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LEGAL ENGLISH



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Legal English

Second Edition

RUPERT HAIGH

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Preface

This book is aimed at legal professionals, law students and other persons who regularly deal with legal documents written in English. It constitutes a practical reference and self-study resource, which will help you both understand English legal language as it appears in contemporary written and oral contexts, and to use clear, accurate English in everyday legal and business situations.

The book falls into three parts. The first part focuses on the key aspects of legal English writing, and provides detailed coverage of the following areas:

- Introduction to legal English
- Elements of legal writing
- Punctuation for legal writing
- Basic standards of legal writing
- Elements of good style
- What to avoid
- British and American English

The second part deals with the drafting of contracts and other legal documents, as well as letters, emails and memoranda. There is also a chapter on applying for legal positions, which contains advice on the composition of CVs and application letters.

The following areas are covered:

- Contracts: performance, termination and remedies
- Contracts: structure and interpretation
- Contract clauses: types and specimen clauses
- Drafting legal documents: language and structure
- Correspondence and memoranda
- Applying for legal positions

The third part looks at the key areas in which English is used orally in legal practice and how English usage can be tailored to achieve maximum effectiveness in different situations. Specific suggestions as to phrases that may be used in commonly encountered situations are given throughout this part of the book.

The following areas are covered:

- Aspects of spoken English
- Meeting, greeting and getting down to business
- Interviewing and advising
- Dealing with difficult people: ten-point guide
- Court advocacy
- Negotiation

- Chairing a formal meeting
- Making presentations
- Telephoning

Throughout the book, clear and concise explanations of different issues are supported by practical examples. These range from specimen clauses, contracts and letters to transcripts of court hearings and client interviews. The book also contains no fewer than 35 separate self-study exercises, ranging from short gap-filling exercises to more involved comprehension exercises. Answers are contained in a key at the back of the book. In addition to these self-study exercises, further resources, and study tools can be accessed in the Companion Website at www.routledgelaw.com/books/companionwebsites and on the author's materials website at www.legalenglishstore.com.

In addition, the book includes extensive glossaries explaining the meaning of key legal terminology.

Rupert Haigh

13 February 2009

Introduction to legal English

1

THE DEVELOPMENT OF MODERN ENGLISH

1.1

The English language contains elements from many different European languages and has also borrowed words from a wide variety of other languages. It is impossible to grasp how these influences affect the language without understanding a little about the history of the British Isles.

Prior to the Roman invasion in 55 BC, the inhabitants of Britain spoke a Celtic dialect. Latin made little impression until St. Augustine arrived in AD 597 to spread Christianity. Latin words are regularly used in English, particularly in professional language. In the legal profession, Latin phrases like *inter alia* (among others) and *per se* (in itself) remain in current use.

Subsequently, the Angles, Saxons and Jutes invaded the British Isles from mainland northern Europe. The language they brought with them forms the basis of what is known as Old English. This gives us the 100 most commonly used words in the English language (words like *God, man, woman, child, love, live, go, at, to*).

The Vikings began to raid the northeast of England from Scandinavia from the eighth century onwards. At a later date, a significant number of Vikings settled in this area, bringing with them their own linguistic contribution (which can be seen for example in the numerous place names in the northeast of England (and Scotland) ending in *-by* or *-thorpe, -wick, -ham* and in words such as *egg, husband, law, take, knife*).

In 1066 the Normans invaded from northern France and conquered England. Words such as *court, parliament, justice, sovereign* and *marriage* come from this period.

Later, the English helped themselves initially to further words from French, such as *chauffeur, bourgeois, elite*. As the British Empire expanded, further opportunities to borrow words arose – words such as *taboo* and *pukka* came into the English language from that period.

The result of this multiplicity of linguistic influences is a rich and diverse language with a complex grammar and many synonyms. For example, a coming together of two or more people could be a *meeting* or *gathering* (Old English), *assignation* or *encounter* (Old French), a *rendezvous, rally* or *reunion* (French), a *caucus* (Algonquin), *pow-wow* (Narragansett) or a *tryst* (Old French).

1.2

SOURCES OF LEGAL ENGLISH

Legal English reflects the mixture of languages that has produced the English language generally. However, modern legal English owes a particular debt to French and Latin. Following the Norman invasion of England in 1066, French became the official language of England, although most ordinary people still spoke English. For a period of nearly 300 years, French was the language of legal proceedings, with the result that many words in current legal use have their roots in this period. These include *property*, *estate*, *chattel*, *lease*, *executor* and *tenant*.

During this period, Latin remained the language of formal records and statutes. However, since only the learned were fluent in Latin, it never became the language of legal pleading or debate.

Therefore, for several centuries following the Norman invasion, three languages were used in England. English remained the spoken language of the majority of the population, but almost all writing was done in French or Latin. English was not used in legal matters.

In 1356, the Statute of Pleading was enacted (in French). It stated that all legal proceedings should be in English, but recorded in Latin. Nonetheless, the use of French in legal pleadings continued into the seventeenth century in some areas of the law. In this later period, new branches of – in particular – commercial law began to develop entirely in English and remain relatively free of French-based terminology.

As the printed word became more commonplace, some writers made a deliberate effort to adopt words derived from Latin, with the aim of making their text appear more sophisticated. Some legal words taken from Latin in this way are *adjacent*, *frustrate*, *inferior*, *legal*, *quiet* and *subscribe*. Some writers also started to use a Latin word order. This led to an ornate style, deliberately used to impress rather than inform. Even today, Latin grammar is responsible for some of the ornateness and unusual word order of legal documents. It also lies behind the frequent use of *shall* constructions in legal documents.

English was adopted for different kinds of legal documents at different times. Wills began to be written in English in about 1400. Statutes were written in Latin until about 1300, in French until 1485, in English and French for a few years, and in English alone from 1489.

1.3

WHAT MAKES ENGLISH DIFFICULT?

It is said of chess that the game takes a day to learn, and a lifetime to master. In similar vein, English is reputed to be an easy beginner's language in which it is nevertheless very hard to achieve native-level fluency. Why is this?

There are probably four main factors that make English difficult to master. These are:

- 1 Lack of clear rules of grammar. We have seen how English is a product of various different linguistic traditions. One of the results of this is a comparative lack of consistent grammatical rules. Prepositions are a clear example of this.
- 2 Extensive vocabulary. There are many different ways of saying the same thing in English. This is again due to the fact that English draws upon different linguistic traditions. For example, if you wanted to say that something was legally permissible, you could use the Old Norse (Scandinavian)-derived word, *lawful*. Alternatively, you could use the Latin-derived word, *legitimate*. Or, if you wanted a more emotive word, you could use the Old English word, *right*. To take another example, when talking about employment do you say *calling, career, profession, employment, job, work, occupation* or *vocation*?
- 3 The use of phrasal verbs in English (and legal English). For example, you *put down* a deposit, and you *enter into* a contract. These combinations must be learned individually because they involve using a verb with a preposition or adverb or both; and, as noted above, prepositions do not follow clear grammatical rules. Some of the phrasal verbs most commonly used in legal English are set out in a glossary at the back of the book.
- 4 The use of idioms. Idioms are groups of words whose combined meaning is different from the meanings of the individual words. For example, the expression *over the moon* means 'happy'. Idioms are frequent in ordinary English – they are a distinctive element of the way native English speakers use the language. They are found less often in legal English, but exist in some legal jargon. For example, the expression *on all fours* is used to refer to the facts of a case that correspond exactly to the facts of a previous case.

WHAT MAKES LEGAL LANGUAGE DIFFICULT?

1.4

One of the main reasons why legal language is sometimes difficult to understand is that it is often very different from ordinary English. This comprises two issues:

- 1 The writing conventions are different: sentences often have apparently peculiar structures, punctuation is used insufficiently, foreign phrases are sometimes used instead of English phrases (e.g. *inter alia* instead of *among others*), unusual pronouns are employed (*the same, the aforesaid, etc*), and unusual set phrases are to be found (*null and void, all and sundry*).
- 2 A large number of difficult words and phrases are used. These fall into four categories, brief details of which are given below.

1.4.1 Legal terms of art

Legal terms of art are technical words and phrases that have precise and fixed legal meanings and which cannot usually be replaced by other words. Some of these will be familiar to the layperson (e.g. *patent*, *share*, *royalty*). Others are generally only known to lawyers (e.g. *bailment*, *abatement*).

A number of frequently encountered terms of art are defined in the glossary of legal terminology at the back of this book.

1.4.2 Legal jargon

Terms of art should be differentiated from legal jargon. Legal jargon comprises words used by lawyers, which are difficult for non-lawyers to understand. Jargon words range from near-slang to almost technically precise words. Well-known examples of jargon include *boilerplate clause* and *corporate veil*.

Jargon includes a number of archaic words no longer used in ordinary English. These include *annul* (to declare that something, such as a contract or marriage is no longer legally valid) and *bequest* (to hand down as an inheritance property other than land).

It also includes certain obscure words which have highly specialised meanings and are therefore not often encountered except in legal documents. Examples include *emoluments* (a person's earnings, including salaries, fees, wages, profits and benefits in kind) and *provenance* (the origin or early history of something).

Jargon words should be replaced by plain language equivalents wherever possible.

1.4.3 Legal meaning may differ from the general meaning

There is also a small group of words that have one meaning as a legal term of art and another meaning in ordinary English. One example is the word *distress*, which as a legal term of art refers to the seizure of goods as security for the performance of an obligation. In ordinary English it means anxiety, pain or exhaustion. Here are some further examples.

Word and its legal English meaning

Consideration in legal English means an act, forbearance, or promise by one party to a contract that constitutes the price for which the promise of the other party is bought. Consideration is essential to the validity of any contract other than one made by deed.

Word and its ordinary English meaning

Consideration in ordinary English means; **(1)** careful thought, **(2)** a fact taken into account when making a decision, **(3)** thoughtfulness towards others.

<p>Construction in legal English means interpretation. 'To construe' is the infinitive verb form of the term.</p>	<p>Construction in ordinary English means: (1) the action of constructing [e.g. a building]; (2) a building or other structure; (3) the industry of erecting buildings.</p>
<p>Redemption in legal English means the return or repossession of property offered as security on payment of a mortgage debt or charge.</p>	<p>Redemption in ordinary English usually means Christian salvation.</p>
<p>Tender in legal English means an offer to supply goods or services. Normally a tender must be accepted to create a contract.</p>	<p>Tender in ordinary English means: (1) gentle and kind; (2) (of food) easy to cut or chew; (3) (of a part of the body) painful to the touch; (4) young and vulnerable; (5) easily damaged.</p>



Further examples may be found in the glossary dealing with obscure words and phrases at the back of the book.

Words may be used in apparently peculiar contexts

1.4.4

A number of words and phrases, which are used in ordinary English, are also used in legal English but in unusual contexts. Examples include *furnish*, *prefer*, *hold*. For details of the meanings of these and other words and phrases, refer to the glossaries dealing with obscure words and phrases at the back of the book.

2

Elements of legal writing

The aim of this chapter is not to provide comprehensive coverage of all aspects of grammar, but merely to provide guidance on various issues that may cause difficulties in legal writing.

2.1

ARTICLES

Articles in English include **the**, **a** and **an**.

A few simple rules clarify the way in which these articles should be used.

A and **an** are indefinite articles. **A** is used when mentioning something for the first time ('a client walked into the office'). **An** is used in the same circumstances but only where the following word begins with a vowel ('an attorney walked into the office').

The is the definite article. It is used when referring to something already mentioned before ('the client then sat down'), or when referring to something that is the only one of its kind ('the sun') or when referring to something in a general rather than specific way ('the Internet has changed our way of life').

In some circumstances, articles should be omitted. For example, when a sentence links two parallel adjectival phrases, the article should be omitted from the second phrase. Here is an example:

The judge ruled that Cloakus Ltd was a validly registered and ~~an~~ existing company.

In addition, when using certain abstract nouns in a general, conceptual sense, it is not necessary to use an article to precede the noun. For example:

In the event of conflict between the definitions given in appendix 1 and the definitions given in the contract, the contract shall prevail

There is no need here to precede **conflict** with **a**, since **conflict** is used in a general conceptual sense. However, when referring to a specific conflict, articles should be used, as in 'the opposing factions took part in the conflict'.

EXERCISE 1

Correct these sentences by adding articles as appropriate. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) Parties signed contract today after having discussed price.

- (2) Lawyer about whom I spoke arrived at meeting too late to advise about amount of damages company could get.
- (3) If there is telephone call for me about case, put it through.
- (4) Client said that Roggins was inefficiently run and unprofitable company.
- (5) Mobile phone has revolutionised way in which firm does business.

PREPOSITIONS

2.2

Prepositions are words used with a noun or pronoun, which show place, position, time or method.

Prepositions such as **to, in, from, between, after, before**, etc. normally come before a noun or pronoun and give information about how, when or where something has happened ('she arrived before lunch', 'I travelled to London').

The preposition **between** should be followed by an object pronoun like **me, him** or **us** instead of a subject pronoun such **I, she** and **we**. It is therefore correct to say 'this matter is between you and me' and wrong to say 'this matter is between you and I'.

The main problem for the non-native speaker is remembering which preposition to use. There are no clear rules to follow in this respect, but some examples of common usages are set out below:

- The parties **to** this agreement . . .
- The goods must be delivered **to** the purchaser.
- The commencement/termination **of** this agreement . . .
- The price list set out **in** Schedule 1 . . .
- Royalties will be paid **in** accordance **with** this agreement **for** a period **of** five years.
- The goods must be delivered **within** 14 days.
- The Company agrees **to** provide training **for** service personnel.
- The agreement may be terminated **by** notice.
- An arrangement **between** the Seller and the Buyer . . .
- It is agreed that the goods will be collected **from** the Seller's warehouse **at** 21 Redwoods Road.
- It is agreed that the goods will be collected from the Seller's warehouse **in/on** Redwoods Road.

- Interest will be charged **on** any unpaid instalments **after** the expiration **of** a period **of** 28 days **from** the date hereof.
- He was charged **with** murder.
- The property **at** 2 Pond Road is sold **with** vacant possession.

It is important to note that in certain circumstances it may be possible to use more than one preposition, and that there may be small but important differences in meaning between them. For example, the sentence:

The goods must be delivered within 7 days

is subtly different from

The goods must be delivered in 7 days.

The use of the word **within** makes it clear that the goods may be delivered at any time up to the seventh day, while the word **in** implies that the goods should be delivered on the seventh day. This minor linguistic difference could be critically important in a contract for the sale of goods.

EXERCISE 2

Replace the missing prepositions in the gaps in the following sentences. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) Ten units must be delivered _____ the buyer _____ 30 November.
- (2) This agreement can be terminated _____ giving not less than 14 days' notice _____ writing.
- (3) Rent will be paid _____ accordance _____ this agreement.
- (4) This is an agreement _____ the parties to the contract.
- (5) The goods are to be moved _____ the defendant's warehouse no later _____ 28 August.

2.3

PRONOUNS

A pronoun is a word used instead of a noun to indicate someone or something already mentioned or known. For example, **I, you, this, that**.

Pronouns are used to avoid repeated use of a noun. They are usually used to refer back to the last used noun.

Legal drafters have traditionally avoided using personal pronouns such as **he, she, we, they**, instead replacing them with formulations such as **the said, the**

aforsaid, or **the same**. The reason for this is a fear of ambiguity in cases where it is unclear to which noun the pronoun might refer if a number of parties are mentioned in the document.

Here is an example of a sentence made ambiguous by unclear use of personal pronouns:

He arrived with James and John. John then continued his journey by car. James stayed at the depot, and he followed John later.

The modern trend, however, is to use pronouns where possible, as their use makes documentation less formal and intimidating. For example, 'you must pay the sum of £100 per month to me' is easier for a layperson to understand than 'the Tenant must pay the sum of £100 per month to the Landlord'.

However, their use is inappropriate where the aim of the drafter is to impress the reader with the seriousness of the obligations being undertaken, as pronouns often lead to a chattier and lighter style than is found in traditional legal documentation.

One aspect of pronoun use that is now highly relevant lies in the desire to avoid sexist language in legal and business English. This subject is discussed further in Chapter 6. A list of common gender-neutral pronouns and adjectives that can be used to avoid using sexist language is set out below.

- any
- anybody
- anyone
- each
- every
- everybody
- nobody
- none
- no one
- some
- somebody
- someone

Replace the missing pronouns in the following sentences. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) I went to the office very early this morning and did not see _____ there.
- (2) It is important that _____ be there to welcome Mr Jones when he arrives at the airport tomorrow evening.

- (3) These rules are very clear. Therefore _____ should be in any doubt as to what they mean.
- (4) If you feel that the issues Mr Smith wants you to resolve are outside your field of expertise, don't hesitate to pass _____ case to me.
- (5) The lawyers in that firm are rather old-fashioned in _____ approach. It's time for _____ to modernise.

2.4

ADJECTIVES

An adjective is a word used to describe a noun or make its meaning clearer (e.g. **excellent**, as in 'an excellent horse'). Some words in the English language have the ability to change parts of speech. For example, the word **principal**, often used in legal English, can be used as an adjective ('the principal sum') or as a noun ('the principal instructs the agent').

Some adjectives are described as uncomparable adjectives, meaning that they describe something that can only be absolute. Such adjectives cannot be qualified by words like **most**, **more**, **less**, **very**, **quite** or **largely**. For example, if a provision in a contract is void it cannot be 'largely void' or 'more void' – it is simply void.

A short list of uncomparable adjectives is set out below:

- absolute
- certain
- complete
- definite
- devoid
- entire
- essential
- false
- final
- first
- impossible
- inevitable
- irrevocable
- manifest
- only
- perfect
- principal
- stationary
- true
- uniform

- unique
- void
- whole

Legal English contains many adjectives that relate to abstract nouns. For example, remediable from remedy. Complete the table below. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

Nouns	Adjectives
(1)	defective
acceptance	(2)
(3)	restorable
reliance	(4)
(5)	requisite

ADVERBS

An adverb is a word that modifies or qualifies a verb (e.g. **walk slowly**), an adjective (e.g. **really small**) or another adverb (e.g. **very quietly**).

Most adverbs consist of an adjective + the ending **-ly**. There are a number of words that act both as adjectives and as adverbs, to which the suffix **-ly** cannot be added. These include:

- alone
- early
- enough
- far
- fast
- further
- little
- long
- low
- much
- still
- straight

Choose an appropriate adverb from the list below to complete the following sentences. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) My client accepts that he is _____ responsible for the difficult financial circumstances in which he finds himself.
- (2) This clause is not _____ enforceable.
- (3) The speaker droned on _____ for over two hours.
- (4) We should be grateful if the documents were issued _____.
- (5) The proposition, though _____ attractive, was flawed.
 - a. superficially
 - b. legally
 - c. expeditiously
 - d. tediously
 - e. solely

2.6

COLLECTIVE NOUNS

A collective noun is one that refers to a group of people or things (e.g. **jury**, **government**, **committee**). Such nouns can be used with either a singular verb ('the jury was made up of people from many different backgrounds') or a plural verb ('the jury are all in the court now').

It should be remembered that if the verb is singular any following pronouns (words such as **he**, **she**, **it** or **they**) must also be singular, e.g. 'the firm is prepared to act, but not until it knows the outcome of the negotiations' (not '... until they know the outcome').

In general it is better to use the singular when referring to collective nouns. The exception to this is where the plural is used to indicate that one is referring not primarily to the group but to all the individual members of the group (e.g. 'the staff were unhappy with the changes that had been proposed').

Here is a short list of collective nouns found in legal English:

- board (e.g. of directors)
- class
- club
- committee

- company
- government
- group
- jury
- majority
- nation
- parliament
- party (i.e. a body of persons)
- staff
- team
- union
- the Cabinet
- the public

Consider the sentences below and decide whether the singular or plural form should be used. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) Our staff (is/are) divided over the proposed management changes.
- (2) Our staff (consists/consist) of skilled people from many different backgrounds.
- (3) The committee (have/has) decided to approve the amended proposal.
- (4) The majority of our lawyers (is/are) fluent in English.
- (5) The group (thank/thanks) all those people who have helped it to succeed.

UNCOUNTABLE NOUNS

Some nouns in English are uncountable. In other words, they are not used with **a** or **an** and do not have **plural** forms. For example, the word *information*, as in the phrase **I need some information**.

In order to refer to a particular number of an uncountable noun, especially one, you can join the noun to a word that is itself countable, or use a countable synonym instead.

Here are some examples:

Uncountable noun	A particular number
data	A piece/item of data
equipment	a piece of equipment
litigation	a litigation matter a case a claim
machinery	a piece of machinery a machine
software	a piece of software an application a program
training	a training course a training programme
legislation	a law an Act
real estate	a property

2.8

PAST TENSES

One of the main difficulties experienced by non-native speakers in using tenses concerns which form of past tense to use in different situations. The subject is more complex than the guidance given below might indicate, but these notes cover the most common areas of difficulty.

2.8.1 Past-perfect tense

This tense refers to a past action that is completed before a more recent time in the past, and is formed using **had**. For example:

In 1998 I lived in New York. In 1997 I had decided to move to the United States the following year.

2.8.2 Simple past

This tense refers to completed actions that occurred in the past, and is formed with the ending **-ed**. For example:

I lived in New York.

Past continuous**2.8.3**

This tense refers to an action that occurred in the past and is not described as having been completed. For example:

In 1998 I was living in New York.

A common mistake made by non-native speakers is to use the past continuous when the simple past or past-perfect tense should be used. In legal contexts this can easily lead to ambiguity. For example, to say 'In 1998 I was working as a commercial lawyer' leaves it unclear as to whether you still work as a commercial lawyer.

Read through the passage below and insert the correct past tense forms. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

In 1989, Statchem _____ (insert correct form of verb 'to open') its first chemical plant in Thailand. Two years before this the company _____ (insert correct form of verb 'to begin') negotiations with Kemble Inc., but these eventually _____ (insert correct form of phrasal verb 'to fall through'). At about the same time, during the mid to late eighties, Statchem _____ (insert correct form of phrasal verb 'to be involved in') the development of plastics technology and _____ (insert correct form of verb 'to spend') considerable sums of money on research and development. Statchem _____ (insert correct form of verb 'to hope') that this investment would result in an increased market share going into the new decade.

Unfortunately, this strategy failed _____ (alter phrase 'fail to pay off' as appropriate). Due to the onset of a global recession, the market _____ (insert correct form of verb 'to shrink') and as a result all the money and effort that Statchem _____ (insert correct form of phrasal verb 'to put into') the project _____ (insert correct form of verb 'to waste').

EXERCISE 7

VERB FORMS**2.9****The conditional form****2.9.1**

This form is used to express a condition; or to put it another way, to express that something is dependent on something else. For example:

- I would go if I felt better (I would in fact go if I felt better).
- I could go if I felt better (I would be able to go if I felt better).
- I should go if I felt better (I would in fact go if I felt better).
- I should go if I feel better (I ought to go if I feel better in the future).

When used for the conditional, **should** goes with **I** and **we**, and **would** goes with **you, he, she, it** and **they**. However, even well-educated English native speakers often disregard this rule. Consequently, using the wrong word is not a very serious error.

A mistake often made by non-native speakers is to use the conditional instead of the subjunctive in a sentence in which both forms should be used. Consequently, the sentence, 'I wouldn't try it if I were you' is often wrongly expressed, 'I wouldn't try it if I would be you'.

EXERCISE 8

Insert the correct conditional form (*could, would, or should*) in the sentences below. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) We _____ be grateful if you _____ send the documents to us.
- (2) You _____ insert a clause dealing with that issue if you want to avoid uncertainty.
- (3) We were advised that the goods _____ arrive on 20 May 2002.
- (4) We _____ certainly help you if we _____.
- (5) _____ you mind answering the telephone?

2.9.2 The subjunctive form

This form of a verb is in the following circumstances:

- to express what is imagined ('Let's imagine that he were here today');
- to express what is wished ('I wish that he were here today');
- to express what is possible ('If only that were possible!').

It is usually the same as the ordinary form of the verb except in the third person singular (**he, she, it**), where the normal -s ending is omitted. For example, you should say **face** rather than **faces** in the sentence 'the report recommends that he face the tribunal'.

The situation is slightly different when using the verb **to be**. The subjunctive for **to be** when using the present tense is **be**, whereas the ordinary present tense is **am, are** or **is**. For example, 'the report recommends that he be dismissed'.

When using the past subjunctive form of **to be**, you should use **were** instead of **was**. For example, 'I wouldn't try it if I were you'.

Insert the correct subjunctive forms in the sentences below. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) _____ I to suggest this course of action, it is unlikely that it would be accepted.
- (2) The committee recommends that he _____ (insert correct form of verb 'to face') an enquiry.
- (3) We think it best that the machinery _____ (insert correct form of verb 'to be') tested by an expert.
- (4) We would be happier _____ you to agree to reduce the price by 20%.
- (5) If we _____ to reduce the price, we would expect you to accept a penalty for late payment.

PHRASAL VERBS

2.10

Phrasal verbs are phrases that consist of a verb used together with an adverb (e.g. **break down**) or a preposition (e.g. **call for**) or both (e.g. **put up with**). They are often found in legal English. For example, **account for**, **enter into**, **serve upon**, **put down**.

Phrasal verbs can cause particular problems for non-native speakers of English where the verbs used have ordinary meanings when used without an adverb or preposition, but form an idiom when used with an adverb or preposition. In such cases the literal meaning of the words differs from the real meaning. For example, the phrasal verb **to brush up on** means to practise or study something in order to get back the skill or knowledge you had in the past but have not used for some time. For example, 'I must brush up on my French before visiting Paris'.

Here are the main adverbs and prepositions that may be used with a verb to form a phrasal verb.

- aback
- about
- above
- across
- after
- against
- ahead
- ahead of

- along
- among
- apart
- around
- as
- aside
- at
- away
- back
- before
- behind
- between
- by
- down
- for
- forth
- forward
- from
- in
- into
- of
- off
- on
- onto
- out
- out of
- over
- past
- round
- through
- to
- together
- towards
- under
- up
- upon
- with
- without

See also the phrasal verb glossary at the back of the book, which sets out the most common phrasal verbs in legal usage together with explanations of their meanings and examples showing how they are used.

Insert the most appropriate phrasal verb from the list at the bottom into the sentences below. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) The corporation _____ about \$10,000 in unpaid debts last year.
 - (2) A number of members of staff had to be _____ due to the sudden downturn in the company's profitability.
 - (3) Unfortunately, the partners failed to _____ the agreement they had reached.
 - (4) We do not want to _____ court proceedings, but we may have to do so if the debtor fails to pay the money he owes us.
 - (5) I do not _____ your leaving the office early on Friday, provided you finish your work before you go.
 - (6) We need to _____ running costs when considering the total expense of this project.
 - (7) The parties _____ an agreement for the provision of accountancy services.
 - (8) This is an interesting article which _____ Finnish employment law.
 - (9) This client is somewhat exacting, so make sure you _____ her instructions very carefully.
 - (10) Let's try to _____ this meeting by 5pm.
- a. laid off
 - b. entered into
 - c. deals with
 - d. wrote off
 - e. wrap up
 - f. carry out
 - g. object to
 - h. resort to
 - i. factor in
 - j. adhere to

2.11

NEGATIVES

Negatives are formed in English by using prefixes. The most common of these are **un-**, **in-**, **il-**, **im-**, **ir-**, **non-** and **anti-**.

Here are some common negative forms often used in legal English:

- unlawful
- unfamiliar
- impractical
- illegal
- unfair
- invalid
- independent
- injustice
- impartiality
- inequitable
- unwritten
- impracticable
- unconstitutional
- illicit

The prefix **dis-** is often used in a slightly different way to the prefixes listed above. It is not usually a direct negation but generally indicates dissent. For example, 'we disagree'.

Note also that there are some words in English, which look like negatives but are in fact synonyms. For example, **flammable** and **inflammable** both mean easily set on fire.

See also 6.5.5 below for guidance on the use of **un-** and **non-**.

EXERCISE 11

Add the correct prefixes to the following words in order to make them negative. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) stabilise
- (2) paid
- (3) approve
- (4) partial
- (5) regard
- (6) usual

- (7) correctly
- (8) respective
- (9) limited
- (10) valid

SENTENCE STRUCTURE

2.12

Basic structure

2.12.1

The general rule in English is that a simple declarative sentence should be structured Subject – Verb – Object. For example:

The lawyer drafted the contract.

In this sentence, **the lawyer** is the subject, **drafted** is the verb, and **contract** is the object.

Subject

The subject is the part of the sentence that usually comes first and on which the rest of the sentence is predicated. It is typically – but not always – a noun phrase. In traditional grammar it is said to be the ‘doer’ of the verbal action.

A subject is essential in English sentence structure – so much so that a dummy subject (usually ‘it’) must sometimes be introduced (e.g. **It is raining**). However, they are unnecessary in imperative sentences (e.g. **Listen!**), and in some informal contexts (e.g. **See you soon**).

Verb

Verbs are traditionally described as ‘doing’ words. They are usually essential to clause structure.

Verbs may be classified either as **main** or **auxiliary**. Auxiliary verbs are traditionally described as ‘helping verbs’, and include **be**, **do** and **have**. Compare:

I bought oranges.

I have been buying oranges.

Object

The object is usually a noun phrase. In a simple declarative sentence it follows the verb. The object is usually said to be ‘affected’ by the verb.

The object is usually a noun phrase. In a simple declarative sentence it follows the verb. The object is usually said to be 'affected' by the verb. For example,

The lawyer drank a cup of coffee.

2.12.2 More complex sentences

In more complex sentences, it may be necessary to introduce other parts of speech. These include:

Adjectives

An adjective is a word used to describe a noun or make its meaning clearer, e.g.

A green car.

An efficient engine.

Adjectives go before the nouns they qualify. For example:

*The **commercial** lawyer drafted the **sales** contract.*

Adverbs

Adverbs are words or phrases that add more information about place, time, manner or degree to an adjective, verb, other adverb or sentence (e.g. **greatly**, **very**, **fortunately**, **efficiently**).

Therefore, adverbs may be added to modify the meaning of our example:

*The commercial lawyer **efficiently** drafted the sales contract.*

2.12.3 Linking clauses

In order to build more complex sentences, it is necessary to find ways of linking clauses together.

One way of achieving this is by using prepositions (*in, at, on, to, from*, etc) or conjunctions (*and, or, but, since, when, because, although*, etc). For example:

*The commercial lawyer efficiently drafted the sales contract **for** the company, **but** the client requested various amendments **and** additions.*

Punctuation can be used to coordinate clauses in a sentence. For example:

The commercial lawyer efficiently drafted the sales contract, the receptionist faxed it to the client, and the client approved the draft.

In addition, relative pronouns (e.g. **who**, **whom**, **whose**, **which**, **that**) provide a convenient means of linking sentences together. For example:

*The commercial lawyer efficiently drafted the sales contract, **which** the client read and approved.*

More information on relative pronouns is set out below.

RELATIVE PRONOUNS

2.13

As noted above, relative pronouns include **who**, **whom**, **whose**, **which** and **that**. Here are some brief notes about their use.

Who or whom?

2.13.1

The correct use of **who** and **whom** is a matter which many non-native and native speakers of English alike have difficulty with. The distinction between them is that **who** acts as the subject of a verb, while **whom** acts as the object of a verb or preposition. This distinction is not particularly important in informal speech but should be observed in legal writing.

For example, **whom** should be used in the sentence, 'I advised Peter, John and Mary, all of whom are contemplating claims against RemCo Ltd'.

Who should be used in the sentence, 'I saw Peter, who is contemplating a claim against RemCo Ltd'.

When **who** is used, it should directly follow the name it refers to. If it does not, the meaning of the sentence may become unclear. For example, 'I saw Peter, who was one of my clients, and James' instead of 'I saw Peter and James, who was one of my clients'.

Which or that?

2.13.2

Which or **that** can frequently be used interchangeably. However, there are two rules to bear in mind.

- When introducing clauses that define or identify something, it is acceptable to use **that** or **which**. For example, 'a book which deals with current issues in international trade law' or 'a book that deals with current issues in international trade law'.
- Use **which**, but never **that**, to introduce a clause giving additional information about something. For example, 'the book, which costs €30, has sold over five thousand copies' and not 'the book, that costs €30, has sold over five thousand copies'.

Who, whom, which or that?

2.13.3

Who or **whom** should not be used when referring to things that are not human. **Which** or **that** should be used instead. For example, 'the company which sold the

shares' is correct. 'The company that sold the shares' is also correct. 'The company who sold the shares' is incorrect.

That should be used when referring to things that are not human, and may be used when referring to a person. However, it is usually thought **that** is more impersonal than **who/whom** when used in this way. As a result it is better to say 'the client who I saw yesterday' than 'the client that I saw yesterday'.

EXERCISE 12

Link these sentences together using relative clauses. You may also need to adjust the wording and/or word order of the sentences. In some cases you should consider deleting or replacing certain words and phrases. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) Here is a contract. There are many typing errors in it.
- (2) This is the burning question. Everyone wants to know the answer to it.
- (3) Is that Susan Jones? I saw her CV only yesterday.
- (4) Please refer to clause 7 of the contract. It deals with certain force majeure situations.
- (5) We have an intellectual property expert. Her name is Clare Brewster. She specialises in complex patent infringement cases.

Punctuation for legal writing

3

GENERAL POINTS

One of the most unusual aspects of old-fashioned contract drafting was the belief among lawyers and judges that punctuation was unimportant. The prevailing view in common law jurisdictions was that the meaning of legal documents should be ascertained from the words of the document and their context rather than from punctuation. Accordingly, old-fashioned legal drafting tends to involve little or no punctuation. This makes it extremely hard to read and potentially highly ambiguous. For example, consider these unpunctuated sentences:

*This man said the judge is a fool.
Woman without her man would be a savage.*

Now consider the same sentences with punctuation:

*This man, said the judge, is a fool.
Woman – without her, man would be a savage.*

Fortunately, modern legal drafters have begun to use punctuation in the same way that ordinary writers use punctuation – to give guidance about meaning.

3.1

PUNCTUATION MARKS

Full stop/period (.)

Full stop is the British English term for this punctuation mark, and **period** is the American English term for it. Full stops should be used in the following situations:

- At the end of all sentences that are not questions or exclamations. The next word should normally begin with a capital letter.
- After abbreviations. For example, 'Sun. 10 June'.
- When a sentence ends with a quotation which itself ends with a full stop, question mark, or exclamation mark, no further full stop is required. However, if the quotation is short, and the sentence introducing it is more important, the full stop is put outside the quotation marks. For example: on the door were written the words 'no entry'.
- A sequence of three full stops indicates an omission from the text. A fourth full stop should be added if this comes at the end of a sentence. For example, 'this handbook . . . is exceptionally useful. . . . I refer to it every day.'

3.2

3.2.1

3.2.2 Comma (,)

Commas are used to show a short pause within a sentence. They should be used with care as a misplaced comma can alter the intended meaning of the sentence. For example:

James hit Ian and Edward, then ran away.

James hit Ian, and Edward then ran away.

At the same time, commas should be used where necessary to clarify meaning. Simply omitting the commas often leads to ambiguity or an unintended meaning. For example:

This lawyer, said the judge, is a fool.

This lawyer said the judge is a fool.

The principal circumstances in which commas should be used are as follows:

- To separate items in a list of more than two items. For example, 'cars, trucks, vans, and tractors'. In this sentence, it may be crucial to put the comma after **vans** to ensure that it is clear that **tractors** does not form part of the same category of items.
- To separate coordinated main clauses. For example, 'cars should park here, and trucks should continue straight on'.
- To mark the beginning and end of a sub-clause in a sentence. For example, 'James, who is a corporate lawyer, led the seminar.'
- After certain kinds of introductory clause. For example, 'Having finished my work, I left the office.'
- To separate a phrase or sub-clause from the main clause in order to avoid misunderstanding. For example, 'I did not go to work yesterday, because I was unwell.'
- Following words which introduce direct speech. For example, 'He said, "my lawyer is a genius!"'
- Between adjectives which each qualify a noun in the same way. For example, 'a small, dark room'. However, where the adjectives qualify the noun in different ways, or when one adjective qualifies another, no comma is used. For example, 'a distinguished international lawyer' or 'a shiny blue suit'.

The importance of using commas correctly cannot be overstated. In one Australian case the court had to look at a workers insurance policy that described the employer's business as 'Fuel Carrying and Repairing'. The question the court had to decide was whether the policy covered an employee who was injured when driving the employer's vehicle carrying bricks. The court interpreted the

policy as if it read either 'Fuel, Carrying, and Repairing' or 'Fuel Carrying, and Repairing'. Litigation could have been avoided if a comma had been inserted in the first place.

Commas are softer in effect than full stops and semicolons, and are therefore unsuitable for long lists. They should not be used simply as an alternative to using short sentences or if there is any risk of ambiguity.

Colon (:)

3.2.3

The colon is usually used to point to information that follows it. It may also be used to link two clauses. Here are some examples of usage:

- To precede a list (e.g. 'The following items are included:').
- To introduce a step from an introduction to a main theme or from a general statement to a particular situation (e.g. 'The remedy is simple: introduce new rules.').
- To show cause and effect (e.g. 'An energetic new director has been appointed; this accounts for the rise in share prices.').
- To precede an explanation (e.g. 'The argument used by the defence was as follows:').

Colons should not be followed by a dash (–). The dash serves no useful purpose in this context.

Semicolon (;)

3.2.4

The semicolon is used to separate parts of a sentence when a more distinct break is needed than can be provided by a comma, but the parts of the sentence are too closely connected for separate sentences to be used. For example, 'To err is human; to forgive, divine'.

In legal writing, semicolons are used to punctuate the end of any sub-clause or paragraph that forms part of a longer sentence. However, if the sub-clause or paragraph constitutes the last part of the sentence a full stop may be more appropriate.

Parentheses ()

3.2.5

These are used to enclose words, phrases or whole sentences. If a whole sentence is in parentheses, the end punctuation stays inside it. For example:

(Stanning plc is hereinafter referred to as 'the Company')

Where only the end part of the sentence is in parentheses, the end punctuation goes outside the parentheses. For example:

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Stanning plc (hereinafter referred to as 'the Company').

The main circumstances in which parentheses are used are as follows:

- To enclose remarks made by the writer of the text himself or herself. For example, 'Mr. X (as I shall call him) then stood up to speak'.
- To enclose mention of an authority, definition, explanation, reference or translation.
- In the report of a speech, to enclose interruptions by the audience.
- To enclose reference letters or figures. For example, '(1) (a)'.

Avoid parentheses within parentheses – use commas or dashes instead. Dashes are a useful way of separating concepts within sentences.

3.2.6 Square brackets []

These enclose comments, corrections, explanations or notes not in the original text, but added at a later stage by new authors or editors.

Square brackets are used in legal writing to adjust the format of quoted material. For example, they may be used to indicate that a letter now in lowercase was in capitals in the original text ('The court ruled that [e]xistence of the subject matter of the contract precluded a finding of *force majeure*.').

3.2.7 Dashes (– and —)

Dashes can be used in two circumstances. They can be used to enclose a sub-clause in a sentence. For example:

Very few – in fact almost none – of the lawyers working in this city have additional expertise in accountancy.

This can be a handy way to clarify sentences which might otherwise be filled with confusing commas.

A long dash can also be used as a substitute for the word *to*. For example:

The proposed route is Helsinki—London—New York—Helsinki.

3.2.8 Hyphen (-)

Hyphens are used in two circumstances. They are used, particularly in British English, to join together two words in respect of which the first word is a prefix of the second. For example, **pre-trial, non-statutory**. These words are usually run together in American English: **pretrial, nonstatutory**.

Hyphens are also used to make phrasal adjectives, which are adjectives made up of more than one word. For example, **health-care provider** or **real-estate purchase**.

Apostrophe (')**3.2.9**

The apostrophe is often used incorrectly both by native and by non-native English speakers. However, mistakes can be avoided by following a few simple rules.

There are two uses for the apostrophe. First, it is used to show that a word has been shortened or that two words have been combined. For example:

I'll be there, so don't say that I won't.

This use of the apostrophe to shorten a word is not usually seen in legal writing as it is considered too informal for most situations.

Secondly, the apostrophe is used to show that something belongs to somebody or something else. For example:

The client's payment was late.

When more than one person or thing owns something, put the apostrophe after the s. For example:

The clients' payments were late.

You could put this another way by saying 'the payments of the clients were late'. However, this looks very clumsy and laborious by the standards of modern English.

Take care when using **its**. It only takes an apostrophe when it is short for **it is** or **it has**. For example:

It's a straightforward case.

When using **its** in a possessive sense, the apostrophe should be omitted. For example:

This agreement has its advantages.

Quotation marks (' ' and " ")**3.2.10**

In British English, single quotation marks (' ') should be used for a first quotation. For example:

He wrote, 'that is the most important question'.

Double quotation marks should be used for any quotation within a quotation. For example:

He wrote, 'she said "that is the most important question".'

Single quotation marks should be used again for any quotation inside a quotation inside a quotation. For example:

He wrote, 'she said "that is the most important question he asked during his 'manor house' speech".'

The closing quotation mark should come before all punctuation marks unless these form part of the quotation itself. For example:

Did the judge really say, 'that lawyer is a fool'?

but:

The judge asked, 'is that lawyer a fool?'

3.2.11 Question mark (?)

The circumstances in which question marks are used are as follows:

- To follow every question that requires a direct answer. For example, 'what does that mean?'. However, note that a question mark is not required after indirect questions. For example, 'he asked me what that meant'.
- A question mark may also be placed before a word or phrase the accuracy of which is doubted. For example, 'Joe (?) Zanuderghosh'.

3.2.12 Exclamation mark (!)

The exclamation mark is used after an exclamatory word, phrase or sentence. It usually forms the concluding full stop but need not do so. It may also be used within square brackets after quoted text to indicate the writer's feelings of, for example, amusement, surprise or disagreement. For example, 'The court then heard the defendant mutter, "this judge is a fool" [!].

3.2.13 Capital letters

Capital letters should only be used in the following situations:

- At the beginning of a sentence (e.g. 'Thank you for your letter.').
- When writing proper names (e.g. London, George W Bush).
- When writing names which derive from proper names (e.g. Christianity, Marxism).
- For certain abbreviations (e.g. USA, NATO, WTO).
- For a defined term in a legal document where the definition uses a capital letter (e.g. 'Roggins plc, hereinafter referred to as "the Company"').

In lower case subheadings, use a capital letter only at the beginning of the first word (and for defined terms).

When inserting information in tables or lists, only use a capital letter if a separate sentence is being started (lists often occur within a sentence, in which case the only capital should be at the start of the sentence).

When writing headings or titles, capitalise the first letter of every important word (e.g. nouns, pronouns, verbs, adjectives and adverbs). Capitalise the first letter of the first and last word in the heading. Put articles, prepositions and conjunctions (**and, or**) in lowercase.

The punctuation has been removed from the following sentences. Replace it. Model answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) no variation of this agreement or any document entered into pursuant to this agreement shall be valid unless it is in writing and signed by or on behalf of each of the parties hereto
- (2) the purchaser and the seller agree as follows the goods will be sold for the sum of four hundred pounds £400 per unit delivery will take place on 4 august 2003 and payment will be made in cash no later than 28 august 2003
- (3) dear sirs thank you for your letter of 12 may with regard to your contention that our client is in breach of his agreement with your client it is clear that this is not the case your letter of 3 february to our client constitutes a clear waiver of paragraph 3 sub paragraph b of the agreement between our respective clients dated 9 june 2001
- (4) he said it appears that what the judge said was I will not accept this application unless it is made in the proper form and not I will not accept this application under any circumstances as we had previously been told for which information we thanked him
- (5) you said or at least this is what the report states you can all go to hell do you accept first of all that you made this comment and if so do you not think that it was a highly unwise comment for you to have made

4

Basic standards of legal writing

4.1

DATES

In British English dates should be written 1 February 1999, 3 March 2000 – not 1st February or 3rd day of March.

Note, however, that dates are written differently in American English, since the month is placed before the day, and a comma is often placed after the day. For example, February 1st, 1999.

4.2

NUMBERS

The general rule is that all numbers ten and below should be spelt and numbers 11 and above should be put in numerals. However, there are certain exceptions to this:

- If numbers recur through the text or are being used for calculations, then numerals should be used.
- If the number is approximate (e.g. 'around six hundred years ago') it should be spelled out.
- Very large numbers should generally be expressed without using rows of zeros where possible (e.g. \$3.5 million instead of \$3,500,000). In contracts, the use of both words and numbers is common in order to increase certainty. For example, 'THREE THOUSAND FIVE HUNDRED EUROS (€3,500)'.
- Percentages may be spelled out (twenty per cent) or written as numbers (20%).
- Numbers that begin sentences should be spelled out.

In English writing, the decimal point is represented by a dot (.) and commas are used to break up long numbers. Commas cannot be used to represent a decimal point.

Therefore, the number ten thousand five hundred and fifty-three and three-quarters is written like this in English:

10,553.75

while in most Continental European countries, it is written like this:

10.553,75

When referring to sums of money, the following rules apply:

- When writing numerical sums, the currency sign goes before the sum (e.g. \$100). Note that there is no gap between the sign and the figure that follows it.
- When spelling out numbers, the name of the currency is put after the number (e.g. 'one hundred pounds sterling').

The percentage sign (%) appears after the number to which it relates, and there is no gap between the sign and the number (e.g. 95%).

CITATIONS

4.3

Statutes should be written without a comma between the name of the statute and the year it was enacted. For example, the 'Treaty of Amsterdam 1999'.

The word 'the' should not form part of the name of a statute. Therefore, one should write 'the Single European Act 1986' and not 'The Single European Act 1986'.

When referring to a section of a statute write 'section' in full using a lowercase 's' (unless starting a sentence). For example, 'section 2 of the Law of Property (Miscellaneous Provisions) Act 1989'.

When referring to a particular subsection of a statute do not use the word 'subsection'. Use the word 'section' followed by the relevant number and letter, for example, 'section 722(1) of the Companies Act 1985'.

The names of cases should be written in italics and the word 'versus' should appear as 'v.'. For example, '*Donoghue v Stevenson*'. In US case citations, a dot (.) generally appears after 'v'.

TERMINOLOGY AND LINGUISTIC PECULIARITIES

4.4

Terms of art

4.4.1

Legal English, in common with many other professional languages, employs a great deal of terminology that has a technical meaning and is not generally familiar to the layperson. These are sometimes referred to by lawyers as 'terms of art'.

Examples include ***waiver***, ***restraint of trade***, ***restrictive covenant*** and ***promissory estoppel***. See the glossary of legal terminology for more information.

4.4.2 Foreign terminology

In addition, a number of Latin and French words and phrases (such as *inter alia*, *mutatis mutandis*, *ad hoc* and *force majeure*) are in regular use in legal English. While these should not be overused, a number of them are regarded as indispensable by lawyers because they express a legal idea much more succinctly than could be achieved in English. For example, the phrase *inter alia* is sometimes rendered in English as 'including but not limited to'.

See the glossary of foreign terms used in law for more information.

4.4.3 Doublets and triplets

There is a curious historical tendency in legal English to string together two or three words to convey what is usually a single legal concept. Examples of this include *null and void*, *fit and proper*, *perform and discharge*, *dispute, controversy or claim*, and *promise, agree and covenant*. These are often called 'doublets' or 'triplets'.

These should be treated with caution, since sometimes the words used mean, for practical purposes, exactly the same thing (*null and void*); and sometimes they do not quite do so (*dispute, controversy or claim*).

Modern practice is to avoid such constructions where possible and use single word equivalents instead. For example, the phrase *give, devise and bequeath* could be replaced by the single word *give* without serious loss of meaning.

However, the pace of change in legal usage is slow, and as a result it is still quite common to see certain typical doublets and triplets in certain legal documents. Some of the most common of these are listed below (with suggested equivalents in brackets).

Doublets

Able and willing	(=able)
Agree and covenant	(=agree)
All and sundry	(=all)
Authorise and direct	(=authorise OR direct)
Cancelled and set aside	(=cancelled)
Custom and usage	(=custom)
Deem and consider	(=deem)
Do and perform	(=perform)
Due and owing	(=owing)
Fit and proper	(=fit)
Full and complete	(=complete)
Goods and chattels	(=goods)
Keep and maintain	(=maintain)

Known and described as	(=known as)
Legal and valid	(=valid)
Null and void	(=void)
Object and purpose	(=object OR purpose)
Order and direct	(=order)
Over and above	(=exceeding)
Part and parcel	(=part)
Perform and discharge	(=perform OR discharge)
Repair and make good	(=repair)
Sole and exclusive	(=sole OR exclusive)
Terms and conditions	(=terms)
Touch and concern	(=concern)
Uphold and support	(=uphold)

Triplets

Cancel, annul, and set aside	(=cancel)
Communicate, indicate or suggest	(=communicate)
Dispute, controversy or claim	(=dispute)
Give, devise and bequeath	(=give)
Hold, possess, and enjoy	(=hold)
Pay, satisfy, and discharge	(=pay)
Possession, custody, and control	(=possession OR custody OR control)
Promise, agree, and covenant	(=promise OR agree)
Repair, uphold and maintain	(=repair OR uphold OR maintain)
Way, shape or form	(=way)

Here-, there- and where- words

4.4.4

Words like **hereof**, **thereof**, and **whereof** (and further derivatives ending in **-at**, **-in**, **-after**, **-before**, **-with**, **-by**, **-above**, **-on**, **-upon**, etc.) are not often used in ordinary English. They are still sometimes used in legal English, primarily as a way of avoiding the repetition of names of things in the document – very often, the document itself.

