

The aim of the project was to build a risk assessment tool to help advise companies about the legal risks associated with their contracts.

We decided to base the structure for the questionnaire on Table E1 in the Annex E of document, ISO 31022

Risk management - Guidelines for the management of legal risk



Figure 1 ISO 31022 document

Annex E (informative) Key clauses to consider when reviewing contracts

The annex provides a brief summary of the key clauses to consider when reviewing a contract to minimize legal risk. This checklist of issues is not intended to be a substitute for legal advice nor is it intended to be a comprehensive list of all contract issues. Most of these issues are ultimately business ones, requiring business decisions, but they are “legal risks” in the sense that they are either embedded in the contract or should be dealt with in the contract.

The organization should check that all of the issues given in [Table E.1](#) are covered in a contract or are at least considered, even if dismissed. It may be appropriate to accept greater risks for the product, service or cost benefits. The organization should consider each of the issues from the relevant perspective, depending on whether it is:

- a) the vendor of goods or the provider of services;
- b) the purchaser of goods or the customer receiving the services.

Issue	Considerations
Capacity to contract	Check whether the counterparty has the legal capacity to enter into a binding legal agreement.
Consideration	For those jurisdictions that require consideration for a binding legal agreement, check that there is valid consideration.
Delivery/shipping terms	Does the purchaser require the goods for a specific date (perhaps in order to meet its obligations under a contract with a third party)? If so, the delivery clause should be drafted to ensure:
	time is of the essence for delivery; - the purchaser can recover any actual losses suffered as a result.
	The vendor should be concerned if: a) the losses stipulated in the clause are uncapped; or b) the delivery dates specified by the purchaser have a high risk of not being met.
Transfer of legal title	Under a contract for goods, when does the legal title pass to the purchaser (i.e. when does it become the purchaser’s property rather than the vendor’s)? If title passes before the delivery date and the organization is purchasing the goods, it should ensure that the goods are insured from this date. Failure to obtain insurance risks financial loss through damage or destruction of the goods before they are in the organization’s control.
Cancellation (contracts for goods)	As the purchaser, does the organization need the right to cancel an order? As the vendor, the organization should attempt to limit the period of time for the purchaser to cancel its order to the statutory limit otherwise it risks making losses on the time spent servicing the order until the cancellation date.

Table E.1 — Contract key clauses to consider to minimize legal risk

We defined a series of questions based on the structure of the table.

1. Capacity to contract	Q.1 Does the party you plan to enter into a contract with have the legal ability to do so?
2. Consideration [some jurisdictions]	Q.2 Has one party to the contract given or promised something in exchange for the promise or performance of the other party?
3. Delivery/Shipping Terms	Q.3 Do you require the goods by a specific date? Q.4 If the goods do not arrive by this date, what penalty should ensue?
4. Transfer of Legal Title	Q.5 When does the title to the goods that are the subject of the contract pass to the buyer?
5. Cancellation of Order of Goods	Q.6 Under what circumstances may the purchaser cancel its order before it is completed? Q.7. If the purchaser exercises its cancellation right, what damages can the seller keep or receive to cover their actual losses that directly result from the cancellation (for instance, costs already incurred or loss of profit)?
6. Suspension and Termination of Services	Q.8. Can the service provider or the customer, or both, suspend the services offered under the contract for a defined period of time, e.g. 30 or 60 days and resume thereafter? <ul style="list-style-type: none"> • for convenience, • for breach, • for supply chain disruptions, and • for the protection of the health and safety of their personnel during a pandemic or other public health emergency?

Initial Table of questions in Word.

This table of questions in Word was used to generate an initial version in VisiRule.

