

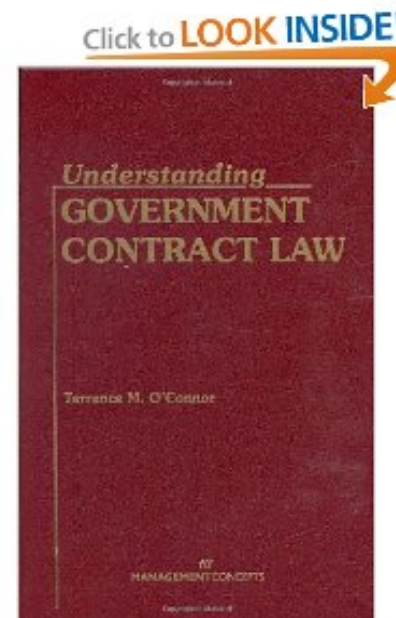
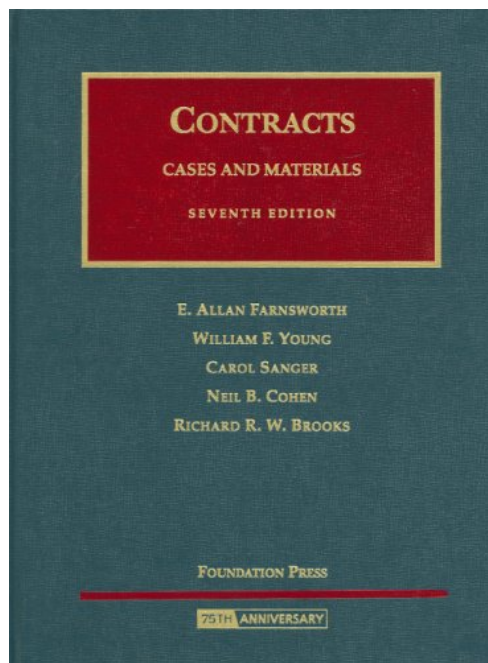
Contracts in France and the United States

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CONTRACTS

- The US law school class is called **Contracts** and there is a separate class called **Government Contracts**



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CONTRACTS

- U.S.
 - civil law (as opposed to criminal law)
 - substantive law (as opposed to procedural law)
 - judge-made law (as opposed to codified law)
 - “Contracts” opposite of “Torts”

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CONTRACTS

- France, Belgium, Switzerland
 - **Droit civil** (Code civil) ou **droit commercial** (Code de commerce)
 - Contrats nommés (contemplated by the code) **VERSUS** contrats innommés (not contemplated by the code)
 - **Droit substantif** (as opposed droit de procédure)
 - **Droit des obligations** (contracts + torts)
 - contractuel
 - extracontractuel

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CONTRACTS

- English
 - contract
 - agreement
- French
 - contrat
 - convention
 - accord
 - entente (Québec)
 - marché public (government contract)

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CONTRACTS

- **marché public** (government contract)
- clauses exorbitantes du droit commun
 - clauses that are incompatible with the ordinary law (droit commun) and make the contract governed by administrative law (droit administratif)
 - Example: clause giving the government the unilateral right to terminate the contract

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CONTRACTS: The title

- Just as **laws** in English usually have the word **act** in their name (Sarbanes-Oxley Act = loi Sarbanes-Oxley), **contracts** in English are usually named **agreement**
 - NDA = non-disclosure agreement
 - accord/convention de non-divulgarion/confidentialité
 - EULA = end user license agreement
 - contrat de licence utilisateur final

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CONTRACTS: The title

- Therefore, French-to-English translators should usually translate **contrat** in the title as **agreement**.
- The situation is more complicated from English to French, because sometimes “convention” and “accord” are used, but in general “This Agreement” = le présent contrat, not le présent accord

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CONTRACTS: Tricky Titles

- Contrat de licence d'utilisation de logiciel = software license agreement
- Contrat de cession de fonds de commerce
 - "asset purchase agreement" (US English)
 - "business sale agreement" (particularly UK)
 - The opposite is a "stock purchase agreement" (asset deals vs. stock deals)

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CONTRACTS: The beginning

- THIS AGREEMENT (**hereinafter** the "Agreement") is **made and entered into** this 10th day of August, 2005, by and between SOFTWARE INTERNATIONAL, Inc., **a corporation organized and existing under the laws of the State of Delaware** and having its principal place of business at 111 Main Street, Atlanta, GA 30303 (hereinafter the "Licensor"), and INTERMARK LANGUAGE SERVICES CORP., a corporation organized and existing under the laws of the State of Georgia and having its principal place of business at 333 Elm Street, Atlanta, GA 30309 (hereinafter the "Customer").