For example:

the parties hereto

instead of:

the parties to this contract

or

the provisions contained hereinafter

instead of:

the provisions contained to later on in this contract

However, in most cases the use of such words is strictly unnecessary or can be rendered unnecessary by the use of definitions. For example, if there is likely to be doubt about the matter, **the parties** can be defined, in a definitions section, as 'the parties to this contract'. In most cases, however, the meaning of words and phrases can be gathered from the context in which they are placed. Here-, there- and where- words persist in modern legal usage largely as a consequence of legal tradition rather than usefulness.

Here is a list of some of these words and the way in which they are used. It should be noted that the list is not exhaustive.

Hereafter means 'from now on or at some time in the future'. For example, 'the contract is effective hereafter'.

Hereat means (1) 'at this place or point' or (2) 'on account of or after this'. For example, 'hereat the stream divided'.

Hereby means 'by this means; as a result of this'. For example, 'the parties hereby declare'.

Herefrom means 'from this place or point'. For example, 'the goods shall be collected herefrom'.

Herein means 'in this document or matter'. For example, 'the terms referred to herein'.

Hereinabove means 'previously in this document or matter'. For example, 'the products hereinabove described'.

Hereinafter means 'later referred to in this matter or document'. For example, 'hereinafter referred to as the Company'.

Hereinbefore means 'previously in this document or matter'. For example, 'the products hereinbefore described'.

Hereof means 'of this matter or document'. For example, 'the parties hereof'.

Hereto means 'to this place or to this matter or document'. For example, 'the parties hereto'.

Heretofore means 'before now'. For example, 'the parties have had no business dealings heretofore'.

Hereunder means 'later referred to in this matter or document'. For example, 'the exemptions referred to hereunder'.

Herewith means 'with this letter or document'. For example, 'I enclose herewith the plan'.

Thereof means 'of the thing just mentioned'. For example, 'The contract was signed on 1 May 1999. The parties thereof . . .'

Thereafter means 'after that time'. For example, 'The products shall be transported to The Grange. Thereafter, they shall be stored in a warehouse.'

Thereat means (1) at that place or (2) on account of or after that. For example, 'thereat, payments shall cease'.

Thereby means 'by that means; as a result of that'. For example, 'the parties thereby agree'.

Therein means 'in that place, document or respect'. For example, 'The parties shall refer to the contract dated 1 May 1999. It is agreed therein that . . .'

Thereinafter means 'later referred to in that matter or document'. For example, 'thereinafter, it is agreed that . . .'

Thereof means 'of the thing just mentioned'. For example, 'Reference is made in paragraph 5 to the contract dated 1 May 1999. The parties thereof agreed that . . .'

Thereon means 'on or following from the thing just mentioned'. For example, 'The machine rests on a wooden block. There is placed thereon a metal bracket . . .'

Thereto means 'to that place or to that matter or document'. For example, 'the parties thereto'.

Therefor means 'for that'. For example, 'the equipment shall be delivered on 13 September 2003. The Company agrees to pay therefor the sum of \$150,000'.

Therefor should not be confused with 'therefore' which means 'for that reason'.

Thereupon means 'immediately or shortly after that'. For example, 'delivery shall take place on 13 September 2003. Thereupon the equipment shall be stored in the Company's warehouse'.

Whereabouts means 'the place where someone or something is'. For example, 'the Company shall be kept informed as to the whereabouts of the products'.

Whereat means 'at which'. For example, 'The seller attempted to charge extra interest on late payment, whereat the buyer objected'.

Whereby means 'by which'. For example, 'the contract dated 1 May 1999, whereby the Company agreed to purchase the products'.

Wherefore means 'as a result of which'. For example, 'the buyer breached the contract, wherefore the seller suffered damage'.

Wherein means (1) in which, or (2) in which place or respect. For example, 'the contract dated 1 May 1999, wherein it is stated that . . .'

Whereof means 'of what or of which'. For example, 'the Company one of the directors whereof is a foreign national'.

Whereupon means 'immediately after which'. For example, 'The sum of \$15,000 shall be paid by the buyer to the seller on 13 September 2003, whereupon the buyer's liability to the seller shall be discharged'.

Select the correct words from the list (a) to (j) and insert them into the gaps in the sentences below. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) The parties _____ agree that this contract shall continue for a period of two years from the date of execution _____.
 - (2) ... and _____ the Purchaser is desirous of acquiring from the Vendor the Goods which form the subject-matter of this contract ...
 - (3) The _____ provisions shall not apply if the parties agree to waive them.
 - (4) The specifications of the Products are set out in the clauses _____ appearing.
 - (5) That was a case _____ the judge ruled that liability could not be excluded in all circumstances, but that limitations might be permissible.
 - (6) The provisions contained _____ shall be construed in accordance with the laws of England and Wales.
 - (7) Any dispute arising _____ shall be resolved in arbitration.
 - (8) _____ all disputes between the parties have been resolved amicably.
 - (9) A copy of the lease is enclosed _____.
- a. heretofore
 - b. whereas
 - c. herefrom
 - d. hereinafter
 - e. hereof
 - f. wherein
 - g. herein
 - h. above-mentioned
 - i. herewith
 - j. hereto

Whatsoever, wheresoever and howsoever

4.4.5

In addition to the words listed above, you may also encounter the words **whatsoever**, **wheresoever** and **howsoever**. These have extremely limited practical meaning and exist as a result of legal tradition only.

Whatsoever means 'whatever', i.e. 'no matter what' in contractual contexts.

Wheresoever means 'wherever', i.e. 'in or to whatever place' in contractual contexts.

Howsoever means 'however', i.e. 'in whatever way or to whatever extent'.

These words are occasionally used together; for example, in the following sentence:

This limitation shall apply in any situation whatsoever, wheresoever and howsoever arising.

The word **whosoever** may also be encountered. This simply means 'whoever'.

Hence, whence and thence

4.4.6

The words **hence**, **whence** and **thence**, and the derivatives **henceforth** and **thenceforth** are all archaic forms in ordinary English, which are however still occasionally seen in legal English. Their meanings are briefly outlined below.

Hence means (1) for this reason; and (2) from now on.

Henceforth means from this or that time on.

Whence means (1) from what place or source; (2) from which or from where; (3) to the place from which; or (4) as a consequence of which.

Thence means (1) from a place or source previously mentioned; (2) as a consequence.

Thenceforth means from that time, place or point onwards.

-er, -or and -ee names

4.4.7

Legal English contains a large number of names and titles, such as **employer** and **employee** in which the reciprocal and opposite nature of the relationship is indicated by the use of **-er/-or** and **-ee** endings. These endings derive from Latin. In the example given here, the employer is the one who employs the employee. Hence, the employee is employed by the employer.

Here are some further examples that you may have encountered:

Assignor is a party who assigns (transfers) something to another party.

Assignee is the party to whom something is assigned.

Donor is a party who donates something to another party.

Donee is the party to whom something is donated.

Interviewer is a person who is interviewing someone.

Interviewee is a person who is being interviewed by the interviewer.

Lessor is a party who grants a lease over a property. He or she is therefore the landlord.

Lessee is the party to whom a lease over a property is granted. He or she is therefore the tenant.

Mortgagor is a lender who lends money to a property owner (the mortgagee) in return for the grant by the mortgagee of a mortgage over the property as security for the loan.

Mortgagee is the property owner to whom money is loaned by the mortgagor in return for the grant of a mortgage over the property.

Offeror is a party who makes a contractual offer to another party.

Offeree is the party to whom a contractual offer is made.

Payer is a party who makes a payment to another party.

Payee is the party to whom payment is made.

Promisor is a party who makes a promise to another party.

Promisee is the party to whom a promise is made.

Representor is a party who makes a contractual representation to another party.

Representee is the party to whom a contractual representation is made.

Transferor is a party who transfers something to another party.

Transferee is the party to whom something is transferred.

Note that these words are not always used in the way the examples given above might lead one to expect. For example, a **guarantor** is someone who provides a **guarantee**. However, the person to whom a guarantee is given is known technically as the **principal debtor**, not the guarantee. The guarantee is the document by which the secondary agreement that constitutes the guarantee is made.

4.4.8 Unfamiliar pronouns

Unfamiliar pronouns represent an archaic usage in legal English, and include such formulations as **the same**, **the said**, **the aforementioned**, etc.

The use of such pronouns in legal texts is interesting since very frequently they do not replace the noun – which is the whole purpose of pronouns – but are used to supplement them. For example, **the said John Smith**.

Ordinary words in unusual contexts

4.4.9

Apparently ordinary words are sometimes found in unusual contexts in legal English and have different meanings in those contexts.

For example, the familiar term **consideration** refers, in legal English, to contracts, and means 'an act, forbearance or promise by one party to a contract that constitutes the price for which the promise of the other party is bought' (Oxford Dictionary of Law).

Other words found in unusual contexts in legal English include:

- construction (interpretation);
- redemption (used in relation to the repayment of debts secured on property);
- furnish (to provide e.g. documents);
- hold (the application of a legal principle in court proceedings, by a judge); and
- find.

Deeming

4.4.10

The word **deem** is frequently used in legal English. In its legal sense it means to treat a thing as being something that it is not, or as possessing certain characteristics that it does not in fact possess. This meaning is employed in contracts and in legislation to create the idea that something mentioned in the contract is **deemed** (treated) to be something else.

Consequently, although it would seem absurd to a layperson, from the point of view of common law drafting practices it would be perfectly acceptable to write in a contract:

In this agreement dogs shall be deemed to be cats.

More typically, one might find **deemed** being used in this sort of clause:

Notice shall be deemed served 72 hours after having been posted.

The purpose of such a clause is to indicate that for the purposes of the contract the parties agree to regard a notice as having been served once 72 hours has passed after the notice was posted.

In ordinary language, **deem** is simply an old-fashioned term meaning to consider in a specified way. It is a synonym for think or judge.

4.5 ABBREVIATIONS

There are two kinds of abbreviations. The first kind is the acronym. An acronym is made from the initial letters or parts of a phrase or compound terms. It is usually referred to as a single word. For example, **radar** = radio detection and ranging.

The second kind is an initialism, which is made from the initial letters or parts of a phrase or compound term. These are usually referred to letter by letter rather than as a single word, e.g. **USA** = United States of America.

In general, those abbreviations that refer to an entity, such as **UK**, **USA**, or **NATO** should be capitalised without dots between the letters.

Those abbreviations that are used as grammatical shorthand, such as **e.g.** and **i.e.** are usually written in lowercase letters with dots between the letters.

There are also certain terms that are referred to in speech as a single word, but which are capitalised in writing. For example, **NATO** = North Atlantic Treaty Organization.

Here is a list of some common abbreviations and their usages:

AGM	= Annual General Meeting
a.k.a.	= also known as ('John Smith a.k.a. King of Style')
a.m.	= ante meridiem ('before noon')
AOB	= any other business (often used in meeting agendas)
B2B	= business to business
B2C	= business to consumer
cc	= carbon copy (used to show that a copy of a letter has also been sent to another person or persons).
CEO	= chief executive officer
CGT	= capital gains tax
c.f.	= compare(d), with
c.i.f.	= cost, insurance, freight contract
c.o.d.	= cash on delivery
EC	= European Communities
e.g.	= exempli gratia ('for example')
enc	= enclosed
etc	= et cetera
EU	= European Union
FBI	= Federal Bureau of Investigation
f.o.b	= free on board contract
GATT	= General Agreement on Tariffs and Trade
GBH	= grievous bodily harm
GM	= genetically modified
GmbH	= German business vehicle equivalent to the common law limited company (Ltd.)

GMT	= Greenwich Mean Time
GNP	= gross national product
HR	= Human Resources
Ibid	= ibidem ('in the same source')
ID	= identification
i.e.	= id est ('that is to say')
Inc	= incorporated (USA)
IOU	= I owe you
IPO	= Initial Public Offering (of shares of a company)
IT	= Information Technology
Ltd	= limited company (UK)
MD	= managing director
MEP	= member of the European Parliament
NAFTA	= North American Free Trade Agreement
NATO	= North Atlantic Treaty Organization
NB	= nota bene ('note well')
p.a.	= per annum
PA	= personal assistant
PC	= (1) personal computer; (2) politically correct; (3) police constable
p.c.	= per cent
plc	= public limited company (UK)
p.m.	= post meridiem ('afternoon')
p.p.	= per procuracionem (used when signing a letter on someone else's behalf)
PO	= post office
PPS	= post postscript
PR	= public relations
PS	= postscript
PTO	= please turn over
QC	= Queen's Counsel
QED	= quod erat demonstrandum ('thus I prove')
TLC	= tender loving care
UK	= United Kingdom
UN	= United Nations
USA	= United States of America
VAT	= value added tax
viz	= videlicet ('namely, in other words')
vs.	= versus, against
WIP	= work in progress

4.6

BUSINESS BUZZWORDS

'Business buzzwords' refers to the typical phrases used by English-speaking lawyers and business people in the course of daily working life. It is a difficult area of English usage to master, and there are two reasons for this.

The first is that the buzzwords or phrases themselves are often extremely euphemistic and may not appear at first sight to have any connection with what they are supposed to mean or describe.

The second is that they are constantly changing. New words and phrases are constantly appearing and old ones dropping out of use.

Here is a brief selection of buzzword and phrases in current (2009) use.

Adminisphere – upper levels of management that are known for making stupid or impractical suggestions.

Blamestorming – a meeting to agree who should be blamed for something that has gone wrong. This is of course a pun on the long-established term **brainstorming**.

Bleeding edge – something extremely new, more so than if it were merely **cutting edge**.

Bobbleheading – group head-nodding when the boss talks.

Carbon-based error – a mistake made by a human being.

Déjà poo – the feeling that you've got into this mess before.

Let's sunset that – referring to a bad idea that should not be mentioned again.

Little 'r' me – send me a personal answer to an email.

Low-hanging fruit – easy opportunities to create business or make money.

Offline – to take something **offline** is to discuss something in person or on the phone, rather than via email, or to deal with something after a meeting.

Plutoed – a project relegated to lower status.

Prairie dogging – the habit of office workers to stick their heads up over cubicle partitions.

Stickiness – a web page quality that captures people's interest. Hence **sticky content**.

Thought grenade – an explosive good idea.

There is no 'I' in team – individual interests must be sacrificed to the needs of the team.

Think outside the box – roughly, this involves not thinking like you normally do, but pretending to be someone much smarter.

Viral marketing – A marketing campaign that spreads very quickly.

5

Elements of good style: clarity, consistency, effectiveness

5.1

GENERAL CONSIDERATIONS

Style in legal writing is to some extent a matter of personal preference or company policy. The only unbreakable rules of style in legal documents and letters are that your writing should be as easy to understand as possible and that it should avoid offensive terms.

In addition to drafting letters, emails and other communications, most lawyers also spend a considerable amount of time creating legal documents for a variety of purposes. These may either be intended for use in court proceedings or for use in non-contentious business such as sales of land, goods or services.

Typical documents prepared by lawyers for use in court include statements of claim, witness statements, divorce petitions, petitions for bankruptcy and affidavits.

Typical documents prepared by lawyers for non-contentious purposes include transfers of land, contracts for sale of goods, articles of association for companies, licences and options.

The style of writing used in legal documents differs from the style used in legal correspondence. This is because the purpose of legal documents is different from that of legal correspondence.

Most legal documents used in court proceedings either act as evidence in support or defence of some claim or make allegations and arguments either in support or in defence of a claim. Most legal documents used in non-contentious business generally record an agreement between parties. Such documents are intended primarily to regulate all aspects of the agreement reached between the parties. They lay down the obligations each party must carry out and specify the consequences of failure. They are intended to be legally effective in court. Consequently, the language used in legal documents displays certain typical features, which often make them difficult to read. These include:

- Use of terms of art. These are words that have a precise and defined legal meaning. They may not be familiar to the layperson, but cannot be replaced by other words.
- Use of defined terms. Many legal documents contain a definitions section in which the parties agree that certain words used repetitively throughout the document shall have an agreed meaning.
- Use of obscure legal phrasing. This can be confusing to the layperson, either simply because the language is unfamiliar, or because the words used have a different meaning in ordinary English.

- Repeated use of the words **shall** and **must** to express obligations, and **may** to express discretions (where the parties are entitled to do something but are not obliged to do it).

These issues are dealt with in more detail in Chapter 11.

The writing used in legal correspondence usually has a different purpose. It is generally intended to provide information and advice, to put forward proposals and to provide instructions to third parties.

However, all legal writing should aim at achieving three goals – clarity, consistency and effectiveness. The notes set out below show how these goals can be achieved in practice.

CLARITY

5.2

Writing of all kinds should be as easy to understand as possible. The key elements of clarity are:

- Clear thinking. Clarity of writing usually follows clarity of thought.
- Saying what you want to say as simply as possible.
- Saying it in such a way that the people you are writing for will understand it – consider the needs of the reader.
- Keep it as short as possible.

Planning

5.2.1

Start by considering the overall purpose of your document or letter. Before starting to draft a document you need to be sure that you have a clear idea of what the document is supposed to achieve and whether there are any problems that need to be overcome to allow it to be achieved. Ask yourself the following questions:

- Have you taken your client's full instructions?
- Do you have all the relevant background information?
- What is your client's main goal or concern?
- What are the main facts that provide the backbone of the document?
- What is the applicable law and how does it affect the drafting?
- Are there any good alternatives for the client? Would it be more effective or cheaper to approach the client's goal in a different way? For example, if it seems that drafting the necessary documentation in English will be too difficult, consider the following options:

- draft the document in your native language and have it translated and verified;
 - engage the services of a native English-speaking lawyer as a consultant in respect of the case;
 - draft the document as best as you can in English and have a legally qualified English native speaker check and correct the documents.
- Are there any useful **precedents** (generic legal documents on which specific legal documents can be based), which could be used for the draft?

More detailed notes on drafting documents are contained in Chapter 11.

More detailed notes on correspondence are contained in Chapter 12.

5.2.2 Words

Whether writing documents or correspondence, the following guidelines are relevant.

5.2.2.1 Use the words that convey your meaning

Use the words that convey your meaning, and nothing more. Never use words simply because they look impressive and you want to try them out, or because you like the sound of them. There is a tendency in legal writing to use unnecessary obscure words rather than their ordinary equivalents, perhaps out of a feeling that the obscure words are somehow more impressive.

5.2.2.2 Use ordinary English words where possible

Do not use a foreign phrase or jargon if you can think of an ordinary English word that means the same thing. For example, do not write **modus operandi** when you can write **method**, nor **soi disant** when you can write **so-called**.

In legal English, this is more difficult to achieve in practice than it is in ordinary English, because much of the terminology used (*inter alia*, *ab initio*, *force majeure*, *mutatis mutandis*) comes from French and Latin. These often act as shorthand for a longer English phrase. For example, *inter alia* comes out in English as 'including but not limited to'. Your choice of vocabulary – between English or French and Latin – will be influenced by who you are writing to.

5.2.2.3 Avoid negative structures

Avoid negative structures where possible. There is a tendency in much business and legal writing to try to soften the impact of what is being said by using **not un-** (or **not im-**, **il-**, **in-**, etc.) formations such as:

- not unreasonable
- not impossible
- not unjustifiable
- not unthinkable
- not negligible

Such structures make what you are saying less clear and definite. They become very hard to follow when more than one is used within a single sentence, for example:

It is not impossible that this matter will have a not inconsiderable bearing upon our decision.

Which, translated in ordinary English, reads:

It is possible that this matter will have a considerable bearing upon our decision.

Sentences

5.2.3

In addition to the notes on sentence structure set out at 2.12 above, bear in mind the following points.

Keep sentences short where possible

5.2.3.1

Use words economically to form your sentences. This does not necessarily mean that every sentence should be short (which might create a displeasing staccato effect), but that all unnecessary words should be removed; this will make your writing much more vigorous.

In particular, pay attention to phrases that introduce new pieces of information or argument. These can often be reduced to single words. Here are some examples:

Commonly used phrase	Single word equivalent
be a significant factor in	affect, influence
be in a position to	can, may
be inclined to the view that	think [that]
by dint of	because
give rise to	cause
have a detrimental effect upon	harm
have a tendency to	tend
have an effect upon	affect
have the effect of	(in most contexts) cause

Commonly used phrase	Single word equivalent
having regard to	concerning
impact upon	affect
in spite of the fact that	despite, although
in the interests of (e.g. saving time)	to (e.g. save time)
in view of	because
it is arguable that	perhaps
make contact with	contact
meet with	meet
notwithstanding the fact that	despite, although
the fact that	delete phrase – replacement word usually unnecessary
with regard to the question of . . .	concerning, regarding

5.2.3.2 One main idea per sentence

Try to have only one main idea per sentence. Where you want to add more than one piece of additional information about a subject introduced in a sentence, consider starting a new sentence. Always start with the most important piece of information, then deal with lesser matters, qualifications or exceptions.

For example, the sentence:

Unless the order is for the goods described in Appendix 3, X shall deliver the goods to Y within 7 days.

would be better written as follows:

X shall deliver the goods to Y within 7 days of an order being received, unless the order is for the goods described in Appendix 3.

And this sentence:

The company, the headquarters of which are in Oxford, specialises in pharmaceutical products and made a record profit last year.

would be better split up as follows:

The company specialises in pharmaceutical products. Its headquarters are in Oxford, and it made a record profit last year.

Use the active voice where possible**5.2.3.3**

Voice refers to the relationship between a clause's subject and its verb. The phrase, 'the lawyer considered the documents' is active because the verb 'considered' performs the action of the subject. The phrase, 'the documents were considered by the lawyer' is passive because the verb is acted upon.

The passive voice has the effect of deadening the impact of the action by burying it in the subsidiary part of the sentence. The active form highlights the action in the first part of the sentence.

Legal drafters have a tendency to use passive forms ('a meeting is to be called') rather than active forms ('John Smith will call a meeting'). The reason for this is that the passive permits an indirect and formal tone with which lawyers instinctively feel comfortable.

However, overuse of the passive can lead to lack of clarity. The example given above leaves it unclear as to who is going to call the meeting. It also leads to less effective and less forceful communication with the reader.

Sentences using the active voice are shorter and more direct. In most cases the active voice is preferable. However, there may be cases in which the writer's intention is to divert attention from the real subject. For example, 'the contract was signed' (passive), as opposed to, 'I signed the contract' (active).

Alternatively, the writer may use the passive voice to focus attention on the object in a case where that is more important than the subject. For example, 'the meeting will be held' (passive) as opposed to 'the company will hold a meeting' (active).

In these last two cases the passive should be used. In other cases it should be avoided.

Use positive phrases where possible**5.2.3.4**

A positive phrase is usually better than a negative one. For example, 'Clause 2 shall apply only if . . .' is clearer than 'Clause 2 shall not apply unless . . .'

However, restrictions are often difficult to express in the positive rather than the negative without either:

- changing the meaning ('A shall not sell goods except those made by B' is a restriction whereas 'A shall sell goods made by B' is a positive obligation and therefore fundamentally different); or
- using indirect language ('A may build anything except a house' is less direct than saying 'A may not build a house').

In these cases, therefore, the negative forms should be used. In other cases they should be avoided.

5.2.4 Paragraphs

Paragraphs should not be defined by length. They are best treated as a unit of thought. In other words, each paragraph should deal with a single thought or topic. Change paragraphs when shifting to a new thought or topic.

Paragraphs should start with the main idea, and then deal with subordinate matters. The writing should move logically from one idea to the next. It should not dance about randomly between different ideas.

One-sentence paragraphs should not be used too often, but can be useful in certain circumstances.

Pay attention to the way the paragraphs look on the page. Text, evenly divided into manageably sized paragraphs, with occasional shorter ones, looks inviting to the reader. Huge, unbroken sections of text are very off-putting to the reader and should be avoided. So too should untidy sequences of very short paragraphs.

5.2.5 Vigour

As a general rule, as noted above, the fewer the words you can use to convey your meaning the more vigorous your writing will be. Every time you write something, look back at it and think how many words you can cut out. Then do it. You will be surprised at what a difference it makes to the vigour and clarity of your writing.

Certain other issues are relevant when trying to write vigorously. Here are some of them:

5.2.5.1 Use active verbs where possible

Use active verbs rather than nominalisations where possible. Nominalisations are produced when verbs are buried in longer nouns. They usually end with one of the following: **-tion, -sion, -ment, -ence, -ance, -ity**. Anglo-American lawyers are addicted to them. They should usually be avoided because they make writing longer and less dynamic.

Common examples include **give consideration to** instead of **consider**, **to be in opposition to** instead of **to oppose**, and **to be in contravention of** instead of **to contravene**.

Here is one example of usage:

We are in agreement that our firm will give consideration to the documents.

This sentence would be better expressed:

We agree that our firm will consider the documents.

However, there are certain occasions in legal writing when we need to use nominalisations. For example, lawyers don't agree to **arbitrate** but to go to

arbitration: arbitration is a defined legal process and should be referred to in its nominalised form.

Here are some examples of commonly used nominalisations and their active verb equivalents.

Nominalisation	Active verb equivalent
agreement	agree
arbitration	arbitrate
arrangement	arrange
compulsion	compel
conformity	conform
contravention	contravene
enablement	enable
enforcement	enforce
identity	identify
implementation	implement
incorporation	incorporate
indemnification	indemnify
indication	indicate
knowledge	know
litigation	litigate
mediation	mediate
meeting	meet
negotiation	negotiate
obligation	obligate, oblige
opposition	oppose
ownership	own
perpetration	perpetrate
perpetuation	perpetuate
possession	possess
reduction	reduce
violation	violate

5.2.5.2 Use short words where possible

Never use a long word where a short one can be used. For example, avoid words like **notwithstanding** where simple words like **despite**, **still** or even **if** can be used instead.

Never use a phrase where you can use one short word. There is a creeping tendency to include unnecessary phrases like **with regard to**, **with respect to**, **in reference to** and so on (see above).

However, this rule is modified by the need to use (1) terms of art, and (2) defined terms properly – and a number of them are long.

5.2.6 Precision

Use precise language and terminology. This means two things: choosing your words carefully and avoiding ambiguity. Refer to 6.1 for notes on avoiding ambiguity.

Differentiate between legal jargon and terms of art. A **boilerplate clause** can be replaced by other words; **patent**, **waiver** and **rescission** cannot.

Use the words that convey your meaning, and nothing more. Never use words simply because they look impressive and you want to try them out, or because you like the sound of them. There is a tendency in legal writing to use unnecessary obscure words rather than their ordinary equivalents, perhaps out of a feeling that the obscure words are somehow more impressive. Here are some examples:

Obscure word or phrase	Ordinary equivalent
annex	attach
at this point in time	now
append	attach
cease	stop
conceal	hide
covenant and agree	agree
demise	death
desist	stop, leave off
detain	hold, delay
determine (as in <i>terminate</i>)	end OR decide (according to context)
donate	give
effectuate	carry out

employ (when not used in connection with labour relations)	use
endeavour	try
evince	show
expedite	hasten
expend	spend
expiration, expiry	end
extend	give
extinguish	end
forthwith	immediately, soon
forward	send
furnish	give, provide
hence	therefore
implement	carry out, fulfil
inaugurate	begin
indicate	state, show, say
initiate	begin
institute	begin
necessitate	require
occasion (as verb)	cause
peruse	read
possess	have
present	give
prior	earlier
proceed	go (ahead)
quantum	amount
retain	keep
suborn	bribe (e.g. a juror or witness)
subsequently	then, after, later
terminate	end
utilise	use

5.2.7 Discourse markers

When writing in English, lawyers use 'discourse markers' to show how different ideas interrelate. These usually appear at the beginning of sentences and they indicate to the reader the way in which he or she should treat the information or ideas given in the sentence. They provide an essential means of orientating the reader and assisting his or her comprehension of the text.

In practice, since there are only a limited number of language functions that are typically required in legal discourse, a small handful of words and phrases will cover most situations that a lawyer might expect to encounter in the course of daily working life.

Here are some examples:

- 1** ***In the event that** a trademark owner wishes to allow others to use the trademark, he or she must inform the Registrar.*

Here, the opening phrase 'in the event that' indicates to the reader that what follows is a hypothesis. The word 'if' could also be used to the same effect.

- 2** *Where trademark infringement occurs, the owner of the trademark has the right to sue. **However**, a trademark may be lost if it is no longer distinctive.*

Here, the opening word of the second sentence – **however** – indicates a qualification to the previous statement.

- 3** ***Of course**, if information is already in the public domain, it will no longer be regarded as confidential.*

The opening phrase **of course** in this sentence indicates an assumption. The writer uses this technique to indicate to the reader that the idea conveyed in the rest of the sentence is generally accepted.

- 4** ***Therefore**, in such circumstances a confidentiality agreement covering such information will be ineffective.*

In this sentence, the opening word **therefore** indicates a logical step or deduction based on the information provided in the previous sentence.

The table below sets out some of the more common functions for which discourse markers are used (on the left) and some suggested words or phrases for those functions (on the right).

Function	Suggested word or phrase
Referring to the past	formerly, previously
Expanding on a point	besides, furthermore
Contrasting	on the other hand, conversely
Summarising	in short, in summary, by way of précis

Drawing a conclusion or inference	as a consequence, consequently, as a result
Giving an example	for instance, for example
Emphasising	in particular, especially, it should be stressed that
Qualifying	however, it should also be borne in mind that
Making a logical step in the argument	therefore, thus, it follows that in particular
Beginning	firstly, to begin with
Making an assumption	of course, naturally, clearly, evidently
Referring to a new issue	turning to, with reference to, with respect to, with regard to, regarding
Hypothesising	in the event that, if
Bearing a factor in mind	given that, bearing in mind that, considering that,
Stating an exemption	except, with the exception of, save for, save as to

Presentation

5.2.8

Pay attention to the layout of the document. There is no point in writing excellent English but presenting it badly on paper or on the screen. Here are some basic suggestions:

- Use a readable serif font in an appropriate size (generally between 9 and 12 points).
- Use between 45 and 70 characters per line.
- Use plenty of white space – break up slabs of text, use wide margins around the text, and use appropriate spacing.
- Use headings to structure the text.
- Use italics rather than underlining to emphasise text.
- Use properly indented lists where appropriate.
- Avoid excessive capitalisation.

Clarity summary

5.2.9

These considerations will help focus your mind on writing well.

- When starting to write a letter or document, ask yourself three questions:

- What am I trying to say?
- What words will express it?
- Could I make it shorter?
- Keep sentences as short as possible. If you can cut words out without affecting the meaning of the sentence, do it. For example, do not write 'in spite of the fact that. . .' Write 'although' instead.
- Try to have only one main idea per sentence.
- Paragraphs should start with the main idea, then deal with subordinate matters.
- The writing should move logically from one idea to the next.
- Avoid negative structures. For example, 'not unreasonable' should be simply 'reasonable'.
- Use precise language and terminology. Avoid ambiguity.
- Use active verbs rather than nominalisations. For example, do not write 'we are in opposition to that idea'. Write 'we oppose that idea' instead.
- Never use a long word where a short one can be used. For example, avoid words like 'notwithstanding' where simple words like 'despite', 'still' or 'even if' can be used instead.
- Do not use a foreign phrase or jargon if you can think of an ordinary English word that means the same thing. For example, do not write *modus operandi* when you can write *method* nor *soi-disant* when you can write *so-called*.
- Use terms of art with care. Differentiate between terms of art and jargon. A *corporate veil* can be replaced with other words, but *bailment* and *patent* cannot.
- Try to produce text that looks as if it has been written by a normal human being. Break any of the rules above sooner than write like a robot.

5.3

CONSISTENCY5.3.1 **Synonyms**

Legal English is full of synonyms. It is therefore all too easy to start writing about something using certain words, and then later on in the document or letter start using other words to describe it. This can lead to lack of clarity or to ambiguity. It is crucial to be consistent in your use of terminology.

For example, if you start off with **buyer** and **seller**, do not start using **vendor** and **purchaser** later in the document. Never mix parts of different pairs: for example **landlord** and **lessee**, **vendor** and **buyer**.

Here are some examples of commonly used synonyms for legal concepts used in legal documents. There are subtle differences in meaning or usage between them.

- **Assign** is used in relation to intangible property (such as rights under a contract) while **transfer** is generally used in relation to tangible property (such as land and other physical items).
- **Breach** is used in relation to contractual violations, while **infringement** is used in relation to the violation of rights (particularly intellectual property rights).
- **Clause** is frequently used in relation to specific contracts, while **article** is more often in relation to EC legislation and overarching or framework agreements/terms and conditions.
- **Contract** is generally used in relation to a specific written contract with legal effect, while **agreement** may also be used in a more general sense to refer to loose understandings or oral agreements (which may or may not have legal effect).
- **Landlord** and **tenant** are used in relation only to the lease of real estate, while **lessor** and **lessee** may also be used in relation to the lease of other types of property.
- **Obligation** is generally used to refer to a specific duty under a contract or legal provision, while **liability** refers to legal consequences. For example, breach of an obligation may lead to legal liability.
- **Undertake** is generally used to indicate a commitment to do a certain thing and to accept the legal consequences of doing so ('X undertakes to deliver the goods to Y by 5 June'), while **assurance** refers to a collateral promise given by a third party.
- **Void** and **invalid** mean that something is not legally binding and has no legal effect, while **ineffective** refers to something that fails to achieve the required legal aim.

Defined terms

5.3.2

The problems caused by the difficulties in choosing and adhering to the most appropriate term can be dealt with in part by using defined terms. However, defining too many terms can be counterproductive, especially if the matters to which the definitions refer only appear once or twice. As a general rule, if a definition is only going to be used once, it should be omitted altogether.

A definition is only needed if the meaning of the word or phrase is unclear and cannot be ascertained from the context. When creating a definition, ensure: (1) that the definition created has a clear and specific meaning; and (2) that the word or phrase defined is used in the same sense throughout the document as that provided by the original definition.

The dangers of putting in too many definitions can be summarised as follows:

- The document becomes more difficult to read and use.
- Creating the document is more difficult: the author is more likely to make mistakes.
- Over-rigid definition of the meaning of certain words may lead to absurd or unintended conclusions.
- Overdefining can be self-defeating: often the attempt to include everything leads to something important being left out. A court might then take the view that the omission must have been deliberate (in the light of the fact that everything else in the contract is rigidly defined). As a result, the use of definitions can actually lead to loopholes in the document.

5.4

EFFECTIVENESS

When drafting legal documents or letters, clarity and consistency are worth nothing if the document is not actually legally effective.

5.4.1 Effectiveness checklist

The following checklist will help focus your mind on how to achieve legal effectiveness and relates particularly to the drafting of legal documents such as contracts.

- 1 Does the language you use correctly state a condition, obligation, authorisation, or limitation? See 11.1 below.
- 2 Does it state it in such a way that it is clear to whom or what it relates? A key point here is to avoid the passive – that is, do not write **a meeting must be called if . . .**, but **the Managing Director must call a meeting if . . .**
- 3 Does it state it in such a way that: it is enforceable (1) under the terms of the document itself; and (2) according to the law that governs the document?
- 4 Have you set clear time limits for the performance of any obligation?
- 5 Is it in conflict with any other terms of the document?

- 6 Does the document clearly state what will happen in the case of breach of any obligation? It is important to define the nature of the innocent party's rights and the nature of the penalty that will be imposed on the breaching party.
- 7 Are the obligations, authorisations, conditions and discretions actually capable of being exercised in practice? A key point here is to be careful with precedent legal documents – if used, they must be adapted rigorously to the deal in hand.
- 8 Is it precise enough? In particular, set clear time-frames rather than using words like **forthwith**; specify precise standards rather than use formulations like **to a reasonable standard**; state enforceable obligations rather than use formulations like **use their best endeavours** to, etc.

Beware of adjectives

5.4.2

Adjectives should be used with great care, particularly in legal documents. The reason for this is that their meaning can vary greatly according to the context and to the writer's intention. They do this to a markedly greater extent than occurs with nouns and verbs, the meaning of which is usually reasonably well fixed. Consider the following typical legal phrases, paying particular attention to the adjectives shown in bold:

- The Company is entitled to make such changes as it considers **necessary** and **prudent**.
- The Distributor shall promptly return all documents upon **reasonable** request by the Company.
- The Company must deliver goods of **satisfactory** quality, and must replace all **defective** parts free of charge.

It will be seen that the general effect of using these adjectives is to make the meaning of the sentences less precise. When is a change 'necessary'? When is a request 'reasonable'? When is quality 'satisfactory'? It may be that these words have a defined meaning in the law on which the relevant document is based, but this is a matter that needs to be verified. Lack of clarity on such issues may lead to unnecessary disputes between the contracting parties.

Consequently, when drafting a document in which obligations need to be precisely specified, adjectives should be avoided where possible. Instead of writing that changes may be made when 'necessary' or 'prudent', define the circumstances in which changes may be made. Instead of using words like 'forthwith' or 'promptly', specify exact time limits. Instead of stipulating that goods must be of 'satisfactory' quality, provide a detailed quality specification. In addition, consider the use of defined terms to fix the meaning of any words that might otherwise have an ambiguous or indeterminate meaning.

In some cases, of course, attempts to define everything may be undesirable or self-defeating. The use of adjectives can be useful where the parties wish to create some leeway in the interpretation of obligations, or where it is not essential – or feasible – to define every obligation in detail. For this reason, adjectives are useful in framework agreements where the precise nature of specific obligations will be defined in further agreements made in relation to a particular transaction. However, in such cases it is important to have some understanding of how a particular adjective might be construed by the courts.

Finally, never use any word unless: you are sure (1) that you know all its possible legal meanings; and (2) that it can only have one meaning in the context in which you have used it.

5.5

EXAMPLES OF BAD STYLE AND ANALYSIS

Here are some examples of bad style together with analyses of what is wrong with them and suggested solutions.

5.5.1 Example 1: waiver

5.5.1.1 Text

In the event that there is a waiver of the indemnity provisions by the vendor, a letter confirming the waiver must be produced by the vendor's solicitor for the purpose of inspection by the purchaser.

5.5.1.2 Problems

This sentence is too long for its content. Its meaning should be capable of being understood at a single glance, but this is not the case. The main problems are: (1) that the wordiness of the sentence obscures its meaning; and (2) that it contains unnecessary stipulations.

5.5.1.3 Solution

The following changes should be made:

- 1 Reduce phrases to words. Therefore 'in the event that' can be reduced to 'if'.
- 2 Change nominalisations to verbs. Therefore, 'waiver' can be changed to 'waive'. This allows us to get rid of 'there is a waiver of' and replaces it with 'waives'.
- 3 Correct the structure of the sentence. As currently drafted, the order of the sentence is verb (waive) – object (indemnity provisions) – subject (the vendor). In order to create a subject-verb-object structure, vendor should be mentioned first.

- 4 Remove the unnecessary stipulations. The phrase 'for the purpose of inspection by' is unnecessary, since it can be assumed that the purchaser will read the letter. The phrase 'a letter confirming the waiver must be produced' can be changed to the shorter and more familiar term 'confirmed in writing'.

Redrafted version

5.5.1.4

If the vendor waives the indemnity provisions, this must be confirmed in writing to the purchaser by the vendor's solicitor.

Example 2: settlement

5.5.2

Text

5.5.2.1

The first case was settled for £2,000, the second piece of litigation was disposed of out of court for £2,500, while the price of the agreement reached in the third suit was £5,500.

Problems

5.5.2.2

This sentence is too long and contains inconsistent terminology ('settled', 'disposed of out of court' and 'price of the agreement', as well as 'case', 'piece of litigation' and 'suit') to describe the same things.

Solution

5.5.2.3

The following changes should be made:

- 1 In all three cases, the term 'settled' should be used to indicate that agreement was reached between the parties without the need for a full court hearing.
- 2 In all three cases the term 'case' should be used to refer to the dispute between the parties.
- 3 The sentence should be phrased so that 'settled' is used as a verb applying to all three cases.

Redrafted version

5.5.2.4

The first case was settled for £2,000, the second for £2,500, and the third for £5,500.

Example 3: exclusion clause

5.5.3

Text

5.5.3.1

The exclusion clause is already null and void by reason of the prior order and direction of the court. This being the case, the exclusionary clause can have no further force or effect.

5.5.3.2 Problems

The problems here are: (1) repetition between the two sentences; and (2) unnecessary words.

5.5.3.3 Solution

The following changes should be made:

- 1 The second sentence adds nothing to the meaning of the whole, and should be deleted.
- 2 The phrases 'null and void' and 'order and direction' can be shortened to 'void' and 'order', respectively, since in both cases the additional words add nothing to the meaning.
- 3 The phrase 'by reason of' should be changed to a less pretentious equivalent, such as 'due to' or 'as a result of', and 'order of the court' can be shortened to 'court order'.

5.5.3.4 Redrafted version

The exclusion clause is already void due to the prior court order.

5.5.4 Example 4: offer of settlement**5.5.4.1 Text**

My client is willing to settle this case for £7,500, to be paid to your client, and your client must immediately return the blueprints and specifications and must remove all his equipment from the property. Moreover, my client insists upon having replacement of the entire section of fence which your client took down, the replacement to be at your client's expense.

5.5.4.2 Problems

This is an offer to settle a case on specified terms. The main problem here is that the precise nature of the terms is not set out in a clear way.

5.5.4.3 Solution

The following changes should be made:

- 1 A form of tabulation should be introduced so that the terms of the offer are clearly delineated.
- 2 Unnecessary and repetitive wording (such as 'moreover', 'insists', etc.) should be removed.
- 3 Nominalisations (i.e. 'having replacement of') should be changed to active verbs.

Redrafted version**5.5.4.4**

My client is prepared to settle this case for £7,500, provided that your client:

(1) returns the blueprints and specifications;

(2) removes all his equipment from the property; and

(3) replaces at his own expense the entire section of fence he took down.

Example 5: personal injury**5.5.5****Text****5.5.5.1**

Mr Brown hit the windscreen of the car with his head, but as it was composed of celluloid he was unhurt.

Problems**5.5.5.2**

The only problem with this sentence is that it is unclear whether it is Mr Brown's head or the windscreen that is composed of celluloid.

Solution**5.5.5.3**

In order to remove the ambiguity in the sentence, we must clarify that it is the windscreen that is composed of celluloid. This can be done by replacing 'it' with 'windscreen'.

Redrafted version**5.5.5.4**

Mr Brown hit the windscreen of the car with his head, but as the windscreen was composed of celluloid he was unhurt.

Rewrite the following colloquial sentences in a formal manner appropriate to legal drafting. Before attempting this exercise, you may also find it useful to read Chapter 11. Model answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) Because you have signed this document you have given up your right to sue for any breaches.
- (2) Both the parties that have signed this agreement can bring it to an end if it turns out that the other party is not able to pay its debts.
- (3) Party A agrees that if Party B gets sued by anyone for a reason to do with the distribution or sale of the products then Party A will be responsible for any costs that result from this.

- (4) Party A has to pay all invoices sent by Party B by 30 days after the day the goods which the invoices are for arrive at Party A's depot. If Party A hasn't paid the invoices in time, Party B is allowed to charge penalty interest at the rate of 20%.
- (5) This agreement will last for a period of two years from the date on which it was signed by the parties, but unless either party ends it for one of the reasons set out in clause 5, it will be automatically renewed for further periods of two years.

What to avoid

6

AMBIGUITY

6.1

Ambiguity occurs when writing can be interpreted to mean more than one thing, and these things are in conflict with each other. You can often get away with this in ordinary English if one meaning seems more likely than another. In legal English – especially in contract drafting – it can be disastrous. Anglo-American lawyers still take a **literalist** approach to construction – that is, contract words are interpreted according to their literal meaning rather than according to the purpose and effect that can be presumed from the context.

The meaning of English sentences can in many cases be changed completely by altering the order of words or the punctuation. For example:

My client has discussed your proposal to fill the drainage ditch with his partners.

The judge, said the accused, was the most heinous villain he had ever met.

Most of the problems caused in this respect are due to the separation of different parts of the verb phrase. In the first sentence, the verb phrase is 'discussed with'. By reuniting the parts of the phrase the real meaning of the sentence becomes clear:

*My client has **discussed with** his partners your proposal to fill the drainage ditch.*

In the second sentence, the verb phrase is 'the judge said'. The use of commas creates a subordinate clause of the words 'said the accused'. This has the effect of severing the verb phrase and linking 'the judge' with 'was'. Removing the punctuation reveals the more likely meaning of the sentence:

*The **judge said** the accused was the most heinous villain he had ever met.*

Ambiguity should be distinguished from mere vagueness. Vagueness arises when the language used is imprecise or non-committal, and may sometimes be intentional (for example, in order to avoid giving a specific commitment on a particular issue).

The sentences below are ambiguous. Rewrite them in a way that makes their intended meaning clear and unambiguous. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) Even if the company sells the product, if it does not usually sell this

particular product in the usual course of business it may not be held liable.

- (2) The caution of the legal temperament, as well as the desire for certainty historically has accounted for the slow pace of change in the law.
- (3) No drilling work shall be carried out on this land within 50 metres of any residence currently situated on said land without the lessor's consent.
- (4) This lawyer said the client is the best trial advocate he had ever had working on one of his cases.
- (5) John drafted the contract for the client during the meeting itself and he then read it through carefully.

6.2

SEXIST LANGUAGE

6.2.1 Personal pronouns

It is inappropriate to use the personal pronouns **he** or **his** to refer to a person whose sex might be male or female. English has a number of gender-neutral words such as **person**, as well as a number of gender-neutral pronouns such as **anyone**, **everyone** and **no one**. However, it does not have gender-neutral singular personal pronouns.

A good workaround is to use the plural possessive form, **their**. The Oxford English Dictionary 2001 sanctions the use of this form to refer to 'belonging or associated with a person whose sex is not specified'. In this way, the writer can avoid using sexist language. For example:

Every competent lawyer must ensure that their legal knowledge is kept up to date.

Other methods can also be employed to avoid using **he** or **his**. These include:

- Deleting the pronoun reference altogether if possible. For example, 'the director read the documents as soon as they were delivered to him': delete **to him**.'
- Changing the pronoun to an article like **a** or **the**. For example, 'the sales representative assisted the customer with his order' can be changed to 'the sales representative assisted the customer with the order'.
- Using **who**, especially when **he** follows **if**. For example, 'if he does not pay attention to detail, a finance officer is worse than useless' should read 'a finance officer who does not pay attention to detail is worse than useless'.

- Repeating the noun instead of using a pronoun. For example, 'When considering the conduct of negotiations, the delegate should retain an objective view. In particular, he [read **the delegate**] should ...'
- Use the plural form of the noun. For example, instead of writing 'a lawyer must check that he has all the relevant papers before attending court', write 'lawyers must check that they have all the relevant papers before attending court'.
- Use the infinitive form of the verb, including 'to' (e.g. 'to perform', 'to draft' etc.). For example, instead of writing 'the lawyer agrees that he will draft the contract', write 'the lawyer agrees to draft the contract'.
- If all else fails, use the passive form. For example, instead of writing 'he must deliver the files to X', write 'the files must be delivered to X'. However, note that this is not a perfect solution, since the passive form makes it unclear who is responsible for delivering the files to X. Therefore, it should only be used if the identity of the parties has already been established in a previous sentence, or if the question of who is responsible for undertaking the actions is unimportant.

Terminology

6.2.2

In addition to paying attention to the use of personal pronouns, it is also important to ensure as far as possible that the terminology used is not gender-specific. This applies particularly to words ending in **-man**. For example, you should consider using **chair** instead of **chairman**, **firefighter** instead of **fireman**, and **drafter** instead of **draftsman**.

It should be remembered, however, that there is a limit to the extent to which the English language can reasonably be manipulated to remove all possible traces of gender discrimination. There is a balance to be struck between avoiding the use of gender-specific language and making your English sound like normal language. A particular problem arises in respect of words for which the only gender-neutral equivalent involves the use of **-person** or **person-**. Words such as **personpower**, **warehouseperson** and **foreperson** (instead of **foreman**) should be avoided where possible.

Equally, avoiding sexist language in English writing is not simply a matter of avoiding certain specific words and phrases. The underlying attitudes of the writer are more important.

Some examples of old-fashioned terms and suggested non-sexist alternatives are set out below.

Old-fashioned term	Nonsexist equivalent
Air hostess/stewardess	Flight attendant
Anchorman	Anchor
Businessman	Business executive, manager, entrepreneur
Cameraman	Camera operator, photographer
Chairman	Chair
Craftsman	Artisan
Deliveryman	Courier, messenger, delivery driver
Draftsman	Drafter
Fireman	Firefighter
Foreman (in the workplace)	Supervisor
Foreman (of a jury)	Presiding juror
Freshman	Fresher, first-year student
Headmaster	Head, principal
Juryman	Juror
Mankind	Humankind/humanity
Man-made	Synthetic, manufactured
Manpower	Workforce, personnel
Ombudsman	Ombuds
Policeman/policewoman	Police Officer
Postman/mailman	Postal worker, mail carrier
Salesman	Sales representative
Spokesman	Representative
Statesman	Political leader
Statesmanship	Diplomacy
The common man	The average person
Warehouseman	Warehouser
Workman	Worker

Rewrite the sentences below in such a way as to remove any inherent sexism. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) A judge should meet his responsibility to avoid any suspicion of bias in his judgment.
- (2) If a student cannot write competently, he cannot expect to make a good lawyer in the future.
- (3) A lawyer knows better than the layman that knowledge of where to find the law is at least as useful as knowledge of specific legal provisions.
- (4) When commencing court proceedings, the lawyer must ensure that his client has been fully advised about the risks of litigation. In particular, he must give the client a realistic estimate of the likely costs.
- (5) The distributor hereby undertakes that upon termination of this contract he will return to the Company all confidential papers.

CONSTANTLY LITIGATED WORDS

6.3

Two words and phrases, commonly used in English legal drafting have produced constant litigation: **best endeavours** and **forthwith**.