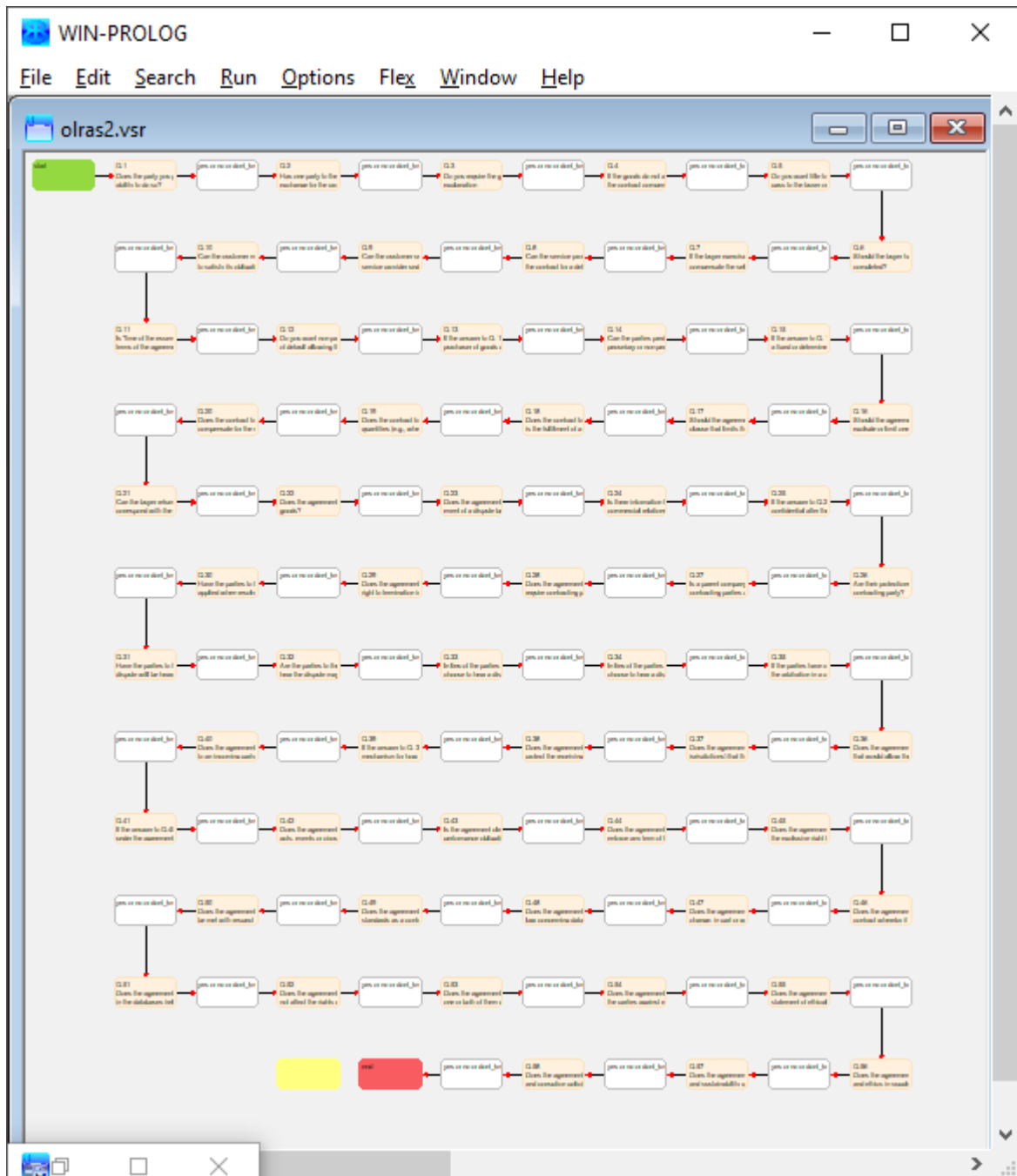


Figure 2 Initial VisiRule chart auto generated from Word table

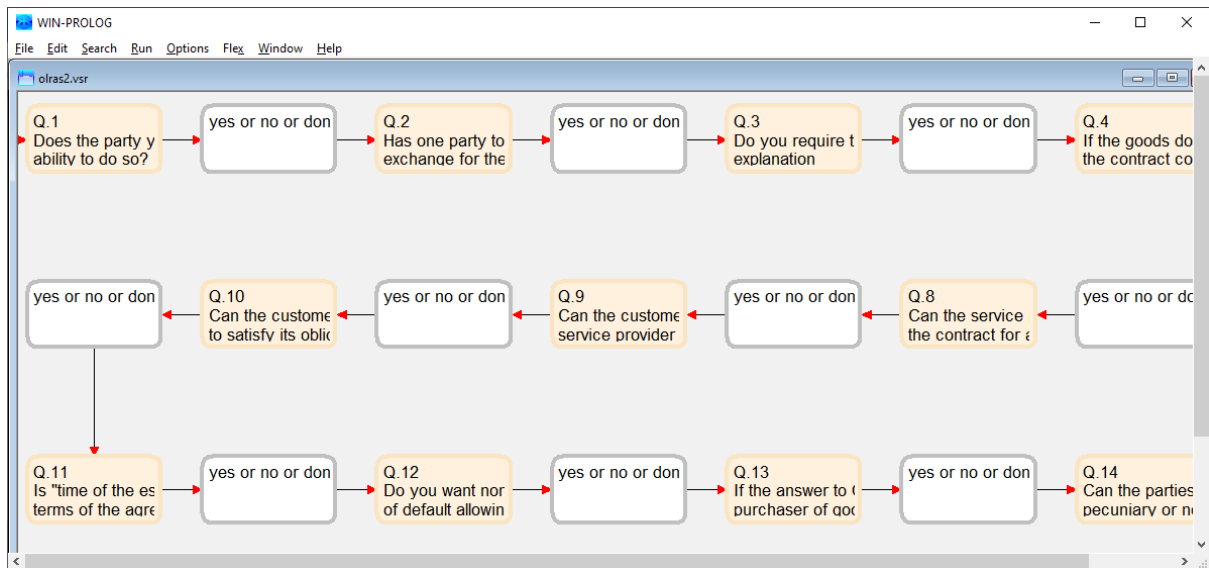


Figure 3 Initial VisiRule chart

We later recast this Word as an Excel table. This enabled us to introduce extra columns which could contain the relevant text fragments to align with the various answers that could be given.

So each question has text which relates to each of the four answers.

This text may also vary depending on whether we are buying or selling.

This text may also vary depending on whether we are contracting to supply/acquire goods or services.

The benefit of using Excel (or Sheets) is that the content can be updated and maintained by non-programmers in their preferred spreadsheet application before being converted into CSV.

			Issue							Question							
	Issue	Priority	Goods Only	Help	Success Text	Fail Text	Mixed Text	QN	Prompt	Short Prompt	Help Description	YesText Universal	YesText Buyer	YesText Seller	NoText Outcome	NoText2 Solution	DK Text
				May not be needed? Do we need to provide help on an issue basis?	If you pass this issue	Text which explains why failing this issue is a problem	Text which explains why not passing this issue could be a problem; could be similar to failing?		Standard Prompt - could be quite long	Shortened prompt	General help on question prompt to aid the operator to answer the question	Even though the operator may have passed - we can still remind them ...	Buying Text when passing	Seller Text when passing	Outcome text for Report	Outcome advice for Report will generate some action points	Don't know text
