guru in a bottle®

Essential Law for Marketers

Second Edition

Ardi Kolah

Contents

About the author ix
About the editor xi
Foreword by Jonathan Coad, Partner, Lewis Silkin xii

Introduction 1

1 Making agreements 5

Introduction 5
Negotiation 6
Heads of terms 7
Use of standard terms of business 11
Relevant statutory framework for sale of goods, services or goods and services 16
Marketing agency agreement 32
Distributorship agreement 36
Website contract 38
Remedies available for breach of contract 47
Misrepresentation 50
References 52

2 Making statements in sales and marketing 55

Introduction 56
Definitions of tortious liability 56
Distinction between contract and tort 57
Remedies in contract not available in tort 58
Negligent misstatements 59
Misrepresentation made in sales and marketing contracts 63
Fraudulent misrepresentation 68

Negligent misrepresentation 71
Innocent misrepresentation 72
Remedies for misrepresentation 72
Defamation 74
Remedies for defamation 80
Tort of malicious falsehood 81
References 81

3 Legal barriers to market entry 85

Introduction 85
Design rights as a barrier to market entry 88
Trademark as a barrier to market entry 92
Passing-off action as a barrier to market entry 104
Copyright as a barrier to market entry 109
Generic top-level domains (gTLDs) as a barrier to market entry 124
References and further reading 127

4 Legal requirements for sales and marketing activities 131

Introduction 132
ICC Consolidated Code for Advertising and Marketing Communications Practice (2011) 132
EU Consumer Rights Directive 2011 143
Consumer Protection from Unfair Trading Regulations (CPRs) 2008 147
Business Protection from Misleading Marketing Regulations (BPRs) 2008 150
Advertising Standards Authority (ASA) CAP and BCAP Codes 151
ASA regulation of marketing activities on websites 170
Protection of children and young people from sales and marketing exploitation 173
References and further reading 179

5 Law as a weapon for competitive sales and marketing advantage 183

Introduction 183
The UK and EU advertising regime 185

Comparative advertising as a weapon for achieving sales and marketing advantage 190
Product placement on television as a weapon for achieving sales and marketing advantage 202
References and further reading 208

6 Direct marketing and direct selling 211

Introduction 211
Data Protection Act 1998 214
Conducting an internal audit to ensure compliance with the DPA 1998 228
E-mail marketing 228
Proximity and m-marketing 233
Distance selling 235
Future reform of data protection regulation in the EU 238
References and further reading 240

7 The EU Privacy and Electronic Communications Regulations 243

Introduction 243
Background to the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 244
Implementation of the 'Cookie Directive' in the UK 246
Modification to the law of privacy as a result of the 2011 Regulations 252
Online advertising and marketing 254
References 256

8 Sales and price promotions 259

Introduction 259
Discounts and other special offers 262
Legal framework: the UK and the European Union 263
Non-Broadcast Advertising, Sales Promotion and Direct Marketing Code (CAP Code) 267
Consumer Protection from Unfair Trading Regulations 2008 (CPRs) 280
Business Protection from Misleading Marketing Regulations 2008 282

Consumer Protection (Distance Selling) Regulations 2000 282
Electronic coupons and vouchers 283
Intellectual property issues 286
References and further reading 289

9 Prize promotions and incentives 291

Introduction 291
Prize draws and lotteries 294
Competitions 298
Consumer Protection from Unfair Trading Regulations 2008 308
References and further reading 310

10 Sponsorship and hospitality 313

Introduction 313
Types of sponsorship 315
Rights and obligations of the sponsor 318
Rights and obligations of the property owner 326
Management of intellectual property rights 327
Broadcast sponsorship regulation 330
Legal issues around hospitality within sponsorship 335
References and further reading 341

Index 343
Endorsements 353

Introduction

The introduction to the first edition began by saying that knowing your legal obligations as well as your rights as a marketer is fundamental. In many respects, the first edition was unique in that it was written as a law book for non-lawyers and with the 'legal virgin' in mind who wanted to get to grips with essential legal principles as they applied to professional sales and marketing in its broadest context.

Our sympathy has always been with marketers who want to use the full force of marketing firepower at their disposal but who perhaps lack the fundamental understanding of the restrictions placed on them by the law in being able to carry this out unencumbered. Knowing and understanding the 'rules of engagement' will definitely give you a competitive advantage. And of course ignorance of the law is no defence when the wheels come off the wagon of your carefully crafted marketing campaign and you find it needs to be scrapped or – worse still – it leaves you open to legal and even criminal sanctions when it's in full swing!

The first edition quickly became the recognized standard work on the subject for anyone studying marketing and communications and was the recommended textbook for those studying professional examinations regulated by the Chartered Institute of Marketing, the Chartered Institute of Public Relations and many other professional institutes.

The second edition contains many of the features of the first edition, such as avoiding jargon and over-complicated 'legalese-type' explanations that only lawyers can understand! It's also been completely updated to take account of the seismic changes that have transformed the law as it applies in England and Wales, as well as the impact of EU laws that have effectively rewritten the law on privacy, human rights, data protection and marketing across the web and mobile networks.

This book also takes account of a tremendous amount of feedback we received from readers, and so the second edition has been organized differently in light of this. Some sections, such as intellectual property rights, have been incorporated in a different way compared with the first edition, which we hope you'll find works much better in how it applies to your daily sales and marketing activities.

Fundamentally, we've looked at the law as it applies to all sales and marketing activities through three distinct lenses:

- law as a barrier to market entry;
- law as a requirement for sales and marketing activities; and
- law as a weapon for competitive advantage.

In this way, we've created a powerful tool that in the right hands will dramatically improve the performance of any sales and marketing programme.

The chapters of the book are arranged as follows:

- *Chapter 1: Making agreements*. This chapter examines the typical type of contracts you're likely to come across in sales and marketing.
- *Chapter 2: Making statements in sales and marketing*. In this chapter, we'll look at statements that you may wish to make in any sales and marketing activity to ensure that they comply with current legal best practice.
- *Chapter 3: Legal barriers to market entry.* This chapter looks at how legal barriers such as intellectual property rights can help to maintain and defend your market position.
- *Chapter 4: Legal requirements for sales and marketing activities*. In this chapter, we'll navigate you through the thicket of legal rules and regulations that surrounds a very wide variety of sales and marketing activities so you keep on the right side of the law. This includes the new CAP Code, which now extends to websites!
- *Chapter 5: Law as a weapon for competitive sales and marketing advantage*. In this chapter, we'll look at strategies for using the law for competitive sales and marketing advantage, such as the use of comparative advertising and product placement on television.
- *Chapter 6: Direct marketing and direct selling*. This chapter looks at the impact of the Data Protection Act 1998, as well as regulations that affect direct selling and distance selling.
- *Chapter 7: The EU Privacy and Electronic Communications Regulations*. In this chapter, we'll examine the extent to which the EU Privacy and Electronic Communications Regulations (PEC Directive) have changed the face of how we conduct marketing, such as the use of cookies on websites.
- *Chapter 8: Sales and price promotions*. In this chapter, we'll look at how best to implement sales and price promotions and how the CAP Code, the Gambling Act 2005 and other legislation have made an impact on these popular areas of sales and marketing activities.
- *Chapter 9: Prize promotions and incentives*. In this chapter, we'll examine prize draws, prediction competitions and skill-based competitions, as well as the potential lottery risks that are run by marketers and how to avoid these pitfalls.
- *Chapter 10: Sponsorship and hospitality.* In the final chapter, we untangle the complex web of legal issues as they affect sponsorship, as well as assess the impact of the Bribery Act 2010 on the provision of hospitality to customers, clients and prospects.

The law as it applies to England and Wales

This book covers English law and how it applies to England and Wales only. Scotland is a separate jurisdiction with its own laws and customs and, whilst there's a reasonable correlation between English and Scottish law, we're not covering the latter at any stage. Separate advice from a Scottish lawyer will be required if a sales and marketing issue has legal implications in Scotland.

Although European Union law is a highly specialized area, where possible we've also highlighted the relevance of this to sales and marketing.

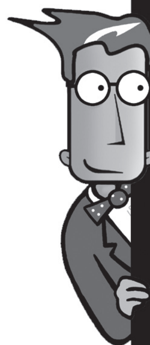
All information contained in this book is for general purposes only and, where necessary, separate legal advice should be sought from a qualified lawyer who specializes in your area of sales and marketing practice.

The law stated as it applies to England and Wales is correct as of April 2012.

About Guru in a Bottle®

Guru in a Bottle® is about taking technical, high-level subjects and making them clear, human and accessible. Unlike Dummies®, which tends to treat the reader as a blank canvas for much of the content presented, the approach taken by Guru in a Bottle® is to guide the reader through technical subjects as their friend and personal guru. Buying a Guru in a Bottle® book gets the Guru out of the Bottle, empowering the business manager and student to tackle technical subjects and enhance their working and learning experience.

Ardi Kolah created the iconic character Guru in a Bottle® with cartoonist Steve Marchant, and the unique approach has helped make the Guru in a Bottle® series extremely popular throughout Europe, the United States and India.



1

Making agreements

In this chapter

- Negotiation
- Heads of terms
- Use of standard terms of business
- Relevant statutory framework for sale of goods, services or goods and services
- Marketing agency agreement
- Distributorship agreement
- Website contract
- Remedies available for breach of contract
- Misrepresentation

Introduction

The fundamental basis for all commercial relationships is a legally binding contract that confers certain rights and benefits on the parties of that agreement whilst at the same time imposing obligations, duties and responsibilities in the execution of that contract.

Commercial agreements and relationships endure where there's a mutual alignment of rights and obligations so that all parties derive economic value from the agreement. The point at which the agreement starts to unravel is

where the value expected to be delivered fails to materialize and the agreement doesn't fairly benefit all parties who signed up to it. It's therefore critical that the agreement reflects the intentions of all parties so that there aren't problems further down the line that effectively derail these 'best laid plans'. The other key issue is that, having agreed the terms and conditions, one or more parties to the contract fail to deliver or are in breach of what has been agreed, which could give rise to termination of the contract and some form of compensation or remedy for the injured party.

Within the context of marketing, there are a huge number of different types of agreements, ranging from the supply of public relations or advertising services, through merchandise for a major marketing campaign, to the agreement to build a new website.

Let's take cloud computing, for example. Many businesses are currently bombarded with the opportunity to remove the requirement for storing a mountain of valuable marketing data on their in-house servers and to switch to a managed service where the data sit on a cloud. This may sound like a fantastic opportunity, but it has led to major concerns about the wide variance in the quality of cloud service providers (CSPs) and whether a new type of contract needs to be created given that an organization isn't buying a piece of technology but rather is engaged in business process re-engineering.

In a survey of 200 IT suppliers and 450 end users undertaken in 2011 by marketing consultancy Vanson Bourne, over 50 per cent of clients had agreements where the contract was set to renew automatically, making it difficult to get out of them. Other issues of concern were that 33 per cent of CSPs excluded liability for loss of data, and over 50 per cent of all clients didn't have a migration plan in place to cover the termination of the service contract. The underlying result of the research was that neither users nor service providers had given sufficient thought to the need for consistent standards in contracts.

Frank Jennings, chair of the governance board of the UK Cloud Industry Forum, sums up the situation: 'People don't even read their own contracts and there's a general assumption that suppliers "won't shaft me".'

Liabilities and indemnities can be a major cause of contractual grief, and this chapter guides you through the various legal provisions you can expect to affect many sales and marketing agreements within a business-to-consumer (B2C) and business-to-business (B2B) context.

Negotiation

Ultimately the sales and marketing contract you eventually end up with will be largely determined by how well you can negotiate the deal in the first place. See also Guru in a Bottle® *The Art of Influencing and Selling* for further discussion on how to negotiate successfully.

There has been much discussion by lawyers as to whether an obligation to negotiate a contract in 'good faith' can be legally binding.

At the time of writing, the situation appears opaque and will depend on the circumstances under which negotiations take place. The clearest and most recent steer on this point was given by the High Court in the Barbudev case (2011), which ruled that an agreement to negotiate in 'good faith' is too uncertain in terms of its application for the courts to be able to enforce it.

In an earlier ruling from the Court of Appeal in the Petrobras case (2005), the court left it open that a commitment to negotiate in 'good faith' may be legally binding in certain circumstances, so an express obligation to negotiate in 'good faith' may be held to be enforceable.

In the general context of sales and marketing agreements, it's highly unlikely that any representations to negotiate in 'good faith' could be relied on later should things go wrong. In essence, it's much safer to assume that the contractual agreement is the principal instrument that determines what the parties to the agreement intended.

Heads of terms

Establishing heads of terms is very common practice within commerce, and there's nothing technical about them. Their main purpose is to record the main points of principle on a sales and marketing deal before the fine details and small print get drafted and negotiated. Heads of terms are also known as letters of intent, memoranda of understanding, term sheets or heads of agreement.

Some of the benefits of a good set of heads of terms are:

- It provides a focus and clears up confusion. It's common for two people to leave a conversation and end up with very different interpretations as to what was agreed! Writing down the basic bones of a transaction means that those misunderstandings get spotted and resolved amicably before hours of legal drafting and expense are incurred.
- We're all human, and memory fades over time. Forgetting what you agreed in a meeting a month ago is a real possibility, so a set of heads of terms is a great aide-memoire.
- It acts like a moral commitment on both sides to observe the terms agreed.

It's also a useful discipline to have heads of terms particularly when instructing an in-house lawyer to draft a sales and marketing agreement on your behalf. In drafting an agreement, the lawyer is setting out, in legally binding words, what you've agreed with the other party. Although lawyers love to add loads of 'legal stuff' to a contract, at the end of the day it's their job to create an instrument that reflects the intentions of all parties.

'A good set of heads of terms lets us know what that is. We can then get on with "doing our bit" without having to come back to you with a whole host of irritating questions,' explains Brinsley Dresden, partner with leading media law firm Lewis Silkin.

Heads of terms generally come in two flavours: 'term sheets' and interim agreements.

'Term sheet'-type documents provide evidence of serious intent and have some moral force, but generally don't contractually require the parties to conclude the deal on the terms outlined in the heads, or even at all. Their intention is effectively to outline key terms agreed in principle, to give the parties a structured basis for negotiating the main contract. They are generally intended to be non-binding as a whole, but will often include some provisions that are intended to be binding.

Interim agreements are documents that are intended to be binding in their entirety and are therefore effectively temporary agreements. They are most often used to cover the situation common to many industries where the parties start to incur costs or perform the contract before the final contract is agreed, for example leasing a marquee or providing outside catering at a hospitality event. In such a situation, the heads of terms will assume greater importance, and additional considerations will apply.

There's no standard form for heads of terms; they can vary from a simple letter, which is probably the most common format you'll encounter, to a carefully drafted document prepared by professional advisers.

They are commonly entered into at the beginning of a transaction, once the parties have agreed preliminary terms and before the definitive agreements are drafted (which is when the parties begin to incur significant legal costs). The parties may need to enter a series of heads of terms throughout the negotiations, particularly when negotiations are prolonged.

Heads of terms in certain specific situations may fall foul of competition law rules. For example, if they have as their object or effect the restriction, prevention or distortion of competition within the UK or the EU, they may be prohibited by Chapter 1 of the Competition Act 1998 or Article 101(1) of the Treaty on the Functioning of the European Union (formerly 81(1) of the EC Treaty). In such cases, the parties should consider whether the heads of terms are exempt, for example under a block exemption, or whether the agreement qualifies for individual exemption and should seek suitably qualified legal advice in such cases.

The other danger to avoid is the case of the heads of terms being signed, work commencing, and the parties getting involved in the nitty-gritty of the day-to-day arrangements but forgetting to finalize the full agreement! This of course can store up problems for a later date, so it's preferable to get an agreement signed as soon as practicable.

Legal effect of heads of terms

The legal effect of 'non-binding' heads of terms is often one of the key concerns of the parties. They don't want the statement of the terms of the

commercial transaction to be legally binding; but if, as is often the case, they include provisions in the heads of terms document dealing with issues such as confidentiality, exclusivity (lockout) or costs, they'll want those provisions to have legal effect.

The case law in this area (see also '"Subject to contract"' below) illustrates that great care must be taken when drafting heads of terms.

Where the intention of the parties is to be legally bound, then the legal requirements relating to the creation of a valid contract must be satisfied. Third-party rights may also become an issue at this point, and heads of terms can give rise to liability for misrepresentation or negligent misstatement, whether or not they are contractually binding.

Legal requirements for creating binding provisions

In the unusual situation where one of the parties wishes to rely on heads of terms as evidence of an agreement and in the absence of a properly construed contract, there are two 'tests' that the heads of terms will need to pass in order to be legally enforceable: the terms must be sufficiently certain to be enforceable; and, unless the heads of terms are executed under seal, there must be consideration flowing from the party benefiting from the agreement to the other party, in the form of a promise in return, a payment, an action or a forbearance (not doing something in return).