Best endeavours is often used in contracts to indicate that parties have promised to attempt to do something. The use of the phrase usually suggests a compromise in which neither party is prepared to accept a clear statement of their obligations.

The problem with the phrase is that there are no objective criteria by which best endeavours can be judged. It is easy to conclude that someone has used 'best endeavours' to ensure that something is done if the result is that the thing is done. It is very hard to make the same judgment if, despite certain efforts having been made, the thing is not done.

The phrase poses particular problems in professional undertakings (such as 'X promises to use its best endeavours to obtain the title deeds') due to the vagueness it introduces into the obligation undertaken. For this reason, the Law Society of England and Wales has warned solicitors against giving a 'best endeavours' undertaking.

Forthwith causes problems because it is too open-ended to introduce any certainty into the contract. According to the context, 'forthwith' could mean a matter of hours or a matter of weeks.

Everything depends on the context. For example, in one English case 'forthwith' was held to be within 14 days. In another it was held that notice entered on a Friday and given the following Monday was not given 'forthwith'. In yet another, the duty to submit a claim 'forthwith' was held not to arise until a particular state department had the basic information to allow the claim to be determined.

For these reasons, it is preferable to specify a precise time and date by which something must be done if time is of the essence in an agreement.

6.4

FALSE WORD PAIRS

Many words in English look and sound alike but can have very different meanings. Typical examples include **principal** and **principle**, **affect** and **effect**, and **disinterested** and **uninterested**. In some cases – as in **prescribe** and **proscribe** – the meanings may in fact be opposite.

It is important to be aware of the more common of these false pairs – the consequences of confusing them could be disastrous. For more information on this subject, see the glossary of easily confused words at the back of the book.

EXERCISE 18

Choose the correct word from the choices given in brackets in respect of each sentence. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) You are not (eligible/illegible) to practise as a lawyer in this country unless you have received official authorisation to do so.
- (2) The testimony given by the witness was not entirely (credible/creditable).
- (3) I have always been completely (disinterested/uninterested) in what judges do in their spare time.
- (4) It is an important legal (principal/principle) that the accused should be presumed to be not guilty until proven guilty.
- (5) The present economic recession will (affect/effect) this company adversely.

6.5

PROBLEM WORDS

Certain words cause problems, either because they have a number of meanings or because it is unclear to writers when one word should be used instead of another. It may not be possible to avoid them – particularly since many such

words are extremely useful (when used correctly) – but care should be taken when using the following words, among others.

Only

6.5.1

Only, when used as an adverb, has four meanings:

- 1 It can be used to mean 'nothing or no one else but' ('**only** qualified lawyers are able to draft these documents').
- 2 It can also be used to mean 'with the negative result that' ('he turned, **only** to find his path was blocked').
- 3 A further meaning is 'no longer ago than' ('it was **only** on Thursday that the document arrived').
- 4 Lastly, it can mean 'not until' ('we can finalise the contract **only** when the document arrives').

The positioning of this word in a sentence is of critical importance. The meaning of the whole sentence can change profoundly according to where it is placed. Generally, it should go immediately in front of the word or phrase which it is qualifying: for example, 'the only cows are seen on the northern plain' has a different meaning to 'the cows are only seen on the northern plain', which in turn has a different meaning to 'the cows are seen on only the northern plain'.

Fewer or less?

6.5.2

These words are often used incorrectly, even by native speakers of English.

Fewer should be used with plural nouns, as in 'eat fewer cakes' or 'there are fewer people here today'.

Less should be used with nouns referring to things that cannot be counted, as in 'there is less blossom on this tree'. It is wrong to use less with a plural noun ('less people', 'less cakes').

Can or may?

6.5.3

Can is mainly used to mean 'to be able to', as in the sentence 'Can he move?', which means, is he physically able to move?

May is used when asking to be allowed to do something as in 'may we leave now?', as can is thought to be less correct or less polite in such cases.

Imply or infer?

6.5.4

Do not confuse the words **imply** and **infer**. They can describe the same situation, but from different points of view.

If a speaker or writer **implies** something, as in 'he implied that the manager was a fool', it means that the person is suggesting something though not saying it directly.

If you **infer** something from what has been said, as in 'we inferred from his words that the manager is a fool', this means that you come to the conclusion that this is what they really mean.

6.5.5 Non- or un-?

The prefixes **non-** and **un-** both mean 'not' but they tend to be used in slightly different ways. **Non-** is more neutral in meaning, while **un-** means an opposite and thus often suggests a particular bias or standpoint.

For example, **unnatural** means that something is not natural in a bad way, whereas **non-natural** simply means 'not natural'.

As a consequence, where there is a genuine choice about which prefix to use, non- is preferred in legal writing (e.g. **non-statutory** instead of **unstatutory**).

6.5.6 If or whether?

Although **if** can mean 'whether', it is better to use the word **whether** rather than **if** in writing ('I'll see whether he left an address' rather than 'I'll see if he left an address').

6.5.7 Specially or especially?

Although **especially** and **specially** can both mean 'particularly', they are not exactly the same. **Especially** also means 'in particular, chiefly', as in 'he distrusted them all, especially Karen', while **specially** also means 'for a special purpose' as in 'the machine was specially built for this job'.

6.5.8 Save

Save usually means to rescue from harm or danger. However, it can also be used to mean 'except'. It is frequently used in this sense in legal documents. For example:

No warranties are given save as to those set out in Schedule 3.

6.5.9 Client or customer?

Generally speaking, businesses that provide professional services (e.g. lawyers, accountants) have **clients**, while businesses that sell products (e.g. retailers) have **customers**.

Choose the correct word from the alternatives provided in parentheses in the sentences below. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) There are (less/fewer) risks in this transaction than I had previously assumed.
- (2) The hardware store did not have many (customers/clients) that morning.
- (3) It (can/may) be a good idea to send a copy of that document to the client.
- (4) I dislike all English food, (specially/especially) fish and chips.
- (5) I asked him to help me with this project but I'm afraid he was most (uncooperative/non-cooperative).

7

British and American English

British and American English can be differentiated in three ways:

- 1 Differences in language-use conventions: meaning and spelling of words, grammar and punctuation differences;
- 2 Vocabulary. There are a number of important differences, particularly in business terminology;
- 3 Differences in the ways of using English dictated by the different cultural values of the two countries.

It is necessary to choose between British or American English and then apply the conventions of the version you choose consistently. If you muddle up British and American standards, it implies that you do not understand that they are different.

7.1

DIFFERENCES IN LANGUAGE-USE CONVENTIONS

Here are some of the key differences in language-use conventions.

- 1 **Dates.** In British English the standard way of writing dates is to put the day of the month as a figure, then the month (either as a figure or spelled out) and then the year. For example, 19 September 1973 or 19.09.73. The standard way of writing dates in American English is to put the month first (either as a figure or spelled out), then the day of the month, then the year. For example, September 19th 1973 or 9/19/73. Commas are also frequently inserted after the day of the month in the USA, for example, September 19, 1973.
- 2 **o and ou.** In British English, the standard way of writing words that might include either the letter **o** or the letters **ou** is to use the **ou** form. For example, **colour, humour, honour, behaviour**. The standard way of writing such words in American English is to use only **o**. For example, **color, humor, honor, behavior**.
- 3 **Through.** In American English, the word **through** (or **thru**) can be used to mean **until**. For example, 'September 19th thru October 1st', would be in British English '19 September until 1 October'.
- 4 **Hyphens.** Hyphens are often used in British English to connect prefixes with the main word. For example, **pre-emption, pre-trial, co-operation**. They are less common in American English. For example, **preemption, pretrial, cooperation**.
- 5 **z or s?** In British English, **s** is generally used in such words as **recognise, authorise**. The letter **z** is used in American English in such words as

recognize or **authorize**. However, it is not wrong to use **z** in such words when using British English as standard.

Note, however, that some words must always end in **-ise**, whether you are using British or American English standards. These include:

advertise	advise
arise	comprise
compromise	demise
despise	devise
disguise	enfranchise
excise	exercise
franchise	improvise
incise	merchandise
premise	revise
supervise	surmise
surprise	televisе

- 6** **I** or **II**? In American English, a single **I** is used in such words as **traveled** or **counseled**. In British English, **II** is used (e.g. **travelled, counselled**).

Note, however, that in British English, some words which end in a double **II** lose one **I** when a suffix is added: **skill** becomes **skilfully**, **will** becomes **wilfully**. In American English, the double **II** is retained: **skill** becomes **skillfully**, **will** becomes **willfully**.

- 7** **-re** or **-er**? In American English, the **-er** ending is used in words like **theater**, **center**, **meter**, and **fiber**. In British English, these words are spelt **theatre**, **centre**, **metre**, and **fibre**.
- 8** **oe** and **ae**. Some scientific terms retain the use of the classical composite vowels **oe** and **ae** in British English. These include **diarrhoea**, **anaesthetic**, **gynaecology**, and **homoeopathy**. In American English, a single **e** replaces the composite vowel: **diarrhea**, **anesthetic**, **gynecology**, **homeopathy**.
- 9** **-e** or **-ue**? In British English, the final silent **-e** or **-ue** is retained in such words as **analogue**, **axe** and **catalogue**. In American English, it is omitted: **analog**, **ax**, and **catalog**.
- 10** **-eable** or **-able**? The silent **e**, produced when forming some adjectives with a suffix is generally used in British English in such words as **likeable**, **unshakeable** and **ageing**. In American English, it is generally left out: **likable**, **unshakable**, and **aging**. The **e** is however sometimes used in American English where it affects the sound of the preceding consonant: **traceable** or **manageable**.
- 11** **-ce** or **-se**? In British English the verb that relates to a noun ending in **-ce** is sometimes given the ending **-se**. For example, **advice** (noun)/**advise** (verb),

device/devise, licence/license, practice/practise. In American English the situation is more complicated. Both forms are used in **advice/advise** and **device/devise, license** is used for both noun and verb, and **practice** for both noun and verb. It also uses **-se** for other nouns, which in British English are spelt **-ce**, including **defense, offense, pretense**.

- 12** Prepositions. In American English, it is acceptable to omit prepositions in certain situations. In British English, this habit is less common. For example, an American lawyer might find a certain clause in a contract to be 'likely enforceable'. A British colleague would be more likely to say that it was 'likely to be enforceable'. An American civil rights activist might 'protest discrimination', while his British colleagues would 'protest against discrimination'.
- 13** **Have** and **got**. In American English it is quite acceptable to use the word **got** without **have** in sentences like 'I got two tickets for the show tonight'. In British English, it is more usual to say 'I've got two tickets for the show tonight'.
- 14** **Gotten**. **Gotten** is a proper word in American English, but is only used as an Americanism in British English, except in certain phrases such as 'ill-gotten gains'.
- 15** **While** or **whilst**? Both **while** and **whilst** are used in British English. In American English, **while** is the right word to use, and **whilst** is regarded as a pretentious affectation.

7.2

VOCABULARY

Here are some key vocabulary or spelling differences.

7.2.1 Ordinary words and phrases

British	American
aerial (TV)	antenna
aluminium	aluminum
anti-clockwise	counterclockwise
at weekends	on weekends
aubergine	eggplant
autumn	fall
banknote	bill
bill	check
biscuit	cookie

braces	suspenders
building society	savings and loan association
calibre	caliber
camp bed	cot
car bonnet	hood
car park	parking lot
car windscreen	windshield
caravan	trailer
cheque (bank)	check
chips	french fries (or, recently, 'freedom fries')
cinema	movie theater
clerk (bank)	teller
clever	smart
cling film	plastic wrap
cooker	stove
cosy	cozy
courgette	zucchini
crisps	potato chips
crossroads/junction	intersection
dialled	dialed
dived	dove
draught	draft
dressing gown	bathrobe/housecoat/robe
dual carriageway	four-lane highway
estate agent	realtor/real estate agent
film	movie
flat	apartment
flyover	overpass
frying pan	skillet
fuelled	fueled
full stop (punctuation)	period
give way	yield

British	American
grey	gray
ground floor	first floor
high street	main street
holiday	vacation
increase (of money)	hike
lent	loaned
lift	elevator
lorry	truck
maize/sweetcorn	corn
manoeuvre	maneuver
meet	meet with
metre	meter
motorway	highway, freeway, expressway, throughway
mum	mom
muslin	cheesecloth
nappy	diaper
oblige	obligate
ordinary	regular, normal
pants	underpants
pavement	sidewalk
petrol	gasoline, gas
plough	plow
post	mail
power point	electrical outlet
programme	program
property (land)	real estate
quarters (three-quarters)	fourths (three-fourths)
queue	line, line-up
rationalisation (personnel)	downsizing

riding (horses)	horseback riding
ring road	beltway
rivalled	rival
rowing boat	rowboat
sceptical	skeptical
sizeable	sizable
skilful	skillful
solicitor	attorney, lawyer
sombre	somber
stand (for election)	run
starter	appetizer
storey (of building)	story, floor
stupid	dumb
sweet shop	candy store
tap	faucet
tartan	plaid
terraced house	row house
till	checkout
towards	toward
transport	transportation
trainers	sneakers
travelled	traveled
trousers	pants or slacks
tyre	tire
underground (or tube train)	subway
upmarket	upscale
vest	undershirt
waistcoat	vest
work out (problem)	figure out
Yours faithfully	Respectfully yours/Yours truly
Yours sincerely (letter)	Sincerely yours

7.2.2 Business and legal terminology

Note that some of these terms are not exactly equivalent or may be used interchangeably in some cases. For example, 'competition law' is often understood as a wider concept than 'antitrust law', and a large number of US terms (e.g. 'par value') are in relatively common use in British legal English.

British	American
called to the bar	admitted to the bar
competition law	antitrust law
articles of association	bylaws
balance sheet	statement of financial position
bills	notes
bonus or scrip issue	stock dividend or stock split
company	corporation
creditors	payables
debtors	receivables
depreciation	amortization
employment law	labor law
exceptional items	unusual items
flotation	initial public offering (IPO)
indemnify	hold harmless and indemnify
land and buildings	real estate
maintenance	alimony
nominal value	par value
ordinary shares	common stock
preference shares	preferred stock
profit and loss account	income statement
provisions	allowances
receivership	chapter 11 bankruptcy
share premium	additional paid-in capital

shareholders' funds	stockholders' equity
stocks	inventories
theft	larceny
turnover	revenues
undistributable reserves	restricted surplus

DIFFERENCES RELATED TO CULTURAL VALUES

7.3

There are a number of differences between British and American English, which relate to the different cultural values of the two countries. For example, British English contains a number of frequently used metaphors relating to football ('scoring an own goal') and cricket ('a sticky wicket'), while American English uses metaphors relating to baseball ('in the ball park').

The two versions of the language also have certain tendencies that are worth bearing in mind. These are not absolute, since individual writers have their own styles, which may incorporate aspects of both British and American tendencies. However, in general:

- British English tends to react more slowly to new words and phrases than American English. American English enthusiastically adopts new usages, some of which later pass into general use (e.g. **corporate citizen**, **social performance**), and some die out after a short period in fashion (e.g. **synergy**).
- British English has a slight tendency to vagueness and ponderous diction. American English (at its best) tends to be more direct and vivid.
- American English tends to be more slangy than British English.
- Both American and British English are keen on euphemisms. In British English, these are often used for humorous purposes (e.g. **to be economical with the truth**) or to smooth over something unpleasant. In American English they may be used for prudish reasons (thus **lavatory** or **WC** becomes **restroom** or **bathroom**), to make something mundane sound important (thus **ratcatcher** becomes **rodent operative**), or to cover up the truth of something unpleasant (thus civilian deaths in war become **collateral damage**).
- American English has a tendency to lengthen unnecessarily existing words in an effort to make them sound more important (thus **transport** becomes **transportation**).

The passage below is written in British English. Put it into American English. A model answer can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

We signed the document on 19 October 2007 in my solicitor's city centre offices after a great deal of complex manoeuvring fuelled by the need to establish a manageable programme for the transport of maize by lorry. It was a grey, rainy autumn day, which I remember well, because I arrived at the office rather late, after getting stuck in a traffic jam on the anti-clockwise section of ring road – on the flyover just past the Daventry crossroads in fact.

I parked the car in the car park next to the estate agent's office, placed my ticket on the windscreen, and threw my empty crisp bag into the rubbish bin. Then I climbed the stairs to Mr. Smith's first floor office. I recall that Smith was wearing a rather striking waistcoat, in a lurid purple colour, together with truly appalling tartan trousers and braces. His idea of humour, I thought.

'Have a biscuit', said Smith, as we started looking at the document. 'I dare say traffic on the motorway was bad this morning?' I made no comment, but began to look over the text whilst Smith skilfully explained the document to me: 'this paragraph obliges the other party to make payment in case of default, and this one provides for pre-emption ...' I listened sceptically.

Smith then explained that the other side had authorised a company called Dartingley Hoardings to install aerials in city centre flats at weekends from 20 November 2008 to 19 November 2009. Payment for these services was to be made from a building society account. 'Is that clever?' I asked. Smith thought it would have no effect on company turnover.

PERFORMANCE OF CONTRACTS

8.1

The general rule is that a party must perform exactly what he or she undertook to do in the contract. This rule may be modified in a number of ways, including:

- 1** Substantial performance. Where a party has performed his or her contractual obligations but there are minor defects, that party will normally be able to claim the price of the work done less any money the other party will have to spend to put the defects right. Note that this principle does not apply when a fundamental term of the contract has been breached.
- 2** Voluntary acceptance of partial performance. A party may agree to accept and pay for partial performance of the contract by the other party. However, the courts will only infer such agreement where the party accepting partial performance had a genuine choice about the matter.
- 3** Breach of terms relating to time. If a contract is performed but performance occurs later than agreed, the effect of the delay depends on whether time of performance is considered 'of the essence'. If so, late performance will give rise to a right to terminate the contract. If not, late performance will not justify termination unless it amounts to a substantial failure in performance (although it may give rise to a claim for damages if loss is caused).
- 4** Vicarious performance. Vicarious performance occurs where the contractual obligations of one of the parties are performed, upon that party's request, by a third party. The general rule is that the other party cannot object to vicarious performance unless (1) it prejudices their interests, or (2) the service contracted for is one that relies on the skill and judgement of the party contracted to provide the service (e.g. an employment contract, or a contract for musical performance), or (3) the contract stipulates that the obligations must be performed personally.

Contracts may also be varied by mutual agreement. Alternatively, where a party agrees to a request of the other party to the contract not to insist on performance of part of the contract, that second party is said to have **waived** his or her right to insist on performance in the manner originally agreed. The parties are then bound by the terms of the waiver and no consideration is necessary to support this.

8.2 TERMINATION OF CONTRACTS

As noted above, the most usual way in which contracts are discharged is by performance. In addition, (again, as noted above) they may be void from the outset or become void or voidable for a number of reasons, including mistake, misrepresentation, lack of capacity, duress, frustration, fraud and illegality.

However, in some circumstances contracts are terminated as a result of breach. This occurs where one party performs defectively, or in a manner different from that agreed in the contract, or not at all. There are three basic types of breach:

- 1 Actual breach. This occurs where one party has in fact performed the contract defectively, or in a manner different from that agreed in the contract, or not at all.
- 2 Anticipatory breach. This refers to the situation where it becomes clear to one party that the other does not intend to fulfil his or her part of the contract. For example, if A agrees to sell a car to B but in fact sells and delivers it to C before the delivery date agreed with B, then as far as B is concerned an anticipatory breach of his contract with A has occurred.
- 3 Lawful excuse. This occurs where an actual breach of a contract can be excused as a matter of law, because the reason for breach is regarded as sufficient to justify non-performance of contractual obligations. For example, an employee who does not go to work because he is ill is not in breach of his employment contract even though the illness is not serious enough to frustrate the contract.

Every breach of contract entitles the innocent party to sue for damages, but only certain types of breach permit the innocent party to discharge the contract. It should also be noted that in respect of any actual or anticipatory breach of contract, the innocent party is not obliged to sue for damages or to discharge the contract where applicable – he or she may also choose to **affirm** the contract, that is, to treat it as continuing to exist.

There are two main circumstances in which the innocent party may choose to discharge the contract:

- 1 Repudiation. This occurs when one party makes it clear that they no longer intend to be bound by the contract, either before the contract begins or during its performance.
- 2 Breach of a fundamental term of the contract. The terms of a contract can be divided into fundamental terms (sometimes referred to as **conditions** in the UK) and warranties, which are minor terms. Breach of a fundamental term permits the innocent party to terminate the contract, while breach of a warranty does not justify termination but may entitle the innocent party to claim damages. There may also be situations in which it is unclear whether a certain term should

be regarded as a fundamental term or as a warranty. These terms are called **innominate terms** in the UK. Breach of such a term can lead to termination of the contract where the seriousness of the results of the breach justifies it.

Contracts may also be terminated by agreement. Most commercial contracts contain termination clauses that set out the circumstances in which either party may terminate the contract. These include, for example, the insolvency or bankruptcy of the other party.

REMEDIES

8.3

The usual remedy for breach of contract is damages, although injunctions and specific performance are available in certain circumstances. These remedies are discussed briefly below.

Damages

8.3.1

Definition

8.3.1.1

Damages means the award of a sum of money by the court as compensation for a tort or breach of contract. It is important, as a matter of terminology to distinguish **damages** from **damage**. **Damage** is the harm suffered – which may or may not be actionable. Many synonyms may be used for **damage** (such as loss, harm, etc.), but **damages** is understood as a term of art.

The general principle is that of **restitutio in integrum** – the claimant is entitled to full compensation for the losses suffered, and the damages awarded are intended to put the claimant back in the position s/he would have been in if the contract had been properly performed. Save for in certain very limited circumstances, damages awarded by the court are not intended to punish the defendant.

Recovery is limited by rules relating to remoteness of damage, and the claimant is under a duty to take all reasonable steps to mitigate the losses suffered and cannot claim compensation for any loss suffered by failure to do this.

Limitations on awards of damages

8.3.1.2

There are three ways in which the recovery of damages is limited. These are as follows:

- 1 Causation. The basic rule is that a person will only be liable for losses caused by their breach of contract. The breach need not be the sole cause but it must be an effective cause. In other words, there must be a 'chain of causation' between the breach and the loss suffered by the claimant. If the chain of causation is broken by intervening acts (between the breach and the loss) that cannot be said to be reasonably foreseeable, then the defendant will not be liable for

damages. However, if the breach can be shown to be an actual cause of the loss, the fact that there is another contributing cause will not prevent the existence of causation.

- 2 **Remoteness.** The defendant must compensate for damage only if that damage was within his or her 'reasonable contemplation' (in other words, the damage a reasonable person would have known was likely to result from the breach in the usual course of events). Unusual damage resulting from special circumstances is within the defendant's contemplation only if a reasonable person (objective standard) would have thought it likely to result.
- 3 **Mitigation.** Mitigation means the reduction in the loss or injury resulting from a tort or breach of contract. The point here is that the injured party is under a duty to take all reasonable steps to mitigate loss when claiming damages, and will not be able to claim damages for losses that could have been avoided by taking reasonable steps.

8.3.1.3 Classification of damages

Damages may be classified in a number of ways. Note that the classifications given below may overlap. For example, the term **substantial damages** may also be classified as **general damages**.

Substantial damages are given when actual damage has been caused.

Nominal damages may be given for breach of contract and for some torts (e.g. trespass) in which no actual damage has been caused, as a means of vindicating the claimant's rights.

Liquidated damages are a sum fixed in advance by the parties as the amount to be paid in the event of a breach. They are recoverable provided the sum fixed was a fair estimate of the likely consequences of a breach, but not if they were imposed as a penalty.

Unliquidated damages are damages the amount of which is fixed by the court.

General damages may be: (1) damages given for losses which the law presumes are the natural and probable consequences of a wrong (e.g. libel is presumed to have damaged someone's reputation without proof that that person's reputation has actually suffered), or (2) damages given for a loss that cannot be precisely estimated (e.g. for pain and suffering).

Special damages are: (1) damages given for losses that are not presumed but have been specifically proved, and (2) damages given for losses that can be quantified (e.g. loss of earnings).

Exemplary damages (also known as **punitive damages**) may in exceptional circumstances be awarded in tort cases but are never awarded in contract cases.

Their purpose is to punish the defendant as well as compensate the claimant for harm done. They can be awarded in three circumstances:

- 1 when expressly authorised by statute;
- 2 to punish oppressive, arbitrary or unconstitutional acts by government servants;
- 3 when the defendant has deliberately calculated that the profits to be made out of committing the tort may exceed the damages at risk (put colloquially, 'if you can do the time, do the crime').

Aggravated damages are awarded when the conduct of the defendant or the surrounding circumstances increase the injury to the claimant by subjecting him or her to humiliation, distress, or embarrassment, particularly in such torts as assault, false imprisonment, and defamation.

Injunctions

8.3.2

An injunction is a type of court order that either prohibits a party from doing or continuing to do a particular thing (**prohibitory injunction**), or orders that party to carry out a certain act (**mandatory injunction**).

When considering an application for a mandatory injunction, the court applies a balance of convenience test, and may refuse to grant the injunction if the defendant would lose a lot more by restoring the original position than the claimant would gain.

Specific performance

8.3.3

Specific performance is a court order, which compels a party to perform their obligations under a contract. It is only granted where damages alone would not constitute adequate compensation (although damages may be ordered in addition to specific performance). This situation arises where the goods that are the subject of the contract are in some way unique and cannot therefore be replaced by money. Therefore, specific performance is mainly applied in contracts to sell land.

Specific performance is not available in cases of (1) contracts involving personal services (e.g. employment contracts), and (2) contracts that involve continuous duties.

Agreed remedies

8.3.4

In order to ensure some predictability in contractual relations many commercial contracts specify the kinds of breach that will justify termination and stipulate the levels of damages to be paid in the event of certain types of breach. For example, building contracts routinely provide for specified damages to be paid in the event that the building is not completed on time.

8.3.4.1 Liquidated damages clauses

Liquidated damages is the term used where a contract specifies the amount of damages to be paid if the contract is breached. This amount reflects – or should reflect – the parties' estimate of the actual loss that would be incurred in the event of such a breach. In such cases, the courts will allow the claimant to recover this amount without proof of loss, and the usual rules regarding damages will be excluded.

STRUCTURE OF CONTRACTS

9.1

There is generally no legal requirement for a contract to follow a particular format or layout. The exact structure used will vary according to the kind of document being drafted. However, most modern commercial contracts prepared by lawyers follow a similar structure.

There are obvious advantages in having a structured and standard layout that is familiar both to lawyers and to parties to the contract. The aim in all cases should be to produce a document that is laid out in a clear and logical way, thus making it as easy as possible to read and understand.

As a rough rule, the structure of a typical commercial contract is as follows:

- the names and addresses of the parties
- recitals
- definitions
- conditions precedent
- agreements
- representations and warranties
- boilerplate clauses
- schedules
- signatures
- appendices

These brief headings are considered in the notes below.

The names and addresses of the parties

9.1.1

The first section of the contract usually sets out the full names and postal addresses of all the parties to the contract. This section may also specify that a shortened name will be used in the remainder of the contract to denote each of the parties. For example:

Pan-Oceanic Shrimp Packers plc (hereinafter referred to as "the Company")

The words 'the Company' will then be used in the remainder of the contract in place of Pan-Oceanic Shrimp Packers plc.

Recital

9.1.2

The recital is often referred to as a nonoperative part of the contract since it has no specific legal effect. The purpose of the recital is to explain to the reader the background to the transaction. If necessary, the recital also sets out certain facts

that may influence the way in which a court might interpret provisions of the contract.

For example, the background to an exclusion clause might be clarified by relating the decision of both parties to impose the risk of loss on one party rather than the other because this is more economical from an insurance viewpoint.

If it is vital to the contract that the content of the recital be treated as an integral part of the substantive part of the contract, an express clause to this effect should be included in the contract.

9.1.3 Definitions

The definitions section contains a list of terms used later in the contract. A definition is given for each term, which represents the way in which the drafters of the contract wish the term to be interpreted as a matter of law. Here is an example of a definition:

"Execution date" shall mean 3 October 2005, the date of execution of this Agreement.

Often the definitions section needs to be read in conjunction with another section of the agreement. For example, a definition may simply state that '... shall have the meaning assigned to that term in Section 4.3 of this Agreement'.

The definitions form part of the substance of the contract since they prescribe that certain words and phrases shall mean certain things. It is best to state directly what these words and phrases shall mean rather than resorting to phrases such as 'where the context so admits', since this creates potential for ambiguity.

Problems arise with definitions when:

- 1 the defined word or phrase is used in the agreement in a different sense to the one in which it is defined;
- 2 the definition is too vague, so that the exact meaning is unclear and depends upon the parties' interpretation;
- 3 the definition is too narrow, in which case it can lead to absurd or unintended meanings in certain contexts;
- 4 a term is defined to be used only once in the agreement;
- 5 the definition contravenes the golden rule of drafting – which states ***never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning.***

When drafting a contract it is often convenient to insert definitions throughout the agreement, as necessary, and then to remove these once the contract has been

drafted, then edit and arrange them in a suitable order in the initial definitions section.

Conditions precedent

9.1.4

Conditions precedent are conditions which have to be satisfied before the agreement comes into force. They are generally viewed as being outside the main terms of the contract.

One important consequence of this fact is that these conditions are therefore not subject to the **parol evidence rule**. This rule states that where all the terms of a contract are contained in a written document, no external evidence may be added to it to vary the interpretation to be given to the contract. Since the conditions precedent are not regarded as forming part of the main terms of the contract, the parol evidence rule does not apply. Consequently, it follows that external evidence can be added to vary the interpretation of such clauses.

Contracts may stipulate that if a specified future event occurs during the term of the contract then it will be terminated. This type of stipulation is sometimes known as a **condition subsequent**.

Agreements

9.1.5

The agreements section contains the rights and obligations of the parties. This part reflects the heart of the deal struck between the parties. The drafting of the clauses will therefore depend upon the particular facts of the case at hand. In a simple sale of goods contract, the seller will promise to sell and deliver goods of a certain description and quality. The buyer will promise to pay for them.

In addition, this part of the contract will contain various clauses covering what happens if the seller fails to deliver or the buyer fails to pay.

Representations and warranties

9.1.6

The representations and warranties section contains promises by one or other party that a given statement or set of facts is true. A representation is a statement of fact made by one contracting party to the other, which induces the other to enter the contract. A warranty is a contractual promise and if such a promise is broken, the innocent party will be able to claim damages.

Boilerplate clauses

9.1.7

Boilerplate clauses are standard clauses that are inserted as a matter of course into certain types of agreement. They relate to issues that are to do with the way in which the contract works rather than the heart of the deal itself. These include clauses dealing with **service of notices** (the means by which documents which relate to the contract must be sent) and **assignment** (whether and on what basis

the parties can transfer the contract to other parties) together with many other types of clause.

9.1.8 Schedules

If the contract contains certain very detailed agreements or information, the parties often prefer to put this in schedules that are contained at the back of the contract, instead of cluttering up the main part of the contract with a mass of detail. For example, if a contract must contain a very detailed price list for various kinds of goods sold under the contract, this is usually placed in a schedule rather than in the main part of the contract.

It should be noted that the stipulations contained in the schedules do form part of the substantive agreement between the parties.

9.1.9 Signature section

The signature section comes after the schedules and before the appendices. Witnesses are not required for most kinds of contract. All parties to the contract are required to sign the document as evidence of their agreement to its terms.

The parties' names are usually printed together with the date of the contract, and the parties must then add their signatures to the contract. It is common practice for contracts to be produced in **duplicate**. This means that two copies of the contract are made – one for each party – and the parties each sign both copies of the contract.

9.1.10 Appendices

Appendices usually contain documents that are referred to in the contract. These may simply be put there because they are useful reference material for the parties. They do not necessarily form part of the substantive agreement between the parties. For example, in a contract for the sale of machine parts by one company to another, the appendices to the contract might contain detailed drawings or specifications for the machine parts for illustrative purposes.

9.2

PRINCIPLES OF INTERPRETATION

9.2.1 The textual approach

The basic method of interpretation traditionally used by common law lawyers is known as the **textual** or **literal** approach. This approach is based on the idea that the meaning and effect of a contract or piece of legislation should be determined solely from the words of the text itself and not from any external evidence.

This method contrasts with the approach to interpretation traditionally taken in civil law jurisdictions. In such jurisdictions, the **purposive** or **teleological**

approach is used. This is based on the idea that the meaning and effect of a contract or piece of legislation should be determined by taking account of object and purpose of the contract or piece of legislation and the intentions of the parties (if a contract) or intention of the drafter (if legislation).

The effect of this approach on the drafting of contracts is that common law lawyers tend to draft contracts in a way that seeks to cover any possible thing that might go wrong in the contract, no matter how remote. This of course leads to long and complicated documents. This tendency is made worse by the fact that many common law countries (particularly the USA and to a lesser extent the UK) have lightly regulated free-market economies in which parties' freedom to contract is not much affected by legal rules. In such climates there is greater need for remedies and dispute resolution methods to be specifically agreed between the parties in the contract itself.

Specific rules of interpretation

9.2.2

In addition to the basic approach outlined above, some specific rules of interpretation are used in common law jurisdictions. These are briefly outlined below.

The document must be read as a whole

9.2.2.1

This rule provides that when a reader is seeking to interpret the meaning of a particular clause in a contract, this should not be done without taking into consideration what the rest of the contract says. The exact meaning of a part of the contract should become clear once the whole document has been read.

Contra proferentem rule

9.2.2.2

This rule provides that if an ambiguity in a contract cannot be resolved in any other way then it must be interpreted against the interests of the party that suggested it.

For example, if a problem arises concerning the extent of cover provided in an insurance contract and one interpretation favours the insurer and the other the insured, the court will use the interpretation that favours the insured.

Noscitur a sociis rule

9.2.2.3

Noscitur a sociis is Latin meaning 'it is known by its neighbours'. The *noscitur a sociis* rule states that if the meaning of a phrase in a contract is unclear by itself, its meaning should be gathered from the words and phrases associated with it.

Ejusdem generis rule

9.2.2.4

Ejusdem generis is Latin meaning 'of the same kind'. The *ejusdem generis* rule applies when a list of specific items belonging to the same class is followed by

general words; the general words are treated as confined to other items of the same class.

Therefore, if a list reads 'cats, dogs, and other animals', the phrase 'other animals' will be interpreted as meaning other **domestic** animals only.

The phrase **inter alia** (including but not limited to) is often used to avoid this presumption being made – it indicates that the list is not exhaustive, but merely illustrative.

9.2.2.5 Expressio unius est exclusio alterius rule

Expressio unius est exclusio alterius is Latin meaning 'the inclusion of one is the exclusion of another'. The *expressio unius est exclusio alterius* rule states that when a list of specific items is not followed by general words, it is taken as exhaustive. For example, 'weekends and public holidays' excludes ordinary weekdays.

9.2.3 Golden rules of interpretation

Two rules of interpretation are sometimes referred to as golden rules on account of their overriding importance. These are:

9.2.3.1 Words should be given their ordinary meaning

This rule provides that when reading a contract one should stick to the ordinary and grammatical sense of the words being used. There are two exceptions to this:

- Where the ordinary meaning of a word leads either to absurdity or inconsistency with the rest of the document, the meaning should be modified in the light of the intentions of the parties to avoid such absurdity or inconsistency.
- Technical words should be given their technical meanings.

9.2.3.2 Consistent terminology

This rule is often stated as follows:

Never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning.

The basic point here is that if you have used one word to refer to a particular concept, you should stick to it consistently throughout the document. If you change to a different word, there is a risk that this will be interpreted to mean a different concept. For this reason, defined terms are often used in commercial contracts as a means of maximising consistency of terminology and fixing the meaning of words.

Refer to the text above to find the answers to the following questions. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) Can a valid contract be concluded by means of spoken words?
- (2) What is the meaning of the word 'void'?
- (3) In what part of a contract might one find background information about why the contract has been concluded?
- (4) In what part of a contract might one find the meanings of certain terms used repeatedly in the contract?
- (5) What name is given to types of clauses routinely inserted into commercial contracts, which deal with the way in which the contract is governed?
- (6) What is the name given to a situation in which one party agrees not to insist on part of the agreement being carried out in the manner originally agreed?
- (7) What is the 'literal' approach to contract interpretation?
- (8) What is the effect of the *contra proferentem* rule?
- (9) When should one interpret a word in a contract differently from the ordinary meaning of that word?
- (10) Why is the phrase *inter alia* often used in relation to lists in contracts?

10

Contract clauses: types and specimen clauses

10.1

OVERVIEW

As discussed above, there is no legal requirement for contracts to follow a particular format or layout, but it is customary for modern commercial contracts to do so.

The notes below set out the different sections of a typical commercial contract and the kinds of clauses (and provisions that may be included within clauses also dealing with other issues) that might be included in each section. Example clauses are given in respect of those provisions which amount to complete clauses in themselves.

This is not intended as an exhaustive list. Furthermore, not all of the types of clauses and provisions set out below will be relevant to every type of commercial contract. However, the contents of the following subsections can be used as a rough checklist for drafters who wish to check that they have covered the most obvious aspects of the contract being prepared.

10.2

DEFINITIONS

Affiliates etc: the term 'affiliates' refers to individuals or companies connected with a party to the contract.

Charges: the term 'charges' refers both to fees, costs and payments to be made under the contract or incurred by one of the parties, or to legal charges (e.g. mortgages) on property etc.

Commencement date: the date on which the agreement comes into effect, or the obligations under the agreement commence.

Completion: the term 'completion' can mean either the formal coming into effect of the contract or the completion of work to be done under the contract.

Exclusive, non-exclusive and sole: where these words have particular meanings, for example, as applicable to agency or distribution agreements.

Force majeure: the circumstances under which the parties may be released from their obligations under the contract (see below).

Intellectual property: the extent and nature of the intellectual property dealt with and to be protected by the parties under the contract. This may be defined by means of a general definition in the definitions section cross-referenced to a

schedule in which the various aspects of intellectual property to be protected are defined and itemised in detail.

Interpretation: the way in which the parties should interpret references to: legislation (i.e. to include future amendments); gender (i.e. references to 'he' may also include 'she' and vice versa); singular and plural forms of words used in the contract; headings, etc.

Expressions of time (months, years, etc.): the way in which the term 'month', 'year', and so on, should be interpreted.

Parties: the names to be used in referring to the parties in the contract (e.g. expressions such as 'Employer' and 'Employee', or 'Company' and 'Distributor') may be used in place of the parties' full names.

Price: the payment terms and interest rates applicable.

Subcontracting: the identification and role of particular subcontractors that will carry out aspects of the work agreed between the parties in the main contract.

Territory: definition of the territory to which the contract applies.

MAIN COMMERCIAL PROVISIONS

10.3

Acknowledgements

This clause indicates the existence of a legal relationship or that a person has not relied on certain statements or facts. Here is an example:

Party A acknowledges that Party B has assigned certain R&D contracts with Party C to Party A ("R&D Contracts").

Vocabulary: to 'assign' means to transfer, and 'R&D' means 'research and development'.

Appointment

In this clause, one party appoints another party to carry out specified tasks or fulfil a specified role. It is important to ensure that the clause is clear about who is being appointed, what they are being appointed to do, whether and how much they will be paid for doing it and how long the appointment is to last.

Here is an example, in which one party appoints another to provide certain services.

Party A hereby appoints Party B to provide haulage services in the Territory for the Term in return for the Payments, and Party B accepts such appointment.

Vocabulary: ‘haulage’ means transportation, usually by lorry. The ‘Territory’ refers to a specific geographical area defined elsewhere in the contract, and the nature of the ‘Payments’ will also be defined elsewhere in the contract.

Audit and records

This type of clause is needed where payments under the contract are calculated by reference to variable factors (e.g. extent of work done or sales received) and provides a right of audit – that is, a right to carry out an official inspection of financial records – to the party that will receive such payments. The clause should deal with such questions as what records may be examined, whether copies may be made of them, how long the right to inspect will continue for, who bears the costs of the audit, and so forth.

The example clause below empowers the authorised representatives of each party to inspect certain records.

The authorised representative of each party shall be entitled at that party’s expense to inspect and audit the books, accounts and records relating to the subject matter of the contract, the times at which such inspection shall take place to be agreed between the parties in advance of each inspection.

Vocabulary: the ‘subject matter’ of the contract means the deal the contract is designed to put into effect, and ‘in advance of’ means before.

Best endeavours

This provision is generally contained within another clause, and it creates a qualified obligation whereby a party must demonstrate a high level of commitment and effort towards achieving a certain result, but is not absolutely obliged to achieve it (e.g. ‘A shall use its best endeavours to sell the Products as specified in Appendix II’). Generally speaking, this kind of formulation should be avoided if it is possible to indicate specific and absolute obligations.

Here is an example of a best endeavours clause relating to dispute resolution.

If the unresolved dispute is having a material and adverse effect on the Project, the Parties shall use their best endeavours to achieve an expeditious resolution of the dispute.

Vocabulary: ‘material’ in this context means significant, and ‘adverse’ means harmful. The word ‘expeditious’ is frequently used in legal contexts to mean quick.

Commencement

This provision is generally contained within another clause and indicates when performance of the obligation contained in that clause is to start. Particular care should be taken in drafting where the commencement date is different from the

date of the contract or where different parts of the contract commence on different dates.

The example clause below stipulates the commencement date in a fixed-term contract.

This agreement shall commence on [insert date] ("the Commencement Date") and continue for a period of [] months unless terminated earlier by either party under the provisions of Clause [].

Completion

This provision is generally contained within another clause to indicate when certain defined activities are to take place. Care should be taken to ensure that the meaning of the word 'completion' is clear and unambiguous in the contexts in which it is used.

This example clause provides a definition for the term 'Completion Date'.

The "Completion Date" means the date of actual completion of the matters detailed in clauses [] and Completion shall be construed accordingly.

Vocabulary: the word 'construed' means interpreted. 'To construe' is to interpret.

Conditions precedent and subsequent

This provision is generally contained within another clause (see 9.1.4 above).

Here is an example of a condition precedent in relation to the grant of a patent.

The obligations contained in paragraph [] of this contract shall not come into effect until the day after the date on which Party A receives formal notification from the Patent Office that a patent has been granted.

Vocabulary: the phrase 'come into effect' means to become legally valid.

Consent

This provision is generally contained within another clause and has a variety of meanings: (1) that a contracting party is responsible for obtaining various consents necessary for the contract to proceed; (2) that a party is warranting that the necessary consents have been obtained; and (3) that a party may not take certain steps unless the consent of the other party has been obtained. The main issue to be considered when drafting such a provision is whether the requirement for consent should be made subject to a provision that it cannot be reasonably withheld.

Here is an example of a clause prohibiting assignment of the contract by either party in the absence of written consent from the other party.

This contract and all the rights under it may not be assigned or transferred by either party without the prior written consent of the other party.

Vocabulary: the phrase 'prior written consent' means agreement given in writing before assignment of the contract occurs.

Consultation

This clause generally takes the form of a stipulation that one party must consult with another party before taking certain actions (note that this does not amount to an obligation to obtain the other party's consent, but is more onerous than a mere obligation to inform the other party). The drafting of this kind of clause should take into account the question of what actually qualifies as proper consultation, how much time should be allowed for this process to take place, in what form the advice should be given, and so forth.

The clause set out below stipulates a general duty to consult and consider recommendations made by the other party.

Party A shall consult with Party B and give good faith consideration to any recommendations made by Party B.

Vocabulary: the phrase 'good faith consideration' means genuine consideration. In other words, Party A must give genuine thought to recommendations made by Party B.

Currency

This clause stipulates the currency in which payments are to be made under the contract, and is often contained in a payments clause. The clause should also specify whether payment can only be made in that currency, how and when the currency is to be converted, and who bears the risk of the currency exchange rate changing between the date of the agreement and the date on which payment is in fact made.

Here is a simple clause specifying the currency and manner of payment.

All sums payable under this contract by Party A to Party B shall be paid in euros by direct bank transfer to Party B's bank account number [insert number] held at [insert name and address of bank].

Deposits and part payments

This clause stipulates when, under what circumstances, and in what amounts deposits or part payments are to be made in respect of purchases handled under the contract.

The example clause given below provides that one party must pay a non-returnable deposit to the other party.

Party A shall pay to Party B a deposit in the sum of [] within seven (7) days of the date of signature of this agreement. If Party A fails to pay the balance of the Contract Price by [insert date] or seeks to terminate the Order, Party B may retain all of the deposit.

Vocabulary: a deposit is a preliminary payment made in the purchase of an item, which may or may not be returnable if the purchase is not completed. In this case, the deposit is not returnable if Party A does not pay the rest of the agreed price or tries to terminate the order.

Exclusive, non-exclusive and sole

See note above. This provision may be contained within a main commercial clause (see above), or may also be a stand-alone clause.

Here is a clause granting an exclusive licence to sell certain products.

Party A hereby grants Party B, subject to the provisions of this contract, an exclusive licence to manufacture, use and sell the Licensed Products in the Territory.

Vocabulary: an exclusive licence is one granted to only one party (as opposed to a nonexclusive licence). Therefore, under this clause Party B is the only one able to manufacture, use and sell the Licensed Products in the specified territory.

Indexation

This provision gives a means by which the parties can adjust prices for goods and services or salaries or wages in order to take account of the effects of inflation. It should stipulate the method of calculation, the index used, whether notice should be given in case of increases, and so forth. Such a provision is often contained within a payment clause.

The example clause given below is taken from a UK contract and provides a means of increasing a salary automatically by reference to the Retail Prices Index (which is the primary consumer price index used in the UK).

On each anniversary of the Commencement Date, the Salary specified in clause [] shall be increased by the percentage by which the Retail Prices Index has increased during the preceding year.

Vocabulary: 'preceding' means previous.

Interest

This provision specifies whether interest should be charged on late payments of contractual debts, at what rate it should be charged and whether any other rights are obtained by the party receiving payment. It is often contained in a payments clause.

The clause set out below simply provides for the payment of interest at a specified rate on invoiced amounts paid late.

All sums payable by Party A to Party B under this contract shall be paid against invoice within [insert time period] of the date of invoice, and in the event of late payment all sums due shall bear interest at the rate of [insert percentage] per month.

Vocabulary: the expression 'paid against invoice' means that Party B must send an invoice to Party A stating the amount to be paid and the date on which payment must be made, and Party A must pay as stated in the invoice.

Net sales value

This provision is usually contained within a payments clause, where payments are calculated by reference to the amount of a party's sales of goods (e.g. in agency and sales agreements). The word net indicates that certain items (VAT, insurance, etc.) may be deducted from the amount actually charged to the customer.

The example given below shows how the net sales value definition can be applied in a payments clause.

The Licensee shall pay to the Licensor a royalty being a percentage of the Net Sales Value of all the Licensed Products sold by the Licensee.

Vocabulary: the word 'royalty' means a payment made to an author or patent holder in respect of the use or sale of published work or products.

Options

An 'option' is a contractual right for one party (the 'option holder') to elect to bring into force a certain term of a contract. Options often relate to the purchase of land or shares or to take a licence (e.g. in relation to intellectual property). They generally continue for a specified term and are exercisable on pre-agreed terms.

An option clause should include a clear statement of what the option holder receives on exercising the option. It should also cover the questions of whether the option is exclusive or not, whether a lockout agreement (an agreement not to negotiate with a third party during the period of the negotiations) is being created, what payment is to be made for the option, and how the option may be exercised etc.

The provision set out below is taken from an option clause in a franchise agreement, and provides the franchisee with a right of first refusal where the franchisor indicates its aim to grant a franchise to a third party in respect of a further retail outlet.

In the event that the Franchisor wishes to grant to a third party a franchise for a new Outlet in the Designated Territory during the term of this contract the Franchisor shall notify the Franchisee in writing of such desire, following which the Franchisee shall have 90 days from the date of such notice in which to notify the Franchisor in writing that it shall exercise the Option in respect of such Outlet failing which the Franchisor shall be at liberty to grant a franchise to a third party for such Outlet.

Vocabulary: a 'franchise' is a licence given to a trader (the franchisee) enabling them to manufacture or sell a named product or service in a particular area for a stated period. The franchise is granted by the franchisor to the franchisee.

Payment terms and interest

This clause provides relevant stipulations about payment, including: when payments are to be made; the method of calculation; retention of title; whether VAT is included; by what method payment is to be made; whether interest is to be added; the currency of payment; any deductions; whether time is of the essence; what statements or receipts are required, and so forth.

Here is a simple clause that merely records that payments are to be made without deductions of any kind.

Payments made under this contract shall be made without deductions (including taxes or charges). If the applicable law requires any tax or charge to be deducted before payment, the amount due under this agreement shall be increased so that the payment made will equal the amount due to [specify party] as if no such tax or charge had been imposed.

Vocabulary: deductions are amounts subtracted from the sum to be paid before payment of that sum.

Receipts

This provision is usually contained in another clause (e.g. payment clause) and is necessary when a party is required to acknowledge that it has received something. It is important to ensure that the payment for which a receipt is required is sufficiently identified in the relevant provision.

The example clause below imposes a duty on the payee to issue receipts to the payer in respect of the amounts paid under a certain clause of the contract.

Party B shall issue a written receipt to Party A within seven (7) days of receipt of each payment received under clause [] of this contract, confirming the amount of payment made and the date on which it was received.

Vocabulary: a receipt is a document acknowledging that a specific payment has been made.

Reporting

This clause is used when a party is required to make regular reports to the other parties about its activities under the contract (as in a consultancy or agency agreement). It should stipulate what information is provided, in what form it should be provided, the rights of the recipient, and so forth.

In the clause below, one party agrees to provide specified sales information to the other party, which extends to details of competing products.