	Capacity to contract	essential		This is whether a party has the legal ability to enter into a contract: Humans; Minors; Mental Incapacitation; Intoxication. Companies: Does the company has the capacity to enter into this contract?	Remember to make sure that the contract is signed and witnessed (if required) and safely stored in your digital vault or ledger with your accountant or legal advisor.	This is a major issue as if the other parties representative(s) are not legally empowered to sign the agreement, then everything agreed in the contract is unenforceable. Also, have you checked	This is a major issue as if the party you are contracting with is not legally empowered then everything is unenforceable.		Is the party you are entering into this contract an individual or a company?	Is the party you are entering into this contract an individual or a company?	There will be different rules in terms of capacity to contract in the event you wish to enter into a contract with an individual or a company.						
								C1	Does the party you plan to enter into a contract with have the legal ability to do so?	Does the party you plan to enter into a contract with have the legal ability to do so?	Each party to the contract must be legally capable of entering into contracts. Some contracts with minors (under 18 years), inebriates and persons with mental incapacity are not legally	That's good - you have ensured that each party is legally capable. Remember to make sure that the contract is signed and witnessed and safely stored in your digital vault or ledger with			This is a major issue as if they are not legally empowered to sign then everything is unenforceable.	You need to find a party who is empowered or tear up the contract	You need to ensure that the other party is empowered or else tear up the contract
	Payment	essential			Good - make sure that our finance department is aware of the payment terms that we have agreed.	We need to have clearly agreed payment terms with which we are happy.	We need to have clearly agreed payment terms with which we are happy.		Can the	Is there	An early						