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CONTRACTS: defined terms

- Hereinafter referred to as
- Hereinafter
- (the “Customer”)
 - ci-après désigné
 - ci-après dénommé
- Hereafter not as good a choice because it means “later in time”

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CONTRACTS

- **Hereunder** ALWAYS means “conformément aux présentes” = “en vertu du présent contrat” etc.
- It NEVER means “below” = ci-dessous (later on in the document), for which the word is “below” (not “hereinbelow”).

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Contracts

- **Conclure un contrat** = to enter into a contract
= to make a contract
- **Conclusion du contrat** = the making of the contract
- La conclusion du contrat is a term of art in French.
- "Conclude a contract" is practically never used by American or English lawyers (instead use "enter into" / "make").

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CONTRACTS

- THIS AGREEMENT
 - Le présent Contrat
- (**hereinafter** the "Agreement")
 - Ci-après désigné le "Contrat")
- is **made and entered into** this 10th day of August, 2005
 - est **conclu** aujourd'hui, le 10 août 2005

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Contracts: “conclusion”

- “Conclusion of the contract” is not a term of art in English and may be misunderstood to mean “the end of the contract” (i.e., the OPPOSITE of what *conclusion* means in French). It’s better to use “the making of the agreement” if you need a noun; otherwise use the verb “**to enter into**” (e.g. *après la conclusion du contrat* – after the agreement is entered into)

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Contracts: “conclusion”

- Conclure un contrat
 - to enter into an agreement
 - to make an agreement

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Contracts: “conclusion”

- Consultant shall treat as privileged and proprietary any information so designated by the law firm and disclosed to Consultant in the course of this Agreement. Consultant further agrees not to disclose such information to any person, and to return all copies of such information to the law firm at the **conclusion** of this Agreement.

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Contracts: “conclusion”

- A l' échéance [English: conclusion] des rapports contractuels, les parties se retourneront les documents et matériaux confidentiels échangés dans le cadre de l' exécution du projet, sans en garder copie, ni aucune trace sur un support quelconque (disquette, disque dur, etc...).

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Contracts

- l'exécution du contrat = the performance of the contract
- exécuter un contrat = to perform a contract
- to execute a contract = to sign a contract = signer un contrat



CONTRACTS: The beginning

Entre les soussignés :

La société _____, [forme juridique] au capital de _____ euros, dont le siège social est _____, enregistrée au Registre du Commerce et des Sociétés de _____ sous le numéro _____, représentée par M. _____ [nom et qualité],

ci-après désignée « le Franchiseur »,

d'une part,

et

La société _____, Société [forme juridique] au capital de _____ euros, dont le siège social est _____, enregistrée au Registre du Commerce et des Sociétés de _____ sous le numéro _____, représentée par M. _____ [nom et qualité],

ci-après dénommée « le Franchisé »,

d'autre part,

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Préambule

- AYANT PRÉALABLEMENT EXPOSÉ QUE
- IL EST PREALABLEMENT EXPOSÉ CE QUI SUIT
- IL A ÉTÉ TOUT D'ABORD EXPOSÉ CE QUI SUIT
- ÉTANT DONNÉ QUE
- APRÈS AVOIR EXPOSÉ CE QUI SUIT
- IL EST EXPOSÉ PRÉLIMINAIREMENT QUE
 - All the above can be translated as “recitals” or “whereas”

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English

- The recitals: acknowledgments of fact
- Stated in the present tense (no "shall")
- Whereas
- This Agreement WITNESSETH
(déconseillé)

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English

- Example of recitals:
- Purchaser wishes to purchase from the Company, and the Company wishes to sell to Purchaser, the Business together with substantially all of the assets, properties and operating contracts of the Company, subject to certain liabilities, upon the terms and conditions of this Agreement.