Party B shall supply such reports, returns and other information as Party A from time to time requests, including sales forecasts and information with regard to products competing with or likely to compete with the products marketed by Party A in the Territory.

Vocabulary: the expression 'from time to time' usually means periodically or at any particular time.

Retention of title

Under a provision for retention of title, a seller of goods seeks to retain ownership of the goods, even after delivery to the buyer, until they have been paid for. Such a clause should ensure full title is retained, clearly identify the goods, indicate what the purchaser may do with the goods, and so forth. This type of provision is usually contained in a payments clause.

The clause below specifies that the buyer does not own the goods until they have been paid for, but at the same time clarifies that the risk in the goods passes to the buyer at the time of delivery.

Ownership of the goods which are the subject of this contract shall not pass to the Buyer until they are fully paid for, but the risk in the goods shall be borne by the Buyer from the date of delivery by the Seller or its agents to the Buyer.

Vocabulary: the word 'borne' means carried by the specified party. In other words, in this context if anything happens to the goods the responsibility for this is the Buyer's.

Set-off and retention

This provision is usually contained in a payments clause. 'Set-off' generally means 'deduction'. It occurs when party A to the contract is obliged to pay party B a sum of money, but party B also owes party A a smaller sum. In such a situation, it may be agreed that party A will deduct from the sum to be paid to party B the amount that party B owes to party A. 'Retention' generally means 'holding back'. For example, a contract may provide that a sum is not to be paid until the contract work is successfully completed.

The example clause below simply records that set-off is not permitted.

Party B agrees with Party A throughout the term of the contract not to set-off for any reason any money payable by Party B to Party A for supplies of products under the contract.

Subcontracting

This clause deals with: whether subcontracting of the work required under the contract is allowed at all; on what terms it might be allowed; whether there is a duty to consult the other party; and the situations in which particular obligations and requirements are laid upon subcontractors (e.g. as to intellectual property rights).

The example clause below provides that subcontracting is permitted but must be personally supervised by the contractor.

All work undertaken or services provided by the Contractor, or by any subcontractor appointed by the Contractor, under the terms of this contract, shall be done or performed by, or under the personal supervision and direction of, the Contractor.

Time of the essence

Where a term of a contract is said to be 'of the essence', breach of that term will usually entitle the other party to terminate the contract (i.e. delays are regarded as a fundamental breach of the contract). Provisions to this effect will usually form part of another clause, and should indicate the consequences of failing to meet the time limits stipulated.

The example clause set out below provides that time is of the essence with respect to the dates and periods set out in the contract or to any other dates and periods agreed between the parties. The result of this is that delays in the performance of obligations past these time limits will be treated as fundamental breaches of the contract (giving rise to the right to terminate the agreement) instead of minor breaches (giving rise only to a possible claim for damages).

Time shall be of the essence of this contract, both as regards the dates and periods specifically mentioned and as regards any dates and periods which may be substituted for them by agreement in writing between the parties.

Vocabulary: the phrase 'substituted for' means to replace with. In this clause if the agreed dates and periods are changed by agreement between the parties, time will still be of the essence in relation to the new dates and periods.

10.4

SECONDARY COMMERCIAL PROVISIONS

Capacity

'Capacity' refers to whether a person or legal entity has the legal right to enter into a contract. A provision on this issue is usually contained in another clause, and its purpose is to indicate that various documents that may be signed under the contract (e.g. notices, approvals, variations of contract) may only be signed by an authorised representative of a party.

In the clause given below a party warrants that a certain person has authorisation to sign documents on its behalf.

The Company warrants that its duly authorised representative (insert name) has the necessary authority to enter into this contract on the Company's behalf.

Vocabulary: the word 'warrants' in this context means to make a legally binding statement.

Confidentiality

A confidentiality clause allows one or both parties to protect the confidentiality of sensitive information. Such a clause should identify the information to be covered, which parties are bound by the clause, what the confidential information can be used for, to what extent it can be disclosed (e.g. to employees or third parties), and whether there are any exceptions to the requirement of confidentiality, and so forth.

The short clause set out below provides a general duty of confidentiality in respect of information shared as a result of the contract.

The parties to this contract shall at all times keep confidential all information acquired in consequence of this contract, except for information to which they may be entitled or bound to disclose by force of law or where required to do so by regulatory agencies.

Vocabulary: the expression 'by force of law' means as a result of a legal requirement. Therefore, in this clause if either a binding legal provision stipulates that information must be disclosed, or a court orders such disclosure, then such disclosure must be made.

Consequences of termination

In many cases, certain rights or obligations contained in the contract may continue to exist or come into existence after the contract has ended. The contract may contain a clause on this subject. This clause should indicate which provisions survive termination, how long they survive for, whether any payments are to be made, whether termination of this agreement impacts on other

related agreements, whether any new rights are granted on termination, and so forth.

The clause below specifies which clauses shall survive termination of the contract.

No term, other than clause [insert clause or clauses that will survive termination], shall survive expiry or termination of this contract unless expressly agreed in writing between the parties.

Vocabulary: the expression 'expressly agreed' means specifically agreed. In other words, there must be specific agreement between the parties on that particular issue.

Cumulative remedies

This type of clause provides that remedies provided for under the contract are in addition to any other rights or remedies a party might have. The aim of such a clause is to prevent a party from arguing that only one of a possible range of remedies can be used.

The clause below provides that both parties may use the full range of legal remedies and rights available to them under the applicable law.

Any remedy or right conferred on either party for breach of this contract shall be in addition to and without prejudice to all other rights and remedies available to it under the applicable law.

Vocabulary: the use of the phrase 'without prejudice' in this clause means that the fact that a party has used a remedy granted under the contract does not prevent them from using other remedies.

Disclaimers

A disclaimer is used by a party to a contract in order to disclaim (i.e. avoid) responsibility for a particular fact or situation. Such a provision is often used in the context of warranties to indicate an understanding that no legal liability arises in a context where it might otherwise arise.

Here is a simple clause in which the purchaser of goods acknowledges that it has inspected the goods to be sold and entered into the contract on that basis rather than on the basis of representations made by the vendor. This acts as a disclaimer on the vendor's part for any possible liability arising from misrepresentation.

The Purchaser agrees that the goods to be sold have been inspected by him or on his behalf and he has entered into this agreement on the basis of such inspection and not in reliance on any representation or warranty made by or on behalf of the Vendor.

Vocabulary: the phrase 'on his behalf' means that the inspection is carried out by another person on the instruction of the Purchaser.

Exemption clauses

Commercial contracts invariably contain provisions that seek to exclude or limit liability (collectively known as exemption clauses). These are discussed in further detail in 11.3 below.

The example clause below seeks to exclude liability for one party's failure to deliver goods or provide services by the dates specified in the contract, or for any damage caused to the other party as a result of failing to deliver the goods or provide the services by those dates.

While Party A will endeavour to meet estimated dates for delivery of the goods and performance of services specified in Schedule II, Party A undertakes no obligation to deliver or perform by such dates, and Party A shall not be liable for any damage resulting from any failure to deliver or perform by such dates however caused.

Vocabulary: the phrase 'undertakes no obligation' means 'accepts no obligation'. The word 'liable' means to be legally responsible for.

Expiration and termination at will

This type of provision is used in fixed-term contracts to specify the date on which the contract automatically expires, and is generally contained in the termination clause. It may also provide that the contract may be terminated earlier by one or more of the parties by notice to the other parties.

The clause given below provides that the contract terminates on a fixed date if it has not been terminated prior to that under any other applicable provision of the contract.

Subject to any earlier termination under clause [], this contract shall continue in force until the [] of the Commencement Date when it shall terminate automatically by expiry.

Vocabulary: the phrase 'terminate automatically by expiry' means that when the specified date is reached, the contract is no longer valid and no action is required by either party to achieve this.

Force majeure

Under common law, where a contract becomes impossible to perform or can only be performed in a manner substantially different from that originally envisaged, then performance is excused under the doctrine of frustration.

The purpose of a *force majeure* clause is therefore to define the circumstances in which performance may be excused. This may either be done by setting out a long list of such circumstances (but see the *expressio unius est exclusio alterius*

rule at 9.2.2.5 above) or by merely referring to 'circumstances beyond the control of the parties', and so forth.

The clause sets out below that no liability applies in respect of breaches of contract caused by circumstances beyond the reasonable control of the parties, and incorporates an extension of time for performance in the event of delay being caused by *force majeure* events.

Neither party shall be liable for delay in performing or failure to perform obligations under this contract if such delay or failure results from events or circumstances beyond its reasonable control. Such delay or failure shall not constitute a breach of this contract and the time allowed for performance shall be extended by a period equivalent to that during which performance is so prevented.

Vocabulary: the phrase 'circumstances beyond reasonable control' means circumstances over which the parties cannot for legal purposes be expected to have control, even if it might theoretically be possible for them to influence such circumstances.

Indemnities

An indemnity consists of an undertaking given by party A to party B that party A will make good any losses suffered by B arising from claims made against B by a third party in specified situations.

The wording 'hold harmless' is often used in US contracts to indicate that the party giving the indemnity will not sue the other party for recovery of its losses. The clause should indicate what the indemnifying party will be responsible for, whether there are any limits on the amount to be paid, what the indemnity covers, whether other persons are covered by the indemnity, and so forth.

In the clause below, Party A provides a general indemnity to Party B in respect of any breach of warranties given in the contract.

Party A undertakes to indemnify Party B and keep Party B fully indemnified against all losses, liabilities, costs and expenses arising out of the breach of the [above warranties] or out of any claim made by a third party which if substantiated would constitute such a breach.

Vocabulary: the phrase 'losses, liabilities, costs and expenses' covers a variety of slightly different types of financial losses. The word 'losses' means losses in income caused by the breach of warranty; 'liabilities' means legal obligations (which may also be financial) brought about by the breach; 'costs' means legal costs; and 'expenses' means financial outlay necessitated by the breach.

Insurance

This clause generally includes warranties as to the level and scope of insurance cover held by a contracting party, and may also include obligations on a party to ensure against certain risks. The drafting should take account of whether the party requires insurance in the circumstances of the contract, what kinds of incidents are to be covered by the clause, what level of cover is required and for how long, and so forth.

The clause set out below provides a warranty that valid insurance is in place in relation to the subject-matter of the contract.

The Vendor warrants that:

- 1 *Insurance policies are in force in respect of the Assets to their full reinstatement value and against all other risks and liabilities (including but not limited to product liability and consequential loss of profits); and*
- 2 *To the best of the Vendor's knowledge and belief there are no circumstances which could lead to any such insurance being revoked or not renewed in the ordinary course of events*

Vocabulary: 'reinstatement' is roughly a synonym for replacement. 'Product liability' refers to defects in the products caused by the manufacturing process. The phrase 'to the best of the Vendor's knowledge' means 'as far as the Vendor knows'.

Warranties

Warranties are statements of fact, which the party giving the warranty asserts to be true, and breach of which will usually lead to the other party being entitled to claim damages.

They include standard warranties as to a party's ability to enter into an agreement as well as detailed warranties regarding the quality of the goods or services that form the subject-matter of the contract. It is common for the party giving the warranty to limit the warranty to matters within its knowledge (using the formulation 'to the best of his/her knowledge, information and belief').

The clause below provides a warranty about the quality of the goods to be supplied under the contract. It should be noted that Party B's acceptance of designs that are provided to it is not in itself sufficient to relieve Party A of liability for defects in the products.

Party A warrants that all goods delivered under this contract shall be free from defects in material and workmanship, conform to applicable specifications and drawings and free from design defects and suitable for the purposes intended by Party B. Party B's approval of designs provided to it by Party A shall not relieve Party A of its obligations under any provision of this contract including the warranty contained in this clause.

BOILERPLATE CLAUSES

10.5

Agency and partnership

Commercial contracts sometimes include provisions stating that one party cannot bind the other parties or act on their behalf except where this is specifically provided for in the contract. The purpose of such provisions is to prevent an assumption arising, in respect of a long-term business relationship, that an agency or partnership relationship may have arisen.

The clause set out below simply asserts that no partnership exists under the contract.

Nothing in this contract shall be deemed to constitute a partnership between the parties.

Vocabulary: see 4.4.10 for an explanation of the meaning of 'deemed'.

Agents for service

In some cases, a party may require that documents issued by a court or some other party in relation to a court case should be served upon (i.e. sent in a legally prescribed or agreed manner) someone other than the party concerned. A clause may be included in a commercial contract, which specifically provides that this is agreed between the parties in the event of future legal proceedings.

The clause set out below authorises an agent to accept service on Party A's behalf and specifies the details of that agent for the benefit of the other parties.

Party A irrevocably appoints [insert name] at present of [insert address] to receive on its behalf service of proceedings issued out of the courts in any action or proceedings arising out of or in connection with this contract.

Vocabulary: the word 'irrevocably' means that the appointment cannot be revoked (i.e. cancelled).

Amendment or variation

This type of clause normally deals with the issue of whether and to what extent the parties may amend an agreement, and the procedure to be followed if amendment takes place. The clause will typically specify who is entitled to make amendments, with whom they must be agreed, the manner in which they are to be made, and whether amendments may be made to the whole contract or only to specified parts of it.

The clause set out below provides that there is no automatic right to make amendments or variations to the contract, and therefore these may only be made with the written consent of both parties.

No amendment or variation to this contract shall take effect unless it is made in writing and signed by the authorised representatives of each of the Parties.

Announcements

The purpose of this clause is to control the extent to which and the manner in which information is released into the public domain about an existing contract or about negotiations to enter into a contract. This is particularly important for public companies (where the information could affect the share price), as well as to companies subject to close regulatory control or media scrutiny.

Such a clause will usually state whether announcements are allowed, who is entitled to make them, whether the consent of other parties is required, whether the wording of the announcement needs to be agreed, and so forth.

The clause below provides that announcements may only be made if both parties agree to them or they are necessary for legal reasons. The clause also imposes a duty on the parties to consult each other prior to the announcement.

No announcement of any kind shall be made in respect of the subject matter of this contract except as specifically agreed between the parties or if an announcement is required by law. Any announcement by either party and so required by law shall only be issued after prior consultation with the other party.

Arbitration and ADR (alternative dispute resolution)

The purpose of an arbitration clause in a contract is to enable the resolution of disputes between the contracting parties by an impartial third party or panel acting in a judicial manner.

Clauses on this issue generally address issues including whether an expert should be used in the arbitral proceedings, the duration of the arbitration agreement, the number of arbitrators to be used, the method of appointment of the arbitrator(s), the language and law to be used in the arbitration proceedings, and whether the decision reached in arbitration should be final (i.e. should the clause exclude the possibility of further appeal to the court?), and so forth.

The clause below provides for arbitration to be carried out by the ICC and leaves the conduct of the arbitration to the relevant rules.

Any dispute or claim arising out of this contract shall be referred to the International Chamber of Commerce ('ICC') in Paris for resolution in accordance with the ICC Conciliation and Arbitration Rules.

Assignment and novation

These terms refer to the transfer of a party's rights and obligations to another party. 'Novation' arises where a party assigns both rights and obligations under

the contract to a third party, giving rise to a new contract between the transferee and the other party to the existing contract. Such an arrangement requires the consent of the transferor, the transferee and the other contracting party. Clauses dealing with assignment and novation generally state whether or not assignment is permitted, who is entitled to assign, what can be assigned, whether the consent of the other party is needed, and in what form, and so forth.

The clause below provides that there is no automatic right to assign any part of the contract to a third party, and therefore such assignment may only be made if the other party gives consent.

Neither Party may assign, delegate, subcontract, charge, or otherwise transfer any or all of its rights and obligations under this contract without the prior written consent of the other Party.

Vocabulary: the word 'charge' in this context means to provide as a security on a loan.

Costs and expenses

The word 'costs' is generally used to refer only to legal fees. Expenses form a slightly different category and generally refer to expenditure involved in dealings with regulatory authorities (e.g. registrations and application costs) or to incidental expenses such as transport costs.

The usual rule is that unless the contract specifies otherwise the parties bear their own costs and expenses incurred in negotiating and preparing a contract. However, they may provide otherwise in a specific clause to this effect, which may specify the costs and expenses involved, who is to be responsible for paying them, when they are to be paid, and the consequences of failing to pay.

The clause below simply confirms that each party will bear its own costs and expenses in relation to drawing up the contract.

Each party shall bear its own legal costs and other costs and expenses arising in connection with the drafting, negotiation and execution of this contract.

Vocabulary: the word 'execution' in this context means signature of the contract and any other actions required to make it legally valid.

Further assurances

After completing a transaction, the parties may be required to take further steps in order, for example, to comply with statutory or regulatory requirements. For instance, it may be necessary to execute further documentation to give effect to certain parts of the contract. The purpose of a further assurance clause is therefore to secure the relevant party's agreement to carry out whatever further action is needed in order to implement the contract.

The clause below confirms that the parties will, if necessary, carry out such further actions as are necessary to put the purposes of the contract into effect.

Each party agrees to execute, acknowledge and deliver such further documentation and do all such acts as may be necessary to carry out and put into effect the purposes of this contract.

Language

English is frequently used in international transactions. However, in many cases contracts are prepared in more than one language. In such contracts it is advisable to insert a clause regulating such issues as which language version is the authoritative version, which language should be used for amendments to the contract, which law and whether documents relevant to the contract should be translated into English.

The clause below may be used where the contract is drawn up entirely in English. It provides that the contract may be translated into other languages but that the English text remains the authoritative version.

This contract is made only in the English language. It may be translated into any language other than English, provided however that the English text shall in any event prevail.

Vocabulary: the word 'prevail' in this context means that the English text takes precedence over texts in any other language.

Law and jurisdiction

This type of clause usually specifies which legal system applies to the contract or disputes arising from it, and may also stipulate which court should hear the matter. In formulating such a clause, it is important to consider whether the drafting of the contract in general will be binding under the law to be specified in the clause.

The clause set out below provides that the contract will be governed by Finnish law and that the Finnish courts have exclusive jurisdiction in relation to any claims arising from it.

The validity, construction and performance of this contract shall be governed by Finnish law, and the Parties agree to submit to the exclusive jurisdiction of the Finnish courts in respect of any claim arising under this contract.

Vocabulary: the word 'construction' in this context means interpretation. 'Exclusive jurisdiction' means that no other court is entitled to hear cases arising out of the contract.

Notices

This type of clause specifies the means by which the parties to the contract are to communicate with each other when certain events under the contract occur.

Usually, a notices clause will provide that the parties must send formal notices to one another in specified circumstances, including where they intend to terminate the contract or to exercise options or powers contained in the contract. The clause will stipulate whether the notice should be given in writing, the means by which it must be delivered, to whom it must be given, and what time period must elapse before it becomes effective.

The clause below provides that notices must be served by first-class post and shall be treated as having been received at the time that it would normally have been received by post. Of course, it is also possible to agree that notices may be served by other means either in place of or in addition to the post (e.g. personally, by fax, by email, etc.).

All notices and other communications made under this contract shall be in writing and shall be deemed to have been duly given if sent in a letter by first-class or airmail pre-paid post addressed to that party [at the party's last known address or place of business or that party's registered office or the address of that party set out at the head of this contract (or any alternative address notified by that party in accordance with this clause)] and any notice so given shall be deemed to have been received (unless the contrary is proven) at the time at which the letter would be delivered under normal postal conditions.

Waivers

The term 'waiver' refers to a situation in which one party to a contract agrees not to insist on the exact performance by the other party of obligations contained in the contract. A concession of this type should be made in a formal document, which therefore amounts to a variation of the contract (though in certain situations an 'implied waiver' can arise as a result of the conduct of the parties).

The purpose of a waiver clause is to regulate the circumstances under which a waiver may occur. Such a clause will usually clarify that failure to exercise a right under the contract, or delay in exercising it, does not amount to a waiver of that right. It may also specify that a waiver of performance under a term of a contract does not constitute a waiver of any future breach of that term or any other term.

In addition, a waiver clause may incorporate provisions setting out the conditions under which a waiver may take place.

Here is a simple clause that stipulates that failure or delay in exercising a contractual right shall not constitute a waiver of that right or of any other right under the contract.

No failure or delay by any party to exercise any right, power or remedy shall operate as a waiver of it, nor shall any partial exercise of such right, power or remedy preclude any further exercise of it or of any other right, power or remedy.

Vocabulary: the word 'preclude' means prevent.

Whole agreement

In formal legal terms, a binding contract may be formed in writing, involving one or more documents, or orally, or by a mixture of written documents and oral statements. It is therefore important for the parties to clarify either that the contract consists of the final written agreement alone, or specify what other documents or statements should also be included.

The clause set out below clarifies that all the terms of the agreement between the parties are contained in the written contract and excludes the validity of any prior agreement between them. It also seeks to exclude liability for misrepresentation.

This contract contains the whole agreement between the parties and supersedes and invalidates any prior written or oral agreement between them, and the parties confirm that they have not entered into this contract on the basis of any representations that are not expressly incorporated in this contract.

Vocabulary: 'supersedes' means replaces, and 'expressly' means specifically.

OPERATIVE LANGUAGE

11.1

As a rough rule, the functions of contractual language can be summarised using the acronym COAL (conditions, obligations, authorisations, limitations). These functions require different words and phrases, as set out below.

Conditions

11.1.1

Conditions can take different forms. For example:

- 1 When something **must** be done before something else **may** be done (condition precedent). For example, 'the consent of X bank **must** be obtained before the terms of this agreement **may** be implemented.'
- 2 When the performance of one obligation is linked to the performance of another. In this context expressions such as **provided that, on condition that, or subject to** are frequently used. For example, 'this agreement may be renewed for a further period of two years **subject to** X having carried out the duties specified in section 7 to the satisfaction of Y.'

Obligations

11.1.2

In the third person **will** refers to the future ('he will go' means he intends to go) whereas **shall** indicates an imperative ('he shall go' means that he is obliged to go).

Therefore, in legal documents drafted in the third person, obligations are often expressed using **shall**.

Shall is frequently overused to indicate the future. This should be avoided. **Must** is a good replacement for shall when expressing the imperative: 'if X becomes a party to this agreement, he shall [must] immediately pay to Y . . .'

- 'must' or 'shall' indicates an obligation to do something ('X must/shall pay the rent');
- 'shall not' indicates a duty not to do something ('X shall not pay to Y . . .');
- 'must' can also be used to indicate a condition precedent ('in order to qualify for this position, X must . . .');
- 'is not required to' indicates that there is not duty to do something ('X is not required to pay Y to use the office premises').

11.1.3 Authorisations

Authorisations – those situations in which a party is allowed to do something but is not obliged to do that thing.

May is used in the following situations:

- to express a possibility that something may be done ('the Company may purchase further products');
- to indicate that one has a discretion to do that thing ('the parties to this contract may assign the benefits under this contract'); or
- to indicate a wish ('the parties intend that the signature of this contract may signal the beginning of a mutually beneficial cooperation between them').

The following words are generally used in the contexts suggested:

- 'is entitled to' indicates a party's right ('X is entitled to use the office premises');
- 'is not entitled to' indicates that a party does not have a right ('X is not entitled to use the office premises');
- 'may' indicates a party's discretion to do something ('X may use the office premises');
- 'may not' indicates that a party does not have discretion to do something ('X may not use the office premises').

11.1.4 Limitations

Limitations may of course take a number of forms – temporal, geographical, as to scope of activities, applications and responsibilities – though time limitations are perhaps the most frequently encountered of these. Words and phrases typically found in this context include:

- No later than 3 February 2006
- By 3 February 2006
- Remains open until 3 February 2006

The word **within** is particularly useful in this context, as it can mean, *inter alia*, 'no later than' in a temporal context ('within 14 days') or no further than in a geographical context ('within a 12-kilometre radius').

Insert the correct word or phrase from the list and insert it into the sentences below. It may be necessary to use certain of the choices open to you more than once. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) The consent of Remington Bank plc (a)_____ be obtained before the share transfer (b)_____ proceed.
- (2) The parties intend that this agreement (c)_____ signal the beginning of a long and fruitful cooperation between them.
- (3) The Seller (d)_____ deliver the goods to the Buyer no later than 15 September 2009.
- (4) It is contemplated that the parties (e)_____ agree to further purchases of Product A in the future.
- (5) This information constitutes a business secret. Therefore, the Distributor (f)_____ disclose it to third parties.
- (6) Since the firm does not have relevant expertise in that area of law, it (g)_____ handle this case.
- (7) We (h)_____ contact the Vendors as soon as we have received the relevant information.
- (8) The question of the level of fees to be paid (i)_____ be agreed between the parties and it is possible that performance-related bonuses (j)_____ also form part of the remuneration package.

- a. may
- b. shall
- c. may not
- d. cannot
- e. must
- f. will

11.2 TROUBLESHOOTING ISSUES

The notes set out below should be read in the context of the general notes on drafting contained in Chapter 5.

11.2.1 Separate obligations from definitions

When drafting definitions, care should be taken that the definition given merely declares what a particular word or phrase is to be understood to mean, and does not contain any obligations.

Here is an example of a definition which has become merged with an obligation:

"Completion Date" means 13 August 2007, on which date Party A must pay the purchase price in respect of the Property to Party B and relieve Party B of liability for all rates and taxes payable on the Property.

This is bad drafting, because it results in hiding the obligation ('Party A must pay the purchase price . . .') in a part of the document where the reader does not expect to find it. The contract will remain legally valid, but time will be wasted trying to locate the obligation.

The example given above should be separated into two separate clauses, as follows:

Definition

"Completion Date" means 13 August 2007.

Payment

On the Completion Date Party A must pay the purchase price in respect of the Property to Party B and must relieve Party B of liability for all rates and taxes on the Property.

11.2.2 Differentiate conditions and promises

It is important not to confuse the function of conditions and promises in the drafting of contracts.

A **condition** is an event that must occur before performance of a certain obligation occurs. A **promise** is the means by which a party binds itself to the performance of that obligation.

These two functions must be clearly differentiated in the drafting of a contract, since failure to do so will frequently result in the ultimate obligation being unclear. Here is an example of this problem:

Party A shall deliver the Products to Party B on 13 August 2007. The Products shall be fit for the purpose notified to Party A by Party B. Party B shall pay Party A the sum of \$10,000 on 13 September 2007.

Here, the fitness of the products for the notified purpose is a condition, while the other parts of the clause (the obligation to deliver the products and pay for them) are clearly promises. The mixture of these different functions makes it unclear whether Party B has to pay for the products, even if they are not fit for the purpose. The solution is to place the fitness for purpose condition in a separate clause, and separate the delivery and payment obligations – resulting in three different clauses.

Avoid use of 'and/or'

11.2.3

The formulation 'and/or' is frequently used in the drafting of legal documents, but can in certain situations lead to ambiguity. The reason for this is that the use of 'and' and 'or' together is often contradictory. The usual remedy is to use one of the words but not both.

Here is an example of a problem caused by using 'and' and 'or' together:

Party A must provide the necessary equipment and/or the financing necessary to purchase the necessary equipment.

The use of 'and/or' in this sentence makes it appear that Party A does not have a choice in what it provides, while in reality, it is entitled to provide either the equipment or the financing, but not both. Therefore, the word 'and' should be omitted.

Conversely, in the following sentence, 'or' should be omitted because it is clear that both parties have equal entitlement:

Party A and/or Party B may use the Premises.

Use a clear numbering system

11.2.4

A number of different numbering systems are used in Anglo-American legal documentation. No one system is best – the choice is a matter of personal preference or company policy. However:

- In all cases consistency in the use of numbering is crucial: once a particular system has been chosen, it should be logically applied.
- In order to ensure the user-friendliness of the document it is best not to descend beyond the third level of numbering (e.g. 1 (2) (a) or 3.3.1) unless this is absolutely necessary. Instead of subdividing further, it may be better to structure the document in a different way.

Three of the most common systems are illustrated in the table below.

Arabic/Roman system	Decimal system	Partial combination
1.	1.	1.
2.	2.	2.
3 (1)	3.1	3.1
(2)	3.2	3.2
(3) (a)	3.3.1	3.3 (a)
(b)	3.3.2	(b)
(c) (i)	3.3.3	(c) (i)
(ii)	3.3.3.1	(ii)
(iii) (A)	3.3.3.2	(iii) (A)
(B)	3.3.3.3	(B)
(C)	3.3.3.3.1	(C)

11.2.5 Avoid excessive cross-referencing

It is often necessary to create cross-references between one clause and another in a legal document (often using formulations such as 'subject to the provisions for termination contained in clause 5.1'), where one obligation cannot be read in isolation from another. A good example of this is where a clause dealing with the basis on which a commercial contract involving ongoing obligations can be renewed includes a reference to a clause that deals with the basis on which the contract can be terminated.

However, excessive cross-referencing should be avoided. The main reasons for this are as follows:

- It makes the document difficult to read and understand, since the reader constantly has to alternate between different clauses to grasp the overall meaning of a provision (and for the same reason it makes the document difficult to create).
- There is increased scope for errors in the preparation of the document. A typical error in this respect is that having created a reference in one numbered clause to another numbered clause, the drafter changes the number of the clause referred to without making a corresponding change to the reference.

11.3

DRAFTING EXEMPTION CLAUSES

In most commercial contracts, either party to a contract may seek to avoid incurring liability for certain breaches of the contract (**exclusion clause**), or may

specify that their liability for such a breach will be limited in some way (**limitation clause**). The term 'exemption clause' refers to both of these situations, and such clauses may be designed to fulfil a variety of purposes, including the following:

- Allowing a party unilaterally to vary the nature of its obligations under the contract;
- Limiting a party's remedies in the event that another party breaches the contract;
- Imposing restrictions on the circumstances in which a party is entitled to exercise contractual remedies;
- Limiting liability to a specified sum of money ('liquidated damages' clause);
- Excluding liability for certain types of loss (e.g. indirect and consequential losses – see below);
- Excluding liability altogether.

Exemption clauses are interpreted using the **contra proferentem rule** – which states that where the words of the clause are ambiguous they will be interpreted in the way least favourable to the party relying on them. This rule is applied strictly in the case of exclusion clauses (particularly where they seek to exclude liability for negligence) and less strictly in the case of limitation clauses.

Such clauses are often the subject of dispute between parties to a contract and the courts are regularly called upon to interpret their meaning. Therefore, parties should take care in deciding what liability they wish to exclude or limit, and in ensuring that the contract accurately reflects their intentions. Particular care should be taken in differentiating between:

- 1 direct loss**, that is, loss which arises naturally and directly from the breach of contract; and
- 2 indirect or consequential loss**, that is, loss that was reasonably contemplated because of special circumstances going beyond the ordinary course of things and known by the parties at the date of the contract.

A problem arises here from the use of clauses which seek to limit 'indirect or consequential loss'. Parties often use this phrase in the mistaken belief that they are excluding all potential liability for loss of profit, whereas in fact it will only cover the second situation outlined above. For example, loss of general trade due to delay in delivery of goods will usually be direct loss since in most commercial situations this cannot be classified as 'special circumstances'.

Here are some pointers aimed at ensuring that your exemption clauses are drafted in such a way as to ensure that you have limited your liability in accordance with your aims.

- Exclusion or limitation clauses should be drafted in plain English and should explicitly state what liability is to be excluded or limited.
- It is important to evaluate what potential losses could be classified as direct and what losses could be classified as indirect or consequential and then carefully draft the exclusion or limitation clause accordingly.
- In particular, if loss of profits is to be excluded they should be excluded in clear terms, distinct from any separate exclusion of indirect or consequential losses.
- Always remember that clauses excluding or limiting recovery of indirect or consequential losses may not exclude claims for loss of profits.

Wording such as 'no liability for indirect or consequential losses such as loss of profits' or 'loss of profits or other indirect or consequential losses' should be avoided. Both involve the risk that loss of profits considered to be 'direct' will not be excluded.

11.4

STRUCTURING A CLAUSE

Each clause in a document should deal with a separate issue. The typical structure of a clause is as follows:

- definitions of terms used only in the clause;
- the basic proposition;
- exceptions to the basic proposition;
- any restrictions on the scope of the exceptions.

If the clause contains a number of sentences that deal with different areas of the main topic of the clause, these should be split into separate sub-clauses. Where the clause is long and complex, such subdivision is essential.

When drafting a clause, the drafter should also consider whether that clause has any bearing on, or overlaps with, the terms of another clause in the document, and if necessary:

- Eradicate any duplication or contradiction in the stipulations set out in different clauses. Ensure that each clause clearly deals with a separate issue.
- Where necessary, create explicit linkages between the clauses (e.g. 'this clause takes effect subject to the provisions of clause 7').

Detailed provisions such as timetables or formulae can be placed in a separate clause or in a schedule to the document and then cross-referenced.

LAYOUT AND DESIGN

11.5

The use of clear, readable English and a logical document structure should be complemented by user-friendly document design. The aim of document design should be to help readers find their way around the document. In this way, the document will be simpler to understand.

Here are a few suggestions as to how to improve the layout and design of your documents:

- Use a readable serif font in an appropriate size (generally between 9 and 12 points).
- Use 45–70 characters per line.
- Use plenty of white space – break up slabs of text, use wide margins around the text, double-space all text and use generous spacing between clauses.
- Use headings. Give each main clause a bold heading. If possible give subsidiary clauses headings in italics.
- Use italics rather than underlining to emphasise text.
- Use properly indented lists where appropriate.
- Put citations in footnotes rather than having them interrupt the flow of the main text.
- Don't justify the right margin.
- Use a cover sheet for any document over five or six pages long.
- Avoid excessive capitalisation.

CHECKLIST

11.6

This checklist can be used when drafting or evaluating business contracts and other documents.

Before drafting the document

- Have you got all the information you need?
- What is the main aim of the document?
- What are the main facts that form the basis of the document?
- What is the applicable law and how will it affect the drafting?

- Are there any useful **precedents** (generic legal documents on which specific legal documents can be based) that could be used for the draft?

Content

- Do the terms of the document reflect the intentions of the client or – if a contract – the bargain struck between the parties?
- If the document is a contract, does it contain fair mutual obligations?
- Does the document foresee what might go wrong in the future?
- Does the drafting of the document provide protection if something does go wrong?
- If the document is a contract, does it provide a dispute-resolution mechanism in case something goes wrong?

Language

- Is the language used in the document clear and coherent?
- Are there any ambiguities?
- Is terminology used in a consistent way?
- Are the spelling and punctuation correct?
- Will the reader understand the contract?
- Have the following been removed:
 - irrelevant language;
 - jargon;
 - excessive use of capitals;
 - unnecessary definitions;
 - unnecessary use of foreign terms.

Law

- Is the document legally effective?
- Does it fulfil all formal requirements (if applicable)?
- Are any clauses in the document illegal?
- How will the governing law interpret its terms in the event of breach?

Accuracy

Is all factual matter contained in the document accurate, in particular:

- dates;
- time-limits;
- names and addresses;
- prices;
- identification numbers;

- references to other sections or schedules;
- list information contained in schedules.

Structure

- Does the document have a logical structure?
- Does each paragraph contain just one main idea?
- Does the order of sentences and paragraphs make sense?
- Are there links between one paragraph and the next?
- Are there links between sentences in each paragraph?

Presentation and layout

- Is the font size big enough (between 9 and 12 points)?
- Are the lines the right length (45–70 characters per line)?
- Is there enough white space in the document?
- Have headings been used for main clauses?
- Have properly indented lists been used where appropriate?

CONTRACT COMPREHENSION EXERCISES

11.7

Read the excerpt from a share purchase agreement set out below, and then do the exercises on it.

- 4.1 If the Vendor fails or is unable to (1) _____ any material (2) _____ required to be performed by the Vendor pursuant to clause 4.2 by the last date on which Completion is required to (3) _____, the Purchaser shall not be obliged to complete the sale and purchase of the Shares and may, in its absolute (4) _____, by written notice to the Vendor:
- (a) (5) _____ this Agreement without liability on the part of the Purchaser; or
- (b) elect to complete this Agreement on that date, to the extent that the Vendor is ready, able and willing to do so, and specify a later date on which the Vendor shall be obliged to complete the (6) _____ obligations of the Vendor; or
- (c) elect to (7) _____ the completion of this Agreement by not more than twenty (20) Business Days to such other date as it may specify in such notice, in which event the provisions of this clause shall apply, (8) _____, if the Vendor fails or is unable to perform any such obligations on such other date.
- 5.1 Neither of the Vendors shall (whether alone or jointly with another and whether directly or indirectly) carry on or be engaged or (except as the owner

for investment of (9) _____ dealt in on a stock exchange and not exceeding 5 per cent in nominal value of the securities of that class) be (10) _____ in any Competing Business during a period of one year after Completion. For this purpose, **Competing Business** means a business:

- (a) which involves any business carried on by the Company as at Completion; and
- (b) which is (11) _____ within the area in which the Company carries on business as at Completion.

5.2 Neither of the Vendors shall within a period of one year after Completion, directly or indirectly, solicit or endeavour to entice away from the Company, offer employment to or employ, or offer or conclude any contract for services with, any person who was employed by the Company in skilled or managerial work at any time during the six months prior to Completion.

5.3 Except so far as may be required by law and in such circumstances only after prior (12) _____ with the Purchaser, neither of the Vendors shall at any time disclose to any person or use to the detriment of the Company any trade secret or other confidential information of a technical character which he or she holds in relation to the Company or its affairs.

5.4 Any provision of this Agreement (or of any agreement or arrangement of which it forms part) by virtue of which such agreement or arrangement is subject to registration under the Restrictive Trade Practices Act 1976 shall only take effect the day after (13) _____ of such agreement or arrangement have been furnished to the Director General of Fair Trading pursuant to section 24 of that Act.

6.1 Each of the Vendors:

- (a) Represents and (14) _____ to the Purchaser in the terms of the Warranties and acknowledges that the Purchaser has entered into this Agreement in reliance upon the Warranties;
- (b) Undertakes, without limiting the rights of the Purchaser in any way, if there is a breach of any Warranty in respect of the Company, to pay in cash to the Purchaser (or, if so directed by the Purchaser, to the Company) on demand a sum equal to the (15) _____ of:
 - i. the amount which, if received by the Company, would be necessary to put the Company into the position which would have existed had there been no breach of the Warranty in question; and
 - ii. all Costs suffered or (16) _____ by the Purchaser or the Company directly or indirectly, as a result of or in connection with such breach of warranty;

- (c) agrees to (17) _____ the benefit of all rights (if any) which he or she may have against the Company, or any present or former officers or employee of the Company, on whom the Vendor may have relied in agreeing to any term of this Agreement or any statement set out in the Disclosure Letter and the Vendor undertakes not to make any claim in respect of such reliance.
- 6.2 Each of the Warranties shall be construed as a separate Warranty and (save as expressly provided to the contrary) shall not be limited or restricted by reference to or in inference from the terms of any other Warranty or any other term of this Agreement.
- 6.3 The rights and (18) _____ of the Purchaser in respect of the Warranties shall not be affected by (i) Completion (ii) any investigation made into the (19) _____ of the Company or any knowledge held or gained of any such affairs by or on behalf of the Purchaser (except for matters fairly and reasonably disclosed in the Disclosure Letter) or (iii) any event or matter whatsoever, other than a specific and duly authorised written waiver or release by the Purchaser.
- 6.4 The Vendors shall procure that (save only as may be necessary to give effect to this Agreement) neither the Vendors nor the Company shall do, allow or procure any act or (20) _____ before Completion which would constitute a breach of any of the Warranties if they were given at any and all times from the date hereof down to Completion or which would make any of the Warranties inaccurate or misleading if they were so given.

Fill the numbered gaps in the contract clauses above with the most appropriate word or phrase from the corresponding numbered choices set out below. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) accept, perform, ratify, do
- (2) requirement, stipulation, obligation, liability
- (3) occur, arise, be, terminate
- (4) choice, power, freedom, discretion
- (5) cancel, revoke, rescind, resign
- (6) other, remaining, outstanding, unperformed
- (7) put back, refer, defer, postpone
- (8) mutatis mutandis, per se, pari passu, inter alia
- (9) securities, holdings, investments, transactions

- (10) interested, a member, engaged, mired
- (11) carried out, carried in, carried on, operated
- (12) discussion, briefing, talks, consultation
- (13) particulars, specifications, components, aspects
- (14) indicates, proves, warrants, promises
- (15) total, combination, sum, aggregate
- (16) paid, incurred, expected, reimbursed
- (17) forego, defer, deny, waive
- (18) remedies, redress, duties, wrongs
- (19) dealings, transactions, affairs, situation
- (20) occurrence, circumstance, negligence, omission

EXERCISE 24

Match the words on the left of the table (which appear in the extract) with their equivalents on the right. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

nominal (1)	reveal (a)
business (2)	lure (j)
company (3)	harm (c)
period (4)	previous (d)
area (5)	par (e)
entice (6)	term (b)
prior (7)	corporation (g)
disclose (8)	enterprise (h)
detriment (9)	clause (i)
provision (10)	sector (f)

EXERCISE 25

Are the statements below true or false? The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) The Purchaser can terminate the agreement if the Vendors have not carried out key obligations by the date of completion. (true/false)

- (2) The Vendors may not be involved in the running of any other business after completion. (true/false)
- (3) The Vendors cannot employ anyone who was employed by the Company at the time of sale for a period of one year after completion. (true/false)
- (4) The Vendors may disclose confidential information to third parties in some circumstances. (true/false)
- (5) Fair and reasonable disclosure in the disclosure letter serves to limit the Purchasers' rights in relation to matters that might otherwise constitute breaches of the warranties. (true/false)

Consider the questions below. In each case, which of the four statements given corresponds most closely to the meaning of the passage. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) If the Vendors fail to complete a material obligation under clause 4, the Purchaser may:
 - a. terminate the agreement immediately;
 - b. decide to complete the agreement on the agreed date on the basis that the Vendors will fulfil their obligations at a later date;
 - c. seek damages for such failure to perform obligations;
 - d. release the Vendors from their obligations.
- (2) Following completion, the Vendors are not entitled to:
 - a. own more than 5% of shares in a competing business for a period of one year after completion;
 - b. own shares in a competing business that are publicly traded on the stock exchange for a period of one year after completion;
 - c. engage in any activity liable to breach the Restrictive Trade Practices Act 1976;
 - d. be involved in the running of a business that competes with the Company for a period of one year after completion.
- (3) The Vendors are not entitled:
 - a. to offer employment for a period of one year following completion to anyone employed by the company in a managerial position during a period of six months prior to completion;
 - b. to offer employment to anyone employed by the company in the year prior to completion;

- c. to offer managerial employment to anyone employed by the company during a six-month period prior to completion;
 - d. to employ ex-employees of the company.
- (4) The Purchaser's rights under the warranties:
- a. do not exist in relation to matters disclosed in the disclosure letter;
 - b. can only be removed by specific release or waiver made by the Purchaser;
 - c. are affected where the Purchaser's knowledge of the matter giving rise to the breach was fairly and reasonably disclosed in the disclosure letter;
 - d. subsist regardless of the Purchaser's state of knowledge.
- (5) Clause 6.4:
- a. contains a caveat permitting acts that might otherwise lead to breaches of warranties where these are necessary in order to give effect to the agreement;
 - b. prohibits the Vendors and company from providing inaccurate or misleading warranties;
 - c. prohibits the Vendors and company from providing inaccurate and misleading statements about the warranties;
 - d. prohibits acts that might lead to breaches of warranties up to completion.

EXERCISE 27

Rewrite the following colloquial sentences in a formal legal style using the word given in brackets. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) If a company goes to the wall, the next thing that will happen is that it will get liquidated. (*insolvent*)
- (2) The liquidator has got to get all the company's money in and then give it out to the creditors. (*assets*)
- (3) The creditors get their money in a certain order according to what kind of creditor they are. (*priority*)
- (4) The meeting was put off to another day because one of the directors was off sick. (*adjourned*)
- (5) What I'd do if I were you is try to get some advice off a lawyer about the procedure. (*recommend*)

SPECIMEN CONTRACT (NDA)**11.8**

The short contract below is a non-disclosure agreement (NDA) – also referred to on occasions as a confidentiality agreement. The aim of this type of agreement is to specify confidential information the parties wish to share with each other as a result of their business relationship, and to define the levels of access permitted to it, by placing confidentiality obligations on the parties and their business partners.

NON-DISCLOSURE AGREEMENT

THIS AGREEMENT is made the _____ day of _____ 20__
BETWEEN:

1) *[insert full legal name of business]* of *[insert business address]* (hereinafter referred to as the "Company"); and

2) *[insert full legal name of cooperation partner or client]* of *[insert business address]* (hereinafter referred to as *[insert name to be used throughout document]*).

1. ENGAGEMENT

The Company and _____ acknowledge to one another that as a result of their business relationship, _____ may acquire possession of Confidential Information (as defined in clause 2 below).

2. DEFINITION OF CONFIDENTIAL INFORMATION

"Confidential Information" means any confidential customer information, trade secrets, technical data and know-how relating to the Company's products, processes, methods, equipment and business practices. It includes, but is not limited to, technical and business information relating to the Company's inventions or products, research and development, strategies and methods which are not standard industry practices, specifications, proposals, reports, analyses, finances, client details, marketing, production and future business plans, business and personal data relating to clients, subcontractors, affiliates, and subsidiaries of the Company.

3. NON-DISCLOSURE

1) _____ shall keep confidential all Confidential Information, whether or not it is in permanent or written form, and shall not, without the Company's express written authorisation, signed by one of the Company's authorised

officers, sell, use, market or reveal any Confidential Information to a third person, firm, corporation or association for any reason.

- 2) _____ shall not make copies of the Confidential Information, except where the Company gives written authorisation, signed by one of its authorised officers, and shall not remove any copy or sample of Confidential Information from the Company's premises without the Company's express written authorisation signed by one of the Company's authorised officers.
- 3) On receipt of written request from the Company, _____ shall immediately return to the Company all copies or samples of Confidential Information that are in _____'s possession at the time of receiving the above request.
- 4) _____ shall remain subject to the obligations contained in this agreement in relation to the Confidential Information after the termination of the business relationship between the Company and _____, and these obligations shall remain in force unless and until such time as the Confidential Information stops being secret and confidential and becomes part of the public domain, unless this occurs as a result of wrongful conduct by _____ or its partners, subcontractors, officers or affiliates, or as a consequence of a breach of this agreement.

4. SCOPE OF OBLIGATIONS

The obligations contained in this agreement with respect to the Confidential Information extend to information belonging to clients, suppliers, subcontractors, subsidiaries and affiliates of the Company, or persons or entities which license confidential information or technology rights to the Company, who may have disclosed such information to _____ as a result of _____ business relationship with the Company.

5. NO PUBLICITY

_____ agrees not to disclose its participation in this undertaking, the existence or terms and conditions of the Agreement, or the fact that discussions are being held with the Company.

6. INVALIDITY

If any provision of this agreement is found to be invalid by any court having competent jurisdiction, the invalidity of that provision shall not affect the validity of the remaining provisions of this agreement, which shall remain in full force and effect. Failure either by the Company or _____ to exercise any right or

remedy under or in accordance with this agreement does not constitute a waiver of that right or remedy.

7. LAW

This agreement and its validity, construction, and effect shall be governed by and construed in accordance with *[insert preferred legal system]*.

8. WHOLE AGREEMENT & VARIATION

This Agreement terminates and supersedes all prior understandings or agreements on the subject matter hereof. No variation to this Agreement shall be valid unless it is made in writing and duly executed by both parties.

9. SEVERABILITY

If any term of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, then this Agreement, including all of the remaining terms, will remain in full force and effect as if such invalid or unenforceable term had never been included.

10. NO IMPLIED WAIVER

Failure by either party on any occasion to insist upon strict performance by the other party of any of the terms of this Agreement shall not be construed as a waiver of any continuing or subsequent failure to perform or delay in performance of any term hereof.

11. HEADINGS

Headings used in this Agreement are provided for convenience only and shall not be used to construe meaning or intent.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

COMPANY

By: _____
[insert signature]

By: _____
[insert signature]

[print full legal name & position]

[print full legal name & position]

12.1

LETTER-WRITING CONVENTIONS

12.1.1

Beginning a letter

When beginning your letter, note the following conventions:

- **Dear Sir** opens a letter written to a man whose name you do not know.
- **Dear Sirs** is used to address a firm where at least one of the members of the firm is male. When writing to American firms, **Dear Sir or Madam** is preferred, since it does not assume that the person who opens the letter will be a man.
- **Dear Mesdames** (extremely formal and rarely used) is used to address a firm where all the members are female.
- **Dear Madam** is used to address a woman, whether single or married, whose name you do not know.
- **Dear Sir or Madam** (or **Dear Sir/Madam**) is used to address a person when you do not know their name or sex.

When you know the name of the person you are writing to, but do not know them well, the salutation takes the form of **Dear** followed by a courtesy title (i.e. Mr, Ms, Miss, Mrs, etc.) and the person's surname.

Initials or first names are not used with courtesy titles, e.g. **Dear Mr Smith**, NOT **Dear Mr J Smith** or **Dear Mr John Smith**. Persons who you know well can be addressed using just their first name, for example, **Dear John**.

In British usage, a comma after the salutation is optional, that is, **Dear Mr Smith,** or **Dear Mr Smith**.

In American usage, it is customary to put a colon after the salutation, that is, **Dear Mr Smith:**.

12.1.2

Ending a letter

If the letter begins Dear Sir, Dear Sirs, Dear Madam, Dear Mesdames or Dear Sir or Madam, the ending should be **Yours faithfully**.

When writing to American firms, **Respectfully yours** (very formal) or **Yours truly** (less formal) should be used.

If the letter begins with a personal name, for example, **Dear Mr Jones**, **Dear Mrs Brown** or **Dear Ms Porter**, it should end with **Yours sincerely**. The American equivalent is **Sincerely** or **Sincerely yours**.