Third-party rights

This is where the heads of terms get much more complex and qualified legal advice will be required. The issue may arise as to whether some third party has the right to enforce a binding term. For example, the parent company or a group subsidiary of a party to the heads of terms might want to benefit from the confidentiality provisions – a term that may give them directly enforceable rights under the Contracts (Rights of Third Parties) Act 1999.

'Subject to contract'

These words are often seen on estate agents' boards in small print below the word 'SOLD'. So under what circumstances do the words 'subject to contract' actually indicate a sale?

Leaving aside the legal complexities surrounding the sale and purchase of land, which are outside the scope of this book, there's a well-established principle of English law that an agreement made on terms such that the parties don't intend to be legally bound unless and until they enter into a more formal contract isn't legally binding. After all, that's common sense.

The use of the phrase 'subject to contract' in commercial negotiations creates a strong presumption that the parties don't want to be bound but isn't immune from attack when used in heads of terms documents, particularly if the parties start to perform the contract envisaged by the heads of terms, for example providing services as described earlier, such as hospitality.

It's preferable for heads of terms to spell out the parties' intention, rather than relying on the inclusion of the words 'subject to contract', for example: 'These heads of terms are not intended to be legally binding between the parties except as specifically set out in this letter.'

If some provisions of the heads of terms are intended to be legally binding, and others are not, it's particularly important to identify the relevant provisions clearly. However, it's always preferable to have a properly executed contractual agreement rather than relying on heads of agreement as the instrument for binding the parties in a contractual sense.

Foreign jurisdictions

The 'subject to contract' wording isn't recognized in many jurisdictions outside the UK, so it shouldn't be relied on when dealing with foreign parties. In some jurisdictions, certain headings, such as 'pre-contract' or 'preliminary contract', can risk creating contractual obligations. In some continental European jurisdictions, such as France and Italy, heads of terms may be construed by the courts as a binding pre-agreement if they contain key terms such as the parties, price and conditions precedent. It's therefore essential that the language in the heads of terms is consistent throughout in expressing that the document isn't legally binding.

Most continental European jurisdictions impose a duty to negotiate in good faith, which extends to all phases of commercial relationships in both the pre-contractual and the contractual stages. Entering into a heads of terms document may help to crystallize the duty and make it easier to enforce. For example, heads of terms that set out detailed terms agreed in principle would be evidence of the closeness of the relationship and of what each party expected from the other.

Non-binding heads of terms

As a general rule, when drafting heads of terms that aren't intended to be binding as a whole, the document should cover important deal points. It's usual to find a statement that the parties intend to enter legal relations, for example sponsorship exclusivity or a television advertising campaign.

Any provisions that are intended to be legally binding must satisfy the legal requirements relating to the creation of a valid contract.

Typically, a non-binding heads of terms document should cover the following points:

- Principles underlying the agreement, leaving the detail for the formal contract.
- Governing law – if one party to the deal wants the document to be governed by foreign law, the other party should understand how this might affect its rights before making this concession.

- Key preconditions to signing the contract and the person responsible for making sure those preconditions are satisfied.
- Acknowledgement that the non-binding heads of terms are non-exhaustive. Wasted time and effort on excessive detail often occur because each side fears that the other will later try to treat any point not raised as implicitly conceded in principle. A statement that specifically leaves open the opportunity to raise subsidiary points can help keep things moving.
- Assumptions upon which the heads of terms are based, as well as the identification of areas where further information is required and reservation of the right to revisit the deal in light of any further or new information.
- An agreed formula for calculating any fees payable in order to ensure there aren't misunderstandings as to how the formula will operate under the legally binding contract.

The following can also form part of the non-binding heads of terms: provisions for scope; terms and conditions with respect to works being carried out or services rendered; limitation on liabilities; duration; payment of fees; arbitration and disputes resolution; and jurisdictional issues.

Use of standard terms of business

It's likely that you'll work for a company or organization that has standard terms of business or be dealing with companies, suppliers and consultancies that will also have standard terms of business. And of course there is likely to be more than one set of standard terms of business depending on the circumstances and nature of the agreement to be entered into.

It's important if you work to standard terms of business to keep these under constant review; for example, the sales department may be issuing sales quotations or processing orders using terms and conditions that are out of date, not fit for purpose or simply cloned from terms used by competitors!

The use of standard terms of business can help save the time and money that would be incurred in drawing up specific terms for each individual transaction that your company may wish to make. Standardization also allows more junior members of the team to be able to handle and conclude contracts that are in alignment with a company's stated policies and procedures.

In order to avoid standard terms for transactions where their use is not appropriate, a procedure could be created internally where contracts over a certain value are automatically sent to the legal department for review before they are issued, which is a prudent system that most organizations have in place, particularly if they operate in regulated industries and need to keep an audit trail available for inspection by the regulator.

Offer and acceptance

The contracting process is analysed for legal purposes in terms of offer and acceptance. From the seller's perspective, it is preferable that the offer should be made by the buyer and if appropriate be accepted by the seller. From a sales and marketing perspective, this appears to run counter to where the focus of communication has been to this point (from seller to buyer), but makes perfect legal sense.

The common law rule is that new contract terms can't be introduced after the contract has been formed by offer and acceptance between the parties.

This means that the all-too-frequent practice whereby sellers seek to impose their standard business terms by printing them on the back of an invoice generally won't be effective to incorporate the terms in the contract, because the invoice won't usually be dispatched until sometime after the contract will be held to have been entered into.

Standard terms should be drafted and contracting procedures established by the seller. The advantages to the seller are that it will then know whether and, if so, when a contract has been entered into. The rule that a valid contract can be made when acceptance of an offer is posted means that the party making the offer won't know immediately that it is contractually bound.

If the offer by the buyer is not on the seller's terms, then any purported acceptance by the seller stated to be on its own terms may in fact be a counter-offer and won't create a legally binding agreement (see '"Battle of the Forms"' below).

The seller should ensure that:

- any proposals put forward for agreement – whether in the form of a quotation or a brochure – are phrased so as not to constitute an offer, as otherwise the buyer's acceptance could form a contract before the seller's standard terms can be incorporated into it;
- the offer made by the buyer is on the seller's standard terms and conditions, which may be by way of providing the buyer with the seller's standard order form, stating that the order is an offer on the seller's standard terms and conditions; and
- the standard terms contain a clause indicating that any purported acceptance by the buyer will take effect only as an offer on the seller's standard terms and that no contract will be created until the seller issues its acknowledgement or confirmation of order.

It should be borne in mind that it's not possible to guarantee the effectiveness of such a provision. The courts might, in such circumstances, find that the seller's and the buyer's terms weren't incorporated as there was no consensus. However, the provision will at the very least strengthen the seller's negotiating position if there's a dispute later.

As a contract can be oral, any discussions with the customer or client – whether over the phone or face to face – need to be on the basis of the seller's standard terms or stated to be subject to contract (not binding until a written contract is entered into).

A buyer will seek to submit its standard purchase terms together with its purchase order so as to constitute an offer on those terms, which will be accepted by the seller delivering the goods.

Incorporation of standard terms in contracts with buyers

In order to maximize the chances of successfully incorporating the seller's standard terms in its contracts with customers or clients, the seller must ensure that standard terms are brought to the attention of customers or clients at the earliest possible opportunity.

The simplest way of doing this is expressly to state in pre-contract correspondence that the seller's standard terms will apply to the sale. However, this is likely to provoke customers or clients into seeking to negotiate the terms. The seller's desire to avoid this must be balanced against the increased risk that those terms will be considered not to have been incorporated if an express statement isn't made in the pre-contractual correspondence. The next best option is for the seller to bring the terms to the attention of customers or clients in as much pre-contract and contract documentation as possible.

This could include setting out the standard terms:

- in the seller's sales brochures, catalogues or other marketing material; or
- on the seller's quotation forms; or
- on the acknowledgement or confirmation of order issued by the seller; or
- on the seller's delivery notes.

If the standard terms appear on all or some of the above documents, there's no harm in putting them on the seller's invoices as well, because if there's a course of dealing with that particular customer or client this will assist the seller's argument that the terms had been brought to the attention of the customer over a period of time should there be a dispute later.

Conversely, a buyer's standard purchase terms should be set out on: the purchase order of the buyer; or the quotation acceptance of the buyer.

All sales and marketing employees must be made fully aware of the company or organization's sales and purchasing procedures and adhere to them at all times. They should also be given guidance where the standard contract has blank spaces that need to be completed. Any blanks completed in a way inconsistent with the printed terms have the legal effect of adding provisions that override the standard terms.

When introducing new standard terms, a copy should be sent to every customer or client stating that the new terms will apply in the future.

This is also an ideal opportunity to enclose a slip for return by which the customer signs and acknowledges receipt of the new terms. Such a confirmatory slip won't always be returned, but when it is it can be invaluable evidence of acceptance of the new terms. The use of methods to prove receipt, such as recorded delivery, may also be useful evidence, particularly if seeking to rely on a course of dealings over a period of time.

However, it should be noted that receipt doesn't necessarily indicate acceptance.

The following drafting rules should be followed with a view to ensuring, so far as possible, that terms are properly incorporated:

- Where the seller's terms are printed on the reverse of a document, the document should have a statement on the face of it clearly stating that the sale is made on the terms printed on the reverse and that they form part of the contract.
- If a term is unusual, particular attention should be drawn to it on the face of the document, since the courts require special notice to be given of any such terms (for example, many exclusion clauses fall into this category).
- If a term governs or potentially varies something on the face of the document, for example price or delivery date, it should be cross-referenced.

'Battle of the forms'

While standard terms of sale are more usual, it's becoming increasingly common to see standard terms of purchase.

If both sellers and buyers seek to impose their own standard terms, then difficulties arise in determining which terms will prevail.

The approach taken by the courts is that an acceptance that attempts to impose new terms isn't an acceptance at all, but is a counter-offer, which can be accepted by an unequivocal acceptance by the other party or by performance under the contract. This means in practice that the last set of terms dispatched before acceptance or performance – if you like, the last 'shot' fired in the 'battle of the forms' – will prevail.

There are several practical approaches that a seller may adopt when faced with a 'battle of the forms'.

The most obvious and practical way of dealing with this situation is to discuss the sale terms with the customer or client and if possible agree any variations in terms and conditions in a side letter. The disadvantage is that this involves a negotiation of the standard terms, which could result in further time and legal costs. However, where the relationship is important, such as a key account, then agreeing special terms makes commercial sense.

An alternative solution would be to include the seller's terms in as many pre-contractual documents as possible and refrain from raising the standard terms as an issue with the customer as well as firing the last 'shot' in the 'battle of the forms' by ensuring as far as possible that the terms appear on the last document passing between the parties before the delivery of the goods or services.

The advantage of this approach is that no time is wasted in negotiating amendments to the seller's terms and that, assuming that the 'battle of the forms' is won, the seller's terms will be incorporated without amendment. The disadvantage is that the risk that the customer might succeed in firing the last 'shot' can't be entirely eliminated, in which case those terms will end up being incorporated without amendment.

Representations made in sales and marketing literature

Companies or organizations may incur liabilities for statements or representations made to the buyer that they hadn't intended would form part of the contract depending on the context of the sales situation.

Indigo International case (2003)

In this case, the High Court ruled that statements in sales and marketing could lead to an action for misrepresentation if the buyer had relied on these to enter into the contract and would be entitled to damages.

In such cases, it isn't necessary that it's reasonable for the buyer to rely on such statements but merely that it did and the seller ought to have known that such statements would act as an inducement. See also Guru in a Bottle® *The Art of Influencing and Selling* on how to write effective sales materials.

Verbal statements made in sales and marketing

There is a danger that sales and marketing employees could make statements to the buyer in circumstances where those statements are inaccurate or unsustainable claims about a product.

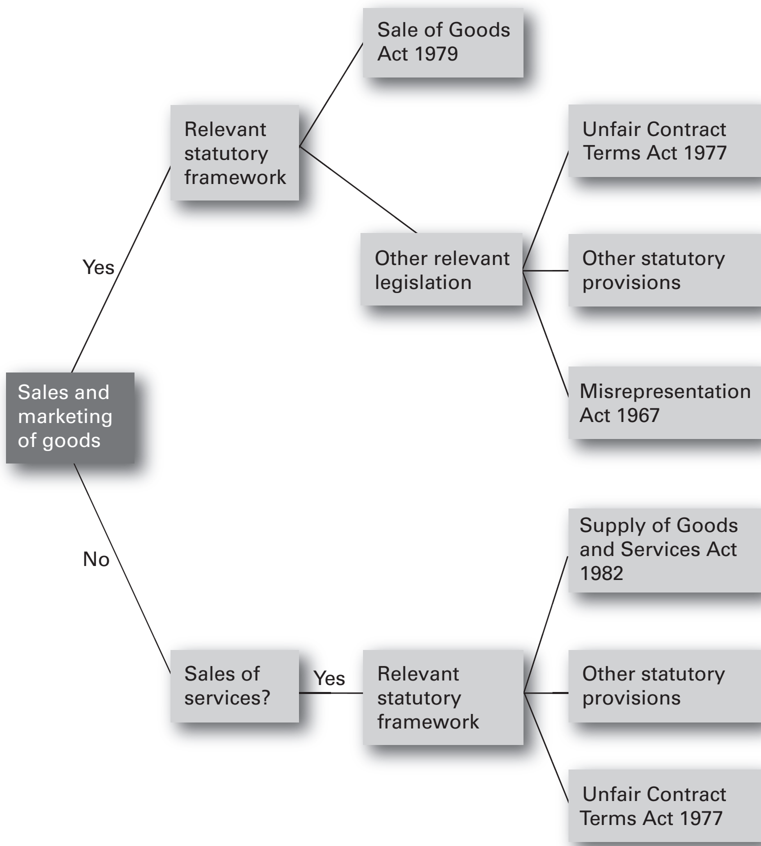
The courts may, as in the circumstances surrounding sales and marketing literature, find that such statements are contractually binding on the company or organization whether as an additional term of the parties' contract or as a collateral contract. Alternatively, the court may decide that this amounts to a misrepresentation and gives rise to an action for damages (see 'Remedies available for breach of contract' below).

It's therefore important that sales and marketing employees are aware of their legal obligations and should always consult a suitably experienced lawyer when in any doubt about sales and marketing literature.

Relevant statutory framework for sale of goods, services or goods and services

From a legal perspective, the fork in the road for which relevant statutory framework applies in making agreements depends on whether the seller is involved in selling goods on its own, services on its own or goods and services together (Figure 1.1).

Figure 1.1 Relevant statutory framework in selling goods and services



Sale of goods or goods and services

A significant number of statutes and regulations have an impact on contracts for the sale of goods:

- those statutes that regulate the supply of goods or supply of goods and services and impose implied terms and conditions in contracts of sale;
- those statutes that limit the extent to which the seller can exclude or restrict its liability; and
- statutes that specifically relate to misrepresentation, consumer credit and product liability.

The most important pieces of legislation are the Sale of Goods Act 1979 (SOGA 1979) and the Unfair Contract Terms Act 1977 (UCTA 1977) as they apply to all sale of goods contracts.

There are a number of important implied terms in sale of goods contracts by reason of the SOGA 1979, for example as to title to the goods and quality of the goods, and it provides a large number of presumptions that apply unless specifically dealt with in the contract for the sale of goods.

UCTA 1977 regulates the use of exclusion clauses that the seller may wish to rely on in order to avoid any liability at a future date for the goods sold.

With B2C transactions, the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (Unfair Terms Regulations) also apply. These regulations impose additional restrictions on the exclusion of liability, and other regulations may also apply depending on whether the sale is online, via phone or mail order, and these include the Consumer Protection (Distance Selling) Regulations 2000 (see Chapter 6).

At the time of writing, the government has yet to reform the law by replacing UCTA and the Unfair Terms Regulations with a single statute, although the previous government did accept the need for a new Consumer Rights Bill in order to modernize and simplify consumer law as well as implement the EU Consumer Rights Directive that the EU Council of Ministers voted to adopt in October 2011. Member states have two years to implement measures into national law, which means that the law in the UK will need to change before the end of 2013. Although this has yet to happen, it's useful to outline briefly what these changes will mean for sellers and buyers in the future.

EU Consumer Rights Directive

The Consumer Rights Directive brings together a number of disparate existing rules. Currently, European rules on consumer rights are contained in four separate EU directives covering unfair contracts, distance selling, doorstep selling, and sales and guarantees respectively. The problem with these EU regulations is that they were made in a rather haphazard fashion, and many were written almost three decades ago. The Consumer Rights Directive will, it's hoped, 'harmonize' these existing regulations and give consumers more clarity about their rights when buying and selling in Europe. For further discussion, see Chapter 4.

Broadly, the purpose of the EU directive is to ensure that customers can be confident about making purchases within Europe, particularly online, and from businesses in other European countries outside of their own.

