radka Pelikánova</i>	
1. Introduction	225
2. Formation of agreement	225
3. Payment terms and stock	227
4. Competition law aspects	228
5. Origin of products	230
6. Contractor's machinery	231
7. Labour law	231
8. Corporate law aspects	231
9. Industrial and intellectual property rights	232
10. Guarantees and product liability	232
11. Termination and its effects	235
12. Bankruptcy	236
13. Non-assignment	236

14. Dispute resolution	237
15. Governing law	237
England and Wales	239
<i>Eric Gummerts, Guy Facey and Steven Morris</i>	
1. Introduction	239
2. Formation of agreement	241
3. Payment terms and stock	243
4. Competition law aspects	244
5. Origin of products	246
6. Contractor's machinery	246
7. Labour law	246
8. Corporate law aspects	247
9. Industrial and intellectual property rights	247
10. Guarantees and product liability	250
11. Termination and its effects	251
12. Bankruptcy	252
13. Non-assignment	253
14. Dispute resolution	254
15. Governing law	255
'Rules of Origin' – A Definition under EU Law	257
<i>Robert M. MacLean and Sarah Davis</i>	
1. Non-Preferential rules of origin	258
2. Preferential origin	258
2.1 General System of Preferences	258
2.2 EEA Agreement	259
2.3 Europe Agreements	259
2.4 Mediterranean Agreements	260
2.5 Lome IV Convention	260
Finland	263
<i>Pekka Jaatinen and Peter Salovaara</i>	
1. Introduction	263
2. Formation of agreement	264
3. Payment terms and stock	265
4. Competition law aspects	266
5. Origin of products	269
6. Contractor's machinery	270
7. Labour law	270
8. Corporate law aspects	270
9. Industrial and intellectual property rights	271
10. Guarantees and product liability	272
11. Termination and its effects	275
12. Bankruptcy	276

13. Non-assignment	278
14. Dispute resolution	279
15. Governing law	280

France 281

Olivier Personnaz

1. Introduction	281
2. Formation of agreement	282
3. Payment terms and stock	285
4. Competition law aspects	286
5. Origin of products	288
6. Contractor's machinery	288
7. Labour law	289
8. Corporate law aspects	289
9. Industrial and intellectual property rights	290
10. Guarantees and product liability	291
11. Termination and its effects	293
12. Bankruptcy	294
13. Non-assignment	296
14. Dispute resolution	296
15. Governing law	297

Germany 299

Detlef Hass

1. Introduction	299
2. Formation of agreement	301
3. Payment terms and stock	305
4. Competition law aspects	307
5. Origin of products	310
6. Contractor's machinery	310
7. Labour law	310
8. Corporate law aspects	312
9. Industrial and intellectual property rights	312
10. Guarantees and product liability	313
11. Termination and its effects	319
12. Bankruptcy	320
13. Non-assignment	322
14. Dispute resolution	323
15. Governing law	324

**Hong Kong Special Administrative Region of the
People's Republic of China** 325

Christopher Lambert

1. Introduction	325
2. Formation of agreement	326

3. Payment terms and stock	328
4. Competition law aspects	328
5. Origin of products	330
6. Contractor's machinery	331
7. Labour law	331
8. Corporate law aspects	331
9. Industrial and intellectual property rights	332
10. Guarantees and product liability	333
11. Termination and its effects	334
12. Bankruptcy	336
13. Non-assignment	337
14. Dispute resolution	338
15. Governing law	339

Hungary 341

Tamás Balázs

1. Introduction	341
2. Formation of agreement	341
3. Payment terms and stock	343
4. Competition law aspects	344
5. Origin of products	346
6. Contractor's machinery	347
7. Labour law	347
8. Corporate law aspects	347
9. Industrial and intellectual property rights	348
10. Guarantees and product liability	349
11. Termination and its effects	351
12. Bankruptcy	353
13. Non-assignment	354
14. Dispute resolution	354
15. Governing law	355

India 357

Akil Hirani

1. Introduction	357
2. Formation of agreement	357
3. Payment terms and stock	359
4. Competition law aspects	360
5. Origin of products	362
6. Contractor's machinery	362
7. Labour law	362
8. Corporate law aspects	363
9. Industrial and intellectual property rights	363
10. Guarantees and product liability	365
11. Termination and its effects	366
12. Bankruptcy	369

13. Non-assignment	370
14. Dispute resolution	370
15. Governing law	371

Italy 373

Massimiliano Granieri and Carlo H. Mastellone

1. Introduction	373
2. Formation of agreement	374
3. Payment terms and stock	377
4. Competition law aspects	378
5. Origin of products	380
6. Contractor's machinery	380
7. Labour law	380
8. Corporate law aspects	381
9. Industrial and intellectual property rights	381
10. Guarantees and product liability	382
11. Termination and its effects	385
12. Bankruptcy	386
13. Non-assignment	388
14. Dispute resolution	389
15. Governing law	390