A letter to someone you know well may close with a number of different informal phrases. Examples include:

- With best wishes
- Best wishes
- With best regards
- Best regards
- Kindest personal regards
- Best

Avoid closing your letter with old-fashioned phrases, such as, ***We remain yours faithfully***.

Commas after the complimentary close are generally not used in legal letters. The complimentary close is usually placed on the left, aligned under the rest of the letter.

Reference table (letter endings)

12.1.3

The table below provides a quick guide to ending your letters, according to the title used in the opening.

Title used	Status	Ending (UK)	Ending (US)
Mr	married or unmarried male	Yours sincerely	Sincerely
Mrs	married female	Yours sincerely	Sincerely
Miss	unmarried female	Yours sincerely	Sincerely
Ms	married or unmarried female	Yours sincerely	Sincerely
Sir	male – name not known	Yours faithfully	Yours truly/ Respectfully yours
Madam	female – name not known	Yours faithfully	Yours truly/ Respectfully yours
medical/academic/ military e.g. Dr/Professor/ General	these titles do not change whether addressing a male or female	Yours sincerely	Sincerely
None (Dear Bill/ Dear Susan etc)	Irrelevant	Best regards	Best regards

12.1.4 Abbreviations used in letters

A number of abbreviations may be used at the foot of a letter for certain purposes. Here are some examples:

- **Enc./Encl.** indicates that documents are enclosed with the letter. If there are a number of these, it is usual to list them.
- **p.p.** means *per procurationem* (literally *for and on behalf of*). It is used if someone other than the writer has signed the letter.
- **c.c.** means carbon copy (although carbon copies are little used nowadays). This abbreviation is used to indicate that copies are sent to persons other than the named recipient. Frequently the letter will specify the persons to whom the copies have been sent.
- **b.c.c.** means blind carbon copies. This abbreviation is used when other persons have been sent copies but you do not want the recipient to know this. The abbreviation is written on the copies only and not on the original version that is sent to the recipient.

The abbreviation **FAO** is sometimes seen in the address printed on the envelope. It means 'for the attention of' (e.g. **FAO the Managing Director**).

12.2 LETTER-WRITING STYLE

12.2.1 Planning

The main aims of legal correspondence in all cases are clarity and accuracy. However, the style of correspondence will differ slightly according to whom the correspondence is being written for. When writing to another lawyer, the writer can assume that legal jargon and terms of art will be understood and do not need to be explained. When writing to clients and other third parties, this assumption cannot be made. Care should be taken to explain legal technicalities in terms that a layperson can understand.

In all cases, start by thinking about what you are going to say and how you are going to say it. Ask yourself these questions:

- What am I trying to say?
- Who am I trying to say it to?
- What do they need to know?
- What sort of tone should I adopt?
- What words will express what I am trying to say?
- How will I structure what I am going to say?
- How can I divide my writing into manageable sections?
- Could I make it shorter?

Structure

12.2.2

General considerations

12.2.2.1

The most important thing to remember when writing a letter or email is to consider the reader. The content and style of your letter or email will be affected by the following considerations:

- Who is going to be reading it?
- How much do they understand about the subject-matter of the letter (i.e. the content is likely to differ if you are dealing with (a) a client or (b) an expert in a particular field)?
- What do they need to know?
- How much background information do they need?
- Do you need any information from them?
- What sort of tone should you adopt?

Whoever you're writing to, you should ensure that your letter or email is:

- as short as possible but not shorter;
- clearly written;
- clearly set out; and
- appropriate in tone.

First paragraph

12.2.2.2

The opening sentence or paragraph is important as it sets the tone of the letter and creates a first impression.

If you are replying to a previous letter, start by thanking your correspondent for their letter:

Thank you for your letter of 5 May 2006.

If you are writing to someone for the first time, use the first paragraph to introduce yourself, the subject of the letter, and why you are writing:

We act on behalf of Smith Holdings Ltd and write concerning the lease on 22 Fairfields Avenue, Farnley Trading Estate.

Middle paragraphs

12.2.2.3

The main part of your letter will concern the points that need to be made, answers you wish to give, or questions you want to ask. The exact nature of these will depend very much on the type of letter being written.

12.2.2.4 Final paragraph

At the end of your letter, if it is to a client or to a third party, you should indicate that you may be contacted if your correspondent requires further information or assistance. If appropriate, you might also indicate another person in your office who may be contacted if you are absent. It is not usual to do this in a letter to another lawyer acting for another party in a case, however.

Here is an example of a typical letter ending:

Please do not hesitate to contact me, or my assistant, John Bowles, if you require any further information or assistance.

12.2.3 Tone

It is important to try to strike the right tone in your letter. The right tone in most cases is one of professional neutrality. On the one hand, you should avoid pompous, obscure language. On the other hand, you should avoid language that is too informal or colloquial.

At all times, and particularly when writing to parties on the other side of a case from your client, you should avoid any tinge of personal animosity. This is important because although lawyers often find themselves in the position of having to threaten people or organisations with legal action on behalf of clients, the lawyer must ensure that basic standards of professional courtesy are adhered to at all times.

When seeking the right tone, certain things should be avoided:

- 1 Contractions. A contraction is when a word is shortened using an apostrophe, for example, 'I can't and I won't'. This is too informal for most legal contexts.
- 2 Slang. This should be avoided: (1) because using it is unprofessional; and (2) because it may not be understood. Always use the correct, formal term, for example, not a **fake** but a **charlatan**.
- 3 Expressions, proverbs, common metaphors. Again, these are both unprofessional and may not be understood. Always state precisely what you mean rather than resorting to an expression. For example, do not write **prices have gone through the roof** but **prices have increased rapidly**.
- 4 Throwaway informality. It is important to retain a quality of professional gravity in the tone of your writing. Therefore do not write, **it's all sorted to go**, but **the matter has been satisfactorily resolved**.

SPECIMEN LETTER**12.3**

Here is an example letter, written by an English lawyer to a Finnish client in relation to a property purchase (in the UK and US it is common for lawyers to be engaged to represent clients in relation to the purchase of real estate).

¹Turner, Jones,
Smith & Co. Ltd
7 Old Dog Street
Oxford
OX1 7PB

12 March 20

Your ref.

²Our ref. ELD/VIR.1-1

Mr J Virtanen
Koiratie 11A
00100 Helsinki
Finland

Dear Mr Virtanen

Re: Purchase of The Croft, Whittlington

Thank you for your enquiry in relation to the purchase of this property, and I confirm that this firm would be glad to act on your behalf in respect of this transaction. As a senior assistant solicitor in this firm's residential property department, this matter has been passed to me to deal with.

I enclose a copy of our standard client care letter in duplicate. This sets out our terms and conditions. Please read these through, and, if they are acceptable to you kindly sign and return the duplicate copy.

I look forward to hearing from you.

Yours sincerely

Emma Duncan

³pp. Geoffrey Lamb

⁴Enc

¹ Letterhead.

² References

³ Per pro

⁴ Enclosure

12.4 EMAILS

12.4.1 Introduction to emails

It is often thought that emails are a less formal medium than letters. This is true up to a point, but may be a dangerous belief for lawyers. Do not allow the informality of writing emails to lead you to forget the importance and possible sensitivity of the information you may be communicating.

Remember that an email is just as permanent as a letter and may be printed out and referred to in the future. Remember also that the exchange of emails leaves an easily traceable trail in both correspondents' inboxes. For these reasons, the same high standards of professionalism should be adhered to when writing emails as one would follow when writing letters.

There are several areas of legal communication where more traditional forms of correspondence are still the most suitable. These include:

- 1 To communicate information or send documentation that is confidential.
- 2 As noted above, to send documents or communications that require a signature.
- 3 For personal or sensitive communications. Email has a slightly perfunctory, impersonal feel to it. Therefore, it is not suitable for any communication where a personal touch is required; for example, messages of congratulation, condolence, complaint (or a response to a complaint).
- 4 For job applications. Many firms still expect applications to consist of a completed paper form or curriculum vitae together with a covering letter. However, this should be checked on a case-by-case basis, as firms nowadays are becoming increasingly open to emailed applications and some may also offer online application forms.

12.4.2 Email writing style

Email is a relatively recent development, and because it is perceived as a quick and informal means of communication, people are often unclear about the style and conventions they should use in business situations.

In legal work, while email correspondence may tend towards informality, it should follow the same principles as any other form of business correspondence.

Here are some basic tips:

- Write a clear and informative heading in the subject line. Avoid leaving the subject line blank or writing uninformative headings ('Hi', 'Hello', etc.) as this will increase the chances of the email being regarded by the recipient as possible spam or virus mail and thus being deleted.

- In general, email messages follow the style and conventions used in letter or faxes. For example, you can use salutations such as **Dear Mr Archer** or **Dear Gerald**, and complimentary closes such as **Yours sincerely** or **Best regards**. However, if you know the recipient well, or if you are exchanging a series of messages with one person, you may dispense with the salutation and complimentary close altogether.
- Make a clear mental division between personal messages and messages written in the course of legal work. In a message written in the course of legal work, the same rules of writing apply as for a letter: write clearly, concisely, pay attention to the accuracy of factual information and legal advice given, and observe high standards of professional courtesy; consider audience, purpose, clarity, consistency and tone.
- Use correct grammar, spelling, capitalisation and punctuation, as you would in any other form of correspondence.
- Do not write words in capital letters in an email message. This can be seen as the equivalent of shouting and therefore have a negative effect. If you want to stress a word, put asterisks on each side of it; for example, *urgent*.
- Keep your email messages short and to the point. People often receive a lot of emails at work, so conciseness is especially important.
- In general, limit yourself to one topic per message. This helps to keep the message brief and makes it easier for the recipient to answer, file, and retrieve it later.
- Check your email message for mistakes before you send it, just as you would check a letter or a fax message.

Email abbreviations

12.4.3

The following – and many other – abbreviations are often found in emails and other informal communications:

Abt	= about
AFAIC	= as far as I'm concerned
AFAIK	= as far as I know
ASAP	= as soon as possible
BFN	= bye for now
BR	= Best regards
BTW	= by the way
CID	= consider it done
COB	= close of business
c/w	= comes with
DU	= don't understand

ETA	= estimated time of arrival
ETD	= estimated time of departure
FAQ	= frequently asked questions
FUD	= fear, uncertainty and doubt
FYI	= for your information
IAW	= in accordance with
ICBW	= I could be wrong
IMO	= in my opinion
IOW	= in other words
ITYS	= I told you so
LOL	= laughing out loud
NRN	= no reply necessary
OIC	= oh I see
OTOH	= on the other hand
POV	= point of view
P/w	= password
QFE	= question for everyone
TBA	= can mean 'to be advised', or 'to be announced', or 'to be agreed'.
TBC	= to be continued
TOC	= table of contents
Vm	= voicemail
w/e	= weekend OR week ending

Many of these abbreviations are highly informal, and are therefore not suitable for the vast majority of email correspondence. They should never be used in letters or faxes.

12.5

LANGUAGE FOR LETTERS AND EMAILS

The list below covers some of the major language functions you, as a legal professional, are likely to perform when writing a letter or email. For each function, language suggestions are given.

The first line (saying 'hello')

Dear Mr. Jones/Dear Sirs

OR

[informal email only] Hello/Hi David

Confirming client's instructions

During our meeting you told me that . . .

OR

You instructed me as follows . . .

OR [informally] It was interesting to hear about . . .

Referring to the previous email/letter

Thank you for your email/letter of 9 January about/concerning . . .

OR

I/we write with reference to your letter of 9 January about/concerning . . .

Acknowledging letter and promising to write later

I/we acknowledge receipt of your letter of 9 January to which I/we will provide a substantive response shortly.

Referring to theme of a message received

You informed me/us that . . .

OR

I/We note the points you raise with regard to . . .

OR

[informal] It was interesting to hear about . . .

Explaining why you are writing

I/we am/are writing to . . .

Referring to something

With regard/respect to . . .

Expressing doubt

I/we have certain reservations about . . .

OR

I/we remain unconvinced by your argument that . . .

Asking for clarification of issues

I/we have a number of queries about . . .

OR

I/we should be grateful if you could clarify/provide further information about . . .

Expressing certainty

Clearly/obviously/undoubtedly . . .

Giving advice

My/our advice on this matter is as follows.

Refuting an allegation

Your client's allegation that . . . is entirely denied by our client.

Disagreeing on a point of law or fact

[strongly] I/we entirely disagree with your analysis/statement to the effect that . . .
[tentatively] I/we are unable to agree entirely with your analysis/statement to the effect that . . .

Prefacing a statement of legal opinion

[strongly] It is clear that the correct analysis of the facts/applicable law is . . .
[tentatively] It seems to me/us that the correct analysis of the facts/applicable law is . . .

Stating a position

It is our [client's] position that . . .

Making an offer

Our client has instructed us to put forward the following offer:
[list]
OR
Our client is prepared to settle this matter on the following terms: [list]

Accepting an offer

Our client is prepared to accept the offer set out in your letter of . . .

Rejecting an offer

Our client is unable to accept the offer you have made . . .
OR
[more forcefully] The offer you have made is not acceptable . . .
OR
[conditionally, with counter-offer] Our client is unable to accept the offer you have made in its current form. However, if you/your client were prepared to [insert counter-proposal] then it may be that he/she might be prepared to reconsider the matter.

Setting deadlines

This offer will remain open until 29 April 2008.

Making a threat to take certain action by a specified date

[strongly] We have our client's instructions that unless full payment is received by 14 January, we should issue legal proceedings . . .
[tentatively] If payment is not made by 14 January, our client will have to consider instructing us to issue legal proceedings . . .

Issuing a rebuke to the other party's lawyers

[sarcastically] With the greatest of respect, your statement that . . . is not credible. . .

[politely] We must point out that your statement . . .

Giving good news

I/we am/are pleased to be able to . . .

Giving bad news

Unfortunately, I/we have to tell you . . .

Asking somebody to do something for you

I/we would appreciate it if you would/could/might . . .

Showing willingness to do something for somebody

I/we would be glad to . . .

Asking for an immediate response

I/we would greatly appreciate you giving this matter your immediate attention.
OR

[where a deadline is necessary] This matter is urgent. We should be grateful to hear from you no later than close of business on 22 May.

Clarifying what action is to be taken

I/we will now take the following steps:

[list]

OR

We must now take the following action:

[list]

Requesting further information

I/we should be grateful if you could provide us with the following information/documentation:

[list]

Requesting clarification

I/we require clarification of the following issues . . .

OR

I/we would like to hear a little more about the following issues . . .

Confirming an agreement

As discussed on the telephone on 9 January, it is agreed that . . .

OR

We confirm that we have reached agreement [concerning the question of . . .] between us on the following terms:

[list]

Making a suggestion

I/we would like to suggest/propose that . . .

Offering further help

If I/we can be of any further assistance, please do not hesitate to contact me/us.

Promising to get back with further help

I/we will be in touch again shortly.

Thanking for help

I/we would like to take this opportunity to thank you for your assistance.

Closing remarks

Please do not hesitate to contact me if you have any queries or require further information.

12.6**CHECKLIST**

The following self-editing checklist may be useful when drafting letters and emails.

Purpose

- What is the purpose of the communication?
- Have I adapted style and content to suit the reader's needs?
- Have I dealt with the issues?
- Have I answered all the questions?
- Have I answered them in enough depth?

Content

- Is the information accurate?
- Is it relevant?

Humanity

- Will my tone produce the desired response?
- Is it friendly, courteous, helpful, frank, forceful?

Layout

- Is the layout appropriate for the purpose and content?
- Is it set out in manageable blocks?

Structure

- Are the sentences short enough?
- Does the order of sentences and paragraphs make sense?
- Does each paragraph contain just one main idea?
- Is there a link between each paragraph and the next?
- Are there links between the sentences in each paragraph?
- Does the whole letter have a clear and logical structure?

Language

- Have I used plain language, that is clear, concise and correct language, which can be easily understood by the reader?
- Have I used active verbs instead of nominalisations wherever possible?
- Have I omitted words and phrases that are:
 - infrequently used;
 - inelegant;
 - redundant;
 - unnecessarily technical;
 - verbose;
 - vague.
- Is the grammar appropriate for the purpose?
- Are punctuation and spelling correct?

You have received the following email and made some notes on it (these are in italics below). Reply to the email, detailing:

- Client's legal position – pros and cons
- Initial advice on prospects of success and possible compensation
- Further information required
- Procedure to be followed

A model answer can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

Dear X

I require some advice on an accident that recently happened to me. The details are as follows.

I hired a lawnmower from a company called Gardening Solutions Ltd, which hires out gardening equipment. I used it to cut some long grass in my garden, which admittedly is quite rough terrain. While I was working with it, the rotary cutting-blade suddenly shot out from under the mower and hit my left leg, causing serious lacerations and extensive bruising. I had to go to hospital and have 18 stitches put in, and was off work for a week after that.

When I telephoned Gardening Solutions and told them what had happened, they immediately disclaimed responsibility, explaining that they had hired the lawnmower themselves from a third party called Handyman Ltd. This was done because Gardening Solutions did not have enough machinery to hand to cover customer demand over the summer period. Apparently, they quite frequently hire in machinery from other suppliers, particularly to cover periods of peak demand.

The managing director of Gardening Solutions told me that Handyman Ltd had stated that the mower had recently been checked, serviced and repaired, and was in good working order. In fact, he sent me some sort of document stating that this had been done.

I then phoned Handyman Ltd and requested compensation. Their answer was that since I'd hired the mower from Gardening Solutions, I should really be speaking to them. They denied any responsibility.

Can I get any compensation from Gardening Solutions or Handyman? Please email me to advise.

Best regards

Belinda Connolly

Notes

- *Law – this is a case of product liability. The case of Griffiths v Arch Engineering Co may be relevant here: in that case the claimant borrowed a tool from the first defendants which had been lent to them by the second defendants. The tool was dangerous because the second defendants had repaired it badly, and the claimant was injured as a result. The second defendants claimed they were not liable, because the first defendants had had time to examine the tool before they lent it out. The court disagreed: it stated that although it was true that the first defendants had the chance to look at the tool and spot the danger, there was no evidence that the second defendants had reason to think that*

such an examination would be carried out. Both sets of defendants were held liable and damages were apportioned between them.

- *Possible defences – Ms Connolly states that her garden is 'quite rough terrain' and that the grass was long. We need more details on this – just how rough is it? There's a possible defence that the mower was not being used for its proper purposes (i.e. contributory negligence).*
- *Damages – hard to say at present. Depends on injuries, recovery, and so forth. Get medical report.*
- *Loss of earnings – what job does the claimant do and has she lost any wages as result of accident?*
- *Procedure – write both to Handyman and Gardening Solutions for information (what is this document the client refers to?), press client's claim and ask for details of insurers. Should be possible to negotiate settlement if they admit liability – if not, sue.*

MEMORANDA

12.7

General points

12.7.1

Memoranda (usually known as **memos**) are written internal communications that advise or inform staff of new policies, procedures, events or decisions. They are usually quite formal and impersonal in style.

Memos may be addressed to one other person or to a number of persons. They may be put on a noticeboard for everyone to see, or circulated in internal mail.

Layout

12.7.2

Firms often use headed paper for memos. This gives less information about the firm than the letterhead for external correspondence, but indicates which department has issued the memo.

A memo should state at the top of the first page:

- the person(s) to whom they are addressed;
- the person who wrote the memorandum;
- the date;
- the subject.

Important points or long lists of points are usually best presented using bullets (●) or numbers.

12.7.3 Content

A typical memo might be structured as follows:

- The memo should have an appropriate title – one that accurately reflects the contents, and preferably one for which a file can easily be selected.
- The first paragraph of the memo may be used to explain the background to the issue that the memo refers to.
- The main part of the memo should be used to explain concisely:
 - what is going to happen;
 - why it is going to happen;
 - when it is going to happen;
 - how it will affect people;
 - who will be affected.
- The next part of the memo should explain what should be done by anyone affected.
- The last part of the memo should advise staff where they can go for an explanation and how to communicate their comments or complaints.
- The memorandum should be signed by the writer.

12.7.4 Example memorandum

Grange, Arthurs & Co Ltd
62 Martin Avenue
Sheffield

To: All employees

Date: 13 February 2008

From: Michael Bryanston

Subject: Litigation department move

You have no doubt heard that due to pressures on our office space resulting from the firm's rapid expansion it has become necessary to move some staff members to another location.

The partners have decided that the whole of the litigation department will be moved to new premises at 53 Smith Street, Liverpool. The relevant details of the move are as follows:

- 1 The move will take place over the weekend of 12/13 April.
- 2 The members of staff who will be moving include John Stiles, Emily Lane, Bernard Hill, Giles Flaxton, Mary Peebles and Larissa May.

- 3 Staff affected by the move are asked to pack their computers, books and other work items into the storage boxes provided by the removal firm no later than 4.00pm on Friday 11 April. If needed, more boxes can be obtained from Jane Baxter.
- 4 An external IT contracting firm will visit the premises at 53 Smith Street on Monday 14 April to set up the computers and establish the internal network. Therefore we will have a training day for the whole firm, details of which will be announced later.

If anyone has any questions regarding the move, please contact me.

[Signature]

Michael Bryanston, Senior Partner

Memorandum case study

12.7.5

Read the following texts about Articles 81 and 82 of the EC Treaty (which relate to European competition law) and the Irish Sugar case and then do the exercise below.

Articles 81 and 82

Competition law includes a mixture of political and economic objectives. It aims to perfect the common market by preventing undertakings from imposing practices that undermine the removal of barriers to trade. The key provisions are Articles 81 and 82.

Article 81

Article 81 applies to arrangements between undertakings 'which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'. It applies if there is:

- collusion between undertakings;
- which affects trade between member states;
- which has as its object or effect the distortion of competition within the common market.

Such **collusion** may take the form of agreements between undertakings, decisions by associations of undertakings or **concerted practices**. All collusion caught by Article 81(1) is void, although there is the possibility of exemption under Article 81(3).

Article 82

Article 82 applies to any abuse of a dominant position 'within the common market or in a substantial part of it. . . in so far as it may affect trade between Member

States'. 'Dominant position' is not defined in the Treaty, but the European Court of Justice defined it in *United Brands Co v Commission (1978)* as:

A position of economic strength enjoyed by an undertaking, which enables it to prevent competition being maintained on the relevant market by giving it the power to behave, to an appreciable extent, independently of its competitors, customers, and, ultimately, of its consumers.

Enforcement of European competition law operates on the basis of 'dual vigilance', meaning that in theory at least it can be enforced at Community or national level.

Case summary: *Irish Sugar plc v Commission (1999)*

In 1997, the Commission imposed a fine of €8.8 million on Irish Sugar plc, a subsidiary of the Greencore Group. The decision against Irish Sugar concerned a series of infringements that had taken place since 1985. The Commission found that Irish Sugar, as the sole processor of sugar within Ireland had a 95 per cent share of the Irish sugar market. The decision states that Irish Sugar has abused its position on the Irish sugar market by seeking to restrict competition both from imports of sugar from other Member States and from small sugar packers within Ireland.

In the late 1980s Irish Sugar and its subsidiary Sugar Distributors Limited (SDL) sought to restrict competition from imports of sugar from France and Northern Ireland by offering selectively low prices to customers of an importer of French sugar who swapped Irish Sugar's own Siucra brand of packaged sugar for an imported brand and offering selective 'border' rebates to customers for packaged sugar that were located close to the Northern Irish border.

Since at least 1985, Irish Sugar had offered rebates on purchases of bulk sugar to industrial customers that exported part of their final product to other Member States. These 'sugar export rebates' varied between customers for the same tonnage of sugar and varied over time without any consistent relationship to sales volumes or currency changes. Both the practice of offering sugar export rebates and the ad hoc manner in which the scheme was administered discriminated against customers that supplied only the Irish market. The system of rebates on exports to other Member States also distorted the common sugar regime.

Since 1993, Irish Sugar had sought to restrict competition from small sugar packers within Ireland by discriminating against them in the prices that it charged for bulk sugar, thereby placing them at a competitive disadvantage relative both to other customers and Irish Sugar itself. Irish Sugar also offered rebates to certain wholesalers and food retailers that were dependent on increases in their purchases of Irish Sugar's own Siucra brand, thereby making it difficult for small competitors to gain a foothold in the market.

Through its infringements Irish Sugar was able to maintain a significantly higher price level for packaged retail sugar in Ireland compared with that in other Member States, notably Northern Ireland, and was able to keep its ex-factory prices, particularly for bulk sugar for 'domestic' Irish consumption, among the highest in the Community, to the detriment of both industrial and final consumers in Ireland.

In setting the level of the fine the Commission took into account the fact that the infringements represented a serious breach of Community law, that several had been recognised as abuses of a dominant position by the European Court of Justice and that they had taken place over a long period of time.

Write a memo in which you should refer to the summaries of Articles 81 & 82 and the Irish Sugar case above and address the following questions.

A model answer can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) What are the 'sugar export rebates'?
- (2) What objections were there to the 'sugar export rebates'?
- (3) What was ad hoc about them?
- (4) Which article was Irish Sugar plc breaching?
- (5) How was it breaching this article?
- (6) What was the rationale of the Commission's decision?

13

Applying for a legal position



Visit the Companion Website to access extended careers-related resources, including further examples of good and weak covering letters, and useful recruitment weblinks.

13.1

HOW TO APPLY

13.1.1

Types of application

There are basically three kinds of job applications that you can make:

- An application for a specific advertised position;
- An application to a recruitment consultant to register your details in case a suitable position arises;
- An unsolicited application – that is, a general application to a firm in circumstances where no specific position has been advertised.

The kind of letter you write will depend on the kind of application you make, but in all cases you should:

- Find out whether the application must be made on a special application form or by sending your curriculum vitae and a covering letter. If an application form is required, telephone or write to the firm to which you are applying to obtain it.
- Find out the name and job title of the person to whom you should send your application. Many job applications are disregarded because they are not addressed to a particular person. Many big law firms nowadays have Human Resources (HR) departments, which deal with job applications. If it is not clear to whom an application should be addressed, phone the HR department to find out.
- Do your research. Find out as much as possible about the firm or organisation you are applying to before sending your application. In this way you can: (1) save yourself the trouble of sending out any applications which are highly unlikely to be successful; and (2) adapt your application to the needs of the particular firm or organisation to which you are writing.
- Remember to quote any reference numbers mentioned in the advertisement.

When applying for a legal position, always ensure that your letter and CV or

application form are free from grammatical errors and spelling mistakes. Lawyers are trained to pay attention to detail, and mistakes will make a very poor impression.

Application for a specific advertised position

13.1.2

Your letter should have a beginning, middle and end. Generally, the terms **vacancy**, **post**, **position**, or **appointment** are used instead of **job** in advertisements.

In the beginning of your letter, explain what you are applying for and mention any documents that you have enclosed. For example:

I wish to apply for the vacancy for a commercial lawyer advertised in this month's edition of Legal News. I enclose a copy of my curriculum vitae OR the relevant application form duly completed.

Use the middle of the letter to state what appeals to you about the position you are applying for, and why you think that you would be particularly well suited to it. You can use this part of the letter: (1) to demonstrate knowledge about the firm or organisation to which you are writing; and (2) to give some indication of your expertise and experience. For example:

This position is of particular interest to me since I note that your firm is well known for its work for IT companies. I have had over three years of experience in IT law in my present position, and am keen to develop my expertise in this area further.

At the end of the letter, offer to supply more information if necessary:

I look forward to hearing from you. However, if there is any further information you require in the meantime, please let me know.

Application to a recruitment consultant to register details

13.1.3

The main purpose of this letter is to indicate what kind of position you are seeking and what kind of previous experience you have. However, it is important to make a good impression on the recruitment consultant to whom you write, since the consultant is only likely to put your name forward to firms looking for new employees if he or she has confidence in your abilities.

When dealing with recruitment consultants it is important to remind them periodically that you are still looking for work. Most consultants have large databases of people who have at one time or other registered their details, and those who have been silent for a long period of time tend to get forgotten. Phone the recruitment consultant either shortly before or shortly after you have sent them your details, and let them know exactly what you are looking for and why you are a suitable candidate. After this initial conversation, if you hear nothing for a week or so, phone again to check on progress.

Hidden page

I am particularly interested by the possibility of working for your firm, since I note that you have strong expertise in the field of intellectual property. I have three years post-qualified experience working in the commercial department of my present firm, and have primarily focused on patent and industrial design rights. I am keen to further my expertise and experience in this area.

At the end of the letter, offer to supply more information if necessary:

I look forward to hearing from you. However, if there is any further information you require in the meantime, please let me know.

SPECIMEN APPLICATION LETTER

13.2

Here is a specimen application letter written in response to a specific advertised position. The applicant starts off by referring to the job advertisement. She goes on to expand on her present duties and gives other information she believes to be relevant to the post. She explains why she is applying for this particular vacancy and demonstrates knowledge of the firm to which she is applying. If on her CV, she gives her current employers as referees, she could also mention that she would prefer Bowen & Stanmore not to approach them until after an interview.

12 Wakely Road
Cambridge
CB12 1AP

16 September 20__

Ms. G Tilton
Human Resources Coordinator
Bowen & Stanmore
1 Grawley Avenue
Oxford
OX1 4BE

Your Ref: GT 334/07

Dear Ms. Tilton

I wish to apply for the vacancy advertised in Legal News on 10 September 20__ for an assistant commercial lawyer. I enclose a copy of my curriculum vitae.

I am currently employed as an assistant solicitor at Parton & Rice in Cambridge and have had four years of post-qualified experience, primarily in company commercial and IT law. In addition to handling a substantial caseload, I am also heavily involved in helping to coordinate my firm's marketing strategy with regard to IT clients. I am particularly interested by the position on offer at your firm, since I am aware that the firm has extensive expertise in this area.

I speak fluent German, and use the language daily in the course of my work.

If there is any further information you require, please contact me. I look forward to hearing from you.

Yours sincerely

Michelle Hathaway

Enc. CV

13.3

APPLICATION FORMS AND CVs

13.3.1

General points

When you receive an application form, always read it through carefully so that you know exactly what information is required. It is a good idea to photocopy it, complete the photocopy, and when you are happy with it, copy the information onto the actual form.

Some firms or organisations prefer a curriculum vitae (CV), which is known as a **resume** in American English. A CV should contain your personal and working history.

Application forms and CVs may be emailed, faxed or sent by post. It is best to try to find out from the firm or organisation to which you are applying which method they prefer before you send your application.

13.3.2

Curriculum vitae

There are a number of ways of presenting information in a CV. Traditionally, the sequence was name, address, contact details, marital status, education, qualifications, work experience, referees and interests. However, it is now more common to begin with brief personal details, followed by a short profile or description of yourself (sometimes also called a career summary). After that, the most important information is recent employment history, and skills and qualifications.

In the interests of completeness, you should account for all years since leaving school, but if the information is irrelevant to the position you are applying for or is some years old, you should summarise it as briefly as possible.

These days, it is generally unnecessary to mention marital status, children, age, health, or current salary unless specifically asked to do so, but this will vary according to the law and customs in different countries. Here is a typical CV for an experienced commercial lawyer.

Anna Hampton

Address	33 Bromwell Street Oxford OX4 7TR
Telephone	01865 774582
Mobile	032 973 1429
Email	anna.hampton@eelpies.com
Profile	<ul style="list-style-type: none"> – Five years' qualified commercial lawyer with wide experience in company commercial and IT law; – Experience of supervising and coordinating a team of lawyers; – Excellent communication and client skills; – Analytical, innovative, self-motivating, confident; – Fluent in German and French; – Computer literate.
Employment (2002–present)	<p>Cranford & Marchand <i>Assistant lawyer, commercial department</i> Caseload comprised company commercial and IT matters. Worked on several large merger cases under the supervision of the partner in charge of the department. Helped build up the IT law practice and was personally involved in supervising, coordinating and training a team of junior assistant lawyers.</p>
2000–2002	<p>Bracewell & Frank <i>Trainee</i> Undertook training contract, gaining experience in company commercial, commercial property, commercial litigation and criminal litigation departments.</p>
Qualifications	
Diploma of Legal Practice, College of Law	1999
LLB, University of Bristol	1998

Attending an interview**13.3.3**

If you are invited to an interview, remember the following:

- Make sure you know in advance where the venue for the interview is and how you are going to get there. Leave yourself plenty of time – arriving late will create a very bad impression.

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SPOKEN AND WRITTEN ENGLISH COMPARED

14.1

Compared to written English, spoken English is both more and less clear.

When reading a piece of written English, all the information in the communication is in the text. It is usually presented in a finished state and contains full, grammatically complete sentences. Some care will have been taken to structure and present the document effectively. The needs of the reader will have been considered to some extent. The document exists in a permanent form and can be read at leisure as many times as necessary.

By contrast, when speaking English with another person the meaning of the dialogue only emerges gradually. The conversation is likely to be filled with unfinished sentences, interruptions, repetitions, pauses and meaningless phrases and words (such as 'er', 'um', 'you know?', 'if you see what I mean'). The course of the dialogue is unpredictable and infinitely flexible.

However, when speaking English with another person you receive all kinds of clues, which cannot be found in written English, as to what the other person is really thinking or feeling. These include:

- body language;
- tone of voice;
- vocal emphasis (sometimes called stress).

When you are involved in a conversation with another person you instinctively read the meaning of these clues. You also give such clues to the person you are speaking to. Conversation also allows you to use a range of techniques that can only be used to a limited extent in writing. These include:

- humour;
- implying;
- euphemisms;
- rhetorical questions;
- open questions;
- narrow and closed questions;
- simple or conditional forms;
- choice of terminology;
- diplomatic language;
- metaphors and similes.

These techniques are discussed in detail below at 14.5.

14.2 BODY LANGUAGE

Body language refers to the way in which people show their feelings by body movements or positions. While it is relatively easy to control your speech, controlling your body language is remarkably difficult. For this reason, it is well worth paying attention to the body language of the people you are talking to – it will tell you a lot about how they feel about what you are saying. Perhaps most significantly, a careful reading of someone's body language will tell you whether what they feel or think differs from what they say they feel or think.

When considering body language, it is worth bearing in mind that the culture from which a person comes will have some effect on the way they use body language. To take an obvious example, an Italian negotiator is much more likely than a Finnish negotiator to use expansive arm and hand gestures.

In addition, certain aspects of body language have defined meanings in particular cultures. For example, in Pakistan, extending a clenched fist towards someone represents an obscene insult. If an American executive leans back in his chair and links his fingers behind his head while speaking to you, this is probably a bad sign. It means that he has decided that he does not need to demonstrate eagerness or attention towards you.

Some examples of body language, together with their possible meanings are given below:

Arms crossed. This usually represents defensiveness, arrogance, dislike or disagreement.

Eyebrows raised. Raised eyebrows generally mean uncertainty, disbelief, surprise or exasperation.

Fist clenched. A clenched fist usually accompanies an aroused emotional state (e.g. anger or fear). In a business meeting a clenched fist often denotes anxiety or unstated disagreement.

Hands on hips. This usually indicates a preparedness to take action (e.g. to take charge of the organisation of an event). It may also be used to signal a threat against others, or defensiveness against a perceived threat.

Hands behind head. This usually reflects negative thoughts or feelings. It can be taken as a sign of uncertainty, conflict, disagreement, frustration or anger.

Head tilted back. When someone has their head tilted back and is looking at you down their nose, this is a clear sign that they feel themselves to be superior to you.

Head tilted to one side. This can mean different things according to the situation in which it is used. It often indicates friendliness and rapport (for example

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- Thoughtful tone: the proposal is worth considering but ultimately not acceptable. The stress in this version of the sentence might well be upon the word **that**, implying that although the speaker cannot agree to the particular proposal made, he or she might agree to a different proposal.
- Conciliatory tone: the speaker does not want to antagonise the person who has made the proposal.
- Condescending tone: the speaker believes that the person making the proposal is inferior or lacks credibility.
- Incredulous tone: the speaker is amazed that such a proposal has been made.
- Embarrassed tone: the speaker has to reject the proposal but is not comfortable with the fact that this has to be done.

14.4

EMPHASIS

One of the interesting aspects of spoken English is that the meaning of a statement that would seem perfectly clear when written down can be altered dramatically if the speaker places emphasis on a particular word or particular words in the statement. When speaking to someone in English you should pay attention both to the emphasis the other person places on particular words and to your own emphasis, otherwise misunderstandings can easily arise.

This point can be illustrated with this simple sentence:

The contract must be signed today.

This sentence could mean (emphasis in italics):

- 1 '**The** contract must be signed today.'
It is a particular contract that must be signed today.
- 2 'The **contract** must be signed today.'
It is the contract that must be signed, and not something else.
- 3 'The contract **must** be signed today.'
There is an obligation that the contract be signed.
- 4 'The contract must be **signed** today.'
The important thing is that the contract be signed (not drafted, agreed, etc.).
- 5 'The contract must be signed **today**.'
The important thing is that the signing of the contract happens today.
- 6 'The contract must be signed today' (with upward inflection of voice).
Must the contract be signed today?

TECHNIQUES

14.5

There is always more than one way of approaching a discussion and there is always more than one way of saying something in English. The methods you choose will depend upon the subject you are discussing, with whom you are discussing it and what you want to achieve. Here are certain well-known techniques that you will find useful when conducting interviews and negotiations with other lawyers and clients.

Humour

14.5.1

Humour can be very useful, particularly when making a presentation. It breaks the ice and establishes a warmer atmosphere. If a speaker can make an audience laugh, the audience will like the speaker more. Consequently, the audience will be more open to the speaker's ideas and therefore easier to persuade.

In a negotiation situation, the use of humour can be used to reduce the degree of opposition and mistrust between the parties negotiating against each other. The establishment of a warmer atmosphere will increase cooperation between the negotiators, making it more likely that mutually acceptable terms will be reached.

Implying

14.5.2

Implying means to suggest rather than to state directly. It can be a helpful tactic during negotiations, when you wish to choose language that will allow the discussions to continue so that positions can be explored.

For example, you might wish to state your position on a subject, but imply that if your opponent made certain concessions, you might be prepared to take a different view. In this situation it would be more helpful to say:

£10,000 is the most we can offer based on our current understanding of your position.

rather than:

We're not offering more than £10,000.

The first sentence states a position but implies that if certain unspecified concessions were to be made by the opponent, a better price might be offered. It provides an impetus for negotiations to continue. The second sentence states a position that the opponent can either accept or reject, but it provides no impetus for further negotiation.

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Simple or conditional forms?

14.5.6

Simple forms are always the best kind to use when asking a question to which you require a direct and factual answer ('What is your best price?') or when giving a final response to a question ('We can't accept that proposal.').

The main drawback to using simple forms is that they do not usually help the dialogue to flow. They are therefore employed to best effect when closing a negotiation or interview, but are not helpful in the early stages when options are being explored. When suggesting a compromise or formulating a hypothesis, for example, conditional forms are indispensable:

We might agree to . . . if you were prepared to . . .

The use of **might** indicates to the other party that there is still room for discussion, but does not commit you to any particular course of action. The negotiations can continue.

Conditional forms can also be used in a general way to soften the impact of what is being said. For example, in some situations it would be better to say, 'the right solution might be to . . .' (which seems respectful and humble), rather than to say, 'the right solution is to . . .' (which seems arrogant and presumptuous).

Choice of terminology

14.5.7

English contains a large number of synonyms. Consequently, you are likely to have a wide choice of different words, all meaning roughly the same thing, at your disposal in any given situation. You should pay close attention to your choice of words – they are not all neutral, but laden with values and connotations. For example, consider this list of words, all of which refer to making a living:

- calling
- career
- profession
- employment
- job
- work
- occupation
- vocation

While all of these words basically refer to the same thing, they have different connotations. Words like **calling** and **vocation** imply an elevated sense of a person's ultimate role in life, whereas **job** implies little more than work done in return for money. **Employment** is the most neutral term in the list.

14.5.8 Diplomatic language

When dealing with difficult or sensitive subjects – or difficult or sensitive people – it is sensible to choose your words carefully. The following suggestions indicate how to soften the way in which you express yourself.

- Using **would, could** or **might** to make what you say sound more tentative. For example, you might say, 'this could be a problem' instead of 'this is a problem', in order to leave open the possibility that it may be possible to find a solution to the problem.
- Presenting your view as a question not a statement. For example, you might say, 'how about offering them €10,000?' instead of 'we'll offer them €10,000', in order to leave the matter open for further discussion.
- Using an introductory phrase to prepare the listener for your message. For example, 'Here's one possibility. Suppose we . . .' OR 'We'd like to make an offer to settle this case. This is what we were thinking . . .'
- Adding **I'm afraid** to make clear that you recognise the unhelpfulness of your response. For example, 'that's the most we can offer I'm afraid'.
- Using words that qualify or restrict what you say to make your position more flexible (**a bit difficult, a slight problem**). For example, you might say, 'We have a slight problem with that proposal. We don't like clause seven.' This leaves greater room for flexibility than saying, 'We can't accept clause seven.'
- Using **not** with a positive word instead of the obvious negative word. For example, **not very convenient** = I don't agree.
- Using a comparative (**better, more convenient**) to soften your message. For example, 'It would be better if you could agree to . . .' instead of 'This proposal is not acceptable. We want . . .'
- Using a continuous form (**I was wondering**) instead of a simple form (**I wondered**) to make a suggestion more flexible. For example, 'we were wondering if you'd like to make a proposal at this point'.

14.5.9 Metaphors and similes

A metaphor is a figure of speech in which a word or phrase is used to stand for something else (e.g. **food for thought**).

A simile is a figure of speech in which one thing is compared to another of a different kind, using the words **as** or **like** (**like a rolling stone, as safe as houses**).

Both of these techniques can be useful ways of illustrating a point. A good example is Winston Churchill's phrase ***the iron curtain***, used to devastating effect to create a mental picture of the divide created by the USSR's influence in Eastern Europe. However, metaphors and similes must be carefully handled. Clichéd expressions should be avoided. The figure of speech being used must be relevant to the matter being discussed.

15

Meeting, greeting and getting down to business

The notes contained in this section are relevant to the opening phases of business meetings or negotiations.

15.1

THE OPENING PHASE

15.1.1

Key considerations

The opening phase of any discussion is often critical, as the skill (or otherwise) with which it is handled often sets the tone for the negotiations that follow and therefore has a bearing on their success or otherwise.

The aim, essentially, is to establish a basis for communication with people whom you do not know at all or do not know well. By starting discussions with some neutral topic the people involved can get to know each other, trust each other and find their common ground. It is an important phase in any meeting with strangers. If it goes well, a solid basis for discussing matters of importance will have been laid down.

It should be acknowledged, of course, that the duration of this phase varies from culture to culture. When opening discussions with Germans or Finns, for example, it can be kept short – but even then, you don't just launch straight in. With native English speakers, it may be a little longer. In all cases, some use of small talk is made in order to put people at their ease and establish common ground. In Asian cultures the process may be prolonged due to the emphasis placed on establishing an atmosphere of social harmony.

When meeting someone for the first time, there are of course certain obvious and socially conventional phrases that can safely be used, such as 'Pleased to meet you', or 'I'm Peter Jameson'. However, there is a great deal more to first meetings than the mechanical repetition of a few pleasant platitudes. In fact this kind of thing should be kept to a minimum. It is necessary to greet people and ask how they are, and necessary to give some sort of response to this question, but it is also basically quite boring and should be kept fairly short.

After all, one of the working definitions of a bore is:

Someone who, when you ask them how they are, tells you.

Keeping this in mind, remember that when an English native speaker asks 'How are you?' or 'How's it going?', the usual answer is 'I'm fine', 'Great', or words to that effect. They do not really want to know how you feel – the aim instead is to establish social harmony by making conventional small talk.

Therefore, if you are in reality feeling down because you have a slight cold, or you got a parking ticket earlier that day or you stepped on a piece of chewing gum that you can't seem to get off your shoe, or the coffee served on the train was stone cold and tasted foul, remember that your host will not be interested in hearing a full recital of these facts – unless you can turn them into a humorous anecdote.

In the same vein, a comment or two about the weather is perfectly acceptable by way of introductory small talk, but a lengthy exposition on the prevailing meteorological conditions and influences in the local area over the past decade will be received with a certain amount of disbelief.

In other words, you should try to get through this stage of small talk efficiently, without undue haste – but equally without lingering pointlessly on unpromising details – and then move onto the next stage.

Useful phrases

15.1.2

In the meeting and greeting stages, the following phrases may be useful:

Conventional greeting

Hello. How are you?

Nice to meet you.

I'm Giles Dangerfield, managing partner here, and this is my colleague Jane Arthurs, our finance director.

Weather

The weather's been great recently, hasn't it?

OR

Terrible weather we've been having recently.

The other person's journey to your office

Did you have a good journey here?

OR

I hope you managed to find us alright?

Show the other person around your office, commenting on key features and introducing key people

This is my office/This is where I tend to lurk.

I'd like you to meet Daniel Jones, our finance director.

If arriving at someone else's office, praise the location and facilities

Great location you have here – right in the centre of town!

OR

What a fantastic view over the city!

(If the view from the window is over the back of a waterlogged car park or piece of waste ground, maintain a tactful silence on this topic.)

Offer refreshments to your guest (tea, coffee, water, orange juice, etc.)

Can I get you a cup of tea or coffee? Or would you prefer a cold drink?

Try one of these. It's a local speciality.

15.2

ESTABLISHING A BASIS FOR COMMUNICATION

15.2.1

Key considerations

In the second stage, the genuine art of communication comes more into play. One of the key techniques here is to try to find out what the other person is interested in and let them talk about it. All you need then do is demonstrate a genuine appreciation of those things.

While excessive talkativeness may be viewed with suspicion in certain cultures, the feeling that someone is really interested in you and your thoughts and opinions is almost always a positive one. Remember that:

- nobody enjoys listening to someone talking about something that doesn't interest them; but
- everyone enjoys being given the chance to talk about something that interests them, particularly when they have an appreciative audience.

Consequently, the more you can discover about the other person's interests and views prior to your meeting the better. By building up something of a mental picture of the person you will be speaking to, you are likely to find it easier to talk to them about things that interest them. You will then find some common ground more quickly and this will significantly assist your negotiations with that person.

You should also pay attention to any clues given by the person's appearance. For example, if someone walks into the office, puts down their set of golf clubs in a corner, and removes their Ferrari cap, it is pretty likely that golf and motor sport will be successful topics of conversation. Admittedly this is an extreme example, but it is amazing the amount of information you can deduce about a person from a fairly cursory glance at their general appearance and deportment.

When talking to another person, also consider their body language. Do they appear relaxed? Ill at ease? Tired? Tense? Bored? Aggressive? Adjust your approach accordingly.

Also, consider the nonverbal signs you are sending to that other person. Are you presenting yourself as a normal, sociable and friendly person? Try to smile as much as possible: smiles (except the kind used by Jack Nicholson and Sir Anthony Hopkins) are reassuring.

Topics and suggested phrases**15.2.2**

Which topics can be discussed in small talk situations?

In the absence of such helpful clues as just described (the golf clubs and the Ferrari cap), try to engage the other person as soon as it appears convenient to do so on any neutral but reasonably interesting and relevant topic that suggests itself. Avoid any topic that might be taboo for the other person, or anything that might lead to violent disagreement (religion and politics are difficult subjects in this respect). Also, think carefully about what the choice of topic conveys to the other person about you personally. Safe neutral subjects include the following:

- Current events, so long as they are not of a politically sensitive nature;
- The place where the other person comes from: 'Ah, I know Budapest – a wonderful city';
- Sport: 'Did you see the Formula 1 race at the weekend? Great to see Räikkönen get another win!'
- Personal interests. At least, up to a point. The key considerations here are:
 - (1) Only to mention interests likely to help the conversation along and promote social harmony. Therefore, 'I enjoy a round of golf myself – do you play?' is fine; but 'I enjoy killing large wild animals, such as foxes and badgers, and then stuffing them – what do you think about that?' might lead to social discomfort.
 - (2) Don't go into excessive detail. Keep it light and general in order to give yourself time to gauge the other person's response and leave room for an escape route if it is clear they are not interested.
- Family, particularly if you know the other person slightly: 'How's Jane getting on? And the children? Wonderful!' (However, avoid asking overly direct or specific questions about such matters.)
- What they did at the weekend: 'Were you able to get out in the sunshine at all over the weekend?'
- What they are going to do at the weekend coming up: 'Have you got anything planned for the weekend?'

It is important to remember that when conducting small talk it is usually best to make your questions relatively indirect and unspecific. In that way they will sound less pointed and threatening, and the other person will be able to give a diplomatic but uninformative reply without loss of face or dignity. So do not say, for example,

Tell me what you are going to do over the weekend.

which does not allow the other person to avoid the question without appearing evasive.

Try instead:

Do you have anything special planned for the weekend?

Which allows them to say 'not really' if they don't feel like telling you what they'll be doing.

15.3

GETTING DOWN TO BUSINESS

The point will come when you sense that it is time to bring the general conversation to an end and get down to business. There are various ways in which you can signal that this process is beginning. Here are some suggestions:

- Adjourn to the room in which the negotiation is going to take place. You might say at this point something like: ***'Right, ladies and gentlemen. Since time is getting on, might I suggest we make our way to the conference room now?'***
- Stand up and make a short introduction: ***'OK, I think we're all here now, so perhaps now might be a good time as any to get started. Perhaps I could begin by introducing everyone . . .'***
- Outline the parameters of the meeting: ***'OK, we're all gathered together here to discuss the terms of settlement in this case. I'd anticipate that we might expect to be here until about 4 this afternoon, breaking for lunch between 1 and 2 and the main issues we need to discuss appear to be as follows . . .'***
- Suggest an agenda and introduce a speaker: ***'OK, there are maybe five or six key areas we need to cover this afternoon. I'd suggest we start with the question of the option sought by Danchester Ltd. Richard, perhaps you could fill us in on the background to that matter.'***

15.4

SMALL TALK EXERCISES

EXERCISE 31

Form pairs and act out the following scenarios.