The new EU directive is also intended to apply to B2C sales. The key points include:

- An obligation for sellers to provide buyers with key information before the conclusion of a contract: main characteristics of the product, geographical address and identity of the trader, the price inclusive of taxes, and all additional freight, delivery or postal charges for all consumer contracts to help the consumer make an informed choice.
- The consumer's right to a 14-day 'cooling-off period'. This means that consumers can cancel an order, return the goods and get their money back at any point during the 14 calendar days after they make a purchase online or during the visit of a trader to their home.
- The consumer's protection against the risk of loss or damage to goods until it receives them. In practical terms this will mean that sellers will be liable for that risk – and, probably, that sellers will have to bear the cost of postal insurance or pass this on in higher prices.
- The consumer's right to have goods replaced or repaired at any time during the two years after it makes the purchase. When this isn't possible, a refund must be given.
- The seller's obligation to cover the cost of returns when that cost exceeds €40 (currently).
- The seller's obligation to sell to any and every EU country.

In light of the expected approval of the EU directive, the government has signalled its intention to merge all existing UK consumer protection laws and regulations together with the requirements of the finalized Consumer Rights Directive into a single new Consumer Bill of Rights.

In the UK, there are 12 existing laws and regulations relating to consumer protection, which the government has said are complex and confusing and not in the best interests of consumers and business. The forthcoming Consumer Bill of Rights is therefore intended to repeal and replace a number of pieces of legislation, including:

- Consumer Protection (Distance Selling) Regulations;
- Unfair Terms in Consumer Contracts Regulations 1999;
- Misrepresentation Act 1967;
- Sale of Goods Act 1979;
- Sale and Supply of Goods and Services Act 1994;
- Supply of Goods (Implied Terms) Act 1973;
- Unfair Contract Terms Act 1977.

These changes will require a radical readjustment to the many ways that businesses operate at the point of sale. In particular, technology, media and telecoms businesses that provide software and entertainment products to

consumers to be downloaded at the time of sale will need to be aware of the changes that will be required.

Marketers operating in Europe should take the opportunity before the end of 2013 to review their sales and marketing practices, both online and offline, to ensure that they will be compliant when the new legislation comes into force. A government consultation process is now under way.

Unfair Terms Regulations 1999

These regulations apply to any term in a contract between a seller or supplier and a consumer that hasn't been individually negotiated and provide that any such term that is unfair isn't binding on the consumer. It should also be noted that the fact that a single term may have been individually negotiated doesn't mean that the remaining terms in a standard-form contract will escape the fairness test.

A term is 'unfair' if it causes a significant imbalance in the positions of the parties to the detriment of the consumer in a way that is contrary to the requirement of good faith. The scales of justice are therefore heavily tipped in favour of the consumer!

In assessing unfairness, regulation 6(1) of the Unfair Terms Regulations requires the following to be taken into account:

- the nature of the goods or services to which the contract relates;
- all the circumstances surrounding the conclusion of the contract at the time of entering into it; and
- all the other terms of the contract or of another contract on which it is dependent.

The 'core provisions' of a standard contract, defined as terms that define the main subject matter of the contract or concern the adequacy of price or remuneration for the goods or services sold, are excluded from the fairness test, but only in so far as they are expressed in plain and intelligible language.

What the Unfair Terms Regulations refer to as an 'indicative and non-exhaustive list' of terms that may be considered unfair is set out in Schedule 2 of the Unfair Terms Regulations.

These include:

- a clause providing for a deposit or advance payment made by a consumer that is then forfeited if the consumer cancels the contract, unless there is also a corresponding clause providing for the consumer to receive an equivalent amount if the contract is cancelled by the seller or supplier;
- a clause in a yearly agreement that provides that the consumer must give not less than six months' notice of termination, failing which the agreement is automatically extended for another year at the end of the term; and

- a clause allowing the seller to change without a valid reason features of the goods such as their size or colour.

In addition to the sanction of an unfair term being held not to be binding on an individual consumer, the Office of Fair Trading (OFT) and other qualifying bodies are given powers, following the making of a complaint (which may even be made by a business competitor!), to take action in relation to unfair terms, including applying for an injunction to prevent a business from relying on an unfair term. It sounds extreme but is true!

Qualifying bodies include the Information Commissioner; various utility regulators, the Rail Regulator, Trading Standards, the Consumers' Association and the Financial Services Authority.

Sale of Goods Act 1979

The SOGA 1979 imposes the following implied terms in contracts for the sale of goods:

- That the seller has the right to sell the goods (section 12(1), SOGA 1979).
- That the goods are free from undisclosed charges or encumbrances and that the buyer will enjoy quiet possession of the goods (section 12(2) and (3), SOGA 1979).
- Where goods are sold by description that the goods will correspond with that description (section 13, SOGA 1979).
- In consumer contracts, and subject to certain exceptions, that any lack of conformity of the goods with their description in the contract that becomes apparent within six months of delivery is presumed to have existed at the time of delivery (regulation 5, Sale and Supply of Goods to Consumers Regulations 2002). This reversed burden of proof makes it easier for consumers to bring claims in the first six months.
- Where goods are sold in the course of a business that the goods are of satisfactory quality (section 14(2), SOGA 1979). Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, price and all other relevant circumstances.

In addition, the quality of goods includes their state and condition, and the following factors among others are to be taken into account in determining whether goods are of satisfactory quality:

- fitness for all the purposes for which goods of that kind are commonly supplied;
- appearance and finish;
- freedom from minor defects;
- safety; and
- durability.

In consumer contracts, section 14(2D) of the SOGA 1979 provides that public statements made by the seller, the manufacturer or the manufacturer's representative about a product, such as in sales and marketing literature, will be used in determining whether the product is of satisfactory quality. Although there are defences to this, a retailer could potentially be held liable for promises made by a manufacturer about product performance.

Where goods are sold in the course of a business and the buyer, expressly or by implication, makes known to the seller the purpose for which it wants the goods, the goods should be reasonably fit for that purpose (section 14(3), SOGA 1979). The term doesn't apply if the buyer doesn't rely on the seller's skill or judgement or if it's unreasonable for the buyer to rely on it.

Where goods are sold by sample, they should correspond to the sample in quality, and they should be free from any defect making their quality unsatisfactory that would not be apparent on a reasonable examination of the sample.

Section 5A of the SOGA 1979 gives consumer buyers the following remedies where goods fail to conform to the contract of sale at the time of delivery: the right to require the seller to repair or replace the goods within a reasonable time and without causing significant inconvenience to the consumer; and the right to require the seller to reduce the purchase price of the goods by an appropriate amount or to rescind the contract. The consumer can exercise this right only if the repair or replacement is impossible or disproportionate, taking into account the value of the goods if they had not been faulty, the significance of the fault in the goods and the inconvenience to the consumer of other remedies, or if the seller fails to repair or replace the goods within a reasonable time and without significant inconvenience to the consumer.

Goods are deemed not to conform to the contract of sale if there is a breach of an express term of the contract or a term implied by section 13 (sale by description), section 14 (satisfactory quality and fitness for purpose) or section 15 (sale by sample) of the SOGA 1979.

Goods that don't conform to the contract of sale at any time within the period of six months starting with the date on which the goods were delivered to the consumer must be taken not to have so conformed at that date.

The burden is on the seller to establish that the goods did conform to the contract at the date of delivery, unless the application of the principle is incompatible with the nature of the goods, such as perishable foodstuffs, or the nature of the lack of conformity.

If a seller commits a breach of any condition of contract, the buyer is entitled to reject the goods and terminate the contract. However, the buyer's right to reject the goods is lost if it accepts the goods.

Under section 35 of SOGA 1979, the buyer is deemed to have accepted the goods and so loses the right to reject the goods in three situations:

- When the buyer intimates to the seller that it has accepted the goods.
- When the goods have been delivered to the buyer and it acts consistently with ownership of the goods. The buyer must be given a reasonable opportunity of examining the goods in order to check that they comply with the requirements of the contract (this can be excluded in B2B contracts under section 35(2) and (3), SOGA 1979).
- When the buyer has retained the goods after a reasonable time without intimating to the seller it has rejected them. A 'reasonable time' takes into account the time taken to ascertain what would be required to modify or repair the goods, according the judgment of the Court of Appeal in the Clegg case (2003).

UCTA 1977

This statute applies to clauses in contracts that seek to restrict or exclude business liability. UCTA 1977 doesn't apply to international supply contracts in general or where the contract is made outside of the UK jurisdiction and this has been agreed by the parties provided that the party relying on the exclusion hasn't done so simply to circumvent the implied terms of UCTA 1977.

Different controls apply according to the nature of the liability that the supplier wishes to exclude or restrict:

- A term excluding or restricting liability for death or personal injury caused by negligence is wholly ineffective (section 2(1), UCTA 1977).
- A term excluding or restricting liability for negligence is enforceable only to the extent that it satisfies the reasonableness test (section 2(2), UCTA 1977).
- Breach of statutory implied terms is ineffective.
- A term excluding or restricting liability for implied terms of good title to the goods without encumbrances is also ineffective (section 6(1), UCTA 1977).
- Any terms that seek to exclude or restrict liability for correspondence with description of the goods delivered to the customer, satisfactory quality, fitness for purpose or correspondence with a sample will be ineffective against the consumer and will be enforceable only in so far as they can satisfy the reasonableness test as against persons other than consumers (section 6(2) and (3), UCTA 1977).

These controls apply where a contract expressly excludes one or more of the implied terms or excludes one or more of them by implication, for example by means of a term that states that goods supplied will be fit only for the purpose specifically stated by the seller or will meet only certain quality standards specified by the seller.

In contracts with consumers or in contracts with another business that are on the seller's standard terms of business, additional controls also apply.

For example, any attempt to exclude or restrict liability for breach of contract will be enforceable only to the extent that it satisfies the reasonableness test (section 3, UCTA 1977).

'Reasonableness test'

In order to pass the 'reasonableness test' under UCTA 1977, a contract term must have been 'a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made' (section 11(1), UCTA 1977).

Schedule 2 to UCTA 1977 contains a non-exhaustive list of guidelines in assessing reasonableness, which strictly apply only in deciding whether the exclusion or limitation of any of the implied conditions contained in sections 13, 14 or 15 of SOGA 1979 is reasonable.

The guidelines have also been applied by the courts when considering the reasonableness test in relation to the exclusion of other types of liability, in particular for breach of contract under section 3 of UCTA 1977.

In summary, the guidelines are:

- the balance in strength of the bargaining positions of the parties relative to each other (including alternatives open to customers, for example the ability to insure that could redress an imbalance in relative bargaining positions);
- whether any inducement was given to the customer or client to agree the term, or whether the customer had an opportunity of entering into a similar contract with other persons without having to accept a similar term;
- whether the customer or client knew or ought reasonably to have known of the existence of the term having regard, among other things, to any custom of the trade and any previous course of dealing between the parties;
- if a term excludes or restricts liability or if some condition isn't complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; and
- whether the goods were manufactured, processed or adapted to the special order of the customer or client.

Misrepresentation Act 1967

A term that excludes or restricts liability for misrepresentation resulting in death or personal injury caused by negligence is unenforceable (section 2(1), UCTA 1977). In the case of other loss or damage, a term that excludes or restricts liability for misrepresentation or excludes any remedy for misrepresentation is enforceable only to the extent that it satisfies the reasonableness test (section 3, Misrepresentation Act 1967).

The Misrepresentation Act 1967 also imposes statutory liability for pre-contractual misrepresentations.

Consumer Protection Act 1987

This imposes strict liability on manufacturers, importers into the EU and own-label brands for injuries caused by goods that are unsafe and intended for consumer use. A supplier may not exclude its liability under this Act.

Consumer Protection (Distance Selling) Regulations 2000

These apply to contracts where goods are sold at a distance, for example over the internet, by phone or mail order, without the seller and buyer being in each other's physical presence.

The regulations apply only to contracts between businesses and consumers. For these purposes, a consumer is defined as 'any natural person who, in contracts to which these regulations apply, is acting for purposes which are outside his business'. This reflects the wording in the Unfair Terms Regulations (see 'Unfair Terms Regulations (1999)' above).

The Consumer Protection (Distance Selling) Regulations 2000 contain a requirement on the seller to provide the consumer with certain specified information. This includes information on the right to cancel the distance contract, the main characteristics of the goods or services, and delivery costs where appropriate.

The regulations provide for a cooling-off period, which enables a consumer to cancel the contract by providing notice of cancellation to the seller. If the contract is cancelled then it's treated as if it hadn't been made. This right of cancellation doesn't apply to certain contracts, for example where the goods are made to the consumer's specification.

Other elements of the regulations provide that: businesses selling services by the internet, phone or mail order will be able to deliver key written details, which the regulations oblige them to provide, to consumers at any time from when an order is placed until the service finishes; and, if the information to be provided isn't made available until after provision of the service has started, consumers will be able to cancel the agreement for up to seven days after the information is received (Consumer Protection (Distance Selling) (Amendment) Regulations 2005 (SI 2005/689)). See also Chapter 6 for a discussion on distance selling and direct selling.

Other regulations, such as the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095), apply to the marketing of banking, credit, insurance, personal pensions, investment and other such products exclusively by distance means. They contain similar provisions to the Consumer Protection (Distance Selling) Regulations 2000 in that certain specified information must be given to the consumer before the conclusion of the contract, and they also provide for a cooling-off period.

The Electronic Commerce (EC Directive) Regulations 2002

These apply to businesses selling goods to other businesses or consumers on the internet or by e-mail. In essence the regulations require a seller:

- to make specific information available to customers, for example the seller's name and address;
- to inform customers how the contract is to be concluded;
- to ensure customers are able to print off and store a copy of the terms and conditions;
- to allow the customer to identify and correct input errors before an order is placed;
- to acknowledge receipt of an order; and
- to comply with any consumer contract laws in place in its home state when dealing with consumers in other European Union member states.

For a detailed discussion on these Regulations, refer to Chapter 7.

Equality Act 2006

This Act protects individuals from discrimination in the provision of goods and services on the grounds or religion or belief, or on the grounds of sexual orientation.

Consumer Protection from Unfair Trading Regulations 2008

These regulations apply to the sale or supply of products to consumers. The regulations require businesses not to mislead consumers through acts or omissions or subject them to aggressive commercial practices, whether before, during or after the sale.

Business Protection from Misleading Marketing Regulations 2008

These prohibit suppliers from advertising goods to traders in a misleading way. The regulations define advertising as:

> *any form of representation that is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of a product, which includes pre-sales representations made to the customer by the supplier's sales team, and other marketing and promotional activities such as the provision of information of products in catalogues or on websites, and descriptions on packaging.*

The regulations don't give traders or competitors a direct right of action, but these regulations are policed by designated consumer protection authorities.

Cancellation of Contracts made in a Consumer's Home or Place of Work Etc. Regulations 2008

These allow consumers who enter into a contract for goods or services during a visit by a seller to a consumer's home or place of work, or on an excursion organized by the seller, to cancel that contract within seven days of the consumer being given notice of his or her cancellation rights, whether the visit was solicited by the consumer or not.

Bribery Act 2010

The Bribery Act 2010, which came into force on 1 July 2011, replaces the existing criminal offences of bribery and introduces new offences on the statute books.

The Bribery Act 2010 creates a new corporate offence of failure to prevent bribery by an 'associated person', under which a commercial organization will be guilty of an offence if a person associated with it bribes another person intending to obtain or retain business for the commercial organization, or to obtain or retain an advantage in the conduct of business for the commercial organization (section 7, Bribery Act 2010). This is a strict liability offence, and the only defence available to the commercial organization is that it had in place 'adequate procedures' to prevent bribery by its associated persons.

Under the Bribery Act 2010, a person (A) is associated with a relevant commercial organization (C) if A performs services for or on behalf of C (section 8, Bribery Act 2010).

According to the Ministry of Justice, which has issued guidance on the adequate procedures defence, where a supplier of goods can be properly said to be performing services for its customer, rather than simply acting as the seller of the goods to the customer, it may also be an associated person of the customer.

For most supply of goods arrangements, there is unlikely to be a risk of a section 7 Bribery Act 2010 offence arising. However, the risk may arise in certain circumstances where the supplier is providing any services in addition to the goods, or the supplier is an exclusive supplier of the goods. An example of bribery in this context would be if sums are paid by a supplier of goods in order to expedite customs procedures in the country of export. In such cases, a customer should consider whether it's appropriate to deploy prescriptive anti-bribery procedures and drafting, such as due diligence on the supplier, requiring the supplier to comply with the customer's anti-bribery policies, and the inclusion of anti-bribery clauses in the supply agreement.

- Check that the agreement for the purchase of goods is set out clearly and unambiguously.
- Check that the agreement itemizes the correct products, term, price and specification.

- Ensure that there are no pre-existing arrangements such as exclusive purchase arrangements or restrictive covenants that would prevent the buyer from proceeding with the agreement.
- If acting as the seller, ensure that the buyer marks all pre-contractual correspondence 'subject to contract'.
- If as the buyer you want to incorporate your own standard terms, ensure that the agreement expressly does so and reject the seller's standard terms.
- Check the definitions of the goods in the agreement very carefully and the address to which they need to be delivered.
- If there is a conflict between the main body of the agreement and the schedules, consider which terms are to prevail.
- As a buyer, consider whether the EU procurement rules apply.