This spreadsheet contains all the content that OLRAS needs. It can be extended to handle additional requirements both horizontally and vertically (to include additional issues).

The table is exported as CSV which is then processed by a Prolog program which generates a Prolog/Flex executable. This code can be executed on the desktop or on the web.

Issues contain groups of questions which are presented to the User in the form of a questionnaire.

An initial page establishes the context of the user. This Context is used to determine which Issues are relevant. For less important situations, not all the issues are asked.

The Online Legal Risk Advisory Service ("OLRAS") is a *proof-of-concept* app designed to be used by microentrepreneurs to assess and treat aspects of legal risk that they might face.

It is part of a research project undertaken at Aston Law School in Birmingham, United Kingdom.

OLRAS contains general information based on English law and although we endeavour to ensure that the content is accurate and up to date, users should seek appropriate legal advice before taking or refraining from taking any action based on the content of OLRAS.

The contents of this website do not constitute legal advice and are provided for general information purposes only.

If you require specific legal advice, you should contact a specialist lawyer.

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Sales Context

Buyer
 Seller

Services Context

Goods
 Services
 Both

Our Company Type

Small
 Medium
 Large

Their Company Type

Small
 Medium
 Large

Value of Contract

1000

OLRAS

Figure 4 Initial OLRAS context screen

The Context is also used to help produce an overall Summary.

For instance if we are dealing with 2 small companies and a relatively low valued contract, the summary will reflect that this is not life changing; but in the case of a small company say selling to a large organization then the summary will contain stiff warnings about the importance of warranties and indemnification.

Issues are presented as blocks of questions to be answered. Advice will be given on both an issue by issue basis and a question by question basis.

Each question has the same 4 options namely Yes, No, Don't Know and Not-Applicable.

These user's answers are used to calculate a score for each question and each group of questions calculates a score for each issue.

Each question has its own help text which is provide to aid the user understand the question.

OLRAS

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Online Legal Risk Advisory Service

Contract Legal Risk Management

Capacity to contract

Does the party you plan to enter into a contract with have the legal ability to do so?

Each party to the contract must be legally capable of entering into contracts. Some contracts with minors (under 18 years), inebriates and persons with mental incapacity are not legally enforceable.

Yes No Don't Know Not Applicable

Payment

Can the customer make early payment of a discounted invoice amount to satisfy its obligation to pay the full invoice amount?

An early payment discount—sometimes called a prompt payment or cash discount—is a reduction in an invoice balance when it is paid before the due date. It provides an incentive for customers to pay their bills before they are due which can help the supplier's cash flow and is an important part of managing accounts receivable.

Yes No Don't Know Not Applicable

Is "time of the essence" essential for the receipt of payment under the terms of the agreement?

The mere insertion of a closing date in a contract for the sale of an item does not make that date "of the essence" and either party is

Figure 5 Olras questions

OLRAS

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Yes No Don't Know Not Applicable

Is "time of the essence" essential for the receipt of payment under the terms of the agreement?