Japan 391

Makoto Shimada

1. Introduction	391
2. Formation of agreement	394
3. Payment terms and stock	396
4. Competition law aspects	398
5. Origin of products	403
6. Contractor's machinery	404
7. Labour law	404
8. Corporate law aspects	405
9. Industrial and intellectual property rights	407
10. Guarantees and product liability	408
11. Termination and its effects	410
12. Bankruptcy	412
13. Non-assignment	414
14. Dispute resolution	414
15. Governing law	415

Poland 417

Tadeusz Komosa

1. Introduction	417
2. Formation of agreement	418
3. Payment terms and stock	419

4.	Competition law aspects	420
5.	Origin of products	422
6.	Contractor's machinery	423
7.	Labour law	423
8.	Corporate law aspects	424
9.	Industrial and intellectual property rights	424
10.	Guarantees and product liability	426
11.	Termination and its effects	427
12.	Bankruptcy	428
13.	Non-assignment	430
14.	Dispute resolution	430
15.	Governing law	431

Russia 433

Vadim Avdyunin

1.	Introduction	433
2.	Formation of agreement	434
3.	Payment terms and stock	436
4.	Competition law aspects	437
5.	Origin of products	440
6.	Contractor's machinery	442
7.	Labour law	442
8.	Corporate law aspects	442
9.	Industrial and intellectual property rights	443
10.	Guarantees and product liability	444
11.	Termination and its effects	447
12.	Bankruptcy	450
13.	Non-assignment	452
14.	Dispute resolution	453
15.	Governing law	454

Singapore 455

Kenneth Koh

1.	Introduction	455
2.	Formation of agreement	455
3.	Payment terms and stock	457
4.	Competition law aspects	457
5.	Origin of products	459
6.	Contractor's machinery	459
7.	Labour law	459
8.	Corporate law aspects	460
9.	Industrial and intellectual property rights	460
10.	Guarantees and product liability	461
11.	Termination and its effects	463
12.	Bankruptcy	463

13. Non-assignment	464
14. Dispute resolution	465
15. Governing law	465

Slovenia 467

Nataša Pipan

1. Introduction	467
2. Formation of agreement	467
3. Payment terms and stock	469
4. Competition law aspects	470
5. Origin of products	473
6. Contractor's machinery	474
7. Labour law	474
8. Corporate law aspects	475
9. Industrial and intellectual property rights	475
10. Guarantees and product liability	478
11. Termination and its effects	479
12. Bankruptcy	480
13. Non-assignment	481
14. Dispute resolution	482
15. Governing law	483

Spain 485

Sonia Cortés and Roger Marquilles

1. Introduction	485
2. Formation of agreement	485
3. Payment terms and stock	486
4. Competition law aspects	488
5. Origin of products	489
6. Contractor's machinery	489
7. Labour law	489
8. Corporate law aspects	490
9. Industrial and intellectual property rights	490
10. Guarantees and product liability	491
11. Termination and its effects	493
12. Bankruptcy	496
13. Non-assignment	497
14. Dispute resolution	498
15. Governing law	499

Taiwan, ROC 501

Lillian Chu

1. Introduction	501
2. Formation of agreement	502
3. Payment terms and stock	503

4.	Competition law aspects	503
5.	Origin of products	505
6.	Contractor's machinery	506
7.	Labour law	506
8.	Corporate law aspects	506
9.	Industrial and intellectual property rights	507
10.	Guarantees and product liability	508
11.	Termination and its effects	509
12.	Bankruptcy	510
13.	Non-assignment	511
14.	Dispute resolution	512
15.	Governing law	513

Thailand 515

Johnson Stokes and Master

1.	Introduction	515
2.	Formation of agreement	516
3.	Payment terms and stock	517
4.	Competition law aspects	518
5.	Origin of products	521
6.	Contractor's machinery	521
7.	Labour law	522
8.	Corporate law aspects	524
9.	Industrial and intellectual property rights	525
10.	Guarantees and product liability	529
11.	Termination and its effects	531
12.	Bankruptcy	532
13.	Non-assignment	535
14.	Dispute resolution	535
15.	Governing law	536

United States of America 539

Catherine Habermehl

1.	Introduction	539
2.	Formation of agreement	541
3.	Payment terms and stock	543
4.	Competition law aspects	544
5.	Origin of products	548
6.	Contractor's machinery	551
7.	Labour law	551
8.	Corporate law aspects	552
9.	Industrial and intellectual property rights	552
10.	Guarantees and product liability	554
11.	Termination and its effects	556
12.	Bankruptcy	558

13. Non-assignment	559
14. Dispute resolution	560
15. Governing law	560
Appendix 1	565
Law 18 June 1998 No. 192 (Italy) – ‘Discipline of sub-contracting in production activities’ (translation by Carlo H. Mastellone)	
Appendix 2	571
Act No. 120 of 1 June, 1956 (as amended) (Japan) – ‘Act against delay in payment of sub-contract proceeds etc. to sub-contractors’ (from The Fair Trade Commission of Japan, International Affairs Division, ‘Antimonopoly Legislation of Japan’ June 1998, page 381)	
Appendix 3	579
Orgalime ‘General conditions for the supply of specially designed and manufactured components’ (SC96, Brussels, January 1996)	
Index	593