For further guidance on the Bribery Act 2010, see Chapter 10.

Supply of services

The Sale of Goods Act 1979 applies only to contracts by which a seller transfers property in goods to a buyer. It doesn't apply to contracts for the supply of services or contracts for services and materials like those that are typical within the marketing services sector.

These B2C and B2B agreements for the supply of services and/or services and materials are subject to the Supply of Goods and Services Act 1982 (SGSA 1982), which has legal protections that are very similar in scope to those under the SOGA 1979.

Supply of Goods and Services Act 1982 (SGSA 1982)

The SGSA 1982 implies into a contract for services and materials substantially the same terms as the SOGA 1979 as to:

- title (section 2, SGSA 1982);
- description (section 3, SGSA 1982);
- quality and fitness for purpose (section 4, SGSA 1982); and
- transfer by sample (section 5, SGSA 1982).

The SGSA 1982 implies three terms into contracts for the supply of services whether or not goods are also transferred:

- Where the supplier is acting in the course of a business it will carry out the service with reasonable care and skill (section 13, SGSA 1982).
- Where the supplier is acting in the course of a business and the time for the service to be carried out is not fixed by the contract; left to be fixed in a manner agreed in the contract or determined by the course of dealing between the parties.

- There is an implied term that the supplier will carry out the service within a reasonable time (section 14, SGSA 1982). What constitutes a 'reasonable time' is a question of fact (section 14(2), SGSA 1982). Where the consideration for the service isn't determined by the contract; left to be determined in a manner agreed in the contract or determined by the course of dealing between the parties.

There is an implied term that the party contracting with the supplier will pay the supplier a reasonable charge (section 15, SGSA 1982). What constitutes a 'reasonable charge' is a question of fact (section 15(2), SGSA 1982).

With the exception of the term as to title contained in section 2 of SGSA 1982, which may not be excluded (section 7(3A), Unfair Contract Terms Act 1977 (UCTA)), these terms can be excluded or varied by the express agreement of the parties to the contract or by a course of dealing (section 16, SGSA 1982).

An express term won't exclude an implied term unless it's inconsistent with the implied term (section 16(2), SGSA 1982).

Nevertheless, UCTA 1977 will apply to any attempted restriction or exclusion of these implied terms, so that persons cannot exclude or restrict their liability for death or personal injury resulting from negligence (section 2(1), UCTA 1982) or exclude or restrict their liability for other loss caused by negligence, unless the clause purporting to restrict or exclude such loss passes the test of reasonableness (section 2(2), UCTA 1982).

In this context, there is no distinction between consumer and non-consumer contracts.

Liability for fraud and fraudulent misrepresentation can't be excluded. There is case law that suggests that an exclusion clause that fails to distinguish between fraudulent and non-fraudulent misrepresentation can never be reasonable, and is consequently wholly unenforceable (see 'Misrepresentation' below).

A clause that purports to exclude one party's liability for breach of all its contractual obligations may be held by a court not to create a contract at all, but to take effect merely as a declaration of intent by the seller and not be legally binding on the buyer.

In the event that an exclusion clause is relied on and is found to be unreasonable, it will be wholly unenforceable, with the result that the seller will be liable for all of the buyer's loss recoverable as a matter of contractual law.

It may be prudent for a seller to accept liability for some losses under a contract and therefore qualify the scope of an exclusion clause it wants to rely on, rather than a blanket exclusion clause, as this will have more chance of being seen to be reasonable by the courts and therefore valid. There are two different 'tests' that an exclusion clause will need to pass depending on whether the customer is a business or a consumer (Table 1.1).

As can be seen from Table 1.1, this presents a difficulty for a company or organization that sells to both traders (B2B) and consumers (B2C). One solution favoured by lawyers is for the seller to have two different sets of standard terms and even have these printed on different-coloured paper for B2B and B2C buyers.

The danger of taking this approach revolves around determining whether any particular customer falls within the definition of 'consumer', which, to complicate matters further, is defined differently under UCTA 1977 and the Unfair Terms Regulations.

Table 1.1 Satisfying the tests of reasonableness or fairness

Relevant statutory framework	Business to business (B2B)	Business to consumer (B2C)
UCTA 1977 'reasonableness test'	***UCTA 1977 'reasonableness test' does apply.*** Factors relevant to the issue of reasonableness are often specific to the circumstances surrounding each contract. A business can't exclude liability for death or personal injury caused by its negligence. In contrast, a seller could reasonably be expected to accept liability in negligence for damage to tangible property up to a specified limit, as insurance should be easily obtainable in respect of this type of loss. A total exclusion of liability for consequential, financial or indirect losses of the kind frequently used in standard terms is likely to be held unreasonable. In contrast, a clause that places an upper limit on such liability will have a good chance of being held reasonable depending on the amount of such limit.	***UCTA 1977 'reasonableness test' does apply.*** However, given that that the court has regard to the circumstances of the parties in determining reasonableness, it follows that what may be reasonable in B2B agreements may not be reasonable in B2C agreements, where the courts often apply a higher or stricter standard given the relative bargaining power of the parties in order to protect the consumer.

Table 1.1 *continued*

Relevant statutory framework	Business to business (B2B)	Business to consumer (B2C)
Unfair Terms Regulations 'fairness test'	*Unfair Terms Regulations 'fairness test' doesn't apply.*	*Unfair Terms Regulations 'fairness test' does apply.* Avoid provisions that allow the seller unilaterally to vary the contract (for example, a provision allowing the seller unilaterally to vary the price of the goods delivered). Such a provision is more likely to be considered fair if it's drafted so as to give the consumer the right to back out without penalty before any variation becomes effective. Remove any restrictions or exclusions that aren't absolutely necessary for the protection of the seller, as they may make the contract as a whole appear to be balanced unduly in favour of the seller, and therefore unfair, without securing a real commercial benefit for the seller. Use plain and intelligible language in the agreement. Where appropriate, give reasons for the inclusion of exclusion clauses in the form of a recital or preamble in the agreement. Ensure that any dispute resolution procedures make it clear that the consumer will ultimately have the right to take the issue to the courts.

If the company deals predominantly with traders but there is a possibility of occasional consumer sales, then a practical approach is to incorporate the usual B2B exclusions but to include a provision stating that, in the event

of a transaction with a consumer, the consumer's statutory rights aren't adversely affected.

Alternatively, where the majority of the customers of the company are consumers, it will clearly be necessary to include clauses that are designed to satisfy the 'fairness test' under the Unfair Terms Regulations and the UCTA 1977 reasonableness test as applied to consumers, notwithstanding that it would be possible to justify harsher exclusions in the case of the relatively small number of B2B customers.

Following the decision of the Court of Appeal in the Regus case (2007), an exclusion clause won't necessarily be dismissed if it doesn't exclude obvious and primary measures of loss for the breach. In the Regus case, there was a diminution in value of the services promised by the serviced office space provider.

It follows that exclusion clauses should, as far as possible, be drafted in the form of a series of clauses, sub-clauses and sub-paragraphs, as should one sub-clause be held unreasonable it can be severed from the other provisions of the exclusion clause and these could remain enforceable.

The use of a short preamble or recital at the beginning of a clause explaining the background or reasons for its insertion is likely to be helpful in convincing a court of its reasonableness. For example: 'The seller has obtained insurance cover in respect of its own legal liability for individual claims not exceeding £1,000,000 per claim. The seller's liability is therefore limited to £1,000,000 and the buyer is responsible for making its own arrangements for the insurance of any excess loss.' This assumes that the drafting objective is to produce a clause that satisfies the UCTA 1977 'reasonableness test'.

Unfair Terms in Consumer Contracts Regulations 1999

The Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (UTCCR 1999) apply to unfair terms in contracts concluded between a consumer and a seller of goods or a supplier of services.

For the purposes of the UTCCR 1999, the regulations provide that:

- a consumer means a natural person who is acting outside their trade, business or profession (regulation 1);
- a seller or supplier is a natural or legal person who acts in the course of their trade, business or profession (regulation 1); and
- an unfair term is one which hasn't been significantly negotiated and which, contrary to the requirements of good faith, causes a significant imbalance in the parties' rights and obligations under the contract, in favour of the seller or supplier (regulations 1 and 5).

Schedule 2 to UTCCR 1999 contains a list of terms that may be regarded as unfair. This list isn't exhaustive, and therefore all terms in a contract to which UTCCR 1999 applies should be reviewed with their potential unfairness in mind.

Marketing agency agreement

If you work in-house within sales and marketing, then it's likely that at some point you may need to hire an external marketing agency, such as an advertising, sponsorship, events, sales promotions, licensing, merchandising, hospitality, public relations or digital agency.

Irrespective of whether you're on the client or agency side, both parties need to reach a workable agreement that is proportionate to the value of the agreement for the marketing services to be delivered.

Contract for services

Before holding a 'pitch' to determine which agency you would like to work with, whether this is a new arrangement or whether you are looking to re-tender the marketing agency account, it's prudent to carry out a company or bankruptcy search on the agencies you are considering to ensure that they are financially sound.

The description of the supply of services or deliverables sits at the heart of the marketing agency agreement. The agreement needs to explicitly state exactly what the client wants; otherwise it won't be clear what the agency should be delivering, and this could store up problems for the relationship in the future. In a nutshell, the agency agreement needs to cover the services provided and the standard of those services and costs.

If the agreement doesn't cover this at the outset, there needs to be a clear process for defining the services or deliverables under the agency relationship.

It's unwise to rely on a clause that expects the agency to perform according to 'best practice', and it's preferable to spell this out in detail in order to describe the standard of services required.

If the marketing agency has developed the description or narrative of the service to be delivered, ensure that it's fit for purpose and meets your requirements as the client.

Ideally, the process of developing the service description should be collaborative, although this won't always be possible, for example following an EU tender.

Depending on the value of the consultancy services, it's worth considering inserting a provision by which the marketing agency agrees that it's carried out its due diligence in relation to the services it will deliver and consequently it employs a 'no surprises or hidden costs' approach regarding the fees payable for those services. You'll want to avoid a situation where the marketing agency claims that it didn't know that a particular circumstance existed and therefore wants to charge more for its services.

You should also consider continuous improvement in agency performance and how the marketing agency services can be benchmarked over the longer term. Many agencies now expect this to be the norm.

Another important factor is the location of the marketing agency and where it's expected to perform and deliver its services under the agreement and the timescales for the delivery of those services. It's useful to draft an implementation plan with the marketing agency in order to help manage expectations on both sides and maintain a workable relationship.

Although the implementation plan won't form part of the main body of the marketing agency agreement it should include a list of meaningful milestones, the components of each milestone, any particular relevant considerations and dates for completion.

The marketing agency should be under a duty to mitigate any delay in achieving a milestone, and the client should consider making time of the essence for delivery (see below).

As part of the marketing agency agreement, it's wise for the client to give itself enough flexibility to accommodate the changing demands of its employer, so the agreement needs to provide for a flexible change control procedure. As a client, it's prudent to take account of how pricing for these services will be accommodated, as well as any additional consultancy time requirements.

Other key considerations for a marketing agency agreement include:

- Consider the value of entering an exclusive agency agreement where the marketing agency can't work for one of your direct competitors balanced with a non-exclusive agency agreement.
- A mutual non-disclosure clause that protects the use of confidential information.
- Copyright in the material produced, such as photographs, art work and other creative outputs as well as other intellectual property rights (see Chapter 3).
- Attendance at weekly, monthly, half yearly and annual reviews of the performance of the agency according to the milestones and the implementation plan.
- Engagement of an independent third party consultancy to run a 360 degree review annually in the interests of getting the most out of the relationship.
- Typical warranties are expressly included, for example, all services should be performed using reasonable skill and care and in accordance with the agreement and specification, in accordance with all applicable laws and regulations and in compliance with reasonable instructions.
- Ensuring that any briefs (creative briefs should ideally be one page in length) are clear and unambiguous in order to save the time and cost of re-doing work, as well as producing better results faster and at a lower cost.
- Professional indemnity and public liability insurance cover.

- Purchase order needs to be approved prior to any work being commenced.
- Payment terms (this can vary between 30–60 days for fees and 30–60 days in arrears for expenses) and ensure that invoices are properly submitted in order to comply with invoicing and other financial control requirements as well as a penalty interest clause for late payments.
- Consider assignment and subcontracting issues.
- Consider force majeure and try to have the clause restricted to circumstances that are genuinely outside the marketing agency's control.
- Consider warranties and indemnities for goods and other third party.
- Consider duration of the marketing services agreement as well as grounds for termination of the agreement and what events would be fundamental breaches and what events wouldn't amount to fundamental breaches of contract but capable of being remedied.
- Consider jurisdictional issues, choice of law and dispute resolution. In the latter, it's typical in such marketing agency agreements to have a dispute resolution mechanism, such as escalation, and then mediation or arbitration where the costs are borne by both parties.

Digital agency agreement considerations

Creating digital media raises particular issues that aren't generally covered under a standard marketing agency agreement. It's therefore crucial for the client in these cases to use an agreement that contains terms that specifically cover such activities.

For example, two key issues for consideration in using a digital media agency to develop a corporate website are acceptance testing, and transfer and/or licensing of intellectual property (IP) rights in the website and the other digital media created by the agency contained on the website. With respect to acceptance testing, website development is similar to traditional software development in that the digital agency and the client will need to agree a technical and functional specification for a website, and then software (typically html format) is written to create a website that complies with the agreed specification.

To avoid disputes about whether the digital agency has actually delivered what the parties intended, the digital agency agreement should provide for a detailed procedure to test the website to ensure that it complies with the agreed specification. In addition, the agreement should set out the procedures for remedying any errors or defects discovered during the testing process.

With respect to IP rights, the digital agency agreement should set out in sufficient detail which elements of the website are to be licensed to the client

and which elements are to be assigned. A licence works rather like a lease, and an assignment is analogous to a sale.

Digital media assets and software in general can be separated into the following:

- materials created for the client by the digital agency or commissioned from third parties during the term of the digital agency agreement (bespoke materials); or
- materials created by the agency or commissioned from third parties prior to the date that the digital agency first supplied services to the client (pre-existing materials); or
- materials owned by third parties and licensed to the agency for onward supply to the client (third-party materials).

Typically, the rights in bespoke materials are assigned to the client. In contrast, the rights in pre-existing materials and third-party materials are licensed to the client by the digital agency or, in some cases of third-party materials, directly by the relevant third-party owner.

From the digital agency's perspective, there are three options with respect to digital assets used in the client's corporate website:

- to acquire the rights to digital media from third parties under a contractual arrangement;
- to license the rights from a relevant third-party owner; and/or
- to create such digital assets within the digital agency using its own employees.

Typically, the acquisition of rights and/or creating the digital media inside the agency would provide the digital agency with all of the rights that it would require to use relevant digital media without restrictions being imposed by third parties.

However, in some cases these options may not be available, in which case the digital agency will be forced to obtain appropriate licences from relevant third-party owners. The contractual terms of such licences to use digital media can be complex and the type of uses granted by the rights owner will typically be very specific, for example that the digital media can only be hosted on a website or alternatively can only be made available to end users as a streamed file, where no permanent copy is made on the user's device, rather than as a download.

The most common form of technological control of digital media rights is known as digital rights management (DRM). This consists of a variety of technological systems that enable rights holders to specify and control how digital media are used, so preventing unauthorized use. Over the last few years, the courts have taken a stronger line against IP infringement and have strengthened the remedies available to rights owners where a user attempts to circumvent DRM systems or makes an article available to

others that can be used to circumvent such systems. Such remedies now include criminal penalties (see 'Remedies available for breach of contract' below).

Distributorship agreement

The key point of difference between a distributorship and an agency–principal relationship is that there is no intermediary involved in the latter, so the agency acts on behalf of the principal and will have actual, usual and implied authority to bind the principal in law.

In a distributorship agreement, the company or organization sells its products to the distributor, who then sells the products on to its customers and will add a margin to cover its costs and make a profit. In purchasing and reselling the products, the distributor contracts both with the supplier and with the customer, and title in the products will pass to and from the distributor. In an agency relationship, the contract of sale for the products is made on behalf of the principal rather than for the benefit of the agent.

In the supplier–distributor relationship, the duties owed by the principal and agent to each other are replaced by mutual contractual rights and obligations within the distribution agreement, which is essentially a variation on a sale of goods contract. This has a disadvantage for the supplier in that it exerts less control over the distributor's activities than it would if it were an agency relationship, particularly with regard to the final pricing of the products to retailers or end users. However, in selling the products to a distributor, the seller also passes on a large degree of the risk in the products.

In reselling the products to its customers, the distributor assumes liability for the products and therefore incurs a far larger degree of risk than an agent in the course of its business. This is particularly the case if the distributor isn't fully indemnified by the supplier for any claims brought in respect of the products. The higher level of risk assumed by the distributor is typically reflected in the level of remuneration or margin as compared with the commission earned by an agent. The greater the level of risk that the supplier places on the distributor, the higher the distributor's margin will generally be.