- (1) The receptionist in your law firm has just telephoned to say that a client has arrived for a meeting at the office and is waiting in the reception area. You have never met this client before. You must go down to the reception area to meet the client and escort him or her to the meeting room office.

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16

Interviewing and advising

16.1

OVERVIEW

The essence of an interview between a lawyer and a client is an exchange of information and views. The lawyer requires certain information from the client in order to advise the client. The client wants advice from the lawyer.

The lawyer and the client must then jointly decide what should be done to progress the case, and what each of them must do to contribute to this process. In addition, the lawyer must ensure that the client has been informed of and understands certain vital points. These naturally include:

- How much the client will have to pay for the lawyer's services;
- What the lawyer can and cannot do for the client;
- What further information the lawyer needs from the client and why this information is needed;
- What steps the lawyer will take on the client's behalf;
- The time-frame within which these steps will be taken;
- The prospects of success in the client's case (and the strengths and weaknesses of the client's case).

There may be other vital factors according to the type of case being handled and the client's own expectations. Establishing clear understanding with the client is crucial – if the client has not clearly understood these important issues there is a strong likelihood that s/he may become frustrated or angry at a later stage if the case does not proceed according to his or her expectations. These expectations may of course be wildly unrealistic – it is the lawyer's role to 'manage the client's expectations'.

16.2

PREPARATION

It is crucial to prepare thoroughly for all interviews with clients. Here are 10 useful tips:

- 1 Determine the purpose of the meeting. When dealing with the first interview with a new client, it is helpful to instruct staff who book client interviews to obtain as much information from the client as possible about the nature of the legal issue on which they want your advice. If possible, handle the first enquiry from the prospective client yourself.

- 2 Consider the most appropriate structure for the meeting.
- 3 Plan an agenda.
- 4 If the client has been referred from a colleague, speak to that colleague about the work being carried out for the client.
- 5 If dealing with a corporate client, carry out some research into the client's company.
- 6 If dealing with an old client of the firm, retrieve the old files for the client and refresh your memory about the cases that the firm has handled for the client.
- 7 Prepare the physical setting – clear your desk to avoid that omnipresent law firm panic/chaos look. A physical setting that is informal, friendly and private will help make the client feel relaxed and comfortable. If you need access to your computer during the meeting have it started and readily accessible.
- 8 Avoid interruptions – particularly avoid having to take phone calls mid-interview.
- 9 Be prepared to offer the client refreshments – coffee, tea, water, etc.
- 10 If the client has special needs (e.g. is disabled, blind, requires an interpreter), ensure that the appropriate arrangements are made beforehand.

Certain types of case lend themselves to the use of checklists and factsheets. Using these will help ensure that you obtain the most important facts in respect of the client's case during the first interview. They can be completed in the client's presence during the course of the interview.

Some care should be taken about the making of notes – while it is important to obtain all the relevant facts, the client will not like it if you spend all your time staring down at your notebook. Try to maintain eye contact with the client and do not allow your note-taking to impede the flow of conversation.

CONDUCT OF THE INTERVIEW

16.3

Overview

16.3.1

The purpose of the interview is for the lawyer and client to work together to identify the client's interests and achieve the client's aims. The lawyer should know the topic of the interview in advance. This will allow him or her to determine what is relevant and to structure the interview so that all the relevant information is obtained.

However, the structure of the interview should not be too rigid. The lawyer must ensure that a natural flow of conversation, involving a genuine exchange of views,

occurs. The interview should flow naturally from one topic to the next. It should feel comfortable and positive – it should not be marked by a series of highly specific questions. Clients do not enjoy being interrogated!

16.3.2 Listening

Listening is different from hearing and is actually quite difficult. Hearing is the process of receiving information. Listening is the mental processing of what you have heard. You need to pay attention not only to what is said but also to what is left unsaid, and to the body language that accompanies what is said.

The average rate of speech is between 125 to 175 words per minute, and the average rate at which information is processed is between 400 to 800 words per minute. The listener should therefore be able to assimilate thoughts, organise them and respond to the speaker and have time spare to deal with other unrelated mental processes.

16.3.3 Feedback

Feedback falls into two parts. First, it may be used with the intention of allowing the lawyer to summarise what s/he has been told by the client and clarify it with the client. The lawyer might say, 'So let's see if I've got this right. You told me that . . .', or 'OK, we've identified about five or so issues which we need to look at a bit more'. This process allows the lawyer to investigate further the matters being summarised and invite the client to expand upon or clarify certain issues.

Secondly, feedback may be used to encourage the client to communicate with the lawyer, for example when the client seems to lack confidence about the relevance of an issue ('I'm not sure if this is relevant, but . . .'). Giving positive feedback at this stage ('Please tell me what's on your mind. I'm here to listen and help as much as I can.') enables the lawyer to obtain fuller information from the client than might otherwise be possible.

It is also important to give continuous feedback to the client in the form of short phrases, which tell the client that you are listening carefully. You should encourage the client to speak by using phrases and words like 'I see', 'that's interesting', 'go on', 'right', 'yes', etc. Even meaningless encouraging noises ('mmm', 'uh-huh', etc.) can be helpful in this context. They signal to the client that you are still actively listening to what they are saying.

16.3.4 Body language

It is important to demonstrate interest in the client and in what the client is telling you. Pay attention to your body language in this regard. The acronym S-O-L-E-R sums up the skills needed:

- S – Face the client **Squarely**, adopting a posture that indicates involvement.
- O – Adopt an **Open** posture, one that suggests that you are receptive to the client.
- L – **Lean** slightly forward; not aggressively, but enough to show that you are interested in the client.
- E – Maintain **Eye** contact, but do not stare. Use your eyes to show interest, but vary your eye contact in response to the flow of the questioning.
- R – Stay **Relaxed**. Do not fidget, try to be natural in your expressions.

Identifying the client's aims

16.3.5

What does the client really want? The answer may be simple – the client may have told you at the outset. Sometimes, however, it is necessary to dig a little deeper. What are the client's underlying concerns? What would s/he regard as a satisfactory result? Is the client in dispute with another business with which the client has an ongoing relationship? Is the health of the long-term relationship of more value than short-term compensation of a specific breach?

It may also become clear in the course of your discussions with the client that the client has other problems of which s/he may be unaware, or may not have seen as problems. You will need to point these matters out in an appropriate way and either advise the client upon them or arrange for the client to be referred to one of your colleagues on the matter.

Perceived irrelevance

16.3.6

A common problem in interviews is that the client may become confused or frustrated because s/he cannot see the connection between the questions you are asking and the issue on which s/he has sought your advice. The client is unlikely to be a lawyer and will not think like a lawyer, and may therefore perceive your questions as irrelevant.

This problem highlights the importance of lawyer–client communication. The only way to tackle it is to explain carefully to the client why the question is relevant to the issue on which your advice has been sought. This issue is discussed in full in Chapter 17.

LANGUAGE

16.4

Jargon

16.4.1

The first point to be made on this issue is that lawyers must try to avoid using legal jargon when speaking to clients. Jargon has its uses within the legal community – it is a shared language full of familiar terms and common expressions. But it is likely to mystify and alienate the client. So try to speak plainly, using everyday terms. Find alternatives for legal jargon.

For example, do not say, 'We will effect postal service upon the defendant company'. Say instead:

We will send the documents to Acme Ltd by post.

We must now consider what language can be used at different stages of the interviewing process.

16.4.2 Opening

During the opening phase of a client interview, you will of course introduce yourself if you have not met that particular client before. You might say, for example:

Good morning Ms Smith. I'm Richard Jones, and this is my colleague Lucy Brown.

You will then want to break the ice – that is, engage in a little small talk before getting down to business. You might say for instance:

I hope you had no trouble finding our office.

OR

Fantastic weather we've been having, don't you think?

You might also offer them refreshments:

Would you like a cup of tea or coffee? Or maybe a cold drink?

And you'll want to get them from reception into the part of the office where the meeting is going to take place:

If you'd like to follow me, we'll go through to one of the meeting rooms.

After you've got into the meeting room and offered the client a chair, you'll want to open the discussion. You could say simply:

Right. How can I help you?

Or, if you already know what issue the client wants to discuss, you might say:

I understand that you would like some advice on your employment situation. Perhaps we could start by going over some of the background details.

At this stage, you might also indicate to the client how you suggest the meeting might be structured, and seek their agreement on this. You might say, for example:

OK, perhaps we should start by going over the details of this matter. After that we can discuss what might be done and then we can think about the way forward. Would that be OK with you?

And you might warn the client that you'll be making notes:

Do you mind if I make a few notes as we're talking?

It's important to advise the client as to what kind of fees they'll be letting themselves in for at an early stage. You might say:

I should mention at this point how this firm's charging system works. We charge by the hour and my hourly rate is 150 euros.

OR

I should start by giving you an idea of what sort of fees are likely to be involved in this case. A realistic estimate for carrying out this kind of work would be 1500 euros.

Listening and questioning

16.4.3

Once the interview proper is underway, you will need to listen carefully to what the client has to say and ask appropriate questions in order to obtain the information you need in order to provide advice to them. To obtain information from the client, you could say, for example:

Perhaps you could tell me a bit about what happened during your meeting with the managing director.

OR

Maybe you could give me some background information about that.

When you need to obtain more information about a particular issue, you might say:

Tell me more about that.

OR

What happened next?

It is also a good idea to check periodically throughout the client's account of the case that you have a full understanding of what they are telling you. This involves summarising and checking for understanding. You might say, for instance:

OK, let me see if I've got this right. You told me that the managing director actually said, quote unquote, 'I'll make darn sure you never work in this business again'. It's important to be clear about this – is that actually what he said?

OR

OK, we've identified about three or four issues which we need to focus on. These are the fees payable to the key service providers, the question of confidentiality in respect of know-how, and the exclusivity or otherwise of the agency agreements. Is that how you see it?

Equally, you may sometimes need to clarify your own remarks to the client. For instance, you might say:

Perhaps I should make that clearer. The term 'waiver' basically means a variation of the original agreement so that duties set out in it may no longer need to be carried out in the same way or at all.

OR

Perhaps we should just go over that issue again . . .

At times, you might want the client to stick to the point instead of wandering off onto different issues. There are various linguistic strategies you can use in this regard. For instance, you might say:

That's an interesting point. However, I'm not sure it's strictly relevant to the issues we need to discuss at this moment. Could we focus on the issue of confidentiality just for the moment and come back to this other issue in a minute?

Conversely, you might need to get the client to move from one point to the next. You might say:

OK, I think we've dealt with that issue satisfactorily. Let's move on now to the question of exclusivity.

OR

Let's leave this point for a moment and move on to the question of exclusivity.

16.4.4 Advising

After you have all the necessary information you need from the client, you will want to proceed to advising them on the case. It may be best to start by identifying the client's aims. You might say, for instance:

What would be an ideal outcome for you?

OR

Perhaps you could let me know what your priorities are in this matter.

You might also want to give some structure to the way in which you advise the client. For example:

OK, we've been over the key issues in this matter. I think it would be helpful now to look at what your legal and non-legal options might be. I'll give you a quick rundown of the applicable law and how it relates to your case. Then we can discuss what we should do to move things forward.

Then you might provide the client with a quick rundown of the applicable law:

The legal position is as follows . . .

OR

This question is governed by the provisions of the Sales of Goods Act.

And after you've done that, it will probably be time to outline the client's options. You could signpost this by saying, for instance:

You have two or three options here. The first is to go to court. The second is to seek a negotiated agreement through mediation, and the third is to do nothing for the moment. Now there are pros and cons for each of these, and we should maybe run through these before you make any kind of decision on the matter.

OR

The best thing to do, from a legal point of view, would be to terminate the contract immediately and sue for damages. However, we should also consider the non-legal factors, such as the difficulties in engaging an alternative supplier.

It may be necessary to point out certain legal issues that the client has overlooked, perhaps with a view to referring the client to one of your colleagues for advice. For example, you might say:

Incidentally, you should also consider the tax consequences of taking that kind of step. I am not a specialist in this area, but my colleague Stephanie Willis is a very experienced tax specialist and would be happy to advise you. Would you like me to arrange an appointment for you to come in and go through the tax implications with her?

Concluding

16.4.5

When concluding the first interview with a new client, you will of course want to obtain confirmation as to whether you will be retained to handle the case. You might say:

I would be more than happy to handle this case for you. Perhaps you could let me know how you wish to proceed?

Then you will need to agree what follow-up action is to be taken. For example, you could say:

What I will do now is draft a letter to Granton Ltd, asking for payment of the outstanding sums by 24 August. This should go out to them before the end of the week. Does that time-frame sound OK to you?

OR

Here's what we need to do. I'll start by getting a letter out to Granton Ltd seeking payment of the outstanding sums by 24 August. Then, if that doesn't produce a result, we'll need to think about issuing court proceedings. I'll keep you informed.

In some cases, you may need the client to provide further information or documentation before you can take any action on the case. So, in order to stress that you cannot move until the client has done his or her part, you might say:

As soon as I have heard from you with the employment records mentioned earlier, then I'll be in a position to start work on the case.

When you are satisfied that everything has been covered that needs to be covered, you might say:

OK, I think that covers everything we need to discuss today, unless there's anything else you'd like to discuss before we wrap things up?

And finally, you will want to see the client out courteously. So you might say:

Thanks for coming in to see us today. Don't hesitate to phone or send me an email if you have any questions you'd like to ask or need any information on anything. If I'm out, my colleague Emma Stapleton would be glad to help you.

16.5

CLIENT INTERVIEW TRANSCRIPT

The following conversation is taken from a transcript of a (fictional) client interview. Graham Frost is a lawyer. Joe Winterton is a business owner seeking advice on an employment issue.



Alternatively, visit the Companion Website to access an audio version of this interview along with associated exercise questions.

GRAHAM FROST: Hello, Mr Winterton?

JOE WINTERTON: That's right.

GRAHAM FROST: I hope you managed to find us alright?

JOE WINTERTON: Yeah, no problem. Sorry I'm a bit late, by the way. Got caught up in a bit of traffic by the railway station.

GRAHAM FROST: Yes, it's terrible round there isn't it? Complete dog's breakfast. They've been digging up the road for I don't know how long – at least a year I guess. Putting in new gas pipes I'm told. But traffic's a nightmare there at the best of times.

JOE WINTERTON: Well, I'll know for next time anyway.

GRAHAM FROST: Anyway, come on through. How can I help you?

JOE WINTERTON (looking at watch): Right, well I'm a bit pushed, so I'll cut to the chase.

GRAHAM FROST: Go ahead.

JOE WINTERTON: Right. I'm the MD of a local construction firm, Maynards, as you probably know, and I'm after some advice on employment issues, particularly on unfair dismissal. Basically, the problem I've encountered recently is that I discovered one of my managers, Brian McFarlane – a fairly senior guy, who came to us a year ago from a rival firm – had previously done time. He hadn't at any point up to then disclosed the fact to us. Now I'll tell you straight up, I'm strict on that sort of thing – I expect complete frankness from my people, and they know they'll get the same from me in return. So I took the view this was a serious breach of trust and decided he had to be let go.

GRAHAM FROST: Sorry to interrupt, but on what date did this happen?

JOE WINTERTON (*takes out diary*): Just bear with me a moment . . . Right, here it is – exactly four weeks ago.

GRAHAM FROST (*makes note*): Thank you. Please carry on.

JOE WINTERTON: Yes. So the issue we're facing now is that he's threatening to take us to the employment tribunal for unfair dismissal.

GRAHAM FROST: OK, I see the problem. Do you happen to know what Mr McFarlane was sent to prison for – what offence – and how long ago was this?

JOE WINTERTON: No, I don't. Are those relevant issues?

GRAHAM FROST: They are, yes. To put the thing in a nutshell, the whole issue essentially hinges on whether the conviction which led to Mr McFarlane being sent to prison could be classified as a 'spent conviction' at the time he was dismissed. If it was a spent conviction then the law says that dismissal is automatically unfair. If not, the question of whether it was unfair or not depends on a number of criteria that are really to do with Mr McFarlane's general conduct and capacity to do the work, but perhaps we can leave those issues to one side for a moment . . .

JOE WINTERTON: Hold your horses a minute there. What does this 'spent conviction' thing actually mean?

GRAHAM FROST: Right, sorry. It comes from a bit of legislation called the Rehabilitation of Offenders Act. The general idea is that if you're convicted of an offence – unless it's extremely serious – and you're sent down for less than 2.5 years, then your conviction will eventually be 'spent' if you're not convicted again of another offence during a specified period. This is called the rehabilitation period. Generally speaking, the more severe a penalty is, the longer the rehabilitation period.

JOE WINTERTON: OK, I get the drift. So where do we go from here?

GRAHAM FROST: Well, I'd need to know (1) what offence Mr McFarlane was convicted of, and (2) how long ago this was, and (3) whether he was convicted of any other offences in the rehabilitation period, in order to work out whether the conviction was spent at the time he was dismissed.

Various colloquial expressions are used in the interview above. Their formal equivalents are set out below in the left side of the table. Insert the colloquial equivalent in the space opposite. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

Formal equivalent	Colloquial expression
committed to prison (1)	
dismiss him (2)	
directly/honestly (3)	
served a prison sentence (4)	
a complete mess (5)	
in a rush/lack time (6)	
wait/pause temporarily (7)	
proceed directly to the matter at hand (8)	
in brief (9)	
understand the general position (10)	

16.6

CHECKLIST

This checklist is designed to help you to prepare for and structure a client interview.

Preparation

- Purpose of meeting?
- Structure?
- Agenda?
- Ongoing work for client? Which lawyer is handling it?
- Client company researched?
- Previous files retrieved?
- Any special needs of client?

Opening

- Greet client, offer refreshments, preliminary small talk;
- Obtain client's account, concerns and goals;
- Explain preliminary matters including fees, retainer, what can and cannot be done for the client, and the nature and proposed structure of the interview.

Listening and questioning

- Listen actively to the client's account and show understanding of it;
- Uses appropriate questioning techniques (open, closed and leading questions) where necessary to:
 - prompt;
 - clarify;

- prevent deviation;
- probe.
- Pay attention to body language – S-O-L-E-R;
- Identify aims of client;
- Take notes discreetly (use checklist if appropriate);
- Give feedback.

Summarising

- Summarise the client's account, concerns and goals;
- Identify the relevant facts;
- Identify deficiencies in the available facts;
- Avoid giving premature legal advice;
- Seek further information from client.

Advising

- Give a brief introduction to the advising process;
- Give a brief outline of the relevant law;
- Apply the law to the client's problem;
- Outline the available legal and non-legal options;
- Discuss the available options with the client and help him or her reach a decision if appropriate.

Concluding

- Confirm whether lawyer is to be retained;
- Describe clearly the follow-up action to be taken by lawyer;
- Describe clearly the follow-up action to be taken by client;
- Give clear time-frames for action and future meetings;
- Confirm the follow-up procedures with the client;
- Conclude interview appropriately.

Throughout

- Establish and maintain rapport with client;
- Use appropriate language;
- Maintain professional courtesy;
- Move smoothly between interview stages;
- Deal appropriately with any issues of professional conduct or ethics.

17

Dealing with difficult people: 10-point guide

Most legal professionals, at some time or another, have to deal with difficult people – or with otherwise perfectly pleasant and rational people who for some unknown reason become highly emotional and completely irrational in the presence of a legal adviser.

What strategies does the English language provide for dealing with such situations? This chapter contains a 10-point guide outlining the types of approach that may assist in taming an enraged client, colleague or partner – and the language that can be used to support these approaches.

17.1

EMPATHISE

Your client is upset. Therefore, you have to indicate that you understand their concerns. If you fail to do so, the conversation will not progress. In particular, you should show you are actively listening to what they are saying. To a great extent, this can be achieved by body language – lean forward slightly, face the client, maintain eye contact, nod occasionally, and use expressions that simply show you are listening: **mm hmm, yes, I see, OK, go on, right**, etc.

In addition, it is helpful to summarise and reflect what the client is saying. This reinforces the feeling that you are interested in their concerns. Certain phrases can be used in this respect:

- *Tell me more about that.*
- *And naturally you felt annoyed when they said they weren't going to pay you.*
- *Let's see if I've got this right. To summarise, you said that you sent a reminder letter on 16 July and when you got no response you made a personal visit to Mr Brown's office on 5 August.*
- *Do you mind if we just go over this again? I'd like to make sure I've got it right.*

17.2

AVOID DEFENSIVENESS

When attacked, the natural reaction is to defend ourselves. However, this is exactly the wrong way to deal with an angry client.

Never say things like, **Well, it's not my fault** or **I didn't get the message**, or **Our IT systems went down**. Even if these things are true, raising them will only

make the situation more difficult, as the client will think that you are trying to avoid responsibility for the problem that has arisen.

At the same time, it is obviously unwise – if it is not precisely clear where the fault lay – to use language that amounts to an admission of liability, such as ***I'm sorry we messed things up for you.***

The best approach is to find a way of apologising without necessarily admitting fault. For example:

I'm really sorry that you feel we let you down . . .

Once you have established these parameters – that you are sorry that the client is upset, on the one hand, but that you don't admit any liability for the actual problem, on the other hand – then you can go ahead and pacify the client further. Note: it may be wise, however, to keep things reasonably vague rather than making specific promises that you may not be able to keep:

. . . and of course we'll do whatever we can to sort matters out for you.

SEEK MORE INFORMATION

17.3

It is important to be careful here. When someone is angry, a tactless question can sometimes send him or her over the edge. On the other hand, unless you get the information you need, you will not be able to make much progress with the problem they have.

One useful tip here is to try to use tentative or conditional language. For example:

- *Perhaps you could tell me a little more about what happened when you got to Mr Brown's office.*
- *It would be helpful if you could provide further information about exactly what happened when he said that to you.*
- *Just coming on to this question of the broken vase . . .*
- *Is there any way in which we might perhaps find a compromise here?*

ANGER MANAGEMENT

17.4

Sometimes you may find yourselves dealing with someone who is apparently rational but evidently seething with anger inside. The anger may betray itself in one or all of the following ways:

- artificially calm voice, which may have a clipped or over-enunciated quality ('I . . . am . . . not . . . angry . . .');

- tense facial expression: clenched teeth, unblinking eyes, immobile mouth;
- fidgety body language: drumming of fingers on table, hands on hips, clenching of fist, etc.;
- over-rigid body language: very upright posture, holding onto edge of table.

This is a dangerous situation: they are keeping tight control on their anger, but it may explode out at any time. You need to think of strategies to avoid this happening.

One way forward is to encourage the client to talk about their feelings. For example:

Look Bill, I appreciate you giving me the chance to explain, but before I get to that, can I say it's obvious that you are very unhappy with the service you have had and I want to say how sorry I am that you feel that way.

This approach may well result in some criticism of you by the client, but this will be much more manageable than the explosion you will get if you simply ignore the fact that the client is unhappy. Remember that once the client has completely lost his or her temper, there is not much you can do except wait for it to blow over.

Another line that can be tried is:

Bill, you're obviously very upset about this, which I understand, and if it makes you feel better to stand here and shout at me I'm happy to do that, but maybe it would make more sense to talk again this afternoon.

This might seem a bit defeatist, but rage is a tiring emotion, difficult to sustain over a long period, so in a couple of hours you are likely to have a much calmer client.

17.5

DO NOT BE JUDGMENTAL

Sometimes it may be entirely clear to you that the client's problems have been caused by his or her own actions – or at least worsened by his or her own actions.

In such situations, it is best to try to avoid making comments of the **Well, it's your own damn fault** type, or shaking your head sadly and telling the client that **if only you'd done as I advised you to do in the first place none of this would have happened**.

It is more than likely that the client will be acutely aware of any fault on his or her part, angry with him or herself – but looking for someone else to take it out on. This is where you come in . . .

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Stop right there! Do not do this! Ensure that you use clear and straightforward language at all times. If you have to use jargon, explain why you have to use it and what it means. So – our example above can be ‘translated’ as follows:

The problem we've got here, Bill, is that the court will almost certainly take the view you've let them get away with this for so long that in effect the position has changed, meaning it's legally no longer possible to use it as a reason to terminate the contract.

17.8

SET A REALISTIC TIMETABLE FOR ACTION

The client will want to know that his or her problem is going to be dealt with. A good way of handling this issue is to set out in detail the steps that need to be taken, and when each step will occur.

OK, there are three or four things we need to do here. The first of those is to gather the relevant evidence. That will take about a week, and the main information we need to get hold of is an estimate of the cost of replacement of the Ming vase . . .

17.9

DEAL WITH PERCEIVED IRRELEVANCE

One common cause of client frustration is that s/he cannot see the link between the questions you are asking and the problem s/he consulted you about in the first place. They become confused, start to feel that you have not understood the problem and, as a result, tension grows.

The best way of dealing with this is to identify those aspects of your questioning that are likely not to appear relevant to the client, and then to prepare the client for the fact that they will not appear relevant.

OK, Sarah. I'm going to have to ask you one or two questions now about some of the other personnel in your office, the roles they are filling at present and the treatment they are receiving from the company's management. This might not seem strictly relevant to your case, but it is in fact very important. The reason I say that is that in order to establish whether discrimination has occurred in your case, the tribunal will need to compare your situation to some extent with that of your colleagues.

17.10

AVOID ECHOING THE CLIENT

As noted above, an important aspect of empathy is to reflect on what the client has said. However, it is all too easy to fall into the habit of simply echoing or repeating what the client has just said, without really reflecting on it.

You felt annoyed when that happened, did you? Uh huh. OK. Right. Yeah.

Try to avoid this – it is annoying, sounds mechanical, and gives the impression you are just going through the motions and not really thinking about the issues that lie behind the words used by the client. At worst it can even sound sarcastic, but it is all too easy to fall into if you are not really concentrating.

This chapter looks at the typical stages of a court hearing and the linguistic requirements of those stages.

18.1

STRUCTURE OF A CIVIL TRIAL

A civil trial in the English courts follows this basic structure:

- 1** The claimant's lawyer will make an opening speech to the court. This speech should:
 - (a) state the nature of the case before the court;
 - (b) state the issues that will need to be decided;
 - (c) summarise the facts that you will seek to establish during the trial.
- 2** The claimant's lawyer will then call the claimant's first witness and will conduct an examination-in-chief.
- 3** The defendant's lawyer will then have the opportunity to cross-examine this witness.
- 4** The claimant's lawyer may then conduct a re-examination of the witness if appropriate.
- 5** The claimant's lawyer will then call any further witnesses and the process will be repeated.
- 6** Once all the claimant's witnesses has been heard, the defendant's witnesses will be called one by one to give evidence in the same way as indicated in steps (2)–(4) above.
- 7** The claimant's lawyer will give a closing speech to the court. This speech should summarise the argument that underpins the whole case, which you hope will persuade the judge to decide the case in your favour. The suggested structure for this speech is as follows:
 - (a) Introduction;
 - (b) Issues;
 - (c) Narrative;
 - (d) The argument;
 - (e) Confirmation and refutation;
 - (f) Result.

- 8 The defendant's lawyer will give a closing speech to the court. This will follow a similar structure to that presented by the claimant's lawyer, but will present an alternative theory of the case designed to persuade the judge not to decide in favour of the claimant.
- 9 The judge will pass judgment and make an order.

The burden of proof in a civil case is for the claimant to prove his or her case on the balance of probability. This may be contrasted with the criminal law burden of proof, which is for the prosecution to prove the case beyond reasonable doubt.

EXAMINATION-IN-CHIEF

18.2

General points

18.2.1

The aim of the examination-in-chief is to get the witness to tell the court his or her version of events. In practice, the witness statement exchanged prior to the trial will often stand as the witness's evidence-in-chief. The lawyer will then simply seek explanatory comments from the witness where necessary.

Where a witness does give evidence-in-chief in full before the court, the lawyer should take the witness through all the evidence that s/he wishes to obtain from that witness. Vital facts should not be omitted.

Leading questions are not allowed during the examination-in-chief. These are questions that contain their own answers. Often, but not always, they are questions to which the only answer is 'yes' or 'no'. For example, the question, 'Did you last see him at 10.00 am?' is a leading question. It should be rephrased as, 'When did you last see him?'

Guidelines for the advocate

18.2.2

At the beginning of the examination-in-chief, you should ask the witness to introduce himself or herself to the court by providing details of his/her name, address, and, if relevant to the case, employment details. Then you should refer the witness to the dispute being tried and to the point at which his or her evidence begins. You should then take the witness through the evidence in a logical way. It is usually best to approach the evidence in a chronological order. Then stop. Do not repeat yourself.

Generally, questions beginning with **what, where, who, when, why** are open questions and are the best way of obtaining information on examination-in-chief.

If you think the cross-examination is likely to reveal unhelpful information, consider whether it might be better to introduce it in evidence during your examination-in-chief.

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You should be polite to the witness and allow him or her to finish answers to your questions (resist the temptation to try to cut your witness off if it looks like s/he is not giving quite the answer you wanted!).

You should cross-examine on facts not assertions. For example, saying 'You are dishonest' provides the witness with the opportunity for denial. Saying, 'You have six convictions for offences of dishonesty, don't you?' gives scope for a yes or no answer only.

18.6

MODES OF ADDRESS IN COURT

The table below sets out the names of some of the personnel who appear in court and how these persons are traditionally addressed. Note that the scope of this table is limited to the English courts. The terms 'Your Honour' or 'Judge' are however widely used in the US when addressing judges.

Title	Mode of address in court
High Court Judge	My Lord/My Lady, Your Lordship/Your Ladyship
Judge (except High Court)	Your Honour
Magistrates (when addressing several collectively)	Your Worships
Magistrate (when addressing a single magistrate)	Your Worship OR Sir/Madam
District Judge, Master	Sir/Madam
Chair of Tribunal	Sir/Madam
Barrister	My learned friend (when addressed by another barrister or solicitor – when addressed by a judge the title Mr/Ms/Miss/Mrs is likely to be used, followed by the barrister's surname) OR Counsel for the [Prosecution/Claimant/Defendant]
Solicitor	My friend (when addressed by another solicitor or barrister – when addressed by a judge the title Mr/Ms/Miss/Mrs is likely to be used, followed by the solicitor's surname)
Claimant or Defendant in person	If addressed directly, the Claimant or Defendant is referred to either as Claimant or Defendant OR by his or her title and surname (e.g. Mr Smith, Ms Jones)

SUGGESTED LANGUAGE

18.7

It is difficult to generalise about the language used in court cases, partly because the facts of every case will differ, and partly because different advocates will have different styles of questioning and different theories about the case before them.

The language used will also be influenced to some extent by the character and attitude of the presiding judge. In addition, a very different approach is required in criminal cases (where the prosecution must prove its case beyond reasonable doubt) than in civil cases (where the claimant must prove its case on the balance of probabilities). Every case is different. However, some language suggestions and examples are given in respect of different phases of a civil case below.

Opening

18.7.1

Introductions by claimant's advocate

Your Honour, I appear for the claimant in this matter, Mr Gerald Simmons, and my learned friend Miss Arkwright appears for the defendant, Grainger Ltd.

Stating nature of case

This case concerns a claim by Mr Simmons against the defendant company in respect of an item of equipment known as (Product X) purchased by him from the defendant which he says contains a manufacturing defect which renders the equipment useless for the purpose for which he wished to use it.

Stating the issues between the parties

Your Honour, this case falls within the ambit of the Sale and Supply of Goods Act 1994. It is not in dispute that the equipment contained a defect. However, my client argues that the full extent of this defect was not brought to his attention prior to completion of the purchase. The defendant argues that it was. The key issue to be determined by the court is therefore a factual one – whether, for the purposes of section 1 of the Act, the defect was effectively brought to the claimant's attention.

Examination-in-chief

18.7.2

Calling witness

I'd like to call my first witness, Mr John Edmonds.

Putting the witness at ease

Mr Edmonds, what is your full name?

Where do you live?

What do you do for a living?

Connecting witness with relevant party

How long have you known Mr Simmons?

In what capacity do you know Mr Simmons?

Focusing attention on the matter in dispute

What were you doing on the morning of 2 May?

What happened after Mr Simmons began discussing the equipment with Grainger's sales representative?

What did you hear them say about the equipment?

Asking the witness for a particular fact

What was the name of the piece of equipment?

What was the name of the people you were with?

What time was it when that happened?

What did he say next?

Finishing examination-in-chief

Thank you, Mr Edmonds. I have no further questions, but please stay where you are as I expect the defendant's counsel will have some questions for you.

18.7.3 Cross-examination

The purpose of the cross-examination is largely to cast doubt on the examination-in-chief. The purpose of the questions below is to secure admissions that will allow defendant's counsel to argue that the witness did not really understand the nature of the discussion about the equipment mentioned above. Note that the defendant's counsel stops short of asking one question too many – the question left unasked is 'You didn't really understand what was being said, did you?'

Mr Simmons, you mentioned earlier that you work as an accountant. Is that right?

You were accompanying Mr Simmons purely on a social basis, not for business purposes, weren't you?

So it's fair to assume that you don't have specific technical knowledge of engineering equipment, isn't it?

You also told the court that the discussions Mr Simmons had with Grainger's representative appeared to be of a highly technical nature?

COURT HEARING TRANSCRIPT

18.8

The conversation below is from a (fictional) court hearing in relation to a property repossession case. In this particular case, the parties have reached agreement on how the case should be settled prior to going into court. Therefore, they are able to ask the judge to make an order in the terms of what they have agreed.



Alternatively, visit the Companion Website to access an audio version of this interview along with associated exercise questions.

CLAIMANT'S LAWYER: Your Honour, this is the case of *Trandex Apartments Ltd v Arturo Creations Ltd*, which concerns the repossession of commercial property at 33A Benchley Drive. I appear for Trandex Apartments Ltd, the landlord, and the claimant in this matter. My friend, Mr Gardner appears for Arturo Creations, the tenant and defendant. There is also present in court Mr Clive Arthurs, who is the managing director of Arturo Creations. Your Honour will note from the court file, the claimant has instituted possession proceedings against the defendant, on the grounds of non-payment of rent, which has led to substantial arrears building up over the last 14 months. The arrears currently stand at a little over £20,000. Your Honour should have before him a copy of the original tenancy agreement as well as the statement of claim.

JUDGE: Yes, I've seen them. Well, what is the current state of play? Are we to have a contested hearing today or is there any prospect of settling the case? Mr Gardner, does your client intend to defend these proceedings?

DEFENDANT'S LAWYER (*rising to speak*): No, Your Honour. My client fully accepts that arrears of rent have built up and does not dispute the figures set out in the statement of claim. The reason why the rent was not paid for a period of time was acute cash flow problems caused by extremely difficult business conditions – involving falling orders and intense competition – over the past couple of years. The business situation has now improved dramatically, largely due to radical market repositioning undertaken by my client, and my client's current financial situation is promising. In the circumstances, I'm glad to say we have been able to settle matters on the basis that the defendant agrees to clear the arrears of rent over a period of one year. A sum of £5,000 will be paid today, and the balance will be paid in ten equal monthly instalments, commencing 5 August – in other words two months to the day from today's date. This arrangement is acceptable to both parties, and my client is prepared to submit to a suspended order for possession on those terms.

JUDGE: Good. That would seem to clear the arrears within an acceptable time-period. Have you had time to produce a draft order?

DEFENDANT'S LAWYER: Yes, Your Honour. Here it is.

JUDGE (*looking over order*): Thank you . . . Yes, I see . . . Yes, this appears to be in order. I see that the defendant is to pay the claimant's costs.

CLAIMANT'S LAWYER: Yes, Your Honour.

JUDGE: You are aware of course, Ms Thomas, that pursuant to the court rules you should have produced a schedule of your costs for the court?

CLAIMANT'S LAWYER: Yes, Your Honour. In fact, the schedule is clipped to the back of the draft order.

JUDGE: Ah, yes, now I have it. Fine. Good. I take it that you have received a copy of this schedule, Mr Gardner?

DEFENDANT'S LAWYER: Yes, Your Honour. We have no objection to the costs itemised in it.

JUDGE: Good. Right, well, I'm prepared to make an order in these terms. I'll sign the draft and the usher no doubt will be able to run it down to the court office to get it typed up and have sealed copies made.

EXERCISE 33

Consider the questions below. In each case, decide which of the four statements (a) to (d) given in respect of each question corresponds most closely to the meaning of the text. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) Trandex Apartments Ltd is bringing court proceedings against Arturo Creations Ltd:
- because Arturo Creations Ltd has allowed significant arrears of rent to build up;
 - because of non-payment of rent;
 - because the arrears of rent have now reached £20,000;
 - because arrears have built up over a period of 14 months.
- (2) The judge wants to know:
- whether Arturo Creations Ltd intends to defend the proceedings;
 - whether Arturo Creations Ltd accepts the figures set out in the statement of claim;
 - whether there is in the court file a copy of the tenancy agreement;
 - whether the case has been settled.
- (3) The reason the rent was not paid was:
- costs involved in market repositioning;
 - lack of orders for the defendant's products;

- c. intense competition;
 - d. cash-flow problems caused by difficult business conditions.
- (4) A suspended order will be made, according to which:
- a. The arrears will be paid off in monthly instalments over the course of one year.
 - b. The arrears will be paid off in 10 instalments over a period of two months.
 - c. The arrears will be cleared within one year.
 - d. A sum of £5,000 will be paid immediately and the rest on 5 August.
- (5) The judge's point about the claimant's costs is that:
- a. The defendant's lawyer should agree with the amount claimed as costs.
 - b. The court should have received a schedule of costs.
 - c. The schedule of costs should be attached to the draft order.
 - d. The defendant should have received a schedule of costs.

19

Negotiation

19.1

NEGOTIATION STYLES AND STRATEGIES

Negotiation style refers to the personal behaviour the negotiator uses to carry out the strategy that s/he has chosen. Three main styles of negotiation have been identified, and these are usually referred to as cooperative, adversarial and problem-solving.

Negotiation strategy refers to the specific goals to be achieved and the pattern of conduct that should improve the chances of achieving those goals.

Research has found that all effective negotiators have a number of features in common – they prepare on the facts, prepare on the law, take satisfaction in using their legal skills, are effective trial advocates and are self-controlled.

The main features of the three main styles of negotiation are summarised in the table below.

Cooperative	Adversarial	Problem-solving
Participants are friends	Participants are opponents	Participants are problem-solvers
The aim is agreement	The aim is victory	The aim is a wise outcome reached efficiently and amicably
Make concession to cultivate the relationship	Demand concessions as a condition of the relationship	Separate the people from the problem
Be soft on the people and the problem	Be hard on the people and the problem	Be soft on the people, hard on the problem
Trust others	Distrust others	Proceed independent of trust
Change your position easily	Stick to your position	Focus on interests, not positions
Make offers	Make threats	Explore interests
Reveal your bottom line	Mislead as to your bottom line	Avoid having a bottom line
Accept one-sided losses to reach agreement	Demand one-sided gains as the price of agreement	Invent options for mutual gain

Search for the single answer: the one they will accept	Search for the single answer: the one you will accept	Develop multiple options to choose from; decide later
Insist on agreement	Insist on your position	Insist on objective criteria
Try to avoid a contest of will	Try to win a contest of will	Try to reach a result based on standards independent of will
Yield to pressure	Apply pressure	Reason and be open to reason; yield to principle, not pressure

Adversarial/cooperative

19.1.1

Adversarial and cooperative styles of negotiation can be regarded as different forms of positional bargaining. In effect, both styles draw on the principle that the negotiators are opponents. The difference between them is the degree to which the cooperative negotiator is prepared to work with the other side in resolving the differences between them.

By contrast, the stereotypical adversarial negotiator is a tough and aggressive advocate whose aim is victory by defeating the opponent, in much the same manner as s/he might do in court.

Problem-solving

19.1.2

The problem-solving style can be characterised as a form of principled bargaining.

Problem-solving negotiators 'separate the people from the problem' and seek to negotiate in a non-confrontational and non-judgemental way, by applying standards of fairness and reasonableness.

Fisher and Murray summarise the essentials of this approach in their book, *'Getting to YES'*:

In most instances to ask a negotiator, 'who's winning' is as inappropriate as to ask who's winning a marriage. If you ask that question about your marriage, you have already lost the most important negotiation – the one about what kind of game to play, about the way you deal with each other and your shared and differing interests.

Negotiation strategies compared

19.1.3

The different negotiation strategies are compared in the table below.

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Encourages breakdown by creating many opportunities for impasse.

Focuses on being sensitive to other's perceived interests; increases vulnerability to deception and manipulation by a competitive opponent. Increases possibility that settlement may be more favourable to other side than may be fair.

Increases difficulty in predicting responses of opponent because reliance is on manipulation and confrontation.

Increases difficulty in establishing definite aspiration level and bottom lines because of reliance on qualitative goals.

Contributes to overestimation of return possible through all alternatives (court, arbitration) because it does not focus on a relatively objective analysis of substantive merits as standard for resolution.

Requires substantial skill and knowledge of process to do well.

Requires strong confidence in own assessment powers regarding interest/needs of other side and other's payoff schedule.

DIFFERENCES IN NEGOTIATION LANGUAGE BETWEEN USA AND UK

19.2

In Chapter 7 we saw that there are certain differences between American and British English. These are relatively minor in comparison to the differences that exist in the mentality and cultural values of the two countries.

The table below briefly summarises how these differences affect the way American and British people use English in negotiations. Note that the USA and the UK are selected here, purely on the basis that they are the most prominent English-speaking countries. Differences also exist in the way in which other English-speaking countries, such as Australia, New Zealand, Canada and South Africa, use the language in negotiations.

British	American
Formal and reserved on first meeting (informal later on)	Informal and friendly from the start (but initial friendliness may be forced)
Prefer to use indirect language ('I'm not quite with you on that')	Prefer to use direct language ('You're talking bullshit')
Tend to use understatement ('that might be a bit difficult')	Tend to exaggerate ('this is the best deal you'll ever get')
Use irony	May misunderstand irony

British	American
Rarely disagree openly (but will qualify agreement or use noncommittal terms to indicate lack of enthusiasm about a proposal)	Will disagree openly if necessary
Use humour as a tactic in itself (to break tension, speed up discussion, criticise someone or introduce a new idea)	Use humour to break the ice
Insular but have some cultural awareness	Insular, may be culturally naïve
Use vagueness as a tactic (to confuse or delay)	Dislike tactics to delay negotiations but use vagueness to confuse
Dislike making decision during first meeting	Will press for decision on main points during first meeting (and work out details later)
Generally interested in long-term relationships rather than making a quick buck	Interested in getting the deal
Patient	Impatient ('time is money')
May not reveal bottom line (may be plotting against you)	Likely to place cards on the table and work towards a deal by exchange of offer and counter-offer
Do not usually respond well to hard sell tactics	Require and expect hard sell
Often use woolly, old-fashioned phrasing (may be trying to trick you into underestimating their abilities)	Enthusiastic use of latest business jargon
Apparent formality may conceal more individualistic tendencies	Apparent informality and friendliness may conceal deeply conservative beliefs
Appear to 'muddle through' without clear aims (but known for lateral thinking)	Have a plan and pursue it aggressively, persistently and consistently
May resort to sarcasm when angry ('That's a fantastic idea! You must be a genius!')	May resort to threats when angry, particularly a threat to end the negotiations there and then if progress is not being made ('I can see these talks are going nowhere')

American business and legal people have the reputation of being the world's toughest, most aggressive negotiators. However, they are relatively consistent and rarely renege once a deal has been struck. They are also often naïve about the culture of other countries. This means you have one important advantage over

them: you know a lot more about them than they know about you. This can be exploited by, at times, negotiating on the American wavelength and at other times shifting to the cultural norms of your own countries.

British negotiators often like to present themselves as diplomatic amateurs. They often appear to 'muddle through' negotiations without any clear idea of what they wish to achieve. However, do not underestimate the British love of plotting (evidenced by the fact that one of Britain's national heroes, Guy Fawkes, was a man who tried to blow up Parliament). Be aware that the woolly exterior may in fact conceal a considerable capacity for ruthlessness when needed. However, like American negotiators they rarely renege once a deal has been struck. Americans often view the apparent disorganisation of some British negotiators as a weak point and they may instinctively increase the aggressiveness of their approach when confronted with this style in order to 'break' their counterpart.

THE QUALITIES OF A GOOD NEGOTIATOR

19.3

Negotiation is the process of bargaining to reach a deal – but what does it actually involve? Does it mean being as tough as possible in order to get everything you want at that particular moment, or does it mean reaching a compromise that will preserve and even enhance a working relationship that will continue in the future?

The answer clearly depends on the kind of relationship you have, or want to have, with your opponent in the future. A good working relationship, like a good marriage, will probably involve neither of the parties getting everything they want, and both parties having to make concessions to the other.

So, what are the qualities that make a good negotiator? As a negotiator, you'll find yourself in different settings, and dealing with different issues. However, there are three key skills that all negotiators need to develop:

- 1** an awareness of the need to live together after the talking has ended and life goes back to normal;
- 2** an anticipation of how people will be feeling and are likely to react;
- 3** the ability to conduct an ongoing 'risk assessment' as the negotiations progress.

In addition, it is often said that a good negotiator is one who:

- listens to what the other party is saying and observes their body language carefully;
- is able to assess changes in power between the parties;
- has the ability to persuade;

- is assertive where necessary (note that being assertive is not the same as being aggressive);
- has total commitment to the client's case;
- is patient and remains cool under pressure;
- maintains self-control;
- knows the value to the client of each item to be negotiated – and, if possible, to the other side;
- is flexible, able to think laterally, and has imagination;
- avoids cornering the opponent unnecessarily, and avoids impasse;
- knows when to conclude – and when to push on;
- is realistic, rational and reasonable;
- is capable of self-evaluation;
- is able to put himself or herself in the other side's shoes – but doesn't stay there too long.

19.4

PREPARATION: FIVE-STEP PLAN

Preparation for negotiation is of crucial importance. The process of carrying out such preparation can be divided into five key steps, as follows:

19.4.1 Step 1: Research facts and law

Without a sound grasp of the facts and the applicable law, effective negotiation is impossible. Before the negotiation you should do the following:

- Review the case file.
- Consider the history and development of the case and identify the relevant facts.
- Identify the legal issues for each set of facts.
- Review agreements similar to those that will be the subject of the negotiation.
- Review the position of your opponents. How do they view the facts, what interpretations of the law favour their standpoint, what strengths and weaknesses are there in their case? You then need to prepare a balance sheet matching the strengths and weaknesses in each side's case.

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19.4.5 Step 5: Plan the agenda

An agenda should identify and illustrate the issues in dispute. It should distinguish three different dimensions of the negotiation:

- Content: the range of topics to be settled;
- Procedures: the manner in which the negotiation will take place, the control of the meetings, the matters to be discussed, the preliminaries, the timing of the different phases of the meeting;
- Personal interaction: the manner in which the individuals involved in negotiating interact with each other.

19.5

THE NEGOTIATION PROCESS

19.5.1 Negotiation stages

Most negotiators have three basic positions in mind when carrying out negotiations. These are:

- The ideal position – what they would like to achieve in an ideal world.
- The realistic position – what they realistically expect to be possible.
- The fallback position. This is sometimes called the BATNA – the best alternative to a negotiated agreement. In other words, what is the lowest offer the negotiator will accept and what other options does s/he have if the negotiation does not work out?

How does the process of negotiation work in practice? It is possible to break it down into five typical stages.

- 1** Preparation. This is crucial. The more you know about the subject-matter being negotiated, the other party's interest, as well as your own, the quicker you will be able to adapt to new negotiating positions. In this way, you will be able to remain in control of the process throughout. We will look at this area in greater detail in a moment.
- 2** Opening moves. Your opening moves will largely involve investigating the issues and exploring the positions of both parties. You will need to express your views as well as actively listen to the views of others. It is also worth drawing attention to any flaws in the other party's position at this stage.
- 3** Offers. This is the stage where the most active negotiation occurs. As you receive and make offers, you may find yourself having to re-evaluate your position or repackage your ideas. You need to read the signals the other party is giving off quickly and accurately. Do not be afraid to be creative.

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In a problem-solving situation each party will make a brief opening statement, which should present their view of the overall negotiation, identify the party's interest, specify how each party can contribute to achieving a solution for mutual gain and stress those areas in which agreement has already been reached. The parties will then try to identify issues for mutual gain.

Adversarial negotiator. An adversarial negotiator will consider whether to start with the most difficult issues or the least difficult issues.

A cooperative negotiator might wish to start with the least difficult issues, since this is likely to lead to success for both parties in the early stages thus creating a good working relationship. The negotiator may then be able to gain concessions on bigger and more difficult issues.

A competitive negotiator may wish to start with big and difficult issues. In this way s/he issues a challenge to the opponent and destroys the expectation that the early stages of the negotiation may be marked by civility and trust.

19.5.2.2 Persuading and making offers

Problem-solving negotiator. A problem-solving negotiator may wish to generate solutions by making hypothetical suggestions instead of concrete offers. S/he may introduce a proposal, on a 'what if?' basis, and invite the other side to develop it further. Neither side is obliged to make any commitment or oppose the idea. A more relaxed discussion can then follow, with adjustments to the original idea arising as a result of the joint discussion.

The problem-solving negotiator will try to make it as easy as possible for the other side to shift their position and agree on a compromise. This is achieved by stressing the benefits that a proposed solution offers the other party.