The mere insertion of a closing date in a contract for the sale of an item does not make that date "of the essence" and either party is entitled to a "reasonable" adjournment of the closing. An agreement as to a "time is of the essence" closing is enforceable, and the failure to close on the law day will constitute a material breach of the contract.

Yes No Don't Know Not Applicable

Do you want non-payment when it becomes due to constitute an event of default allowing the other party to terminate the agreement immediately upon the occurrence of such an event?

Events of Default are most often found in the context of loan agreements and are similar to termination rights that may be found in commercial agreements, albeit with potentially different consequences. An Event of Default is an event or circumstance relating to a borrower or its activities which will give rise to a right for a lender to refuse to make any further advances, demand immediate repayment of a loan, make a term loan repayable on demand and/or enforce its security.

Yes No Don't Know Not Applicable

Figure 6 Olras Questions II

OLRAS

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Yes
 No
 Don't Know
 Not Applicable

Does the agreement provide a specific mechanism for how such an indemnity will be triggered and, if so, when will payment for such an indemnity be required to be made? *A trigger event can be anything defined by the parties, such as, breach of contract, a party's fault or negligence, a specific action, a specified loss.*

Yes
 No
 Don't Know
 Not Applicable

Force Majeure

Does the agreement allow for events of force majeure, e.g. certain acts, events or circumstances beyond the control of the parties such as natural disasters or the outbreak of hostilities, which typically excuse one or both parties from performance in some way? *Look for language with the term force majeure in it.*

Yes
 No
 Don't Know
 Not Applicable

Is the agreement clear as to when a force majeure event ends and the performance obligations of a party that suspended its performance due to force majeure must resume? *The duration of a force majeure event is usually determined by the specific circumstances of the event.*

Yes
 No
 Don't Know
 Not Applicable

Submit

Figure 7 Olras Questions III with submit button

On submit, the system will assess the User's responses and select the suitable text fragments and calculate the scores.

These results are presented in the conclusion page of the questionnaire session.

Test

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Online Legal Risk Advisory Service

Risk Evaluation

Summary

As the contract is of low value, you probably shouldn't worry too much!

Similar size companies should be able to negotiate the contract on an equal basis. You should check that the contract identifies and minimises your risk exposure.

Evaluation

Risk	Issue	Advice						
	Capacity to contract	<i>Remember to make sure that the contract is signed and witnessed (if required) and safely stored in your digital vault or ledged with your accountant or legal advisor.</i>						
	<table border="1"> <thead> <tr> <th>Question</th> <th>Answer</th> <th>Advice</th> </tr> </thead> <tbody> <tr> <td>Does the party you plan to enter into a contract with have the legal ability to do so?</td> <td>Yes</td> <td><i>That's good - you have ensured that each party is legally capable. Remember to make sure that the contract is signed and witnessed and safely stored in your digital vault or ledged with your accountant or legal advisor.</i></td> </tr> </tbody> </table>	Question	Answer	Advice	Does the party you plan to enter into a contract with have the legal ability to do so?	Yes	<i>That's good - you have ensured that each party is legally capable. Remember to make sure that the contract is signed and witnessed and safely stored in your digital vault or ledged with your accountant or legal advisor.</i>	
Question	Answer	Advice						
Does the party you plan to enter into a contract with have the legal ability to do so?	Yes	<i>That's good - you have ensured that each party is legally capable. Remember to make sure that the contract is signed and witnessed and safely stored in your digital vault or ledged with your accountant or legal advisor.</i>						
	Payment	<i>Good - make sure that our finance department is aware of the payment terms that we have agreed.</i>						
	<table border="1"> <thead> <tr> <th>Question</th> <th>Answer</th> <th>Advice</th> </tr> </thead> <tbody> <tr> <td>Is there any early payment discount?</td> <td>Yes</td> <td><i>Remember to make sure that our finance department are aware of this early payment discount and deadline so that we can use it accordingly.</i></td> </tr> </tbody> </table>	Question	Answer	Advice	Is there any early payment discount?	Yes	<i>Remember to make sure that our finance department are aware of this early payment discount and deadline so that we can use it accordingly.</i>	
Question	Answer	Advice						
Is there any early payment discount?	Yes	<i>Remember to make sure that our finance department are aware of this early payment discount and deadline so that we can use it accordingly.</i>						