An advantage of appointing a distributor rather than an agent is that the Council Directive (EEC) No. 86/653 on Commercial Agents (Directive) doesn't apply to distribution agreements. Within the UK, there's no requirement to pay compensation to a distributor on termination of the distribution agreement, although this may not always be the case within other countries.

However, EU and UK competition rules, which prohibit anti-competitive agreements and abuse of a dominant position, may potentially have an

impact on the appointment of a distributor, whereas they generally don't apply to a genuine agency relationship.

This legislation can have a significant impact on the terms on which a supplier may be able to appoint a distributor, and it's useful to consider this issue at an early stage. In particular, if there's not a 'genuine' agency relationship for the purpose of EU competition law, then a supplier will usually be committing a breach of EU or UK competition rules if it sets the prices or other terms on which the distributor must sell the contract products.

An agency will be genuine if the agent bears no significant financial or commercial risk in relation to its agency activities. In this respect, it is immaterial whether the agent acts for one or several principals, or whether the parties or national legislation categorizes the agreement as an agency relationship.

Typically, there are four flavours of distributorship agreements:

- exclusive distributorship;
- sole distributorship;
- non-exclusive distributorship; and
- selective distributorship.

Exclusive distributorship

An exclusive distributorship is an arrangement whereby a supplier agrees to sell the contract products only to the distributor within a certain defined territory, and agrees not to appoint other distributors or to sell the products directly to other customers within the territory.

Such an arrangement is frequently used to exploit a product within a new territory. The supplier appoints a distributor with local knowledge and usually an established business within the territory. The distributor in turn agrees to take on the high risk and costs associated with promoting a new product in return for the knowledge that, as exclusive distributor, it alone will benefit from the sales and marketing efforts.

The supplier has the advantage of knowing that the distributor will be motivated to sell these products, particularly if a restriction is placed on the distributor prohibiting it from selling competing products. The supplier can use the threat of withdrawing the exclusivity if target sales aren't met by the distributor within a specified period.

Sole distributorship

The term 'sole distributorship' is generally used to describe an agreement whereby a supplier appoints a distributor as its exclusive or sole distributor within a territory, but the supplier reserves the right to supply the products directly to end users. The meaning of the term should always be clarified within the agreement.

Such an arrangement combines the advantages of an exclusive distributorship for the distributor with the advantage for the supplier that it's free to promote the products itself within the territory and to continue to deal with any customers it may have had in the territory before the appointment of the distributor. Such an agreement would contain similar provisions and restrictions to those in an exclusive arrangement, but it would afford more control by the supplier over the territory should the distributor fail to meet the required minimum purchase targets or other key performance measures.

Non-exclusive distributorship

A non-exclusive appointment gives the supplier complete freedom both to sell directly and to appoint other distributors within the territory.

The terms of the appointment will be far less onerous on the distributor than those within an exclusive or sole appointment, as it will need to compete with the supplier and other distributors in terms of both sales and marketing of the product.

Selective distributorship

A supplier, in appointing a distributor as part of a selective distribution system, agrees to appoint additional distributors only if they meet certain criteria. This effectively limits the number of additional distributors who can be appointed within the territory.

Selective distributorship arrangements are perceived as particularly suitable where the nature of the product requires an enhanced level of service or advice at the point of sale to the customer and where the supplier or manufacturer will be required to provide after-sales support. Owing to their potentially exclusionary nature, such arrangements can cause competition law problems. However, examples of products for which a selective distribution system has been held to be justified include high-value cosmetics, pharmaceutical products and electrical goods.

Usually, as part of the arrangement, distributors must also agree to sell on the products only to end users or to other approved distributors. In this way, the supplier retains tight control over the manner in which its products are marketed, and it will generally have greater influence over the marketing of the product provided that EU and UK competition laws are not breached in the process.

Website contract

At some point the organization you work for will appoint a digital agency to help create and manage the corporate website. The global digital marketing

industry has developed at lightning speed, and now many marketing managers will seek external specialist help that is sometimes not available in-house.

However, there are a host of issues that are typically encountered when setting up and operating a website, and these issues need to be addressed in the website contract if external agency support is required.

A key issue is search engine optimization (SEO). For a more detailed discussion on best practice on e-marketing, refer to Guru in a Bottle® *High Impact Marketing that Gets Results*.

The objective of a website design and development agreement is to ensure that the company or organization gets the website that it requires by imposing an obligation on the digital agency to create the site according to the company's specifications. The agreement is therefore similar to a general software development agreement for an IT system. However, there are many unique features that need to be carefully considered.

A website is like a house in which every single window is also a door. Visitors may follow links from other websites or be directed by retweets from other users.

Huge amounts of money are spent every year on designing, building and maintaining e-commerce websites like Amazon. Websites for much smaller businesses are just as important for commercial and organizational success and need to be treated in exactly the same way as if they were for major businesses.

With that in mind, the contract should clearly set out the functional and performance specification. It should also set out the requirements in terms of any visible content that the digital agency is to provide. These should include any legal requirements to which the company is subject and which may need to be taken into account in the design of the site content or its performance, for example usability requirements, cookies and privacy issues.

Given that the amount of money that can be spent on such a project is potentially limitless, it's advisable that a budget is agreed upfront before work commences.

As with any IT programme, costs vary depending on the complexity and functionality of the proposed website. It's also useful to ask the digital agency about its SEO process and what will happen at various stages over the length of the project.

Terms and conditions in a typical website agreement

The following is a non-exhaustive list of terms and conditions typically found in most website contracts.

Timetable

The client in this relationship must ensure that the digital agency is contractually bound to meet key milestones, in particular the date for the launch

of the site. All too often a site remains partially complete, and it can be a bind to get the digital agency to finish off the job, so holding back the final payment until the job has been delivered satisfactorily ought to be considered.

Provision should also be sought for review of the quality and speed of progress, giving contractual remedies, such as liquidated damages – a predetermined amount to be paid in respect of failure or delay (see 'Liquidated and unliquidated damages' below).

Payment mechanisms

Typically, payment terms for the web contract can be on a fixed-fee or time-and-materials basis or a combination of both.

From the client's perspective, it's preferable to negotiate a fixed fee for the design work, which will be payable by instalments on successful completion of agreed milestones. As with any other software development contract, a fee calculated on a time-and-materials basis may quickly spiral out of control!

For the digital agency, payment on a time-and-materials basis is often preferable, as this eliminates the need to anticipate all the costs of a particular project in advance. In any event, the web digital agency should always request a substantial proportion of the fees to be payable on signature of the agreement in order to cover initial outlays.

Acceptance tests

It's prudent to test that the website works properly in terms of functionality as well as being able to cope with anticipated usage levels. In addition, it may be necessary to provide for acceptance tests that assess users' reactions to the pilot website in order to carry out any modifications that are necessary.

Whilst it's reasonable for the client to require the website to pass certain specified acceptance tests, the digital agency should give careful consideration to the extent and nature of the tests and should try to retain as much control over the acceptance testing procedure as possible.

Ownership of what is developed

From the client's perspective, it's useful to possess all rights in the design of the web pages and the underlying software of the site.

Under UK law, the digital agency rather than the client owns copyright and other IP rights unless there's an agreement to the contrary that transfers such rights to the client.

A design and development agreement will need to include the transfer of all IP rights in the site or at the very least provide for an exclusive licence of such rights for the client. By ensuring that it owns or has the right to exploit the copyright and related IP rights in all aspects of the web pages, the client can transfer the whole website to another digital agency to complete the

project where, for example, the current digital agency has failed to meet its obligations and the client has lost all confidence that the website will be delivered according to specification and on time.

In most cases, the digital agency will agree to transfer ownership of the IP rights developed specifically for the client or to license such rights where it isn't in a position to grant an outright transfer. However, the digital agency should ensure that it doesn't transfer to the client ownership of any IP rights in any underlying software not specifically developed for the client but needed to operate the website. In such a case, the digital agency may grant a licence on a non-exclusive basis permitting the client to use the relevant works in the operation of the website. The client should ensure that any such licence is as wide as possible; for example, the licence should be perpetual and not subject to any territorial restrictions, and there should be an obligation to put appropriate source code escrow arrangements in place.

IP rights infringement

It's common practice for the digital agency to provide the client with some protection against claims that any content or software produced by the digital agency in the course of the development of the website infringes the IP rights of third parties. These could arise either because the digital agency inadvertently uses material it's developed for and assigned to other clients or where it seeks to incorporate third-party works in the design such as photographs, video clips or music for which no permissions have been obtained. Although this is such a basic error that it's unlikely to arise, the client should nonetheless seek an indemnity from the digital agency to cover any liabilities that might arise in the future.

Conversely, the issue of IP rights infringement is also relevant to the digital agency where, as is often the case, the client provides content for inclusion in the website, and the digital agency ought to seek an appropriate indemnity. The reason is that the digital agency won't always assume responsibility for obtaining permissions to use third-party material on the website.

Termination

The client should ensure that all consequences of the termination of the digital agency agreement are adequately provided for and that any outstanding issues, such as whether the digital agency is permitted to place a credit on the site, are agreed.

Policing content

In the situation where the web digital agency is also hosting the website and particularly if the site has a message board or chat room, it will be necessary to apportion responsibility between the client and the digital agency for ensuring that content posted by visitors doesn't contain material that is illegal, defamatory or in conflict with the Committee on Advertising Practice

(CAP) Code, which now extends to content on websites. For further guidance on compliance with the CAP Code, see Chapter 4.

In order to avoid or limit liability, it will be important to ensure that there are obligations in the agreement for the removal of infringing material from the site as quickly as possible.

Maintenance and support

It's important to consider how the website will be maintained and updated after it's been launched. The digital agency may be engaged to do this, in which case it will be necessary to ensure that it's provided with fresh content. Alternatively, the client may want to take over this role itself or appoint a third party to do so, in which case it may be necessary to spell this out in the agreement. Conversely, where the digital agency agrees to provide ongoing and maintenance support it should ensure that the fees payable under the agreement reflect the cost of this additional work.

Website content licences

During the process of designing and developing a website, it will be necessary to consider what different types of content will be required for the website, such as text, photographs, audiovisual media and e-commerce content.

The client may own all the rights in the relevant content, but the more complex the design of the website, the more likely that third-party rights will be involved. In some situations, software applications may be owned by the digital agency, in which case the client will want a transfer or licensing of the necessary rights to it under the website design and development agreement. Where the rights of other third parties are involved, the client will need a licence to use the relevant content in order to avoid infringing those parties' IP rights.

Unlike website design or hosting agreements, which provide for the performance of certain services, an agreement for the provision of website content is a licence of IP rights and as such is quite different in nature.

The following key issues should be addressed in a website content licence:

- *Content to be licensed.* The nature and scope of the content to be licensed should be carefully considered, and if the description is particularly detailed it may be necessary to set it out in a schedule to the website agreement. The content may, for example, constitute the actual substance of the website, or it could be more incidental content. The agreement should also address whether there is any obligation on the licensor to provide content updates.
- *Where the content is to be placed.* The parties to the agreement may be concerned about the placement of the content, for example that it should be placed 'above the fold', that is, the part of a web page that can be viewed without the need for the user to scroll horizontally or

vertically through the page, in which case it will be necessary to incorporate appropriate obligations to deal with this. This issue could arise, in particular, where payment under the agreement is dependent on the website's advertising or transaction revenue, in which case the licensor may wish to impose an obligation on the website owner as to the position of the content.

- *Nature of the licence granted.* Both parties should consider carefully the nature of the licence to be granted, for example whether the client requires the licence to be exclusive so that the licensor can't itself use the same content or license it to third parties.
- *Delivery of the website.* Dates should be specified for original content and any updates. Provision should also be made for the way in which the content is to be delivered to the client, for example by delivery of physical materials or providing the client with online access to the relevant materials.
- *Payment mechanisms.* Payment may be made by way of a fixed licence fee payable, for example, at monthly intervals or by means of more complicated revenue share or royalty structures according to which the client agrees to pay the licensor a percentage of all its revenues generated from advertising on the site. Whatever the basis for calculation, the parties should ensure that it's in fact possible to measure and audit the intended multiplier, and the licensor should always request a substantial proportion of the fees to be payable on signature of the agreement to cover its initial outlay.
- *Liability for licensed content.* The client should ensure that the licensor undertakes responsibility for the accuracy and completeness of the licensed content, although the licensor may reasonably expect the client to be responsible for any derivative works created by it. In addition, the client should seek appropriate warranties and indemnities to protect itself against any losses that it might incur for content that is illegal (for example, because it infringes third-party IP rights). For its own protection, the licensor should resist warranting the legality of the content on a worldwide basis and should in any event ensure that, if any allegations or claims are made that any content it supplies is illegal or harmful, it has the right to require the website owner to remove such content from the site so as to minimize its liability.
- *Term.* This is particularly relevant where there is an obligation on the licensor to provide regular updates of the content, since it will want to ensure that it's not committed to providing these indefinitely where, for example, it no longer wishes to offer this as a service to the client.

Website hosting agreements

Once work on the design and development of the website has been completed, the website will need to be hosted on a server. The type of server

required will depend on the size and complexity of the website and the number of anticipated users. Owners of large, high-volume websites with a lot of video content that isn't hosted on YouTube, for example, may decide to carry out this hosting function themselves.

In the vast majority of cases, it's preferable to enter into a third-party managed service agreement to host the website. In those cases, typically the website is hosted on the third party's server. The host will provide the link for all traffic between the internet and the web server.

The capacity (size of the 'pipe') will depend on what network services the host itself has access to, the number of other websites that it hosts and the number of users that connect to the host.

The following key issues should be addressed in a website hosting agreement:

- *Scope of services.* In addition to the obligation to make the website available on the web from the designated server, the host might also have obligations to provide certain specified security features, maintenance and support of the website such as updating content or help-desk support, back-up and disaster recovery or statistics relating to usage of the site.
- *Server.* Where the website owner doesn't intend to use its own server, either it will have to rent space on an existing server provided by the host, or the host may be required to supply a suitably configured server. A website hosting agreement should contain a technical specification that will include the specification for the server on which the site is to be hosted.
- *Response times.* The host must provide sufficient bandwidth to ensure that, even during peak access times, the website will be accessible to all users. As with the server, the capacity of the host's connection to the internet should also be addressed in the technical specification that forms part of the hosting agreement.
- *Uptime requirements.* There may be times when the host's server crashes, making the website unavailable to visitors. Equally, even routine maintenance of the equipment will require the server to be unavailable at certain times. The website owner may therefore wish to impose availability (or uptime) requirements, often expressed as a percentage (say 99 per cent) during a specified period, such as a week, a month or a year. This needs careful drafting, and suitably qualified legal advice should be sought.
- *Timetable.* Depending on the complexity of the website and/or the hosting services, it may be necessary to draw up a detailed project timetable in order to ensure that the host is contractually bound to meet important milestones, which might include setting up the site, acceptance testing and commencement of the services. This could also be important where the host will itself be using a third-party supplier

in order to provide the hosting services. The host should ensure that any deadlines proposed by the website owner are reasonable.

- *Acceptance tests*. As discussed earlier, acceptance of the hosted site or equipment should also be considered by the website owner. For example, the hosting agreement should enable the website owner to be satisfied that the website performs on the designated servers in accordance with an agreed performance specification, and can deal with anticipated usage levels. In particular, the website owner may wish to provide for the conduct of pilot tests to assess the availability and impact of usage levels on the site before commercial launch. While it's reasonable for the website owner to require the hosting services to pass certain specified acceptance tests, the host should give careful consideration to the extent and nature of the tests, and should try to retain as much control over the acceptance testing procedure as possible.
- *Liability for website content*. The most contentious issue is likely to be that of the potential liability of the host for material on the hosted website. The host will be keen to ensure that its exposure is limited to the task of hosting, and it should generally seek an assurance that the website owner will not include material on the website that infringes anyone else's rights or is defamatory, together with an indemnity to cover any liabilities that may arise. Recent government concerns raised over the way in which riots were organized over social networking websites in August 2011 have led to greater calls for those hosting websites or social networks to be more tightly regulated. The website owner should carefully review such provisions, and it should also ensure that it's not hampered in its ability to manage its legal and moral obligations in removing material that could lead to legal sanctions.
- *Hosting fees*. Typically, these are calculated by reference to the space required to run the website on the host's server and are often charged on a monthly, quarterly and half-yearly basis. The host should request a substantial upfront payment for setting up the site, to be payable on signature of the agreement. The website owner may wish to link payments to the achievement of milestones as set out in the agreement and/or to link some of the ongoing payments to usage of the site. This is more contentious and will generally apply to very large e-commerce websites.
- *Termination*. If it becomes necessary for a website owner to terminate its contract with the host, the website owner will want to ensure that the contract contains provisions that will facilitate a smooth handover to another host. This is where the trouble can really start.
- *Data collected*. The host may collate statistics on the number of unique visitors to the site, as well as other visitor and web analytics. Where the website owner is obliged to pay royalties under a content licence, the hosting contract should impose an obligation on the host to provide

statistical reports to the website owner and should address the form, content frequency and timeliness of those reports. The agreement should also allow the website owner to audit the host's records. It's likely the website owner will be required by law to impose specific restrictions on the host as to the processing of personal data under the EU Privacy and Electronic Communications Regulations (see Chapter 7).