Adversarial negotiator. An adversarial negotiator is more likely to make a concrete offer. S/he is likely to make it at an early stage – by making the first offer the adversarial negotiator seizes the agenda and clarifies the issues at stake. The offer should be made as soon as the negotiator has assessed the other side's strengths, weaknesses and bargaining positions.

All offers should be justified. By articulating a justification, commitment to that position is conveyed. The other side are forced to confront the justification.

When making an offer, the adversarial negotiator will start with a high opening position. There is a high correlation between the amount of the negotiator's original demand and the ultimate payoff. But the offer should be reasonable – if it is unreasonable the other side may conclude that the parties are so far apart that it is not worth negotiating further.

The initial proposals must be made firmly. The offer should be specific so as to create commitment. The sum proposed should be exact – not 'around about' or 'in the region of'.

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19.6

NEGOTIATION PLOYS

A ploy is defined in the Oxford English Dictionary as 'a cunning act performed to gain an advantage'. A number of standard ploys are often used in commercial negotiations. They are worth knowing about – you may not wish to use such tactics yourself, but you will certainly wish to know when your opponent is using a ploy against you. Here are some of the more common ploys:

The bogey

This is a buyer's ploy. The buyer assures the seller that s/he loves the product but has a very limited budget, so that in order for a sale to occur the seller must reduce the price.

The idea is to test the credibility of the seller's price. The seller might react positively by revealing information about costing, so that you can force the price downwards. It may also provoke the seller to look at your real needs.

'I am only a simple grocer'

The idea of this ploy is to make your opponent believe they are dealing with an inexperienced negotiator because s/he claims to be 'only a simple grocer'. They may then relax too much and commit indiscretions about their objectives, tactics and intentions. In fact, although you claim to be 'only a simple grocer' you are the managing director of the world's largest chain of grocery stores.

'I'm sorry I've made a mistake'

This is an irritating and rather dishonest ploy used by sellers. You order some goods at \$4.55 per item. The seller then calls you back claiming that s/he has made a mistake in the arithmetic of the order you placed. Instead of the products costing \$4.55 each, they actually cost \$4.95 each. The seller then claims that s/he cannot sell them at \$4.55 because his or her boss will not authorise the sale.

If you believe the seller to be genuine, you agree to the higher price. If you do not, you cancel the order. Buyers usually submit to the ploy.

Minimum order ploy

This is a ploy used by the seller whereby the seller maximises the value of the order by placing restrictions or conditions on the order the buyer has placed.

Examples include:

These are only sold in packs of 12.

If we represent you in the purchase of the building, we must also act as letting agents if you acquire it.

Over and under ploy

This ploy is a handy response to a demand made by your opponent. For example, your opponent might demand that you reduce your price by 5 per cent if they pay your invoice within seven days. You could respond with an 'over and under': 'if you agree to a 5 per cent premium for late payment'.

Quivering quill

This is a ploy used by buyers in which the buyer demands concessions at the very point of closing the deal. At this point, the buyer is about to sign the contract and suddenly demands, for example, 3 per cent off the purchase price. When the seller expresses unwillingness to agree, the buyer threatens not to sign the contract. A typical result is that the seller is pressured into giving a 1.5 per cent reduction on the purchase price.

Shock opening

This is a negotiation ploy designed to pressure the opponent. The other negotiator starts with a price that is much higher than you expected. You are shocked into silence. If – but only if – they back up their opening price with a credible reason for it, you have to review your expectations.

Tough guy/nice guy

This is a ploy that sometimes works on intimidated negotiators. It is an act in which two negotiators alternate between a tough, uncompromising, adversarial style, and a softer, more cooperative style.

You prefer to deal with the apparently softer negotiator, but s/he claims to be unable to act without the approval of the tougher colleague. She wants to help you, but needs you to give concessions in return. You end up moving a lot closer to his or her position than you intended, but are comforted by the illusion that this is a lot less far than you would have had to go to satisfy the 'tough guy'. You have been tricked – the act was a set-up to make you concede.

Waking up the dead

This is a risky ploy. It is used where you are dealing with a team of negotiators and are making little progress. The idea behind the ploy is to try to exploit any differences of opinion in the opposing team. You invite a member of the other team who has remained silent throughout to comment:

What do you think, Mr. Linden?

Do you have any suggestions on how we might break this impasse, Ms. Yardleyo?

You are taking a risk, as the other negotiators may resent your interference and react by hardening their position. The ploy is unlikely to succeed against a disciplined team.

What do you know?

This is a ploy used to try to obtain information.

The other negotiators open the discussion with the question 'What do you know?' If you tell them, you might end up revealing more about the state of your knowledge than would be wise at that stage of the negotiation. The best response is to say, 'Not much. Perhaps you could go over the issues for me?'

19.7**SUGGESTED LANGUAGE****19.7.1 Opening****Making introductions**

Good morning. I am . . . and this is my colleague Mr/Miss/Ms/Mrs . . .

Ice-breaking

Is this your first visit to . . . ?

I hope that you had no trouble finding our office?

It looks as if the weather is going to improve/get worse.

Would you like a cup of tea/coffee?

[if you know the other party slightly] How was your weekend?

OR

How is/how are [mention wife/husband/girlfriend/boyfriend/children/colleague]?

Setting an agenda

Are we agreed that today's meeting should be used to cover the following . . . ?

OR

We would like to use this meeting to . . . [e.g. explore each other's position, to exchange information]. Is that okay with you?

Possible response:

Yes, we'd like to exchange views, but I think we'd like to move towards an agreement on some of the issues.

Reply:

That's fine. I assumed this meeting would last for an hour. Shall we see if we can agree on a timetable?

Opening the discussion

Perhaps we could start with the issue of . . .

OR

There are three/several/a number of points I'd like to make . . .

OR

Perhaps you'd care to give us your thoughts on this matter.

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Are there any questions you want to ask about that?

OR

If I understand you correctly you'd like to . . .

OR

Let me see if I'm following. What you are saying is . . .

Bringing others into the discussion

[formal] Allow me to give the floor to . . .

[informal] Perhaps I could bring in X at this point. X, what's your view on this?

[addressing a member of other side's negotiating team] What's your view on this, Mr/Miss/Ms/ Mrs Y?

Entering the discussion

Could/May I come in at this point?

OR

Let me just add that . . .

Agreeing

I think we are in agreement on that.

OR

Yes, we take the same view on that issue.

OR

We agree.

OR

Agreed.

Agreeing partially

I would tend to agree with you on that.

OR

I basically agree. However, I have the following reservations . . .

OR

I basically agree. However, have you taken into account the fact that . . .

Disagreeing tactfully

I agree up to a point, but . . .

OR

There's some truth in what you say, but . . .

Disagreeing

[politely] That's not a view I share, I'm afraid.

OR

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Interrupting

If I might just interrupt you for a moment, I'd like to . . .

OR

I'm sorry, you've lost me there. You were saying . . .?

OR

Can I just stop you there a moment? I'd like to clarify . . .

Stopping interruptions

[forceful] Just hear me out on this.

OR

[polite] If I could just finish what I was saying . . .

Deflecting an unwanted line of questioning

What exactly are you getting at?

OR

Where is this line of thought leading to exactly?

Narrowing differences

19.7.4

Summarising

To sum up then, there seems to be . . .

OR

The key issues are . . .

Correcting misunderstandings

Perhaps I should make that clearer by saying . . .

OR

Let me just repeat, in case there is any confusion, that . . .

OR

[responding to mistaken impression of other party] You seem to have misunderstood what I was saying. What I meant was . . .

Asking for further information

Could you be a little more specific/precise?

OR

You mentioned something about . . . Perhaps you could just tell me a little more about . . .

OR

That sounds interesting. Perhaps you could give us a few more details.

Seeking clarification

Am I right in thinking that . . . ?

OR

Could you just go over the . . . again? I'm not quite sure how it was supposed to work.

Making recommendations, proposals, and suggestions

I recommend/suggest/propose that . . .

OR

Can I suggest something?

OR

[breaking a deadlock] OK, we seem to have reached an impasse. Perhaps I could suggest something?

Sketching a hypothesis

Let's suppose for a moment that . . .

OR

One way of looking at this matter would be . . .

OR

What if . . .

Projecting false naivety

Correct me if I'm wrong but . . .

OR

This is obviously not my field, but . . .

Expressing support

I'm in favour of . . .

OR

I like that idea. Tell me more about it.

Expressing opposition

I can see many problems in adopting this.

OR

I'm not sure how realistic this proposal is.

OR

If this matter were to be tested in court, the court would never make such an order . . .

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OR

[agreement reached] We seem to be in agreement on all major points. Can we agree that a memorandum of understanding will be prepared by . . . for circulation on . . .

Concluding

In conclusion, I would like to say . . .

OR

I'd like to finish by saying . . .

Saying goodbye

Let me get your coat . . .

It's been a pleasure doing business with you. Have a safe journey home.

19.8

KILLER LINES FOR NEGOTIATIONS

There are certain make or break points in any negotiation. In such situations, your choice of words becomes critically important. Here are just five examples of these, and some tried and tested linguistic strategies for dealing with them.

19.8.1

Avoiding impasse/sketching hypothesis

Sometimes the parties reach deadlock in a negotiation and seem unable to make progress. They have in effect exhausted the possibilities of the parameters within which they are working. One solution is to discard these parameters and invent new ones, that is, to think creatively.

Here are some lines you can use to introduce a fresh perspective on the issues under discussion.

Right, I think we are clear on how we both see the position. Let's look at the creative possibilities.

OR

Another way of looking at this question might be to think in terms of a long-term lease rather than an outright sale.

OR

Let's suppose for a minute that we were prepared to consider a long-term lease rather than an outright sale. How might that change things?

OR

What if we looked at the possibility of a long-term lease?

Rejecting an offer but keeping the door open**19.8.2**

Sometimes you need to reject the offer that has been made, but are keen to indicate to the other party that you are willing to listen to further offers. In particular, you might want to indicate that a concession on one issue by the other party might be rewarded by a concession on another issue on your part.

[firm, but indicating willingness to consider revised offers without specifying what is expected] *You are going to have to do better than that.*

OR

We can't accept that proposal in its current form. However, we might be prepared to agree on/consider raising our offer to 25 per cent, if you were prepared to move on the question of usage rights.

OR

[not committing oneself if certain conditions are met] *We might agree to 25 per cent if you accept that we retain usage rights.*

OR

We might be inclined to take a different view if you were to move a little on the issue of usage rights.

Responding to the question 'is that your best offer?'**19.8.3**

This question is a clear attempt to get a better deal without attempting to justify it. If you say yes, you are committed to defending that offer and the other party might walk away. If you say no, you are committing yourself to making an improved offer.

The following response is one way of getting yourself out of trouble:

That is the best offer we can make in the light of the facts as we understand them at the moment. We might be inclined to take a different view if new facts were to emerge which affected the position. Perhaps you could give us some more information on your situation?

It throws the ball back into the other party's court.

Playing for time**19.8.4**

Sometimes you might find you need time to think over a proposal made by the other party, or the issues generally. There are a number of ways of dealing with this. One is to simply state, for example, 'We'll have to think a bit more about that and get back to you.' The following responses will also work as well.

I'm afraid I'm not in a position to comment on that just yet.

OR

I'm afraid I don't have authority to accept that without checking with our managing director.

OR

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Solutions, to act on their behalf. They received a letter before action from you recently, which Mr Collins has passed on to me. I understand you're instructed by the London Institute.

STEPHEN BAINS: Yes, that's right. Could you hold a minute please while I bring up the correspondence on the screen here?

RACHEL GRUNDY: Certainly.

STEPHEN BAINS: Right, I've got it in front of me now. Sorry to keep you waiting.

RACHEL GRUNDY: That's OK.

STEPHEN BAINS: OK, I see we wrote to your client on 5 March requesting transfer of the domain names at issue to our client and indicating that legal proceedings would be instituted if this was not done. Are they willing to do that?

RACHEL GRUNDY: They may be prepared to consider doing so, but the position is somewhat complex. In any case, appropriate financial compensation would need to be agreed.

STEPHEN BAINS: OK, let me stop you right there. There's clear evidence of trademark infringement here. The London Institute was established in 1945, and has had trademarks dating back to that time. It's established law that in a case of this type, involving cyber-squatting, the registration of domain names by other parties – where they cause serious likelihood of confusion – will amount to trademark infringement. That's been clear ever since the One in a Million case.

RACHEL GRUNDY: I appreciate the point you're making, Mr Bains, but this is not a case of deliberate cyber-squatting, as your comments tend to imply, and so the One in a Million case is not strictly relevant. These domain names were registered in connection with the incorporation of 'the London Institute of Holistic Medicine' in 1996, with which our clients were involved as IT consultants. They were reserved for that body.

STEPHEN BAINS: Ah, I see. That might of course complicate matters. Well, what is the situation with this Institute? Have you made contact with them?

RACHEL GRUNDY: We have not been able to do so as yet. Our clients have no ongoing contact with them. Preliminary enquiries with Companies House suggest they are still trading, but they have not as yet responded to our attempts to contact them. What we are asking is for you to hold off taking any further action for a fortnight. In the meantime, we'll get in contact with them and try to establish their position in relation to this issue.

STEPHEN BAINS: OK, I'll have to take instructions from my client, but it may be that that can be agreed.

Consider the questions below. In each case, decide which of the four statements (a) to (d) given in respect of each question corresponds most closely to the meaning of the text. The answers can be found in the answer key at the back of the book.



Alternatively, visit the Companion Website to access this question online.

- (1) Stephen Bains wrote to Global Corporate Solutions in order to:
 - a. secure transfer of the domain names for his client;
 - b. advise that the company would be sued;
 - c. discuss transfer of the domain names;
 - d. indicate that he was instructed by London Institute.

- (2) Global Corporate Solutions' attitude to Mr Bains' letter was:
 - a. that they would be willing to transfer the domain names;
 - b. that they would not be willing to transfer the domain names;
 - c. that they felt the position was complicated;
 - d. they might be prepared to transfer the domain names on certain terms.

- (3) Mr Bains states that trademark infringement has occurred because:
 - a. the One in a Million case is authority for that notion;
 - b. the case at hand involves cyber-squatting, and there is a strong likelihood of confusion between the registered name and the trademark of the London Institute;
 - c. because London Institute has had trademark protection for decades;
 - d. this is a good negotiation tactic.

- (4) Rachel Grundy's response to what Mr Bains says is:
 - a. that this is not a case of cyber-squatting, since the domain names were registered for the purposes of another organisation with a similar name to London Institute;
 - b. that this is not a case of cyber-squatting, since her client was merely acting as a consultant for another organisation;
 - c. that the law resulting from the One in a Million case is not applicable because the registrations were made in 1996;
 - d. that Mr Bains is wrong.

- (5) The London Institute of Holistic Medicine is:
 - a. clearly still a going concern;
 - b. clearly not still a going concern;
 - c. not at present responding to attempts to contact it;
 - d. a successful company.

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Chairing a formal meeting

THE ROLE OF THE CHAIR

20.1

It is likely that during the course of your working life you will be called upon fairly regularly to chair meetings. The nature of the role you play as the chair will vary slightly according to the degree of formality the meeting requires, what matters are being discussed and who is discussing them. However, in all cases the chair must:

- control and coordinate the meeting;
- ensure that all matters under discussion are properly presented;
- allow participants to comment on the matters being discussed;
- ensure that the meeting is not dominated by a single individual;
- move from one issue to the next;
- ensure that business is transacted efficiently;
- ensure that the necessary decisions are made;
- not allow the meeting to exceed the time allotted;
- see that all necessary minutes and records are kept.

STRUCTURE AND LANGUAGE

20.2

Most formal meetings commence with the reading of the minutes of the previous meeting and the presentation of the agenda for the current meeting. The matters set out on the agenda are then introduced and discussed by the participants. Towards the end of the meeting, motions are proposed and votes are taken on the matters proposed as motions. The participants then deal with any other business (often marked as 'AOB' on meeting agendas), which needs to be dealt with at that point, and the meeting is then closed.

A typical meeting structure is as follows:

- 1 the chair opens the meeting;
- 2 the minutes are read;
- 3 the agenda is introduced;
- 4 first subject introduced;
- 5 the chair gives the floor to a participant;
- 6 another speaker takes the floor;
- 7 the chair keeps order;

- 8 the chair moves the discussion to a new point;
- 9 the chair directs the discussion;
- 10 participants propose new motions;
- 11 the chair moves to a vote;
- 12 voting occurs;
- 13 consensus reached;
- 14 any other business dealt with;
- 15 meeting closed.

The language of formal meetings, particularly the language used by the chair, can be rather stylised. The meeting itself is likely to follow a fairly fixed schedule. The language suggestions set out in 20.3 below cover the kinds of language employed at formal meetings. Where relevant, alternatives are given for formal and less formal language. To a great extent, the language used during the meeting will depend on what is being discussed. Refer to section 19.7 for further language suggestions in this respect.

20.3

SUGGESTED LANGUAGE**Opening**

[very formal] Ladies and gentlemen, I declare the meeting open.

[less formal] Right, shall we get started?

OR

Let's get down to business shall we?

The minutes

[very formal] May I read the minutes?

OR

Would someone move that the minutes of the last meeting be accepted?

[less formal] Has everyone seen the minutes?

OR

Can we take the minutes as read?

The agenda

Has everyone received a copy of the agenda?

OR

Has everyone got the agenda in front of them?

[introducing first item] The first item on the agenda today is . . .

[amending agenda] I would like to add an item to the agenda.

The subject

The purpose of today's meeting is . . .

OR

The first problem we have to consider is . . .

OR

Perhaps we could first look at . . .

Giving the floor

[very formal] I'd like to give the floor to Mr Lee.

OR

Ms Sanchez, do you have any views on this/would you like to say something about this?

OR

Mr Steiner, I think you know something about this matter.

[less formal] Have you got anything to say, Dieter?

OR

What are your views on this, Maria?

Taking the floor

[very formal] With the chair's permission, I'd like to take up the point about . . .

[less formal] Could I just make a point about . . . ?

OR

Could I say something here, please?

Finishing a point

Has anyone anything further they wish to add before we move on to the next item?

OR

Has anyone anything further to add?

Directing

[very formal] We seem to be losing sight of the main point. The question is . . .

OR

This isn't really relevant to our discussion. What we're trying to do is . . .

[less formal] Could we stick to the subject, please?

OR

Let's not get sidetracked. The issue under discussion is . . .

Keeping order

We can't all speak at once; Ms Sanchez, would you like to speak first?

OR

Mr Robertson, would you mind addressing your remarks to the chair, please?

OR

I shall have to call you to order, Mr Ramirez.

Moving to a new point

[very formal] Could we move on to item 4 on the agenda, please?

[less formal] Now, I'd like to turn to . . .

OR

Can we go on now to . . .

Postponing discussion

[very formal] Well, ladies and gentlemen, with your approval, I propose to defer this matter until we have more information at our disposal.

OR

If no one has any objections, I suggest that we leave this matter until our next meeting.

OR

Perhaps we could leave this for the time being. We can come back to it on another occasion. . .

[less formal] Let's come back to this later on.

OR

We can talk about this next time we meet.

Proposing the motion

[very formal] With the chair's permission, I move that . . .

OR

I would like to propose the motion that . . .

OR

Would anyone like to second the motion?

[less formal] I suggest/propose we . . .

OR

I'm in favour of that.

OR

Is anyone else in favour of that?

Moving to a vote

[very formal] Perhaps we should take a formal vote?

OR

Can I ask for a show of hands?

OR

Let's put it to the vote.

OR

Could we take a vote on it?

OR

Can we move to a vote on this?

[less formal] Should we vote?

Voting

[very formal]

In the event of a tie, I would like to remind you that I have a casting vote.

Those for the motion, please?

Those against?

Any abstentions?

The motion is carried unanimously.

OR

The motion has been rejected by six votes to five.

[less formal]

If there's a tie, I have the deciding vote.

Who's in favour?

Who's against?

Abstentions?

Everyone was in favour.

OR

The motion was rejected.

Seeking consensus

Would everyone agree if . . .

OR

I'd be interested to know if anyone has any objections, but shall we try . . .

OR

Am I right in thinking that . . .

Consensus

[very formal] It seems that we have a consensus.

Can I take it everyone's in favour?

[less formal] We're all agreed.

OR

I think we all agree on that.

Any other business

[very formal] Is there any other business?

[less formal] Any further points?

OR

Is there anything else to discuss?

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Making a presentation

PREPARATION

21.1

It has been said that the greatest speeches have two things in common:

- The speaker cared about the topic.
- The audience cared about the topic.

When considering your presentation, therefore, you should try to pick a topic that you care about and that the people you will be making the presentation to care about. You may not, of course, have the luxury of being able to pick any topic you wish to speak about. However, you should try to find those aspects of the given topic which interest you and which are likely to interest your audience.

Try to divide your speech into a few manageable sections (say two to five), which cover the main parts of your presentation and make it easy for the audience to follow you. These sections should be logically ordered and should support the main theme of the presentation.

When preparing, make notes but do not write everything down. Brief, clear notes will stop you getting lost, but if you write everything down your style will become very boring and your presentation will be less flexible.

Look the part. Do not turn up in jeans and a T-shirt if everyone in your audience is going to be wearing a business suit.

Consider the following points when preparing your presentation:

- You should not talk too long. Mark Twain once remarked that few sinners are saved after the first 20 minutes of a sermon. If you go on too long, people will gradually switch off and will end up understanding less, not more of what you have said.
- Are you going to use any visual aids? If so, what kind? Check that the room in which you will make the presentation has the facilities you will need. Prepare your materials and place them in the correct order for the presentation. Only use visual aids if they will actually help illustrate the points you want to make.
- What will you do if there is a power cut? Ensure that your presentation can be given even if your audiovisual props are not available.
- How big is the room in which you will give your presentation? Remember that you will need to project your voice effectively. Think about using a microphone if necessary.

- Think about the kind of audience you are going to address and tailor your speech to that audience's interests and needs.
- Don't be afraid of repetition – if you are going to tell the audience something you want them to remember, you are going to have to say it several times to get it into their heads.
- Use illustrations and examples where possible.

21.2

STRUCTURE

Your presentation should have a clear beginning, middle and end. An effective way of presenting an argument is to start by indicating the theme of your presentation and the points you are going to make in support of that theme. Then make those points. Then at the conclusion of your presentation, summarise the points you've made and explain how they support your theme.

This technique is sometimes characterised as the 'tell them what you're going to say, say it and then tell them you've said it' approach. The main benefits of this approach are: (1) clarity, and (2) that it gives the opportunity to make each point at least three times in different ways, so that the audience is likely to remember at least the main points made.

21.2.1 Beginning

The introduction should be used to:

- Make an impact – you should try to say something immediately that will make the audience want to continue to listen to you (e.g. 'What I'm going to tell you today will fundamentally change the way this firm treats its clients').
- Contain a preview of what you're going to talk about (e.g. 'in my talk today I will explain what needs to be done in order to increase the firm's profits by 100 per cent in the coming year').
- Show appreciation and respect to the audience (e.g. 'I'd like to thank X for inviting me to come here today. I must say I've been very impressed by how friendly and professional everyone here is.').

21.2.2 Middle

In the middle of your speech you should present and develop your main points:

- The middle of your presentation should be divided into a few manageable sections, each including arguments, examples and supporting statistics.

- These should be presented logically so that each point you make leads naturally to the next point (see checklist).
- Use verbal tagging. This is a technique in which you use a neat mental image that summarises your main points. Winston Churchill's use of the phrase 'iron curtain' is an excellent example of this technique. In a presentation on a particular area of the law, one might say something like:

So, as you see, the present law is like a dam with holes in it. The law reforms the government is proposing will plug those holes.

End

21.2.3

The end of your presentation should be used to summarise the main points that you have made:

- You should signal to the audience that you are coming to the end of your presentation. If anyone has fallen asleep, the words 'and finally' or 'in conclusion, I'd like to say' will wake them up.
- Summarise the points you have made. Show how they support the main theme of your presentation.
- End on a high note. Say something that the audience will remember – an insight based on the theme of your presentation ('Remember this. All this points to one thing. That is . . .') or a call to action ('This shows very clearly the need for us to . . .'). Never end weakly with words like, 'Well, that's about it I suppose'.
- Invite questions from the floor. Deal with all questioners with respect and answer all questions fully, no matter how ridiculous they are.

CONTENT

21.3

The techniques you use to make and illustrate your points can be decisive as to whether you persuade or alienate your audience. Much will depend on the nature of your audience and subject. Here are some useful tips:

- Use terms that the audience can relate to and agree with. People like to hear stated in general terms what they already believe in a particular connection. They feel justified in their beliefs. A bond between the speaker and the audience is established. Relate your arguments to things that matter to the audience.
- Relate the points you make to the main theme of the presentation. The separate points should contribute to the whole.

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WHAT TO AVOID

21.5

The following should be avoided:

Waffle. Waffle is talking in a vague or trivial way. Your audience will lose patience with you rapidly if you indulge in it. If you have nothing more to say, stop.

Truisms. A truism is something so obvious that it is not worth repeating ('war is a bad thing').

Misinformation. If you are unsure about the truth or accuracy of a statistic or other piece of information, avoid using it. Someone is bound to notice if you use it.

Assertion. Do not state that something is true without backing it up with evidence.

Contradictions. A presentation that contains inconsistencies can be easily dismissed as being poorly thought-out. It is also vulnerable to attack. Obvious factual inconsistencies should be easy to remove. Where contradictions exist in the underlying principles on which your speech is based the position is more complex. In such a situation, if the contradiction is really unavoidable, the best course is to soften the degree of contradiction or even point out and explain the contradiction.

Mumbling. Always speak clearly, project your voice and try to appear self-confident. If you appear to be doubtful about what you are saying you can hardly expect to persuade your audience.

Unnecessary apologies. Don't apologise for what you are saying. Never say things like 'I'm sorry if this is a bit boring, but . . .' If even you – the speaker – find it boring, why should the audience bother to listen to what you are saying?

SUGGESTED LANGUAGE

21.6

Beginning

21.6.1

Introducing yourself

Good morning/afternoon/evening. I'm/my name is . . . I'm going to speak to you today about . . .

Establishing rapport

It's very nice to see so many people here. I must say I've been impressed at how friendly and professional everyone here is . . .

OR

As all of us involved in the business of . . . know, this question of . . . is one of the biggest challenges facing the business.

Thanking people

I'd like to thank X for inviting me here today.

OR

I'd like to thank X who's done a great job of getting us all here today/organising this event . . .

Introducing theme of presentation

In my talk today I'm going to show that . . .

OR

I'm going to talk today about the important new developments in . . . I know a lot of you will have heard something about them and will be thinking 'how does this affect me exactly?'

Make people want to listen to what you have to say

In my talk today I will explain what needs to be done in order to increase the firm's profits by 100 per cent in the coming year.

Giving a preview of the points you are going to make

I'm going to make a couple of points/three/four/five points today. Briefly, these are . . .

21.6.2 Middle

Introducing a point

Now, the first point I'd like to make this evening is . . .

Introducing a controversial point

Many people blindly assume that X is the case. The truth of the matter is rather different. Let me explain why . . .

Moving from one point to another

And that brings me neatly to the next point I'd like to make, which is . . .

Introducing an example or statistic

Now, a great deal of research has been done into this matter, and X Institute – which as you know is the world's leading research body in this area – has recently produced a report that most experts agree is definitive. I have a copy of it here. On page 12, the report states categorically that . . .

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21.7

CHECKLIST**Preparation**

- Consider your audience. What are they interested in? What do they need to know? What is the best way of presenting it to them?
- Prepare the room in which the presentation is to be given. Is it big enough? Does it have all the equipment you need (e.g. flipchart, computer terminals, microphone, overhead projector, television/video)?
- Consider what visual aids you will be using (e.g. powerpoint presentation, transparencies, slides, handout materials). Make sure they will actually improve your speech and are not simply distractions.
- Place your materials in the order you need them to be in for the presentation.

Beginning

- Make an impact – say something that will make the audience want to listen to you.
- Give a preview of the argument you are going to present.
- Establish a relationship with the audience. Thank anyone who should be thanked. Use humour if appropriate.

Middle

- Divide speech into a few manageable points.
- Place them in a logical order. For example, when discussing a problem:
 - What's the problem?
 - What are we currently doing about it?
 - Why isn't this working?
 - What should we be doing about it?
- Demonstrate how each point contributes to the main theme of the presentation.
- Use verbal tagging.

End

- Indicate that you have reached the end part of your presentation ('and finally').

- Summarise the key points of your presentation.
- End with a clear, decisive statement.

Dealing with questions

- Show respect to the questioner, however stupid or aggressive the question.
- Always answer the question in sufficient detail.

Throughout

- Project your voice so that everyone can hear you.
- Maintain eye contact with your audience.
- Use visual aids to illustrate your points. Do not use them excessively.
- Try to avoid contradicting yourself.
- Do not waffle.
- Do not assert that something is true without backing it up with evidence.

PRESENTATION EXERCISE

21.8

Exercise instructions

Form a group of at least four people. Split the group into two straight lines facing each other. Pair each person with the person opposite.

Everyone on the left side of the room then speaks for two minutes about one of the topics below. After all the people on the left side have spoken, it is the role of their opponents on the other side of the room to try to contradict, disagree and find fault with their opponent's speech. No one need speak for longer than two minutes. All may use notes, but do not simply read them out.

The game is then repeated with the left and right sides of the room switched over. Choose from any of the following topics, or one of your own:

If I ruled the world . . .

I love mobile phones . . .

If I could go back to school . . .

Yesterday, all my troubles seemed . . .

Beware of . . .

What I hate most is . . .

My favourite toy as a kid was . . .

This government is actually quite good . . .

Modern music is just noise . . .

Life was better in the old days . . .

Fast food just tastes of cardboard . . .

Tips for participants

- Try not to read your notes word for word.
- Be natural. Speak in your normal voice.
- Focus your rebuttal of your opponent's speech on their actual words – respond to what they say. If, for example, they argue that their favourite toy was a doll, it is more effective to focus on the possible drawbacks of dolls as toys than to suggest that their favourite toy was in fact a teddy bear.
- Project your voice effectively so that the audience can hear you, and try to look up at your audience rather than read from your notes.

CONSIDERATIONS

22.1

Most lawyers use the telephone many times during a typical working day. There is nothing especially different about using English on the telephone to using any other language on the telephone. However, there are a number of common phrases that people tend to use when speaking on the telephone. Knowing what these are, what they mean and how they are used should help make communication easier.

One of the particular problems with telephoning is that you cannot see the person you are speaking to. You therefore do not have the benefit of the nonverbal clues given by body language, which assist communication in face-to-face situations. This makes it especially important for both parties to speak clearly and use simple terms.

An additional consideration for lawyers is that what is said over the telephone is likely to be noted down and recorded in a case file by the person to whom you are speaking. You should do the same. It is therefore important that you do not accidentally reveal something about your client's case that should be kept confidential, or say anything that might be misunderstood. If you are unsure, write a letter, fax or email instead. Always make a note of the contents of all discussions with other lawyers over the telephone immediately after the call is made – in that way, if the other lawyer has misunderstood what you have said, you have the evidence to show that this is the case and put the matter straight.

SUGGESTED LANGUAGE

22.2

There are a number of phrases that are only used when telephoning. Some examples are contained in this dialogue:

RECEPTIONIST: Hello, Smith Ltd. How can I help you?

JUAN RAMIREZ: This is Juan Ramirez (from . . .). Could I speak to Clare Peters please?/Could I have extension 736?

RECEPTIONIST: Certainly Mr. Ramirez, hold on a minute, I'll put you through . . .

CLARE PETERS' OFFICE: Tim Brown speaking.

JUAN RAMIREZ: Hello. This is Juan Ramirez calling. Is Clare in?

TIM BROWN: I'm afraid she's out at the moment/in a meeting/with a client/not taking any calls/on holiday until Thursday/on a business trip [etc]. Can I take a message?

JUAN RAMIREZ: Yes, this is Juan Ramirez from . . . Could you ask Clare to call me as soon as she gets a chance? My number is +34 9 456 8965. I need to talk to her about the Statchem case, it's urgent.

TIM BROWN: Could you repeat the number please?

JUAN RAMIREZ: Yes, that's +34 9 456 8965 and my name is Juan Ramirez.

TIM BROWN: Could you tell me how you spell 'Ramirez'?

JUAN RAMIREZ: It's R-A-M-I-R-E-Z.

TIM BROWN: Thank you Mr Ramirez. I'll make sure Clare gets this ASAP.

JUAN RAMIREZ: Thanks, bye.

TIM BROWN: Bye.

The language used during telephone calls is usually informal and differs in some respects to everyday English. Here are some typical language functions and suggested language.

Introducing yourself

This is Anna Lindgren.

OR

Anna Lindgren speaking.

OR

Anna Lindgren here.

Asking who is on the telephone

Excuse me, who is this?

OR

Can I ask who is calling, please?

OR

[when putting a call through to someone] Who shall I say is calling, please?

Asking for someone

[formal] May I speak to . . . ?

OR

[informal] Can I speak to . . . ?

OR

[very informal] I need to speak to . . .

OR

Is . . . in? [informal phrase meaning 'is . . . in the office?']

Connecting someone

Hold on a minute, I'll put you through. [put through – phrasal verb meaning 'connect']

OR

Can you hold the line?

OR

Can you hold on a moment?

OR

I'm just connecting you now.

How to reply when someone is not available

I'm afraid . . . is in a meeting at the moment/is with a client/is out of the office/is not available at the moment.

OR

[when the extension requested is being used] The line is busy.

Asking for someone else

OK. Is . . . there by any chance?

OR

I see. Perhaps I could speak to . . . instead?

OR

Could I have extension 971 instead?

Offering to help when the requested person is unavailable

I'm afraid . . . is not available/is out of the office/is in a meeting with a client. Can I help you?

Offering to connect the caller to someone else

Would you like to speak to . . . he/she also deals with these issues?

OR

I'm sure . . . could help you with this. Hold the line and I'll put you through.

Explaining why you're calling

I'm calling about . . .

OR

I wanted to speak to . . . about . . .

OR

It's about the . . .

OR

I wanted to ask about . . .

OR
I need some advice on . . .

Taking a message

Can I take a message?
OR
Would you like to leave a message?

Leaving a message

Perhaps you could tell . . . I called and ask him/her to call me back on [give number]. I'll be in the office until . . .
OR
Could you tell . . . that I called. I'll try him/her again tomorrow.

Clarifying that your number has been noted correctly

Perhaps you could just read the number back to me?

Stressing importance

Please tell . . . that this is an urgent matter and I need to hear from him/her . . .
OR
It's crucial that I hear from . . . no later than . . .

Stating a deadline

I need to hear from . . . by . . . because . . .

Concluding the call

OK. Thanks for your help. Bye . . .
OR
OK. Many thanks. Bye . . .

22.3

LEAVING A MESSAGE ON AN ANSWERING MACHINE

Occasionally, there will be no one available to answer the telephone and you will need to leave a message. Here is an outline that covers all the information the person being called might need.

Introduction

Hello, this is Suzanne Dubois.
OR
[more formal] My name is Suzanne Dubois.

OR

[if you know the person well] Hi . . . Suzanne here. How are you?

State the time of day and the reason for calling

It's 11am on Tuesday 6 November. I'm phoning [calling, ringing] to find out if . . . /to see if . . . /to let you know that . . . /to tell you that . . .

OR

[when replying to a previous telephone message] I got the message you left for me. Thanks for calling. You asked about . . . The answer is . . .

Make a request

Could you call [ring, phone] me back?

OR

Would you mind calling me back?

Leave your telephone number

My number is . . .

OR

You can reach/call me at . . .

State a good time to call (if appropriate)

The best time to get hold of me is . . .

OR

I'll be on that number until . . .

OR

[indicating times to avoid] I'm in a meeting from 2 to 4pm but you can get hold of me before or after that.

End message

Thanks a lot, bye.

OR

I'll talk to you later, bye.

MAKING PEOPLE SPEAK MORE SLOWLY

22.4

Native English speakers, especially business people, tend to speak very quickly on the telephone. They may also use slang and jargon that you may not be familiar with. These factors can cause difficulties for non-native speakers of English. Here are some tactics you can use to make people speak more slowly on the telephone:

- Immediately ask the person to speak more slowly.
- When taking note of a name or important information, repeat each piece of information as the person speaks. By repeating each important piece of information or each number or letter as they spell or give you a telephone number you automatically slow the speaker down.
- If you have not understood, do not be afraid to say so. Ask the person to repeat until you have understood.
- If the person does not slow down, begin speaking your own language! A sentence or two of another language spoken quickly will remind the person how lucky they are that they do not need to speak a foreign language to communicate. Used carefully, this exercise in humbling the other speaker can be very effective.

Exercise answer key



Alternatively, visit the Companion Website to access the questions and answers to the various exercises.

EXERCISE 1

- 1 The parties signed **the** contract today after having discussed **the** price.
- 2 The lawyer about whom I spoke arrived at **the** meeting too late to advise about **the** amount of damages **the** company could get.
- 3 If there is **a** telephone call for me about **the** case, put it through.
- 4 The client said that Roggins was **an** inefficiently run and unprofitable company.
- 5 The mobile phone has revolutionised **the** way in which **the** firm does business.

EXERCISE 2

- 1 Ten units must be delivered **to** the buyer **by** 30 November.
- 2 This agreement can be terminated **on/upon/by** giving not less than 14 days' notice **in** writing.
- 3 Rent will be paid **in** accordance **with** this agreement.
- 4 This is an agreement **between** the parties to the contract.
- 5 The goods are to be moved **into** the defendant's warehouse no later **than** 28 August.

EXERCISE 3

- 1 I went to the office very early this morning and did not see **anyone** there.
- 2 It is important that **someone** be there to welcome Mr Jones when he arrives at the airport tomorrow evening.
- 3 These rules are very clear. Therefore **no one/nobody** should be in any doubt as to what they mean.
- 4 If you feel that the issues Mr Smith wants you to resolve are outside your field of expertise, don't hesitate to pass **his** case to me.
- 5 The lawyers in that firm are rather old-fashioned in **their** approach. It's time for **them** to modernise.

EXERCISE 4

Nouns	Adjectives
(1) defect	defective
acceptance	(2) acceptable
(3) restoration	restorable
reliance	(4) reliable
(5) requirement	requisite

EXERCISE 5

- 1 My client accepts that he is **solely** responsible for the difficult financial circumstances in which he finds himself.
- 2 This clause is not **legally** enforceable.
- 3 The speaker droned on **tediously** for over two hours.
- 4 We should be grateful if the documents were issued **expeditiously**.
- 5 The proposition, though **superficially** attractive, was flawed.

EXERCISE 6

- 1 Our staff (is/**are**) divided over the proposed management changes.
- 2 Our staff (**consists**/consist) of skilled people from many different backgrounds.
- 3 The committee (have/**has**) decided to approve the amended proposal.
- 4 The majority of our lawyers (is/**are**) fluent in English.
- 5 The group (thank/**thanks**) all those people who have helped it to succeed.

EXERCISE 7

In 1989, Statchem **opened** (insert correct form of verb 'to open') its first chemical plant in Thailand. Two years before this the company **had begun** (insert correct form of verb 'to begin') negotiations with Kemble Inc., but these eventually **fell through** (insert correct form of phrasal verb 'to fall through'). At about the same time, during the mid to late eighties, Statchem **was involved in** (insert correct form of phrasal verb 'to be involved in') the development of plastics technology and **spent** (insert correct form of verb 'to spend') considerable sums of money on research and development. Statchem **hoped** (insert correct form of verb 'to hope') that this investment would result in an increased market share going into the new decade.

Unfortunately, this strategy failed **to pay off** (alter phrase 'fail to pay off' as appropriate). Due to the onset of a global recession, the market **shrunk/shrank** (insert correct form of verb 'to shrink') and as a result all the money and effort that Statchem **had put into** (insert correct form of phrasal verb 'to put into') the project **went to waste** (insert correct form of verb 'to waste').

EXERCISE 8

- 1 We **should/would** be grateful if you **would** send the documents to us.
- 2 You **should** insert a clause dealing with that issue if you want to avoid uncertainty.
- 3 We were advised that the goods **would** arrive on 20 May 2002.
- 4 We **should/would** certainly help you if we **could**.
- 5 **Would** you mind answering the telephone?

EXERCISE 9

- 1 **Were** I to suggest this course of action, it is unlikely that it would be accepted.
- 2 The committee recommends that he **face** (insert correct form of verb 'to face') an enquiry.
- 3 We think it best that the machinery **be** (insert correct form of verb 'to be') tested by an expert.
- 4 We would be happier **were** you to agree to reduce the price by 20%.
- 5 If we **were** to reduce the price, we would expect you to accept a penalty for late payment.

EXERCISE 10

- 1 The corporation **(d) wrote off** about \$10,000 in unpaid debts last year.
- 2 A number of members of staff had to be **(a) laid off** due to the sudden downturn in the company's profitability.
- 3 Unfortunately, the partners failed to **(j) adhere to** the agreement they had reached.
- 4 We do not want to **(h) resort to** court proceedings, but we may have to do so if the debtor fails to pay the money he owes us.
- 5 I do not **(g) object to** your leaving the office early on Friday, provided you finish your work before you go.

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EXERCISE 13

- 1 No variation of this agreement (or any document entered into pursuant to this agreement) shall be valid unless it is in writing and signed by or on behalf of each of the parties hereto.
- 2 The purchaser and the seller agree as follows: (1) the goods will be sold for the sum of four hundred pounds (£400) per unit; (2) delivery will take place on 4 August 2003; and (3) payment will be made in cash no later than 28 August 2003.
- 3 Dear Sirs

Thank you for your letter of 12 May. With regard to your contention that our client is in breach of his agreement with your client, it is clear that this is not the case. Your letter of 3 February to our client constitutes a clear waiver of paragraph 3(b) sub-paragraph b of the agreement between our respective clients dated 9 June 2001.
- 4 He said, 'it appears that what the judge said was, "I will not accept this application unless it is made in the proper form", and not "I will not accept this application under any circumstances", as we had previously been told', for which information we thanked him.
- 5 You said – or at least this is what the report states – 'You can all go to hell!' Do you accept, first of all, that you made this comment, and, if so, do you not think that it was a highly unwise comment for you to have made?

EXERCISE 14

- 1 The parties (j) **hereto** agree that this contract shall continue for a period of two years from the date of execution (e) **hereof**.
- 2 . . . and (b) **whereas** the Purchaser is desirous of acquiring from the Vendor the Goods which form the subject-matter of this contract . . .
- 3 The (h) **above-mentioned** provisions shall not apply if the parties agree to waive them.
- 4 The specifications of the Products are set out in the clauses (d) **hereinafter** appearing.
- 5 That was a case (f) **wherein** the judge ruled that liability could not be excluded in all circumstances, but that limitations might be permissible.
- 6 The provisions contained (g) **herein** shall be construed in accordance with the laws of England and Wales.
- 7 Any dispute arising (c) **herefrom** shall be resolved in arbitration.

- 8 (a) heretofore** all disputes between the parties have been resolved amicably.
- 9** A copy of the lease is enclosed **(i) herewith**.

EXERCISE 15

Model answers:

- 1** By signing this document you agree to relinquish any right to bring claims in respect of any breaches.
- 2** Either party may terminate this agreement in the event that the other party becomes insolvent.
- 3** Party A agrees to indemnify Party B in respect of any claims relating to the distribution or sale of the products.
- 4** Party A must pay all invoices sent by Party B in full within 30 days of receipt at Party A's depot of the goods to which such invoices relate. In the event that any invoice remains unpaid, in whole or in part, following the expiration of the specified period, Party B is entitled to add penalty interest at the rate of 20% to the unpaid sums.
- 5** This agreement shall remain in force for a period of two years from the date of signature and shall thereafter be renewed for further successive periods of two years unless terminated by either party under the provisions of clause 5 of this agreement.

EXERCISE 16

- 1** Even if the company sells the product, if it does not usually sell this particular product in the usual course of business it **cannot** ~~may not~~ be held liable.
- 2** **Historically**, the caution of the legal temperament, as well as the desire for certainty ~~historically~~ has accounted for the slow pace of change in the law.
- 3** **Unless the lessor consents to it**, no drilling work shall be carried out on this land within 50 metres of any residence currently situated on said land ~~without the lessor's consent~~.
- 4** This lawyer, said the client, is the best trial advocate he had ever had working on one of his cases.
- 5** John drafted the contract for the client during the meeting itself and **the client** ~~he~~ then read it through carefully.

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- 4 In what part of a contract might one find the meanings of certain terms used repeatedly in the contract? **In the definitions section.**
- 5 What name is given to types of clauses routinely inserted into commercial contracts, which deal with the way in which the contract is governed? **Boilerplate clauses.**
- 6 What is the name given to a situation in which one party agrees not to insist on part of the agreement being carried out in the manner originally agreed? **Waiver.**
- 7 What is the 'literal' approach to contract interpretation? **This approach is based on the idea that the meaning and effect of a contract or piece of legislation should be determined solely from the words of the text itself and not from any external evidence.**
- 8 What is the effect of the *contra proferentem* rule? **This rule provides that if an ambiguity in a contract cannot be resolved in any other way then it must be interpreted against the interests of the party that suggested it.**
- 9 When should one interpret a word in a contract differently from the ordinary meaning of that word? **Where the ordinary meaning of a word leads either to absurdity or inconsistency with the rest of the document, the meaning should be modified in the light of the intentions of the parties to avoid such absurdity or inconsistency; and technical words should be given their technical meanings.**
- 10 Why is the phrase *inter alia* often used in relation to lists in contracts? **To avoid the presumption that the list is exhaustive.**

EXERCISE 22

- 1 The consent of Remington Bank plc (a) **must** be obtained before the share transfer (b) **may** proceed.
- 2 The parties intend that this agreement (c) **may** signal the beginning of a long and fruitful cooperation between them.
- 3 The Seller (d) **must** deliver the goods to the Buyer no later than 15 September 2009.
- 4 It is contemplated that the parties (e) **may** agree to further purchases of Product A in the future.
- 5 This information constitutes a business secret. Therefore, the Distributor (f) **may not** disclose it to third parties.

- 6 Since the firm does not have relevant expertise in that area of law, it (g) **cannot** handle this case.
- 7 We (h) **will** contact the Vendors as soon as we have received the relevant information.
- 8 The question of the level of fees to be paid (i) **shall** be agreed between the parties and it is possible that performance-related bonuses (j) **may** also form part of the remuneration package.

EXERCISE 23

- 1 accept, **perform**, ratify, do
- 2 requirement, stipulation, **obligation**, liability
- 3 **occur**, arise, be, terminate
- 4 choice, power, freedom, **discretion**
- 5 cancel, revoke, **rescind**, resign
- 6 other, remaining, **outstanding**, unperformed
- 7 put back, refer, **defer**, postpone
- 8 **mutatis mutandis**, per se, pari passu, inter alia
- 9 **securities**, holdings, investments, transactions
- 10 **interested**, a member, engaged, mired
- 11 carried out, carried in, **carried on**, operated
- 12 discussion, briefing, talks, **consultation**
- 13 **particulars**, specifications, components, aspects
- 14 indicates, proves, **warrants**, promises
- 15 total, combination, sum, **aggregate**
- 16 paid, **incurred**, expected, reimbursed
- 17 forego, defer, deny, **waive**
- 18 **remedies**, redress, duties, wrongs
- 19 dealings, transactions, **affairs**, situation
- 20 occurrence, circumstance, negligence, **omission**

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- 4 The meeting was adjourned to another day since one of the directors was indisposed.
- 5 I would recommend that you seek legal advice about the procedure.

EXERCISE 28

Model answer:

Dear Ms Connolly

Thank you for your email, in which you detailed the circumstances of your accident and enquired about the prospects of securing compensation.

It seems from your email that the fundamental cause of this accident was that the lawnmower was not in good working order when you used it. In other words, the checks carried out by Handyman Ltd were not sufficiently thorough.

I note that you have contacted both Gardening Solutions Ltd and Handyman Ltd, and that both deny liability, effectively blaming the other. In fact, the court's decision in a recent case involving an accident similar to yours means that this tactic can no longer be used. In that case, both the company that loaned the tool to the tool-hire company and the tool-hire company itself were found to be at fault by the court, and each had to pay a proportion of the compensation due to the customer.

On the face of it, therefore, you have a viable claim to pursue against both Gardening Solutions Ltd and Handyman Ltd. The only problem I can foresee is as to whether the 'rough terrain' of your garden might have contributed to the accident happening. Briefly, if your lawn is unusually rough then Gardening Solutions and Handyman might be able to argue that it was unreasonable for you to have used the lawnmower on it.

As to the amount you can expect to recover if you are successful, it should be possible to obtain compensation for any specific losses you suffered as a result of the accident (i.e. any loss of earnings, medical expenses, and travel costs specifically related to the accident). You will need to present documentary evidence of such losses (e.g. receipts, earlier payslips, etc.). In addition, you should be able to recover a sum compensating you for the injuries suffered. It will be necessary to obtain a medical report from your doctor, detailing the extent of your injuries and the likely prognosis, for this purpose.

The first step necessary to proceed with your claim would be to write formally to both companies outlining the nature of your claim, asking them to accept that they are responsible and must pay compensation to you, and indicating that court proceedings will be taken if they do not. We would also need to obtain a copy of the document to which you refer in your letter, as well as finding out their insurance details.

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Swedish. During the course of my training contract I have handled a number of important litigation cases on my own, and have particular experience in insolvency matters. I have also co-written articles on recent insolvency cases which have appeared in Legal News, and have assisted in creating a library of litigation precedents for in-house use at my present firm.

I would be grateful if you could send me an application form and further information about the post currently available. If you require any further information, I can be contacted by email on gillian.templeman@aardvark.co.uk or by telephone on 056 768 9221.