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Préambule

- EN VERTU DE QUOI, IL EST CONVENU CE QUI SUI
- CECI ÉTANT EXPOSÉ, IL EST CONVENU CE QUI SUI
- EN CONSÉQUENCE DE QUOI, IL A ÉTÉ CONVENU ET ARRÊTÉ CE QUI SUI
- IL A ÉTÉ CONVENU CE QUI SUI
- IL A ÉTÉ CONVENU ET ARRÊTÉ CE QUI SUI
- CELA ÉTANT, LES PARTIES CONVIENNENT
- All can be translated as "Now, therefore, the parties agree as follows:"

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Consideration

- For good and valuable consideration, the receipt of which is hereby acknowledged
- en échange d'une contrepartie de valeur dont la réception est reconnue aux présentes
- pour une contrepartie de valeur dont quittance est donnée par les présentes

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Consideration

- Contrairement au droit français où la rencontre d'une offre [offer] et d'une acceptation [acceptance] suffit à former un rapport contractuel, la *common law* exige que la promesse de chaque contractant vienne s'appuyer sur une **contrepartie** fournie par l'autre, en la forme d'un acte accompli au moment du contrat ou d'un engagement de donner, de faire ou de ne pas faire.

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Consideration

- Le diptyque offre-acceptation est en droit anglais remplacé par un triptyque: **offer, acceptance, consideration**.
- L'exigence de cette contrepartie limite le champ du droit des contrats en droit anglais aux seuls actes à titre onéreux. Les **libéralités** [actes à titre gratuit] n'entrent donc pas dans la catégorie des contrats.
 - contrat de donation

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Definitions (X means Y)

- Dans le cadre du présent contrat, **on entend par « filiales »** des sociétés ...
- Dans le Contrat, les termes suivants ont la signification indiquée ci-dessous, qu'ils soient employés à la forme du singulier ou du pluriel. « Filiales » **signifie** des sociétés ...
- « Marque » **s'entend de** la marque suivante.
- « Contrat » : le présent contrat

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Definitions

- For purposes of this Agreement, the following terms have **the following meanings**:
- “Closing” has the meaning specified in Section 7.
- “Parties” **means** the parties to this Agreement.
- “Person” **means** an individual, partnership, joint venture, corporation, limited liability company, bank, association or other legal entity.
- “Agreement”: this stock purchase agreement

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Shall/Shall Not

- Plain English is more an issue for drafters than for translators.
- The word “shall” is very often used in contracts to signify a duty (where in ordinary language we would say “must”). Confusingly enough, “shall” is sometimes also used as a future form (=will), often in the same paragraph or sentence as “shall” meaning must!

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Shall/Shall Not

- Note that a court may take “X sells to Y” (present tense) to be a mere recital (=acknowledgment of fact) rather than a contractual obligation. Therefore, you need to say “X shall sell to Y.”
- On the other hand, don’t use “shall” in the recitals!
 - NOT: Intermark shall be a company in the translation business BUT is a company....

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Shall/Shall Not

- shall
 - future tense
 - devra
 - s'engage à
- s'engage à = agrees to (USA),
undertakes to (UK), shall
- shall not = s'interdit de
- a le droit de = is entitled to

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Durée du contrat

- Le Contrat est conclu pour la période indiquée en page 1 du Contrat.
- Le présent contrat est conclu pour une durée de 5 ans et **entre en vigueur** à la date du 01.01.1994.
- Le présent contrat **entrera en vigueur** à compter de la date de signature par les parties et restera valable jusqu'au 31.12.1993. Il sera ensuite prorogé d'année en année par **tacite reconduction**.

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Term

- The initial **term** of this Agreement shall commence on the Effective Date and shall expire on June 30, 2005. Thereafter, the term of this Agreement shall be **automatically renewed** for additional successive periods of three years, unless either party notifies the other at least six months prior to the expiration of the initial term or the then current term.