Effect of exclusion clauses found in website design, hosting and content licence agreements

As with other types of commercial agreements, the parties to agreements for the creation and management of websites will want to limit their respective liabilities to the other party. Typically, the digital agency, host or content licensor will seek to limit its liability to the client in various ways: exclude all liability for loss of profits and other types of financial loss, and for any consequential losses; and limit liability for other types of losses to an amount equivalent to the fees payable by the website owner in the relevant calendar year, subject to the Unfair Contract Terms Act 1977 (UCTA 1977).

Restrictions on exclusion of liability for breach of contract under section 3 of UCTA 1977 will only apply to a B2B agreement where the client is dealing on the 'written standard terms of business' of the supplier, so they won't apply where the contract is freely negotiated between the supplier and the customer (see earlier discussion on this point on page 17).

The issue for the client is whether to agree to these exclusions and limitations of the supplier's liability.

If the client is contracting on the supplier's standard terms, then one option is not to seek to negotiate clauses excluding or limiting liability, and to proceed on the basis that it can, if necessary, challenge the clause later on the ground that it is contrary to UCTA 1977 and therefore ineffective.

However, unless the client really has no realistic option other than to accept the supplier's terms, it will be somewhat unsatisfactory to proceed with the express intention of challenging a clause at a later date, and so it's preferable to presume the effectiveness of such a clause when undertaking a risk assessment in respect of the agreement in question.

Where, as is often the case, the website design, hosting or content licence agreement is negotiable, the client should seek to widen the scope of the supplier's potential liability as much as possible by, for example:

- deleting the supplier's exclusion of liability for financial and consequential losses or at least making it subject to the overall cap on liability, or specifying in the agreement the types of loss that the client is entitled to recover in the event of a breach, such as the additional costs of having the site designed or hosted, or the content provided, by another supplier, the cost of reconstituting lost data and the costs of lost management time; and

- increasing the overall cap on liability to a higher figure than that proposed by the supplier. The client should always consider making the exclusions and limitations reciprocal, so as to benefit the client as well, although in practice it is of course the supplier who is much more likely to need to rely on them!

Remedies available for breach of contract

The principal judicial remedy in English law is an award of damages. In contractual claims, damages may be claimed as of right whenever a contract has been breached, even where there is no actual loss. However, damages in such a case would be nominal.

Damages are payable in both contract and tort (action against the person) claims. The principal function of damages for both contract and tort is compensation, with damages being assessed according to the claimant's loss, although the method of assessment differs. The concepts of causation, remoteness, contributory negligence and mitigation apply in most cases to limit damages claims, although there are specific rules for contract and tort claims.

In this section, the discussion will be about contractual damages for breach of a legally enforceable agreement.

Types of damages

There are four key types of damages that are relevant in the situation where there's breach of contract:

- compensatory;
- nominal;
- derisory; and
- restitution.

Compensatory damages

These are awarded in respect of the actual losses suffered by the claimant, and the purpose is to compensate the claimant. Where the actual losses are small, then damages will be commensurate.

'Loss' means any harm to the person or property of the claimant and any amount by which the claimant's wealth is diminished as a consequence of the breach. This is the basis on which damages are most usually awarded for breach of contract.

Nominal damages

As its name suggests, nominal damages are small, token sums awarded for breach of contract where the claimant has suffered no loss.

In certain contractual circumstances, it may be possible to establish a breach of contract even though no loss has been caused, for example where a photographer fails to turn up to photograph an event for the client. Nominal damages are useful because they are the peg on which to hang a claim for legal costs.

The general principle in litigation is that costs are awarded in favour of the successful party. It should be remembered, however, that costs are always at the discretion of the court, and there's no guarantee that a successful party will be awarded costs at all.

Nominal damages are rare, and an action for a declaration is often viewed as a more appropriate remedy in circumstances where no loss has been incurred.

Derisory damages

These damages are awarded to indicate the court's disapproval of the reasons why, or the way in which, the claim was brought. The court may acknowledge a technical breach of contract, finding in favour of the claimant on issues of liability, but may not wish to award a sum of any significance.

Restitution damages

These damages aim to remove any gain made by the party in breach of contract. This is an exceptional remedy in the context of contractual claims.

In the Hendrix case (2003), restitution damages were ordered, but subsequent case law indicates that the courts will award these damages only in exceptional circumstances, preferring to award compensatory damages.

Liquidated and unliquidated damages

Where the parties agree by contract that a particular sum is payable on the default of one of the parties, provided that the sum doesn't constitute a penalty it will constitute liquidated damages. Liquidated damages also describe sums expressly payable as liquidated damages under statute.

In all other cases, whether pecuniary or non-pecuniary, where the court quantifies or assesses damages or loss, the damages are known as unliquidated damages.

In English law, the purpose of an award of damages for breach of contract is to compensate the injured party rather than to punish the wrongdoer. There are, however, different tests for measuring damages in contract and tort.

The principal measure of damage in contract is expectation loss but, in some circumstances, reliance loss or restitution damages may be awarded.

Damages in contract seek to put the injured party in the position it would have been in had the contract been performed satisfactorily. In other words, the innocent party may seek to recover profits expected to be received had the contract been performed. This is known as 'expectation loss'. Expectation-based damages will yield substantial recovery where the innocent party has made a good bargain. For example, where X agrees to sell goods to Y for £1,000 and fails to deliver those goods on the delivery date, if at the date of delivery the goods are in fact worth £1,500 Y's damages will be based on the value of the goods that could have achieved this.

Expectation loss is the usual measure for assessing damages for breach of contract. However, provided the innocent party has good reason not to pursue damages for expectation loss, it may be able to recover damages to put it in the position it would have been in if the contract had never been performed (reliance loss). This would compensate the innocent party for expenses incurred and losses suffered in reliance on the contract. The aim is to put the claimant in the same position it would have occupied had the contract never been made, that is, to prevent unjust impoverishment.

A claimant may prefer to claim reliance loss if it made a bad bargain and expectation-based damages wouldn't give rise to substantial recovery. But note that the courts won't permit the claimant to use the reliance measure to escape the consequences of a bad bargain.

An example of where reliance loss would be the appropriate measure is when the claimant may not be able to establish what profits it would have made if the contract had been performed or, indeed, if it would have made any profits at all.

For example, in the Anglia TV case (1971) the Norwich-based TV company entered into a contract with actor Oliver Reed to take part in a film. Reed broke the contract and the film couldn't be made. The claimant was unable to say what the profit would have been had the actor performed the contract. However, the claimant had incurred expenditure and this was recoverable.

Similarly, the cost of wasted management or staff time is recoverable as a head of damage if a claimant can establish that employees had been significantly diverted from their usual activities.

Expectation and reliance loss are mutually exclusive to prevent double recovery. The claimant must choose one or the other and can't claim both.

Damages for breach of contract should usually be recovered on the basis of either loss of profits or wasted expenditure and, where damages are awarded for loss of profits, the sum awarded will be net of any expenses that the claimant would have had to incur in order to earn the profits in question.

In that sense, the claimant may not recover for both lost profits and wasted expenditure. By and large, the reliance measure will be preferable where it's difficult to demonstrate what the claimant would have recovered using the expectation measure.

Legal costs incurred as a result of breach of contract can generally be recovered as damages.

Table 1.2 Remedies for misrepresentation

Possible cause of action	Legal remedy for the buyer
Breach of contract	Damages in contract
Fraudulent misrepresentation	Damages in tort
Negligent misrepresentation under the Misrepresentation Act 1967	Damages in tort
Innocent misrepresentation	Rescission of the contract
Negligent misstatement	Damages in tort

Misrepresentation

In the lead-up to a signed agreement, many representations may be made to the client over a period of time. In some cases those representations are simply 'advertising' the benefits of a particular product or service and won't be intended to form part of the contract with the buyer. On the other hand, there are representations such as statements made by the seller that have an intention to influence the behaviour of the buyer directly. Such representations will carry far more serious and far-reaching consequences for the party making them, particularly if they turn out to be false, untrue or misleading.

Representations in sales literature

Companies and organizations may incur liabilities for statements or representations made in sales and marketing brochures or catalogues that they hadn't intended should form part of the contract.

Liability may arise in several ways:

- Although the general rule is that statements not forming part of a written contract aren't to be regarded as part of that contract, it's only a rule of presumed intention. A court may, on the particular facts of a case, decide that the parties to a contract intended to incorporate statements from sales literature as terms of the contract.
- A statement made in sales literature may be held by a court to be binding on the seller as a term of a collateral contract.
- Such statements by the seller may lead to liability for misrepresentation under the Misrepresentation Act 1967 or at common law. The court in the Indigo case (2003) confirms two points frequently overlooked by sellers of goods and services – for a buyer to claim damages for misrepresentation, the misrepresentation doesn't have to be the only factor that induced the buyer to enter into the contract; and it doesn't

necessarily have to be reasonable for the buyer to rely on the misrepresentation, as long as the buyer can prove it did rely on it and the seller ought to have known the buyer was likely to.

The remedies on the part of the buyer to which this may give rise are as follows:

- In the case of a breach of contract or collateral contract, the buyer will be entitled to damages for breach of contract. Such damages are intended to put the buyer in the same position as it would have been in had the contract been performed, so that the buyer is, in effect, compensated for the loss of bargain; and the buyer may also be entitled to terminate the contract and in a sale of goods situation the buyer can reject the goods if there's a breach of a condition of the contract or if there is a breach of an intermediate term of the contract that has particularly serious or damaging consequences.
- In the case of a misrepresentation, the buyer's remedies depend on the nature of the misrepresentation. In fraudulent misrepresentation, the buyer is entitled to rescind the contract and claim damages; in negligent misrepresentation, the buyer can rescind the contract and claim damages, subject in the case of rescission to the discretion of the court; or, in innocent misrepresentation, the buyer can either rescind the contract subject to the discretion of the court or claim damages.

Damages for misrepresentation are intended to put the buyer in the same position as it would have been had the representation not been made: unlike contractual damages, the buyer isn't compensated for his or her loss of bargain. If the misrepresentation is negligent, the buyer may be entitled to damages in negligence on the basis of the House of Lords' ruling in the Hedley Byrne *v* Heller case (1964).

It's not possible to incorporate provisions in a contract that can be guaranteed to prevent a court from giving legal effect to statements or representations in sales literature.

However, a seller should include:

- An exclusion clause that refers expressly to liability for misrepresentation as well as for breach of contract. However, a term that excludes or restricts liability for misrepresentation will be subject to the test of reasonableness, and a term that purports to exclude or limit liability for fraudulent misrepresentation will be void.
- An 'entire agreement' clause, stating that the written contract contains all the terms of the agreement between the parties. This will deter a buyer from seeking to raise the argument that a particular representation has legal effect in the first instance. However, in light of the recent judgment of the Court of Appeal in the AXA Sun Life Services case (2011), such a statement won't exclude the seller's liability in misrepresentation. In order to get round this, sellers generally include

a statement in the entire agreement clause saying that neither party has relied on statements or representations made by the other, or a complete exclusion of non-contractual remedies for pre-contractual representations. It should be noted that such an exclusion clause is subject to the reasonableness test.

A buyer's standard purchase terms may make it an express term that the buyer is placing reliance on pre-contractual representations of the seller.

In contracts with consumers, public statements about a product made by the seller, the manufacturer or the manufacturer's representative – particularly in advertising or labelling – will be used in determining whether the product is of satisfactory quality.

Oral representations

A company or organization may incur liabilities in circumstances where sales and marketing employees have made inaccurate or unsustainable statements about products. The courts may, as in the case of statements made in sales literature, find that such statements are contractually binding on the company, either as an additional term of the parties' contract or as a collateral contract. Alternatively, the company may be liable in misrepresentation for such statements.

A seller may attempt to exclude or restrict liability in these circumstances by including the following clauses in its standard terms:

- a clause that restricts the authority of sales staff to make statements binding on the seller and which has the same effect as an exclusion clause; or
- an exclusion clause that refers expressly to liability for misrepresentation; or
- an entire agreement clause.

The distinction between representations and terms is important because each gives rise to different remedies for breach. The intention of the parties determines whether a statement is a term or a representation. Factors that will be considered in examining their intention are the timing and importance of the statement and the relative knowledge of the parties. For a detailed discussion on misrepresentation, see Chapter 2.

References

Cases and judgments

Anglia Television *v* Reed [1971] 3 All ER 690
AXA Sun Life Services plc *v* Campbell Martin Ltd and others [2011] EWCA Civ 133

Barbudev *v* Eurocom Cable Management Bulgaria [2011] EWHC 1560 (Comm)
BSkyB Limited and another *v* HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited) and another [2010] EWHC 86 (TCC)
Clegg *v* Olle Andersson (T/A Nordic Marine) [2003] EWCA Civ 320
Experience Hendrix *v* PPX Enterprises Inc [2003] EWCA Civ 323
Hedley Byrne & Co *v* Heller & Partners [1964] AC 465
Indigo International Holdings Ltd and another *v* The Owners and/or Demise Charterers of the vessel 'Brave Challenger'; Ronastone Ltd and another *v* Indigo International Holdings Ltd and another [2003] EWHC 3154
McMeekin and another *v* Long and another [2003] 29 EG 120
Petromec Inc *v* Petroleo Brasileiro SA Petrobas [2005] EWCA Civ 891
Raiffeisen Zentralbank Osterreich AG *v* Royal Bank of Scotland plc [2010] EWHC 1392 (Comm)
Regus (UK) Ltd *v* Epcot Solutions Ltd [2007] EWHC 938 (Comm)
Thomas Witter Ltd *v* TBP Industries Ltd [1996] 2 AII ER 573

Websites

A survey of IT providers and clients by Vanson Bourne [accessed 26 August 2011] http://www.vansonbourne.com
Cloud Industry Forum website [accessed 26 August 2011] http://www.cloudindustryforum.org

Books

Kolah, A (2013) *High Impact Marketing that Gets Results*, Kogan Page, London
Kolah, A (2013) *The Art of Influencing and Selling*, Kogan Page, London

9

Prize promotions and incentives

In this chapter

- Prize draws and lotteries
- Competitions
- Consumer Protection from Unfair Trading Regulations 2008

Introduction

One of the most engaging and powerful aspects of business-to-consumer (B2C) and business-to-business (B2B) customer marketing and communications is prize promotions and incentives. They are also some of the most difficult things to get right, requiring an understanding of a web of complex competition, data protection and media laws and regulations. However, because they are complex tactics shouldn't mean you can't employ them in order to achieve powerful results.

Part of the reason why prize promotions and incentives have gained in popularity over the past decade is that marketers have been adjusting to a new era of deep customer engagement. Marketers have tacked on new functions, such as social media management, altered processes to better integrate advertising campaigns online, on television and in print and added staff with

web expertise to manage the explosion of digital customer data. Yet this still isn't sufficient to keep pace with changing consumer behaviour.

As discussed in Guru in a Bottle® *High Impact Marketing that Gets Results*, to truly engage customers for whom 'push' advertising is increasingly irrelevant, brand owners and organizations must do much more outside of the confines of traditional marketing. At the end of the day, customers and clients no longer separate marketing from the product – it is the product! They don't separate marketing from their in-store or online experience – it is the experience! And in the era of engagement, marketing is the company or enterprise.

According to Jeremy Stern, Managing Director of PromoVeritas, one of the UK's leading promotions specialists, many marketing agencies are also lagging behind changes in consumer behaviour that has helped to make prize promotions and incentives so popular not just in the UK but all over the world. Jeremy Stern advises:

> *As a communications company, you get involved with consumer and trade interactions – often they involve a reward. These are 'promotions' and need to be run correctly and compliantly. B2B, social media, online or offline, text or post, it makes no difference. Getting it right requires an understanding of statutory and regulatory frameworks, self-regulation policies, and best practice as defined by certain trade bodies as well as embedding a company's ethics and policies in the running of such promotions.*

As discussed in Chapter 8, there are several key characteristics that distinguish prize promotions and incentives from sales or price promotions.

'A far bigger benefit can be given in a prize promotion than in a promotion where the benefit is available to everyone who participates,' observes Roddy Mullin, a marketing expert in this area.

> *There's a difficult balance to be struck in writing about prize promotions. On one hand, they are staggeringly successful. The chance to win a car, a holiday, or a substantial sum of money at little or no cost is permanently attractive to consumers.* Reader's Digest *has built its business on this basis, giving away nearly £3 million a year. On the other hand, they are a legal minefield. Too much stress on legal niceties can lead promoters to regard it as a no-go area. Too much stress on promotional effectiveness can lead promoters to forget the need for caution. Provided there's no change to the purchase price then a prize promotion is likely to be OK.*

The most common types of prize promotions are:

- prize draws;
- competitions;
- free draws;

- instant wins; and
- games.