Figure 8 Conclusion Page

A summary is presented to give an overall assessment using a decision table. A traffic light system (Red/Amber/Green) is used to indicate the result for each Issue.

Does the agreement contain a provision that the parties disclaim or deny warranties	No	<i>It is generally bad to exclude warranties from an agreement. Warranties are important for protecting both parties in a contract and ensuring that the goods or services provided meet certain standards. Without warranties, either party may be left without recourse if something goes wrong.</i>
Indemnities		
Question		Answer
Advice		
Does the agreement provide for an indemnity, e.g., a promise to protect the receiving party against loss, by paying money on the happening of a specified event, which operates as a "trigger and loss" provision that prevents parties from litigating the law on duty, breach or assessment of damages?	Yes	<i>OK - we have an indemnity clause which outlines the compensation for any damages and losses. Make sure we fully understand the implications for such an indemnification in terms of cost. Maybe see if it is covered by some sort of insurance policy.</i>
Does the agreement state how the indemnity is triggered?	Yes	<i>Good - we have an indemnity clause which outlines a form of insurance compensation for any damages and losses. Make sure we fully understand what types of event can trigger the indemnification and how they are to be established.</i>
Force Majeure		
		<i>If we do not define events of force majeure we may have trouble if unforeseen acts of God, war, pandemics, etc. interfere with the performance of the parties to the contract.</i>
Question		Answer
Advice		
Does the agreement allow for events of force majeure?	No	<i>Both sides need to evaluate the risks involved in certain events that are unforeseen or hard to predict with any certainty that could trigger a temporary or permanent halt to performance and consider what both sides would wish in such an event and whether the contract provides appropriate solutions that could ameliorate for such risks, e.g., price review clauses, a 30-day halt on performance coupled with a stay on payments with an option for mutual termination if such a halt continues for a period of 90 or 180 days without abatement. When it comes to the drafting of a force majeure clause, a balanced clause will allow the party claiming force majeure to be relieved from performance without liability whilst the other party would have the right to terminate the contract.</i>
Is the agreement clear as to when a force majeure event ends?	No	<i>We do NOT have any clauses for force majeure.</i>

Figure 9 Conclusion Page with some Red Issues

Advice for each Issue is presented; advice for each question answered is presented.

Colour coding is used instead of scores.

As the context becomes more serious, more issues are presented which means more questions are asked.

The Summary is generated by using the answers from the initial Context questions to determine which text fragments to use using a decision table such as:

Company	TheirCompany	ContractValue	Issues	SizeText	ValueText
Small	Medium	Low	Essentials	Larger	A
Small	Medium	Medium	Medium	Larger	B
Small	Medium	High	Medium	Larger	C
Medium	Small	Low	Essentials	Smaller	A
	Small	Medium	Medium	Smaller	B
Medium	Small	High	Medium	Smaller	C
SmallMedium	SmallMedium	Low	Essentials	Same	A
SmallMedium	SmallMedium	Medium	Medium	Same	B
SmallMedium	SmallMedium	High	Medium	Same	C
Small	Large	Low	Medium	MuchLarger	A
Small	Large	Medium	Medium	MuchLarger	B
Small	Large	High	All	MuchLarger	C
Medium	Medium	Low	Medium	Same	A
Medium	Medium	Medium	Medium	Same	B
Medium	Medium	High	All	Same	C
Medium	Large	Low	Medium	Larger	A
Medium	Large	Medium	All	Larger	B
Medium	Large	High	All	Larger	C