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Provisions

- The provisions **of** this Agreement; the provisions **of** Section 10 (not “in”)
- La loi dispose, le contrat stipule.
- Or, il n’en est rien ! “Les dispositions du présent contrat”: 32 500 occurrences (contre “les stipulations du présent contrat” : 818 occurrences)
- Sometimes can be omitted from French to English:
 - conformément aux dispositions de l’article 3 =
 - under Article 3 (not under the provisions of art. 3)

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Indemnité

- Means “fee” or “compensation” or “damages.”
- **Indemnité forfaitaire** = lump-sum compensation or liquidated damages
- **Indemnité de frais de déplacement** = travel allowance
- **Indemnité de licenciement** = severance pay

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Provisions

- We only have time to look at a few boilerplate provisions (= les clauses de style).
- La définition la plus fréquemment retenue de la clause de style est une clause reproduite dans l'acte sans que les parties y aient prêté une réelle attention ou en aient compris le sens, et qui n'a pas été réellement voulue.

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Indemnisation

- Means “compensation” or “damages
- Droit à indemnisation = right to damages
- Indemnisation équitable = fair compensation
- Créance en indemnisation = claim to damages (compensation)

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Indemnification

- Indemnification is something more specific: the right of a party who is secondarily liable to recover, from the party who is primarily liable, for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty (Black's Law Dictionary)

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To indemnify and hold harmless

- Dict of Modern Legal Usage:
Etymologically the word derives from indemnus (=harmless) combined with facere (=to make). Thus, indemnify has long been held to be perfectly synonymous with “hold harmless” and “save harmless.”
- In French: garantir contre

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Indemnification

- garantie d'éviction – hold harmless clause
 - Note that the English word “eviction” (what happens to a bad tenant) is “exclusion” in French.
 - The French word éviction refers to the situation where a third party comes along and claims to have “paramount title.”

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Provided that/provided, however, that

- **Provided that** means “with the proviso that,” “subject to the condition that”
- **Provided, however, that** is a lawyer’s fancy way of saying “but”. Think of it like this: *provided, however, that*

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Provided that/provided, however, that

- Employee shall receive an annual salary of \$150,000 provided that he devotes his entire time and energy to the corporation.
- The salary shall be paid on the fifteenth and the final day of every month; provided, however, that [= but] if such day falls on a non-business day, the salary shall be paid on the business day immediately prior thereto.

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Provided that; provided, however, that

- **Provided that** = à condition que
- **Provided, however, that** = étant entendu, toutefois, que
 - Or simply: étant entendu que

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Forum Selection Clause

- Note that whereas contracts from France often label this clause “Compétence” or “Attribution de compétence,” contracts from Switzerland label it “For.”
- Possible translations: forum selection, jurisdiction, venue (not “competence”)

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Governing Language

- La version anglaise du présent Contrat **fera seule foi**, et toute traduction que le Client peut avoir reçue lui a été fournie uniquement dans le souci de lui en faciliter la compréhension.
- The **controlling language** of this Agreement is English and any translation the Client may have received has been provided solely for the Client's convenience.

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Governing Language

- The version in English
 - shall control
 - shall govern
- La version en langue anglaise
 - prévaut
 - l'emporte
 - fait foi.

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Droit applicable

- Le présent contrat est soumis au droit français.
- Le présent contrat sera régi et interprété selon la loi française.
- Les droits des parties et les effets légaux du présent contrat seront régis par le droit français.
- Les parties conviennent d'un commun accord de soumettre l'ensemble des dispositions des présentes à la loi de l'Etat de New York.

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Droit applicable

- La présente convention est soumise au droit suisse et le for judiciaire se trouve à Neuchâtel.



Governing Law

- This Agreement shall be governed by and construed in accordance with the laws of the State of Georgia, without regard to conflict of laws principles.
- “To be governed by”. Can’t find authentic examples of “is subject to” (est soumis au droit suisse/unterliegt deutschem Recht).
- Clause may also be entitled “choice of law” in English.

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- **Council of Europe French-English Legal Dictionary**, par Bridge

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