As discussed in this chapter, each of these types of prize promotion is distinct in legal terms, is subject to different legal and code of practice restrictions, and offers different mechanisms for winning the prize (Table 9.1).

Table 9.1 Similarities and differences between typical promotional marketing tactics

Type of promotion	Characteristic
Competitions	Offer prizes for the successful exercise of a significant degree of mental or physical skill or judgment. Participants may be required to pay or make a purchase to enter.
Free draws	Make available prizes by distribution of random chances. No skill or judgment is always involved, and participants can be asked to pay or make a purchase to enter, provided the product hasn't been increased in price as a result.
Instant wins	Offer prizes by distributing a predetermined number of winning tickets. Consumers know instantly whether they have won or lost. No skill or judgment is involved, and consumers can't be asked to pay or make a purchase to enter.
Games	Forms of free draw or instant win that give the appearance of requiring skill but in fact rely on probability. They can be based on brand-name games such as Monopoly® or Trivial Pursuit® or generic games such as snakes and ladders. Because no significant degree of skill or judgment is called for, no purchase or payment can be required in order to enter.

As can be seen from Table 9.1, the distinctions aren't immediately obvious and, as new formats are created, the boundary lines between each of these marketing tactics are likely to become blurred even further.

The popularity of Facebook for running promotions is dealt with separately (see 'Facebook's promotions guidelines' later in this chapter).

As a rule of thumb, lotteries are a no-go area for commercial promoters. The only exceptions are small-scale lotteries held at a single event, such as a fundraising dinner, with non-cash prizes below £50 in total value and where the proceeds are entirely donated to charity.

Prize draws and lotteries

The National Lottery

The Committee of Advertising Practice (CAP) Sales Promotion Codes apply to advertisements for the National Lottery. In particular, they mustn't be likely to appeal to anyone less than 18 years of age by reflecting or being associated with youth culture.

The law on lotteries changed in September 2007 in the UK when the sections of the Gambling Act 2005 that regulate lotteries and prize competitions came into force. A separate regime applies in Northern Ireland, and qualified legal advice needs to be sought for running promotions in this part of the UK.

Other lotteries

Under the Gambling Act 2005, most types of lotteries are illegal in the UK except for the National Lottery and small, private, society and local authority lotteries.

Legal lotteries will generally require a licence, although there are exceptions, for example for small raffles. More guidance about these types of lotteries can be found on the Gambling Commission's website. The Gambling Commission is responsible for regulating gambling and betting under the Gambling Act 2005, which includes lotteries.

Definition of a lottery

The Gambling Act 2005 states that the three elements of a lottery are:

- the requirement to pay to participate;
- the allocation of prizes; and
- the determination of winners by chance.

Under the Gambling Act 2005 there are two types of lottery: simple lotteries, where prizes are allocated wholly by chance; and complex lotteries, where prizes are allocated by a series of processes, the first of which relies wholly on chance.

A random prize draw isn't a lottery if participants don't have to pay to enter. Such a prize draw is exempt from statutory control.

What is payment?

For the purposes of lotteries regulated under the Gambling Act 2005, payment includes:

- the payment of money, which would include a requirement to pay to collect the prize, although it would be acceptable to charge normal rates for delivery or, for example, to charge for road tax and insurance for a prize car;
- transferring money's worth; and
- paying for goods and services at a price or rate that reflects the opportunity to take part in an arrangement under which the participant might win a prize.

In light of the above, it's apparent that it's lawful to run a promotion whereby a consumer has to buy a product provided the price of the product isn't higher than it otherwise would have been. It's not permissible for a marketer to inflate the price of the item to cover the cost of the promotion.

It doesn't matter to whom the payment is made or who benefits from the payment. For example, paying for an entry fee that is then sent to the marketer may still be covered by the legislation.

However, Schedule 2 of the Gambling Act 2005 states that normal-rate telephone calls and postage (normal first- and second-class rates without special arrangements for delivery) don't constitute payment. On the other hand, a premium-rate phone call could constitute a payment.

The provision of personal data, for example as a result of filling out an online survey, isn't likely to be considered payment, although it would depend on whether the request for data was proportionate and whether the information was being obtained in circumstances where the marketer intended to transfer it or sell it to third parties, in which case a monetary value could be placed on this and it would then be considered 'payment'.

Free entry routes

Free entry routes won't be needed as frequently as in the past since the enactment of the Gambling Act 2005. However, it's still relevant in Northern Ireland and if premium-rate telephone lines are used as a means of entry to the promotion. In this latter situation, a free method of entry also needs to be provided and properly publicized, including entry via normal post and telephone calls. A free entry route must be no less convenient than a paid entry route.

In relation to online entry, the Gambling Commission takes the view that many people don't have access to the internet at home and so entering online is not free in all contexts. It appears that online promotions are acceptable, but a problem might exist where the main route to entry is via premium-rate calls or text messages, with the alternative being entering online.

If people have to visit their local library to access the web, they are more likely to call the premium-rate number. Therefore the Commission wouldn't consider the online entry a genuine no-purchase route, especially where the need for an immediate response was emphasized to entrants or

the promotion was run only for a short period, such as in the evening when libraries are closed.

The Gambling Commission considers that participants who wish to use internet entry need at least three working days to do so, and the fact that participants may enter online must be made clear. If a marketer is in doubt about whether online entry meets the requirements, it should offer telephone or postal entry at normal rates.

Organizers also need to bear in mind that a promotional free draw will involve payment and be an illegal lottery if a charge is made to find out whether a prize has been won or to take delivery of that prize.

It's not clear what the Gambling Commission's view would be on, for example, prize holidays where travel to a UK airport isn't included and the winner has to pay that cost. Common sense would say that, as long as this is made clear to entrants before they go to the trouble of entering, it would be acceptable, as they may then choose not to enter.

A purchase-linked prize draw is permissible provided the price to be paid doesn't reflect the opportunity to win a prize; it doesn't matter how low the charge is, as the test is whether it involves any amount that can be regarded as a 'participation fee'.

This is a tricky legal area for promotions off the back of a new product launch, as there's no previous price to base the assessment on. Problems can also occur where there's a mixture of free entry and purchase linked to a prize draw. In cases of a new product, marketers should keep the price of the new product the same after the promotion, as otherwise it will be deemed that there's a payment to enter the prize draw.

Why use a free draw rather than a competition?

There are several reasons for issuing prizes at random to people who may never be customers:

- Free draws can be highly effective in generating interest, awareness and participation. In particular, free draws are a strong traffic builder for retailers and a proven readership builder for newspapers. The absence of tie-breakers means that free draws attract up to 20 times as many participants as do competitions.
- They are easy for the marketer to administer, are easy for consumers to enter, involve a fixed prize fund and are a quick and easy way of building a customer and prospect database.
- They can involve an implicit encouragement to purchase. This needs to be treated carefully. Newspapers invariably state (as they are required to) that consumers can check their tickets without buying the newspaper; petrol stations invariably state (as they are required to) that tickets are issued to all those who visit the petrol station, not just those who buy petrol. This is the 'plain paper entry' route. In practice, between 80 and 90 per cent of those who enter also make a purchase.

- They allow substantial opportunities for creative marketing!
  Compared with competitions, which are the main alternative for those marketers seeking a mechanic with fixed costs, free draws require fewer rules and don't require questions but do allow free rein for games of every kind.

How prize draws work

For B2C prize draws, all you need to do is have a pile of cards on which entrants can write their personal details, a box for them to make their entries and a declared date on which the winner will be drawn from the box.

For B2B prize draws, it's even simpler – just provide a box into which entrants can drop their business cards. When you make the draw, it's important that it is done by an independent person and that it's done with witnesses so it's seen to be independent.

These type of 'out of the hat' prize draws are regularly used by retailers, motor dealers, and companies exhibiting at trade shows as a traffic builder and as a way of capturing data. Provided that the guidelines in the CAP Code are followed (see Chapter 4), these prize draws should be easy to execute as part of the marketing campaign. The other advantage is that they are one of the fastest and simplest forms of promotion to organize.

An alternative free prize draw is to issue consumers with a card printed with a unique set of random numbers. These numbers are openly displayed, not uncovered by opening a flap or scratching off a layer. The winning numbers are announced separately – on a board in a shop or in the pages of a newspaper. Consumers have to check the winning numbers against the number of their card and, if there's a match, they need to contact the promoter to claim the prize. 'Most newspaper cards operate in this way, with winning numbers displayed daily in the newspaper. There is a clear advantage of a double hit – first obtain the card and then check the winning numbers, although to be legal there mustn't be a cost to consumers for checking the winning numbers,' says Roddy Mullin.

Predetermined number cards are a variant on the random number system. Each card is uniquely numbered but, instead of the winning numbers being announced for consumers to check, cards must be returned to the promoter to be matched against predetermined winning numbers. This prize draw format is used by *Reader's Digest* and other direct mail operators, very often because it encourages consumers to respond to direct mail.

For further discussion on direct marketing, refer to Guru in a Bottle® *High Impact Marketing that Gets Results*.

A further alternative method is to distribute a series of different cards that have to be matched together to create a set. Only a limited number of the cards needed to complete the set are distributed. Once the set is complete, the win is instant. Petrol stations have often used this format to good effect with matching halves of banknotes, for example. The left-hand halves were plentiful but the right-hand halves were very rare.

These are some of the straightforward free draws, but such mechanics are also becoming increasingly sophisticated, for example an instant-win card that's also (when mailed in) a predetermined number card and provides an opportunity to match and complete a set. Numbers can be replaced by symbols or words and a whole range of other variants.

Roddy Mullin warns that marketers need to be circumspect in order to avoid fraud and ensure an equitable distribution of winning tickets:

> *You need to use a security printer to make sure that you don't have multiple winning tickets in circulation. A means of verifying the winning ticket via hidden but unique marks is also advisable. You need to carefully seed the winning tickets so that they don't all turn up in the same outlet at the same time. Also, you need to ensure that there's no one involved with the distribution of winning tickets who can take advantage of their knowledge. A good way of doing this is to ask an independent person to do the seeding. That way, you're protected if you are publicly accused of fixing the scheme.*

Competitions

If a promotion is to qualify as a prize competition, the winner must be determined by judgment, skill or knowledge.

There are many forms of competition. The main ones are:

- Order of merit: 'List the following five items in order of importance.'
- Complete a slogan: 'Complete this sentence in no more than 10 words.'
- Question plus slogan: 'Answer these five questions and complete this sentence in no more than 10 words.'
- Spot the difference: 'Identify 12 differences between photographs A and B.'
- Estimate: 'Estimate how many packs of this product will fit inside this car.'
- Spot the ball: 'Mark with an "X" where the ball is on this photograph.'
- Identify: 'Identify these famous people from the photographs of their eyes.'
- Be creative: 'Draw a picture, take a photograph or write a short story.'
- Treasure hunt: 'Use the clues to find the hidden treasure.'

By far the most common type of competition is the question-plus-slogan variety. It's the easiest to fit into the limited space available to communicate most competitions and the easiest to explain and judge. The benefit over a slogan-only competition is that the questions filter the number of slogans that have to be judged.

Skill-based competitions

Genuine prize competitions are permitted, even if they charge a premium for entry. A process won't be treated as relying wholly on chance – that is, it won't be considered to be a lottery – if it contains a requirement to exercise skill and judgment or knowledge that is reasonably likely to: prevent a significant proportion of people who take part from receiving a prize; or prevent a significant proportion of people who wish to take part from doing so. If either of these barriers to entry or success can be shown, the process won't be deemed to rely wholly on chance and the arrangement won't be a lottery.

A skills-based competition could be a crossword or a number puzzle, for example. You need to make sure that the skills-based competition isn't too easy and is sufficiently difficult. This is a grey area! The meaning of the words 'significant proportion' in the Gambling Act 2005 is important in order to distinguish between a competition and a lottery.

The Gambling Commission has issued limited non-binding guidance that what's 'significant' will depend on the context and the facts of the promotion, and it will take the term's ordinary, natural meaning. It's still unclear how you prove this – but the onus is on the marketer, and you should keep material and research documentation demonstrating you've taken steps to estimate the likely proportion of potential or actual participants who are or will be eliminated by the skill element. Where marketers seek to rely on the argument that significant proportions of potential entrants have been deterred, the Gambling Commission considers that it won't be sufficient to compare numbers of entrants with, for example, the audience figures for the television programmes or the readership figures for the newspaper carrying the competition.

The Gambling Commission will require evidence of the propensity of that audience to enter such competitions – so it's a higher burden of proof that's required. This issue is most likely to arise where entry is via premium-rate phone numbers.

The Gambling Commission takes the view that it will be obvious in most cases whether or not the competition requires a sufficient level of skill. It provides the example of a crossword puzzle, where entrants have to solve a large number of clues and where only fully completed entries are submitted. This will qualify as a prize competition even if those who successfully complete the puzzle are subsequently entered into a draw to pick the winner.

At the other extreme, there are many competitions that ask just one simple question, to which the answer will be widely and commonly known or which may be easy to find in the accompanying material. The Gambling Commission takes the view that such competitions would be illegal because they would constitute a lottery.

The Gambling Commission won't generally take action where a competition uses a multiple-answer format provided that:

- there are sufficient plausible alternative answers;
- the question is relevant to the context in which the competition is offered;
- the correct answer is not obviously given close to the question; and
- 'joke' answers are avoided.

It's important to ensure that competitions are run properly with independent judges and clear judging criteria. The Advertising Standards Authority (ASA) has upheld complaints where it has considered that competitions haven't been run fairly.

Bradford & Bingley plc (2008)

An internet advertisement by Bradford & Bingley building society was headlined 'Tell me about the "Property Woman of the Year" Awards.' The advertisement stated: 'Judging will be based on your financial nous, feedback from your tenants, how long it took to build your business, how you run it, and your personal drive and determination to succeed. We don't want much do we?'

The complainant, who was shortlisted for her region in that tier of the competition but didn't win, challenged whether the competition had been properly administered. She argued to the ASA that she hadn't been asked to provide any evidence that might objectively be compared with that of other competitors and believed the regional winners may have been chosen without verification.

The building society said it took its responsibilities under the CAP Code very seriously and had appointed a PR firm to advise on the best way to structure and promote its competition. It said the competition was advertised on its website, via a news release, and independently via the National Landlords Association's e-mail alert, and was open to any woman with a buy-to-let property, regardless of whether or not she held mortgages with the society.

The building society also said it had appointed a panel of three expert judges, including for the regional heats, and ensured some of them were independent of the firm. It also pointed to a full set of legal terms and conditions accessible from the website, and these set out the criteria on which competition entrants would be judged: financial acumen, how long it had taken to build up their business, how they ran their business including property conditions, and their personal drive and enthusiasm.

In total, 50 entries received were first checked in-house to ensure entrants had filled out the forms correctly and provided sufficient information. The next stage was that the entries from all those shortlisted in the regional heats were submitted to the judges, who were asked to score them based on criteria that distilled those set out in the competition rules into four easy-to-score categories: 'overcoming personal obstacles', 'clear business strategy explained',

'taking some form of risk in their venture' and 'overall success (evidence of making a reasonable profit on a property portfolio)'. The competition judges awarded scores of between one and five for each category, with five being the highest.

At stage two of the competition, once the regional shortlisted candidates had been scored and winners chosen for each region, the firm's PR company contacted the tenants of the regional winners to check their credibility and to obtain views on matters such as property upkeep.

A team from the building society also checked semi-finalists on their Mortgage Express database (MX) to establish if the accounts they held were properly conducted. If any of the regional winners didn't have properties with the society, then a Land Registry search was made. This information was then cross-checked by the PR company. Further information was then cross-referenced with the scores the judges had previously given to the eight semi-finalists, in order to arrive at the overall winner.

In evidence to the ASA, the building society said it accepted that whilst verification checks were carried out on semi-finalists (winners of the regional heats) they weren't carried out on all applicants, but said it believed this was a reasonable and proportionate way to have administered the competition.

They sent judges packs for the two independent judges, but not for the third in-house judge, detailing the scores given by them to those entrants shortlisted in the regional heats of the competition, which led to the choice of regional winners. One of the judges had destroyed her notes after the final, as she hadn't foreseen the need to keep them. However, the PR company's records of all three of the judges' scorings on the semi-finalists for the regional heats were submitted to the ASA adjudication panel.

The ASA found in favour of the complainant, as the building society hadn't administered the promotion according to the criteria stated in the advertisement and thereby hadn't dealt fairly with entrants throughout all stages of the competition.

A key finding against the building society was that the regional shortlists put before the judges were drawn from all entries in-house and that the process and criteria for regional shortlisting were unclear. It also found that the four scoring categories given to the judges didn't map clearly on to the criteria set out in the advertisement. For example, the advertisement didn't mention 'overcoming personal obstacles' or 'taking some form of risk in their venture' as judging criteria. In addition, 'feedback from your tenants' was a criterion that had been applied only to the regional winners to determine the overall winner from amongst them, and the ASA considered that the advertisement gave the misleading impression this criterion would be applied across the board and so the advertisement breached the CAP Code as it applied to promotions. The building society was warned to ensure the advertised judging procedures and criteria for its competitions matched those applied in practice in any future competitions.

How competitions work

Competitions tend to have a low level of entry. For example, over 0.5 per cent of opportunities to participate would be considered a good turnout! Competitions can be effective in creating awareness, interest and impact at the point of sale well beyond the actual number of entrants. These are legitimate sales promotion objectives, and they don't have a bearing on sales. On the other hand, a competition can be a useful way of drawing attention to a product's benefits and features, which can result in incremental sales, for example cooking utensils.

Research shows that the level of response to competitions is strongly influenced by the prizes on offer. Best practice is to fix the budget available from the beginning of the competition. There are also different schools of thought with respect to the nature of the prize on offer – a large one or several smaller ones. If the structure is too complicated, this will have the effect of dissipating the impact of the competition and increasing costs – something that marketers should avoid.

The size of the prize is also a factor to be carefully considered when designing a competition. The general rule of thumb is that holidays and cars are always top of the list of goodies because everyone likes them. It's sensible to add in the rules of the competition that there's no cash alternative for the prize (you're likely to have got this prize at a discount of its face value) and, if this is not stated, it can become problematical if demands made for a cash alternative are rejected, as the promoter in those cases can look unreasonable and attract negative publicity.

It's worth bearing in mind that a large number of entries is a reasonable test of attractiveness of a competition but not of its promotional effectiveness. The number of entries can be quite unrelated to the promotional objectives. Attracting entries depends on presenting the competition in the most compelling way to the desired audience and customer segments.

Prediction competitions

These are generally permitted if:

- no payment or purchase is required; or
- purchase is required but the product is sold at the 'normal' price; or
- payment or purchase is required but a compliant alternative entry route is available.

If the competition doesn't comply with any of the above, then it's likely to be deemed as 'betting' as defined by the Gambling Act 2005. The provisions under the Act are designed to ensure that prediction competitions, such as fantasy football games, are regulated as betting products. As a result these may only be offered under a relevant betting licence.

Alternative entry routes

In order to keep on the right side of the Gambling Act 2005, marketers must ensure that:

- each eligible individual has the option to participate by 'sending a communication' rather than paying;
- the communication is ordinary post or 'another method of communication which is neither more expensive nor less convenient than entering... by paying';
- the choice of alternative entry is publicized so as to be 'likely to come to the attention of each individual who proposes to participate'; and
- the prize allocation system 'does not differentiate between those who participate by paying and those who participate by sending a communication'.

Does the provision of data constitute payment?

An issue that the Gambling Commission had to take a view on was whether the provision of personal data constitutes 'money's worth'. According to news reports, there's a growing phenomenon of consumers selling their personal data to companies in order to make money from marketers! The Gambling Commission's view is that the provision of personal data won't constitute 'payment' provided the questions asked of entrants are proportionate. Where the situation would fall foul of the Gambling Act 2005 is where a large amount of data is required before entry to the competition draw takes place and particularly where data are obtained by the promoter in circumstances where it intends to sell them to third parties.

Prizes

Prize winners should receive their prizes within 30 days of the draw date or be told when they'll receive their prizes if later than 30 days after the closing date.

For instant-win promotions, participants should receive their winnings at once or should know immediately what they have won and how to claim without delay, unreasonable costs or administrative barriers. Instant-win tickets, tokens or numbers should be awarded on a fair and random basis, and verification should take the form of an independently audited statement that all prizes have been distributed, or made available for distribution, in that manner.

Marketers should consult the CAP Code for more advice about administering prize promotions and consider the following additional points when administering a prize promotion:

- Prizes should be awarded in accordance with the laws of chance and, unless winners are selected by a computer process that produces verifiably random results, by an independent person or under the supervision of an independent person.
- Each entry should carry an equal chance of winning the prize, ie the draw must be made from all the entries. It's not lawful to select an entry from a particular category of entrant and make the draw from there.
- Winners should be informed individually, rather than relying on their claiming the prize following publication of a list of winners.
- Participants must be able to retain conditions or easily access them throughout the promotion. With online competitions and draws, the winners should be able to retain and print off the prize draw rules for their records. It's good practice to ensure the rules have a print-friendly format.

Holidays as prizes

If a marketer wishes to award holidays as prizes, it's good practice to:

- Describe the prize as fully as possible to avoid disappointment. This could include details such as the quality of hotel, type of room, facilities, full board or half-board, and the number of nights in the resort.
- Fully explain any costs that the winner must bear, such as transport to and from airports or insurance.
- Explain any other factors that may influence a person's decision to enter the competition, for example that the hotel is unsuitable for people with disabilities, the holiday can be taken only within a limited time period or there are excluded dates such as school holidays or bank holidays.
- Make it clear that the responsibility for the holiday will lie with carriers or hotels. However, this won't reduce the marketer's duty to check partners such as travel agents or tour operators to ensure that they are reliable and won't let the winner down.

The Blue Elephant Restaurant (2009)

An online competition, to win a holiday to Thailand, stated: 'BLUE ELEPHANT Cocktail Competition 2009. Create your own unique cocktail with 'Mekhong' the original Thai spirit to win a Royal Orchid Holiday package to Thailand… PRIZE: THE WINNER – One Royal Orchid Holiday package to Thailand in a luxury 5 star hotel. Complimentary one course cooking class at Blue Elephant Cooking School. Complimentary dinner for two at the Blue Elephant in Bangkok… RULES: All the recipes that comply with the conditions of the

competition are to be registered into the contest… The finals will be held at Blue Elephant restaurant.'

The winner of the first prize complained to the ASA claiming that the competition was misleading, because it didn't make clear the significant terms and conditions attached to the prize. The argument with the restaurant owners was around the holiday package plus a cooking class and dinner at the Blue Elephant restaurant in Bangkok for two.

The competition details stated the complimentary dinner was 'for two', and there were no terms and conditions stating the holiday package was for only one person. However, when the winner tried to arrange to receive her prize she found out that the only element of the prize that was for two people was dinner at the Blue Elephant restaurant in Bangkok. She was also told at that point that she would have to pay all airport taxes and surcharges for the flight, and the transfer from the airport in Phuket to the hotel, 100 kilometres away, which wasn't included in the prize. In addition, she was told she would have to bear the cost of travelling from her hotel in Phuket to dinner at the Blue Elephant restaurant in Bangkok, 500 miles away, and the only dates she could take the holiday were between May and September 2009.

Although the ASA conceded that the holiday package and cookery class were for one person and the dinner was for two people, it did uphold the complaint in that there were grounds for disappointment, failure to make clear the significant costs the prize winner had to pay and the restriction on the dates the winner could take the holiday.

The CAP Code clearly states that promotions should specify clearly, before or at the time of entry, how to participate, including significant conditions and costs, and any other major factors reasonably likely to influence consumers' decisions or understanding about the promotion. The CAP Code also stipulates that participants should be able to retain the conditions or have easy access to them throughout the promotion, and advertisements for promotions should specify all the significant conditions that were applicable.

The ASA panel considered the airport taxes and surcharges, airport transfers and travel from the hotel in Phuket to Bangkok for the meal as significant costs, and the restriction in the time of year was deemed to be a significant condition. It was notable that the online competition details made no mention of any of those conditions or costs, and also no terms and conditions were available for entrants to access at the time of entering the competition or at any subsequent point.

Terms and conditions

Clear and unambiguous terms and conditions are core to a competition's success. If marketing space restrictions mean that it's not possible to include all the terms within the body of the communication, then best industry practice

is to include those terms that have a material bearing on whether a contestant decides to take part. Potential entrants can be directed to a different source for the rest of the terms, such as the company's website.

Some terms must be brought to participants' attention before they either buy the relevant product or enter the competition or draw.

Other points that should be considered for inclusion are whether:

- offers are subject to availability (see also the Consumer Protection from Unfair Trading Regulations 2008);
- a cash alternative to the prize is available;
- the winners are to appear in post-competition PR activities;
- the company or entrant owns the copyright in entries;
- entries will be returned;
- offers are available in conjunction with other offers;
- entry forms must be original and undamaged; and
- the company accepts no liability for entries that aren't submitted on time or in full, such as damaged entry forms or corrupted web pages.

It's also important to warn participants, if appropriate, that the judge's decision is final and that no correspondence will be entered into.

A promoter must explain how entries will be judged. What many marketers forget to recognize is that the terms and conditions of the prize draws and competitions create a contract between the promoter and the individual entrant. So a big question to ask is whether you have done enough to bring the terms and conditions to the notice and attention of the entrant

- Make sure the rules and the creative copy don't contradict each other.
- Conditions must be brought to the notice of the party to be bound before or at the time the contract is made.
- As the Blue Elephant case illustrates so well, significant conditions need to be provided before purchase or, if no purchase is required, before or at the time of entry or application in order to comply with the CAP Code.

Facebook's promotions guidelines

At the time of writing, social network giant Facebook has updated its promotions guidelines, which govern all communication about or administration of any contest, competition, sweepstake or other promotion anywhere in the world.

The big caveat here is that you need to comply with the relevant regulations within the jurisdiction in which you're running the prize promotion or competition, such as those provided by the ASA under the CAP Code, as well as Facebook's own 'internal' rules.

Owing to the increasing popularity of running prize promotions on Facebook, these changes are a ‘must know’ for marketers and should be constantly checked, as Facebook is likely to amend them in the future.

The ‘internal’ Facebook rules cover any operation of any element of the promotion, such as collecting entries, conducting a drawing, judging entries, notifying winners, or promoting, advertising or referencing a promotion in any way on Facebook, for example in advertisements, on a Facebook page or in a wall post. These rules apply to promotions that include a prize of monetary value and a winner determined on the basis of skill and those promotions based on chance.

The guidelines are contractually binding on all those using the social media site for the purposes of a promotion.

The likely consequences of breaking these ‘internal’ rules could include the summary removal from the Facebook website of any materials relating to the promotion in question or the disabling of the relevant page and the complete disabling of the marketer’s account. Facebook makes it clear that its decision on whether its ‘internal’ guidelines have been violated is at its sole discretion. So it pays to play the game, so to speak!

It must also be borne in mind that even if a promotion is permissible under the Facebook guidelines this is no guarantee of lawfulness. The promotion may be contrary to other local laws or codes, so these should always be checked before embarking on a promotion on Facebook. Marketers should also comply with other Facebook terms and conditions, including the Facebook statement of rights and responsibilities and the Facebook advertisement guidelines.

The main ‘internal’ Facebook rules are:

- Promotions must include a complete release of Facebook by each entrant.
- Promotion must include an acknowledgement that the promotion is in no way sponsored, endorsed, administered or associated with Facebook.
- Facebook features or functionality can’t be used as a promotion’s registration or entry mechanism; for example, the act of liking a page or checking into a place can’t automatically register or enter a promotion participant.
- You mustn’t condition entry on the entrant liking a wall post or commenting on or uploading a photo on a wall.
- You mustn’t use Facebook features or functionality, such as the ‘like’ button, as a voting mechanism for a promotion.
- You must not notify winners through Facebook.
- You mustn’t use Facebook’s name, trademarks or other intellectual property in connection with the promotion or mention the brand in the rules except in order to comply with the first two obligations above.

Consumer Protection from Unfair Trading Regulations 2008

The rules that affect prize promotions and incentives such as the CAP Code must also be read in conjunction with the law as it applies to unfair commercial practices. Under the Consumer Protection from Unfair Trading Regulations 2008, commercial practices will always be considered unfair where the promoter: claims to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent; and creates a false impression that the consumer has already won, will win or will on doing a particular act win a prize or other benefit when in fact there's no prize or benefit and extracts money from the consumer in relation to claiming the fictitious prize.

Under the Regulations 2008, a practice is an 'unfair commercial practice' if the practice contravenes the requirements of professional diligence. This is defined as a standard of special skill and care that a trader may reasonably be expected to exercise towards consumers, which is commensurate with either: honest market practice; or the general principle of good faith in the trader's field of activity.

Enforcement

Office of Fair Trading *v* Purely Creative Ltd and others (2011)

In order to be legal, a scratch card promotion must comply with certain hygiene factors:

- It needs to have a clearly identified minimal cost, no part of which reaches the promoter's pocket and which is de minimis in comparison to the value of the prize won, and should be unlikely to constitute a misleading or aggressive commercial practice.
- A requirement for payment, all or part of which the trader receives and uses to offset the cost of both the acquisition and the delivery of the prize, may create a misleading impression that a prize has been won, even if its value to the consumer substantially exceeds the cost of claiming it (for example, the consumer has bought the item, not won it).

The 'average consumer' is reasonably well informed, observant and circumspect, not ignorant, careless or hasty, and may not have read the entirety of the promotion small print. The test applied in this case was to consider the combined effect of misleading acts and omissions and then consider whether it would cause the average consumer's transactional decision.

Non-legal issues to consider with prize draws and competitions

A new breed of 'professional entrant' to competitions and prize draws in the UK threatens to affect tens of thousands of marketing campaigns unless action is taken now by promoters, warns Jeremy Stern. As a result of a squeeze on household incomes, coupled with the increasing cost of living, rising inflation and the 20 per cent VAT rate, the number of people seeking tax-free 'money for nothing' is set to explode.

Research by PromoVeritas shows that some 'professional compers' make on average at least 100 entries a week and will often have 10–20 mobile SIM cards to make it easier to enter multiple times for 'text to win'-type promotions. They also operate in syndicates, sharing entry forms, and group-buying promotional packs and tokens.

Some professional compers even resort to using false names and fake e-mails to improve their chances of winning, with the result that their actions make it increasingly difficult for marketers to pick bona fide winners or to get a return on investment from such marketing activities, which are frequently run to create a valuable database of future customers.

'And that's just the tip of the iceberg!' warns Jeremy Stern.

> *In the past, marketers would judge the success of a promotion by the numbers of entries their promotions would attract. Today, this is an increasingly irrelevant measure as it could include a flood of entries from 'hardcore compers' who are just out to win anything and everything and by whatever means is available to them.*
>
> *Few brand owners or promotions agencies are aware of their techniques and even fewer seek to effectively guard against them, leading to a massive waste of time and budget with no corresponding spike in sales. We know of individuals who win prizes on an almost daily basis, most of which are then sold on eBay, which helps to fund their habit.*

There are now a number of very popular subscriber-funded magazines and websites, such as Loquax.co.uk and Compersnews.com, that offer advice on how to win and list all available prize draws together with the answers to competitions and lists of prize-winning tie-breakers, which are often then reused to enter a current promotion!

But marketers are still falling down on compliance issues. Jeremy Stern observes:

> *Compared to other countries in Europe, we've a very liberal regulatory environment. We don't need government approval to run a draw or pay fees or taxes on the value of prizes as they do elsewhere. However, there's still a high level of ignorance amongst marketers on how to properly run the back end of their promotions and this creates weak spots in a marketing campaign with consequent risk to brand reputations and wasted budgets.*

In summary, the following points should be observed:

- *General.* Review all statutory and non-statutory guidance, such as the CAP Codes.
- *Lotteries.* Does the event involve the distribution of prizes by chance to participants who have contributed by any means (in money or money's worth)? In some jurisdictions this can be an illegal lottery. To avoid this, ensure entry can be obtained without any form of financial contribution.
- *Competitions.* Ensure that the competition substantially involves some degree of skill to avoid categorization in some jurisdictions as an illegal lottery. In most countries, a competition is permitted, even where a purchase is required, if the competition is a true test of skill. Ensure that all relevant provisions of voluntary guidance have been complied with. Does any tie-breaker used require skill to solve or complete? This is necessary to avoid it being chance, which would classify the competition as an illegal lottery. Finally, are the terms of the competition clear and well publicized?
- *Prize draws.* Ensure that genuinely no contribution is necessary to enter the draw to avoid it being classified as an illegal lottery. You need to comply with the CAP Code.

References and further reading

Cases and judgments

Blue Elephant Restaurant, adjudication of the ASA (2009)
Bradford & Bingley plc, adjudication of the ASA (2008)
Office of Fair Trading *v* Purely Creative Ltd and others [2011] EWHC 106 (Ch)
Office of Fair Trading *v* Purely Creative Ltd and others [2011] WLR (D) 34

Websites

Compers magazines: http://www.Loquax.co.uk and Compersnews.com [accessed 14 June 2011]
Facebook promotion guidelines [accessed 14 June 2011] http://www.facebook.com/promotions_guidelines.php
Gambling Commission for legal regulations on running raffles, tombolas and sweepstakes [accessed 17 June 2011] http://www.gamblingcommission.gov.uk

Books

Circus, P (2007) *Sales Promotion and Direct Marketing Law*, Tottel Publishing, Haywards Heath
Kolah, A (2002) *Essential Law for Marketers*, Butterworth-Heinemann, Oxford
Kolah, A (2013) *High Impact Marketing that Gets Results*, Kogan Page, London
Mullin, R (2010) *Sales Promotion*, 5th edn, Kogan Page, London