Yours sincerely

EXERCISE 31

Oral exercise only – no answer given.

EXERCISE 32

Formal equivalent	Colloquial expression
committed to prison (1)	sent down
dismiss him (2)	let go
directly/honestly (3)	straight up
served a prison sentence (4)	done time
a complete mess (5)	dog's breakfast
in a rush/lack time (6)	pushed
wait/pause temporarily (7)	hold your horses
proceed directly to the matter at hand (8)	cut to the chase
in brief (9)	in a nutshell
understand the general position (10)	get the drift

EXERCISE 33

- 1 Trandex Apartments Ltd is bringing court proceedings against Arturo Creations Ltd:
 - a. because Arturo Creations Ltd has allowed significant arrears of rent to build up.
 - b. because of non-payment of rent.**
 - c. because the arrears of rent have now reached £20,000.
 - d. because arrears have built up over a period of 14 months.
- 2 The judge wants to know:
 - a. whether Arturo Creations Ltd intends to defend the proceedings.**
 - b. whether Arturo Creations Ltd accepts the figures set out in the statement of claim.

- c. whether there is in the court file a copy of the tenancy agreement.
 - d. whether the case has been settled.
- 3** The reason the rent was not paid was:
- a. the costs involved in market repositioning.
 - b. lack of orders for the defendant's products.
 - c. intense competition.
 - d. cashflow problems caused by difficult business conditions.**
- 4** A suspended order will be made, according to which:
- a. the arrears will be paid off in monthly instalments over the course of one year.
 - b. the arrears will be paid off in 10 instalments over a period of two months.
 - c. the arrears will be cleared within one year.**
 - d. a sum of £5000 will be paid immediately and the rest on 5 August.
- 5** The judge's point about the claimant's costs is that:
- a. the defendant's lawyer should agree with the amount claimed as costs.
 - b. the court should have received a schedule of costs.**
 - c. the schedule of costs should be attached to the draft order.
 - d. The defendant should have received a schedule of costs.

EXERCISE 34

- 1** Stephen Bains wrote to Global Corporate Solutions in order to:
- a. secure transfer of the domain names for his client.**
 - b. advise that the company would be sued.
 - c. discuss transfer of the domain names.
 - d. indicate that he was instructed by London Institute.
- 2** Global Corporate Solutions' attitude to Mr Bains' letter was:
- a. that they would be willing to transfer the domain names.
 - b. that they would not be willing to transfer the domain names.
 - c. that they felt the position was complicated.
 - d. they might be prepared to transfer the domain names on certain terms.**
- 3** Mr Bains states that trademark infringement has occurred because:
- a. the One in a Million case is authority for that notion.
 - b. the case at hand involves cyber-squatting, and there is a strong likelihood of confusion between the registered name and the trademark of the London Institute.**
 - c. because London Institute has had trademark protection for decades.
 - d. this is a good negotiation tactic.

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Test yourself by accessing these glossaries on the Companion Website.

EASILY CONFUSED WORDS

Many words in English sound and look alike but can have radically different meanings. It is important to be aware of the more common of these false pairs – the consequences of confusing them could be disastrous. If in doubt, consult a good dictionary.

The following is a non-exhaustive list of the most common examples.

Advice is a noun that means guidance or recommendation about future action (e.g. 'friends always ask his advice').

Advise is a verb that chiefly means to recommend a course of action (e.g. 'we advised him to go home').

Affect is a verb that means to make a difference to (e.g. 'the pay cuts will affect everyone').

Effect is used both as a noun meaning a result (e.g. 'the substance has a pain-reducing effect') and as a verb meaning to bring about (a result), (e.g. 'he effected a cost-cutting exercise').

Anonymous is an adjective which refers to a name that is not known or not made known (e.g. 'he wrote anonymously in the newspaper') or which means having no outstanding or individual features (e.g. 'the building looked rather anonymous').

Unanimous is an adjective meaning to be fully in agreement (e.g. 'the decision was made unanimously').

Ante means 'before' (e.g. 'ante-meridiem').

Anti means 'against' (e.g. 'anti-nuclear').

Appraise means to assess something (e.g. 'we appraised the services offered by the company').

Apprise is to inform somebody about something (e.g. 'he apprised me of the news').

Assent means approval or agreement (e.g. 'her proposal met/received the assent of all present').

Ascent means an instance of going up something (e.g. 'the first ascent of the Matterhorn').

Aural refers to something which relates to the ear or sense of hearing.

Oral means spoken rather than written.

Biannual refers to something that occurs twice a year.

Biennial refers to something that occurs every two years.

Canvas is a type of material.

Canvass means to seek political support before an election or to seek people's opinions on something (e.g. 'I canvassed her opinion on the matter').

Chance means: (1) the possibility of something happening (e.g. 'there is a chance that it might rain today'); (2) an opportunity (e.g. 'your chances are excellent'); and (3) the way in which things happen without any obvious plan or cause (e.g. 'we met entirely by chance').

Change means: (1) to make or become different (e.g. 'we'll change this provision of the contract'); (2) to exchange a sum of money for the same sum in a different currency (e.g. 'she changed her dollars into euros'); (3) to move from one thing to another (e.g. 'he changed jobs often').

Complacent means uncritically satisfied with oneself; smug.

Complaisant indicates a willingness to please others or to accept their behaviour without protest.

Compliment means politely congratulate or praise (e.g. 'he complimented her on her appearance').

Complement means to add in a way that improves (e.g. 'she selected a green sweater to complement her blonde hair').

Council means an assembly of people meeting regularly to advise on, discuss, or organise something.

Counsel means (1) advice or (2) a barrister conducting a case.

Credible means convincing or believable.

Creditable means deserving recognition and praise.

Curb means a check or restraint (e.g. 'curbs on public spending').

Kerb means the edge of a pavement (sidewalk) (e.g. 'the car's tyres scraped along the side of the kerb').

Defuse means to remove the fuse from an explosive device (e.g. 'the bomb squad defused the device').

Diffuse means spread over a wide area (e.g. 'the crowd gradually diffused').

Dependant is a noun that refers to a person who relies on another for financial support (e.g. 'she has three dependants').

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Loose means not fixed in place or tied up (e.g. 'a loose tooth').

Lose means to no longer have or become unable to find.

Omit means to leave something out (e.g. 'paragraph 3 should be omitted').

Emit means to discharge something (e.g. 'the factory emitted smoke').

Pedal is a noun meaning a foot-operated lever.

Peddle is a verb meaning to sell goods.

Practice is a noun meaning the action of doing something rather than the theories about it. Practice is also the spelling for the verb in American English.

Practise is the British English spelling of the verb (e.g. 'I need to practise my French').

Prescribe means to recommend the use of a medicine or treatment or to state officially that something should be done (e.g. 'the doctor prescribed a course of treatment').

Proscribe means to forbid or condemn something (e.g. 'the statute proscribes the use of dangerous chemicals').

Principal is usually an adjective meaning main or most important (e.g. 'the country's principal exports').

Principle is a noun that usually means a truth or general law used as the basis for something (e.g. 'the general principles of law').

Stationary is an adjective meaning not moving or changing (e.g. 'the car was stationary at the traffic lights').

Stationery is a noun meaning paper and other writing materials (e.g. 'the paper is kept in the stationery cupboard').

Story means a tale or account of something (e.g. 'we listened to his story with interest').

Storey means the floor of a building (e.g. 'the office was on the tenth storey of the building').

Tortious means having the nature of a tort, wrongful (e.g. 'he committed a tortious act and is therefore likely to be sued').

Tortuous means: (1) full of twists and turns (e.g. 'a tortuous route'); or (2) excessively complex (e.g. 'a tortuous case').

Unexceptional means not out of the ordinary (e.g. 'his performance in the examination was unexceptional').

Unexceptionable means not able to be objected to, but not particularly new or exciting (e.g. 'the hotel was unexceptionable').

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Amount to means: **(1)** to add up to something or result in a final total of something. For example, 'the overall costs amounted to well over €50,000'. **(2)** To be equal to or the same as something. For example, 'what they did amounted to a breach of contract'.

Appertain to (or 'pertain to') means to belong to something or be connected with something. For example, 'the duties appertaining to this position'.

Break down means: **(1)** to separate into different parts to make something easier to discuss, analyse or deal with. For example, 'the figures break down as follows . . .' **(2)** To fail. For example, 'negotiations between the parties have broken down'.

Break off means: **(1)** to stop speaking or to stop doing something before you have finished. For example, 'we had to break off the meeting'. **(2)** To separate something from something else using force, or for something to become separated in this way. For example, 'the handle of the cup just broke off'.

Break up means: **(1)** the splitting up of a company or an organisation into smaller parts. For example, 'the company was broken up into smaller concerns'. **(2)** The splitting up of a group of people. For example, 'the conference broke up into discussion groups'.

Call in means: **(1)** to request the return of something. For example, 'the bank has decided to call in the loan'. **(2)** To visit a place or person for a short time. For example, 'he called in at the office before going to court this morning'. **(3)** To telephone your office. For example, 'do you mind if I use your phone? I just want to call in and tell my assistant I'm running late'.

Carry on means to continue something. For example, 'the company carries on business as a garden furniture retailer'.

Carry out means to do something that you said you would do or that you have been asked to do. For example, 'the lawyer carried out his client's instructions carefully'.

Change over means to stop using one system or thing and start using another. For example, 'The Greeks have changed over to the euro'.

Consist in means to have something as its main or only feature. For example, 'the strength of this firm consists in its experienced litigation department'.

Consist of means to be formed from the people or things mentioned. For example, 'the team consists of a number of specialists in different areas.'

Cover up means to try hard to stop people finding out about a mistake, a crime or the true state of affairs. For example, 'the company attempted to cover up its trading losses by falsifying its accounts'.

Deal in means to do business, to make money by buying and selling a particular

product or kind of goods. For example, 'the company deals in computer hardware'.

Deal with means: **(1)** to do business regularly with a person or organisation. For example, 'we only deal with reputable suppliers'. **(2)** To talk to a person or organisation in order to reach an agreement or settle a dispute. For example, 'I like to deal with people I know I can trust'. **(3)** To solve a problem or carry out a task. For example, 'my lawyers dealt with the company sale very efficiently'. **(4)** To be about something. For example, 'this article deals with the issues raised by contractual waivers'. **(5)** To look after, talk to or control people in an appropriate way. For example, 'we sometimes have to deal with very difficult people in this job'. **(6)** To take appropriate action in a particular situation. For example, 'could you deal with this complaint?'

Depart from means to behave in a way that is different from what is usual or expected. For example, 'we have departed from usual practice due to the exceptional circumstances of the case'.

Dispose of means: **(1)** to get rid of or sell something that is not required. For example, 'the company disposed of many of its assets'. **(2)** To successfully deal with or finish with a problem. For example, 'there remains only the question of funding to dispose of'.

Draw up means: **(1)** to make or write something that needs careful planning. For example, 'my lawyers will draw up the contract'. **(2)** To bring something nearer to something else. For example, 'she drew up another chair in order to participate more easily in the discussion'. **(3)** To come to a stop. For example, 'the car drew up outside the office'.

Draw upon/on means to use something that you have or that is available to help you do something. For example, 'the company will draw upon its reserves of capital to finance the deal'.

Engage in means to be involved in something, to take part in something or to be busy doing something. For example, 'this company is engaged in the manufacture of steel tubes'.

Enlarge on/upon means to say or write more about something you have mentioned. For example, 'Would you care to enlarge on that point?'

Enter into means: **(1)** to begin or become involved in a formal agreement. For example, 'the parties entered into an agreement relating to a share sale'. **(2)** To begin to discuss or deal with something. For example, 'the company agreed to enter into negotiations'.

Entitle to means to give a right to have or do something. For example, 'the parties are entitled to assign the benefit of the agreement on giving notice in writing'.

Factor in means to include a particular fact or situation when you are calculating something or thinking about or planning something. For example, 'you must factor in labour costs when calculating the cost of the repairs'.

File away means to put papers, documents, etc. away in a place where you can find them easily. For example, 'I filed the papers away in the drawer'.

Gear to means to make or change something so that it is suitable for a particular need or an appropriate level or standard. For example, 'it is vital that we gear our service to our clients' needs'.

Gear up means to be prepared, ready and able to do something or to become or make ready and able to do something. For example, 'the firm must gear itself up to be able to cope with these large corporate transactions'.

Hand down means: **(1)** to give or leave something to a younger person or to pass from one generation to another as an inheritance. For example, 'this house has been handed down from generation to generation'. **(2)** To announce an official decision (particularly of a court of law). For example, 'the judge handed down a sentence'.

Hand over means: **(1)** to give somebody else your position of power or authority or to give somebody else the responsibility for dealing with a particular situation. For example, 'he handed over the position to his deputy when he retired'. **(2)** To give someone else a turn to speak when you have finished talking. For example, 'I'd like to hand over now to our guest speaker'.

Limit to means to make something exist or happen only in a particular place, within a particular group or for a particular purpose. For example, 'limited to industrial use'.

Object to means to say that you disagree with, disapprove of or oppose something. For example, 'we object to further changes being made to the agreement'.

Opt for means to choose something or make a decision about something. For example, 'many clients now opt for this service'.

Opt in means to choose to take part in something. For example, 'all staff members have the chance to opt in to a pension plan offered by the company'.

Opt out means to choose not to take part in something. For example, 'very few staff members have opted out of the company pension plan'.

Pass off means: **(1)** to pretend that something or somebody is something that they are not. For example, 'the company tried to pass off their copied product as the real thing'. **(2)** If an event passes off in a particular way, it takes place and is finished in that way. For example, 'the meeting passed off without any trouble'.

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hand with this'. **(4)** To write something down or make notes about something. For example, 'I've put down a few ideas which we can discuss during our meeting'. **(5)** To kill an animal because it is old or sick. For example, 'we had to have the horse put down because it was badly injured in an accident'.

Put forward means: **(1)** to suggest an idea or plan so that it can be discussed. For example, 'an idea put forward during the meeting'. **(2)** To suggest somebody as a candidate for a job or position. For example, 'three people put themselves forward as candidates'. **(3)** To move something to an earlier time or date. For example, 'the meeting's been put forward a few hours'.

Put in means: **(1)** to contribute money to something or pay money into a bank. For example, 'he put in €20,000 of his own money into the business'. **(2)** To contribute time or effort to something. For example, 'she put in a lot of hours on that case'. **(3)** To make an official request or claim. For example, 'I've put in a request for a pay rise'. **(4)** To include something in a letter or document. For example, 'you should put in a paragraph explaining the indemnity provisions to the client'.

Put off means to cancel or delay something. For example, 'we'll have to put off discussion of that issue until our next meeting'.

Reckon on means to rely on something happening. For example, 'we reckon on making a profit of €200,000'.

Reckon up means to add figures or numbers together. For example, 'the total comes to €200 if I've reckoned it up correctly'.

Refer to means: **(1)** to mention or talk about somebody or something. For example, 'please refer to paragraph 7'. **(2)** To describe or be connected to something. For example, 'paragraph 7 refers to the question of indemnities'. **(3)** To look at something for information. For example, 'I'll refer to the textbook to see if paragraph 7 will be valid'. **(4)** To send somebody or something to a different place or person to get help, advice or a decision. For example, 'the case was referred to arbitration'.

Report to: if you report to someone in a company or organisation, that person is responsible for your work and tells you what to do. For example, 'I report directly to the senior partner of the firm'.

Resort to means to make use of something, especially something bad or unpleasant, as a way of achieving something, often because no other course of action is possible. For example, 'he resorted to threats in order to obtain their agreement'.

Rest on means: **(1)** to depend on something. For example, 'our chances of winning this contract depend solely on price'. **(2)** To be based on something. For example, 'her argument seemed to rest on an incorrect assumption'.

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OBSCURE WORDS USED IN BUSINESS CONTRACTS

Here are some relatively obscure words that are often found in business contracts, based on British and American drafting standards.

Where the word in question is generally used to mean one thing in legal English and another in ordinary English (e.g. **furnish, provision, construction**) only the legal usage meaning is given.

Abet. Encourage or help someone to do something wrong. For example, 'the perpetrators were aided and abetted by the company representative'.

Abstain. To refrain from doing something. For example, 'members have the right to abstain from voting'.

Accrue. Acquire, gain. For example, 'it is anticipated that benefits will accrue to the company as a result of the cooperation agreement'.

Acquiescence. Consent that is implied from conduct. For example, 'the other party signalled their acquiescence by refraining from taking steps to protest'.

Adjudicate. Make a formal judgment on an undecided matter. For example, 'the court adjudicated on the case'.

Ambiguity. Uncertain or inexact meaning. For example, 'this clause is ambiguous and should accordingly be redrafted'.

Annexes. Relevant documents attached to a contract or other legal document for ease of reference.

Annually. Every year.

Annul. To declare a contract to be no longer valid.

Arbitrator. An independent person who is appointed by agreement between parties to a contract or by a court to hear and decide a dispute. The process is known as arbitration.

Assent. To agree or concur. For example, 'the company is prepared to assent to that proposal'.

Assign. **(1)** A person or corporation to which something is transferred (e.g. the benefit of a contract); or **(2)** to make an assignment. For example, 'the company and its successors and assigns'.

Barred. Prevented or forbidden. For example, 'the proposed claim is statute-barred'.

Binding. Legally enforceable. For example, 'this clause binds both parties'.

Breach. The infringing or violation of a right, duty or law. For example, 'Statchem have breached paragraph 14 of the contract by their actions'.

Clause. A sentence or paragraph in a contract.

Consent. Agreement or compliance with a course of action or proposal. For example, 'no assignment shall be valid unless both parties have given their consent in writing prior to the proposed assignment being made'.

Consignment. A delivery of goods. For example, 'the first consignment must be delivered on 14 April'.

Construction. Interpretation. For example, 'on proper construction of this clause, it appears to mean that assignment is not permitted under the contract'.

Construed. Interpreted. For example, 'paragraph 16 shall be construed in the light of the provisions of paragraph 17'.

Convene. To call, summon or assemble. For example, 'the parties convened in the meeting room'.

Correspondence. Letters, memoranda, notes, messages. For example, 'there has been considerable correspondence between the parties'.

Corresponding. **(1)** Communicating by exchanging letters; **(2)** comparable or equivalent to another thing (e.g. 'the corresponding obligations contained in this agreement').

Counterpart. **(1)** A document that exactly corresponds to the original. For example, 'a counterpart of this agreement shall be prepared'. **(2)** A person fulfilling a similar role in another organisation. For example, 'I will telephone my counterpart to ask about her client's position in relation to the case'.

Covenant. An agreement or a term in an agreement. For example, 'the covenants contained in the lease agreement'.

Deadlock. A situation in which no progress can be made. For example, 'the negotiations have reached deadlock'.

Default. Failure to fulfil an obligation. For example, 'the company has defaulted on its repayment schedule'.

Delegation. The grant of authority to a person to act on behalf of one or more others for agreed purposes. For example, 'the parties are entitled to delegate authority to subcontractors'.

Derogation means to deviate from something. For example, 'the company derogated from the agreement'.

Designated. **(1)** Officially give a particular name or status to (e.g. 'John was designated "Managing Director"'); or **(2)** appoint to a particular job (e.g. 'John was designated Managing Director').

Determine. To decide or resolve. For example, 'this issue shall be determined by means of the procedures which the company has established for that purpose'.

Detriment. Harm or damage. For example, 'the company has acted to its detriment in agreeing to a variation of the original contract'.

Discharge. To release from an obligation. For example, 'the parties shall be discharged from all liability once all the terms of the contract have been performed in full'.

Disclose. Make known, reveal. For example, 'the company disclosed certain information to the distributor'.

Dispose. To sell or transfer [property]. For example, 'the company had to dispose of some of its assets in order to pay its debts'.

Elect. Decide, opt. For example, 'the parties may elect to refer the matter to arbitration if the dispute cannot be resolved by other means'.

Enforce. To compel, impose or put into effect. Hence enforceable (capable of being enforced). For example, 'the terms of the contract can be enforced if necessary'.

Entice. Attract by offering something pleasant or beneficial. For example, 'the company tried to entice their rival's employees to come and work for them'.

Essence. Something intrinsic or essential. The essence of a contract means the essential conditions without which the contract would not have been agreed. For example, 'time is of the essence in this contract'.

Exclusive. Restricted to certain parties. Hence nonexclusive: not restricted to certain parties. For example, 'Bondark Ltd holds exclusive distribution rights in respect of the product in the defined territory'.

Execution. (1) The carrying out or performance of something (e.g. the terms of a contract); or (2) the signature of a contract. For example, 'the parties executed the contract'.

Express. Clearly stated. For example, 'the contract contains express warranties'.

Facilitate. To make easy or make easier. For example, 'implementation of the contract was facilitated by the assistance given by expert advisers'.

Fit. Suitable for a particular role or position. For example, 'the judge took the view that Mr Jones was not fit to run a public company'.

Fixture. An item, usually a piece of equipment or furniture, which is fixed into position.

Forbearance. The act of refraining from enforcing a debt. For example, 'the suppliers' forbearance in extending credit to the company meant that the company was able to continue trading'.

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more people) having the same specified relationship to each other; **(3)** shared by two or more people; **(4)** joint. For example, 'no assignment may take place without the parties' mutual agreement in writing'.

Nevertheless. In spite of that. For example, 'nevertheless, the contract remains invalid'.

Notice. Information or warning addressed to a party that something is going to happen or has happened; a notification. See also **due notice**. For example, 'any notice required to be served under this contract must be served in accordance with paragraph 18'.

Notwithstanding. Despite. For example, 'the parties went ahead with the deal notwithstanding Statchem's financial problems'.

Null. Invalid, having no legal force. For example, 'the contract is null [and void]'.

Omission. A failure to do something that one was supposed to do. For example, 'an omission may render the contract void'.

Onerous. Involving much effort and difficulty. For example, 'the duties laid upon the company are onerous'.

Pass. Transfer to or inherit. For example, 'the property passed to his successors'.

Prefer [charges]. To put forward for consideration by a court of law. Usually used with reference to criminal charges. For example, 'charges were preferred'.

Provenance. The origin or early history of something. For example, 'the provenance of this document is uncertain'.

Provision. A term or clause of a contract. For example, 'the contract contains provisions dealing with termination'.

Provisional. Made for present purposes and may be changed later. For example, 'a provisional agreement'.

Purport. Falsely claims to be. For example, 'a purported assignment is one made without the prior written agreement of both parties'.

Reasonable. **(1)** Fair and sensible; **(2)** appropriate in a particular situation; **(3)** fairly good; **(4)** not too expensive.

Rebut. Oppose by contrary evidence, disprove or contradict something. For example, 'this presumption can be rebutted on the production of evidence to the contrary'.

Reciprocal. Given or done in return, or affecting two parties to a contract equally. For example, 'the contract contains reciprocal obligations regarding payment'.

Recognise. To accept as legally valid. For example, 'the court refused to recognise the judgment made in the foreign court'.

Redemption. Return or payment of property offered as security for a debt. Redemption date is the date upon which this occurs. For example, 'redemption of the mortgage will take place when the last instalment is paid upon it'.

Redress. Legal remedy or relief. For example, 'the innocent party has the right to seek redress'.

Remedy. Any method available in law to enforce, protect or recover rights, usually available by seeking a court order. For example, 'the primary remedy is to claim damages'.

Render. Deliver, provide, present for inspection. For example, 'the company agrees to render the goods for inspection'.

Revoke. To cancel, annul, or withdraw. For example, 'we revoked the order we had placed'.

Solicit. Ask for or try to obtain something (e.g. business) from someone. For example, 'the employee is prohibited from seeking to solicit business from the company'.

Stipulate. Specify, require or demand. Hence stipulation. For example, 'the contract stipulates that all payments be made in US dollars'.

Stipulation. An essential term or condition of an agreement. For example, 'the contract contains a stipulation that all payments be made in US dollars'.

Successor. A person or corporation that inherits something (e.g. the benefit of a contract) from another person or corporation. For example, 'Statchem is the successor of Alfttech and accordingly now has the benefit of Alfttech's contracts with third parties'.

Sundry. Of various kinds. For example, 'telephones, televisions and sundry other appliances'.

Supersede. Take the place of, override. For example, 'this contract supersedes all previous agreements between the parties'.

Severance. The removal of one part of the contract from the rest of the contract without affecting the validity of the rest of the contract. For example, 'the severance clause seeks to ensure that the contract will not be rendered wholly invalid if one part of it is deleted'.

Term. (1) A substantive part of a contract which creates a contractual obligation. For example, 'one of the terms of the contract deals with delivery of the goods'.

(2) The period during which a contract is in force. For example, 'the term of this contract shall be five years from the date of execution'.

Transaction. An act or series of acts carried out in the ordinary course of business negotiations. For example, 'the company engaged in a number of transactions'.

Unenforceable. Not capable of being legally enforced, not legally binding. For example, 'this contract is unenforceable'.

Uphold. To confirm (e.g. the validity of a decision). For example, 'the appeal court upheld the decision of the lower court'.

Usage. (1) The action of using something or the fact of being used (e.g. 'a survey of water usage'). (2) The way in which words are used in a language (e.g. 'this word is no longer in common usage'.)

Vendor. Seller.

Venue. The place at which something occurs or is located. For example, 'the arbitration venue shall be the International Chamber of Commerce in Geneva'.

Void. Having no legal effect. For example, 'the contract is void due to lack of consideration'.

Voidable. Capable of being set aside. For example, 'the contract is voidable as a result of the other party's breach'.

Whereas. While. This word is often used in recitals in contracts. For example, 'Whereas the Company is the owner of certain intellectual property rights . . .'

OBSCURE PHRASES USED IN BUSINESS CONTRACTS

Here are some examples of standard phrases that are commonly encountered in business contracts based on British or American drafting standards.

Accord and satisfaction. The substitution and performance of a new set of obligations under a contract, by means of which the parties to the contract are released from their original obligations.

Actions, costs, claims and demands. A catch-all definition including court cases, costs, formal demands for payment, etc.

Act of God. An accident or event that arises independently of human intervention and that is entirely due to natural causes (e.g. an earthquake).

Aggregate amount. An amount calculated by combining different items.

Aggrieved party. 'Aggrieved party' is a term used to describe a party to the contract in a situation in which that party has the right to bring a claim in respect of breach of contract by the other party to the contract. See also **innocent party**.

An adverse effect. A harmful or prejudicial effect.

Annexed hereto. Attached to this document.

Arising out of. Resulting from.

As contemplated by this agreement. As intended by this agreement.

As hereinafter defined. As defined later in the contract. These words alert the reader to the likelihood that the contract contains a definitions section in which the words 'the Territory' will be given a defined meaning for the purposes of the contract.

As per . . . In accordance with . . .

At any time after the signature of this Agreement. Ever. The obligation is not time-limited.

Bear the costs of. Be responsible for paying the costs of.

By reason of. Because of.

Capacity to enter into and perform. Legal right to sign a contract so that it becomes legally enforceable and carry out the obligations it contains.

Circumstances beyond reasonable control. Circumstances that the party could not be expected to have any control over.

Collectively referred to herein. Referred to as a group of things in this contract.

Completion date. The date on which the main terms of the contract are carried out and ownership of goods is transferred from one party to another.

Construed in accordance with. Interpreted according to.

Defaulting party. A party to a contract who has defaulted on his or her obligations. See also **non-defaulting party**.

Defective part. A broken or faulty component.

Deliver up. Deliver, provide.

Discharge of contract/liability/obligation. The termination of a contract/liability or obligation, usually by performance.

Disclosure letter. A document in which the sellers of a company set out all the facts already revealed to the buyer, which breach the warranties contained in the contract. It is usual practice for the buyer then to agree that it cannot sue for breach of warranty caused by this disclosure.

Due notice. Proper notice; notice in accordance with the requirements of the contract and/or the law.

Due and owing. Owed; of money that must be paid by one party to another.

Duly authorised representative. Someone who has been given authority by one of the relevant parties to do certain things, which are usually things that will legally bind that party.

Duly organised and validly existing. (of a company) Organised according to the applicable company regulations, having proper legal status and not being bankrupt.

Duplicate contract. An exact copy of the original contract. See also **counterpart**.

During the currency of this Agreement. During the period of this contract.

Engaged in the business of. Involved in the business of.

Enters into this agreement. Accepts, signs this contract.

Except as expressly provided in this Agreement. Unless there is a clear statement to the contrary in some part of the contract.

Execution date. The date on which a contract is signed.

Execution of documents. The signature of documents so that they become legally enforceable.

Exhibits attached/annexed hereto. Particular relevant documents attached to an affidavit or statement as 'exhibits'.

Expiration of a time-period/limitation. When a time period/limitation has come to an end or run out.

Failure to perform . . . Failure to do something that was agreed to be done in the contract.

Finally settled by arbitration. Resolved by arbitration with no possibility of taking the dispute further in the event that one of the parties does not like the outcome.

From the date hereof. From the date this contract is signed.

Furnish with. Provide to (someone).

Give and execute all necessary consents. Provide all agreements that are required and sign and do all things necessary to ensure that they are legally enforceable.

Going concern. A viable, ongoing business which may, for example, be sold as such (therefore the sale price takes into account the value of the goodwill of the business) rather than as a sale of individual assets.

Hold harmless. Indemnify.

In any manner that the parties may determine. In any manner that the parties may decide.

In consideration of. As a contractually binding promise made in return for the promise made by the other party.

Incorporated herein. Contained in this contract or to be treated by the parties as contained in the contract.

Incur expenses/fees. To run up or make oneself liable to pay expenses or fees.

In lieu of. Instead of.

Innocent party. A party to a contract which has not defaulted on his or her contractual obligations in circumstances where the other party has defaulted.

In respect of/in respect thereof. Concerning.

In satisfaction of debts. In payment of debts.

Instrument in writing. A formal written legal document.

In witness whereof. 'To confirm my agreement to the terms of this contract'.

Legally binding. Legally enforceable.

Liable to the other. Responsible in law to the other.

Make good. Repair, replace or renew something.

Material breach. A serious breach of a major term of the contract.

Material term. A significant or important term of the contract.

Matters of a product liability nature. Matters relating to manufacturing defects in the products.

Mutual consent. Both parties agree (to a certain proposition).

Mutual covenants and agreements. Things both parties have agreed in the contract.

Negotiation, drafting and execution. All the stages of drawing up the agreement including negotiating it, writing it, and signing it so that it becomes legally enforceable

Non-defaulting party. A party to a contract that has not defaulted on his or her contractual obligations. Also known as the innocent party in circumstances where the other party has defaulted on his or her contractual obligations.

Notice of Default. A formal document advising a party to a contract that s/he has failed to do something required to be done under the contract.

Notice shall be deemed served . . . Notice shall be treated or regarded for the purposes of this contract as having been served . . .

Notified from time to time hereunder. Advised to the other party when necessary under the terms of this contract.

Of even date herewith/hereof. Made on the same date as this agreement.

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Ab initio (Latin): from the beginning. For example, 'this agreement is void *ab initio*'.

Ad hoc (Latin): made or done for a particular purpose. For example, 'an *ad hoc* tribunal was set up to deal with the claims'.

Ad hominem (Latin): to an individual's interests or passions; used of an argument that takes advantage of the character of the person on the other side.

Ad infinitum (Latin): endlessly; forever. For example, 'this case seems to have dragged on *ad infinitum*'.

Ad referendum (Latin): to be further considered. This often refers to a contract that has been signed although minor points remain to be decided.

Ad valorem (Latin): according to value (as opposed to volume).

A fortiori (Latin): more conclusively.

Annus et dies (Latin): a year and a day.

A priori (Latin): based on deduction rather than experience.

Bona fide (Latin): genuine, real. For example, 'a *bona fide* purchaser is interested in buying the company'.

Bona vacantia (Latin): property not distributed by a deceased's will and to which no relative is entitled on intestacy.

Caveat emptor (Latin): the buyer is responsible for checking the quality of goods before purchasing them (literally, 'let the buyer beware').

Circa (Latin): around or about: used for dates and large quantities; can be abbreviated to *c* or *c.*

Cognoscenti (Italian): people who are well informed about something. For example, 'the *cognoscenti* agree that this decision is unprecedented'.

De facto (Latin): in fact, whether by right or not. For example, 'she has acquired *de facto* control of the company'.

De jure (Latin): rightful, by right (e.g. a *de jure* claim to the territory).

Deus ex machina (Latin): an unexpected event that saves an apparently hopeless situation.

Éminence grise (French): a person who has power or influence without holding an official position.

Et al (Latin): and others. This is used as an abbreviation in bibliographies when citing multiple editorship or authorship to save the writer the trouble of writing out all the names. Thus, 'John Smith et al., *Textbook on Damages*'.

Ex aequo et bono (Latin): as a result of fair dealing and good conscience.

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For example, 'the court rejected her application. It ruled that she had no *locus standi* to make an application in these proceedings'.

Mea culpa (Latin) : my fault.

Modus operandi (Latin): a way of doing something. For example, 'his *modus operandi* was fascinating to watch'.

Mutatis mutandis (Latin): 'that having been changed which had to be changed' or 'with the necessary changes'. The phrase is used in contracts to indicate that a stipulation contained in one clause should also be applied in another part of the contract once the necessary changes have been made.

Obiter dictum (Latin): a remark made in passing. Something said by a judge while giving judgment that was not essential to the decision in the case but which may be of persuasive authority in future cases. For example, 'the judge said *obiter* that there did appear to be some authority for the argument the defendant had made'.

Pace (Latin): despite.

Pari passu (Latin): in equal step. This term is often seen in venture capital term sheets, and indicates that one series of equity will have the same rights and privileges as another.

Per annum (Latin): for each year. For example, 'the director earned £250,000 *per annum* before tax'.

Per capita (Latin): for each person.

Per se (Latin): by or in itself. For example, 'the government is not opposed to further European integration *per se*, but it does have certain concerns about the manner in which it is done'.

Persona non grata (Latin): a person who is not welcome somewhere.

Per stirpes (Latin): among families. Used by lawyers in connection with the distribution of inheritance.

Post eventum (Latin) : after the event.

Post mortem (Latin): after death. Generally used as a noun to describe the clinical investigation of a dead body.

Prima facie (Latin): on the face of things; accepted as so until proved otherwise. For example, '*prima facie* you appear to have a reasonable case, although I will need further information before giving an informed opinion on its merits'.

Procès-verbal (French): an informal record or memorandum of international understandings resulting from negotiation.

Pro rata (Latin): proportional; proportionally.

Pro tanto (Latin): only to that extent. For example, 'the judge made an order that payments should be made for a period of one year, *pro tanto*'.

Quantum meruit (Latin): as much as he has deserved. In contract law it means something like the reasonable value of services and is imposed to avoid the unjust enrichment of one party at the expense of another. It applies: **(1)** where a person employs another to do work without agreement as to the compensation to be paid, the law implies a promise that payment will be made for the services provided in the amount that they merit; and **(2)** where there is a contract for a set amount, and this is not paid, the claimant may repudiate the contract and seek payment on a quantum meruit basis.

Quid pro quo (Latin): a favour or advantage given in return for something.

Ratio decidendi (Latin): the reason for deciding; the principles of law on which the court reaches its decision.

Re (Latin): with regard to, in the matter of.

Res ipsa loquitur (Latin): the thing speaks for itself. A principle often applied in the tort of negligence, which states that if an accident happens that is of a kind that usually only happens as a result of negligence, and the circumstances that gave rise to the accident were under the control of the defendant, it may be assumed, unless there is evidence to the contrary, that the accident was caused by the defendant's negligence.

Restitutio in integrum (Latin): restoration to the original position that existed before the events which triggered legal proceedings (re damages).

Sic (Latin): thus; used in brackets in quotes to show that the writer has made a mistake. For example, 'Jacques Chirats (sic) opposed the plan'.

Sine die (Latin): (of proceedings) adjourned indefinitely.

Sine qua non (Latin): without which, not. Used to refer to anything indispensable, and without which another cannot exist.

Stet: let it stand or do not delete; cancels an alteration in proofreading; dots are placed under what is to remain.

Sub judice (Latin): being considered by a court of law and therefore not to be publicly discussed elsewhere.

Sub rosa (Latin): literally 'under the rose': used to describe something that is occurring but not on an official basis.

Sui generis (Latin): unique, of its own kind.

Travaux préparatoires (French): preparatory works that provide a background to the enactment of legislation.

Ultra vires (Latin): beyond the powers. This describes an act by a public authority, company or other body which goes beyond the limits of the powers that it has.

Vis-à-vis (French): in relation to; as compared with.

LEGAL TERMINOLOGY

The following is a non-exhaustive list of specific legal terminology and terms of art often found in commercial as well as certain other branches of law.

Abandonment. The act of giving up the ownership of something covered by an insurance policy and treating it as if it has been completely lost or destroyed.

Abatement. The proportionate reduction in the payment of debts that takes place if a person's assets are insufficient to settle with his or her creditors in full.

Absolute title. Ownership of a legal estate in registered land with a guarantee by the state that no one has a better right to that estate.

Acceptance. Consent, assent or approval. The acceptance of an offer to create a contract must be unqualified and may be either by word of mouth or by conduct.

Account of profits. A remedy that a litigant can claim as an alternative to damages in certain circumstances, for example, in an action for breach of copyright. A successful claimant is entitled to a sum of money equal to the profit the defendant has made through wronging the claimant (e.g. by infringing the claimant's copyright).

Accumulation. The continual addition of the income of a fund so that the fund grows indefinitely.

Affidavit. A sworn written statement generally used to support certain applications, and also sometimes used as evidence in court proceedings. Also known by the term **sworn statement**.

Agency. The relationship of principal and agent where the principal is bound by contracts entered into by the agent with third parties.

Agent. A person who is employed to act on behalf of another person who is known as the **principal**. The work of an agent is to conclude contracts with third parties on behalf of the principal.

Allotment. A method of acquiring previously unissued shares in a limited company in exchange for a capital contribution.

Annually. Every year.

Annul. To declare a contract to be no longer valid.

Appurtenant. Attached or annexed to land and enhancing the land or its use.

Arbitration clause. A clause in a contract in which the parties agree to submit to arbitration if disputes arise between them.

Arbitrator. An independent person who is appointed by agreement between parties to a contract or by a court to hear and decide a dispute. The process is known as arbitration.

Arrears. The accumulation of financial liabilities that have not been settled by their due dates. For example, rent arrears occur when rent has not been paid as it falls due.

Articles of association. Regulations for the management of registered companies. They form, together with the provisions of the memorandum of association, the company's constitution.

Asset. Property; anything which can be turned into cash.

Assignment. The transfer of a legal right by one legal or natural person to another.

Audit. A detailed inspection of a company's accounts by outside accountants usually in connection with the preparation of the annual accounts of the company at the end of the year. Hence **auditor:** a person who carries out such an inspection.

Authorised capital (nominal capital). The total value of the shares that a registered company is authorised to issue in order to raise capital.

Bailment. The transfer of the possession of goods by the owner (the *bailor*) to another (the *bailee*) for a particular purpose, for example the hiring or loan of goods.

Balance sheet. A document presenting in summary form a true and fair view of a company's financial position at a particular time.

Bankruptcy petition. An application to the court for a bankruptcy order to be made against an insolvent debtor.

Bearer. A person in possession of a bill of exchange or promissory note that is payable to the bearer.

Best endeavours. Best efforts. An **undertaking** to use best endeavours to do something means that the person giving the undertaking must try to do what s/he has undertaken to do, but is not absolutely obliged to achieve it.

Bill of exchange. An unconditional order in writing, addressed by one person (the *drawer*) to another (the *drawee*) and signed by the person giving it, requiring

the drawee to pay on demand a specified sum of money to a specified person (the *payee*) or to the bearer.

Bill of lading. A document acknowledging the shipment of a consignor's goods for carriage by sea.

Bond. (1) A document issued by a government, local authority or other public body undertaking to repay long-term debt with interest; or **(2)** a deed by which one person (the obligor) commits himself or herself to do something or refrain from doing something.

Bonus issue (capitalisation issue). A method of increasing a company's issued capital by issuing further shares to existing company members.

Breach. The infringing or violation of a right, duty or law. For example, 'Statchem have breached paragraph 14 of the contract by their actions'.

Burden of proof. The duty of a party to litigation to prove a fact in issue. Generally, the burden of proof falls on the party who relies on the truth of a particular fact to support their argument.

Capacity. The legal competence to enter into and be bound by the terms of a contract.

Capital (share capital). A fund that represents the nominal value of shares issued by a company.

Capital allowance. A tax allowance for businesses on capital expenditure on particular items (e.g. plant and equipment).

Cargo. Goods other than the personal luggage of passengers carried by a ship or aircraft.

Cartel. A national or international association of independent enterprises formed to create a monopoly in a given industry.

Charge. (1) An interest in land securing the payment of money (see also **mortgage**); or **(2)** an interest in company property created in favour of a creditor to secure the amount owing.

Charterparty. A written contract in which a person (the *charterer*) hires from a shipowner, in return for the payment of freight, the use of a ship or part of it for the transport of goods by sea.

Chattel. Any property other than real estate.

Chose in action. A right (e.g. to recover a debt) that can be enforced by legal action.

Claimant. A person (or company, organisation etc) who makes a claim against another person (or company, organisation) in court or other dispute-settlement

venue (e.g. an employment tribunal, an arbitration tribunal etc). See also

defendant.

Class rights. Any rights attached to a class of shares, for example preference shares. Such rights relate to dividend, return of capital and voting rights.

Clause. A sentence or paragraph in a contract.

Clearance. Either **(1)** a certificate acknowledging a ship's compliance with customs requirements; or **(2)** an indication from a taxing authority that a certain proviso does not apply to a particular transaction.

Collateral. Security that is additional to the main security for a debt. For example, a lender may require as collateral the assignment of an insurance policy in addition to the principal security of a mortgage on the borrower's home.

Collateral contract. A subsidiary contract that induces a person to enter into a main contract.

Collusion. An improper agreement or bargain between parties that one of them should bring proceedings against the other.

Commission. A sum payable to an agent in return for the performance of a particular service.

Compulsory purchase. The enforced purchase of land for public purposes by a statutory authority.

Condition. A major term of a contract, which is regarded as being of the essence of the contract. Breach of a condition is a fundamental breach of contract that entitles the injured party to treat the contract as discharged. Contrast with

warranty.

Confidentiality. Refers to information – generally important commercial secrets – that is given in confidence and may not be disclosed to specified classes of people, generally persons outside the firm. Hence **confidentiality agreement** – an agreement whereby a person agrees not to disclose specified information.

Consent. Agreement or compliance with a course of action or proposal. For example, 'no assignment shall be valid unless both parties have given their consent in writing prior to the proposed assignment being made'.

Consideration. An act, forbearance, or promise by one party to a contract that constitutes the price for which the promise of the other party is bought. Consideration is essential to the validity of any contract other than one made by deed.

Construction. Interpretation. For example, 'on proper construction of this clause, it appears to mean that assignment is not permitted under the contract'.

Construed. Interpreted. For example, 'paragraph 10 shall be construed in the light of the provisions of paragraph 17'.

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defined territory on terms that no other distributor will be granted similar rights in the same territory by the same company.

Execution. **(1)** The carrying out or performance of something (e.g. the terms of a contract); or **(2)** the signature of a contract or other legal document. For example, 'the parties executed the contract'.

Expropriation. The taking by the state of private property for public purposes, normally without compensation.

Factor. An agent entrusted with the possession of goods (or documents of title representing goods) for the purposes of sale.

Fiduciary. A person who holds a position of trust or confidence. A fiduciary relationship exists, for example between company directors and their shareholders.

Flotation. A process by which a public company can, by issuing securities (shares or debentures) raise capital from the public, for example by way of a *prospectus issue* in which the company itself issues a **prospectus** inviting the public to acquire securities.

f.o.b. (free on board) contract. A type of contract for the international sale of goods in which the seller's duty is fulfilled by placing the goods on board a ship.

Frustration. The termination of a contract caused by an unforeseen event that makes performance of the contract impossible or illegal. It is also referred to as *force majeure*. Frustration brings the contract to an end and automatically discharges the parties from any further obligations in relation to it.

Furnish. To provide or send something. For example, 'the distributor agrees to furnish sales information to the Company'.

Gaming contract. A contract involving the playing of a game of chance by any number of people for money or money's worth. Gaming contracts are generally void and no action can be brought to enforce them.

Garnishee. A person who has been warned by a court to pay a debt to a third party rather than to his or her creditor.

General damages. **(1)** Damages given for losses which the law presumes are the natural and probable consequences of a wrong (e.g. libel is presumed to have damaged someone's reputation without proof that that person's reputation has actually suffered). **(2)** Damages given for a loss that cannot be precisely estimated (e.g. for pain and suffering). See also **special damages**.

Goodwill. The advantage arising from the reputation and trade connections of a business.

Good faith. Honesty. An act carried out 'in good faith' is one carried out with honest intentions.

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Notice. Information or warning addressed to a party that something is going to happen or has happened; a notification. For example, 'any notice required to be served under this contract must be served in accordance with paragraph 18'.

Notice of severance. The formal notification that a joint tenancy is to be severed, creating a tenancy in common.

Notice to quit. The formal notification from a landlord to a tenant (or vice versa) terminating the tenancy on a specified date.

Null. Invalid, having no legal force. For example, 'the contract is null [and void]'.

Offer. An indication of willingness to do or refrain from doing something that is capable of being converted by acceptance into a legally binding contract.

Omission. A failure to do something that one was supposed to do. For example, 'an omission may render the contract void'.

Onerous. Involving much effort and difficulty. For example, 'the duties laid upon the company are onerous'.

Option. A right to do or not to do something, usually within a specified time. For example, an option to purchase land generally gives the right for a person to have first refusal on the purchase of a piece of land within a specified time period.

Ordinary shares. These shares make up the risk capital as they carry no prior rights in relation to dividends or return of nominal capital.

Parol evidence rule. The rule that oral evidence cannot be given to contradict, alter or vary a written document unless there are allegations of fraud or mistake.

Patentee. A person or company that owns patent rights in respect of an invention.

Patent agent. An expert who prepares applications for patent.

Petitioner. A person who presents a petition to the court (e.g. a divorce petition or a petition for bankruptcy). See also **respondent**.

Piracy. **(1)** Any illegal act of violence, imprisonment or robbery committed on a private ship for personal gain or revenge, against another ship, people or property on the high seas. **(2)** (in marine insurance) One of the risks covered by a marine insurance policy, which extends beyond the criminal offence to include a revolt by the crew or passengers and plundering generally. **(3)** Infringement of copyright.

Pre-emption. The right of first refusal to purchase land in the event that the grantor of the right should decide to sell.

Preference. **(1)** Where an insolvent debtor favours one particular creditor (for example by paying one creditor in full when there is no possibility of paying the others). **(2)** A floating charge created for the benefit of an existing creditor within one year before the commencement of **winding-up**.

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Special damages. (1) Damages given for losses that are not presumed but have been specifically proved. (2) Damages given for losses that can be quantified (e.g. loss of earnings).

Special resolution. A decision reached by a majority of not less than 75 per cent of company members voting in person or by proxy at a general meeting.

Specific performance. A court order to a person to fulfil their obligations under a contract. The remedy is only available in certain cases, generally those in which the payment of damages would not be a sufficient remedy.

Stakeholder. One who holds money as an impartial observer. S/he will part with it only if both parties agree or if ordered by the court.

Stamp duty. A tax payable on certain legal documents specified by statute, for example transfers of land and other property.

Statement of claim. A document filed with the court and served upon the defendant in a court action that sets out the material facts and argument on which a claim is based.

Statutory instrument. Subordinate legislation made under the authority of a statute.

Statutory rights. Rights provided by a statute, that is, by an Act of Parliament.

Strict liability. (1) In criminal law, liability for a crime imposed without the need for proving that the accused intended to cause the harm done by the crime (applicable in product liability and road traffic offences). (2) In tort law, liability for a wrong that is imposed without the claimant having to prove that the defendant was at fault (applicable in product liability and defamation claims).

Subsidiary. A subsidiary company is one that is controlled by a holding company.

Surety. A guarantor.

Suspended order. An order that does not take effect immediately. In civil claims, a suspended order is generally made on certain terms that the defendant must fulfil. If the defendant fulfils these terms, the order will eventually be dismissed.

Tenant. A person – or a company – to whom a lease or tenancy is granted. See also **landlord**.

Tender. An offer to supply goods or services. Normally a tender must be accepted to create a contract.

Term. (1) A substantive part of a contract that creates a contractual obligation. For example, 'one of the terms of the contract deals with delivery of the goods'. (2) The period during which a contract is in force. For example, 'the term of this contract shall be five years from the date of execution'.

Termination clause. A clause in a contract which specifies the manner in which the contract will or may be terminated.

Testator. A person who makes a will.

Title. A person's right of ownership of property.

Title deeds. The documents that prove a person's ownership of land.

Trustee. A person having a nominal title to property that s/he holds for the benefit of one or more others, the *beneficiaries*.

Undertaking. (1) A promise to do or not to do a specified act. In the English legal system, an undertaking given by a solicitor to the court or to another solicitor is binding, and failure to fulfil it may result in professional disciplinary action being taken. **(2)** A business.

Undue influence. A doctrine which states that if a person enters into an agreement in circumstances that suggest that s/he has not been allowed to exercise free and deliberate judgement on the matter, the court will set aside the agreement.

Void. Having no legal effect. For example, 'the contract is void due to lack of consideration'.

Waiver. The act of abandoning or refraining from asserting a legal right, for example by agreeing to a variation of the original terms of a contract.

Warranty. (1) (in contract law) A term or promise in a contract, breach of which will entitle the innocent party to damages but not to treat the contract as discharged by breach. **(2)** (in insurance law) A promise by the insured, breach of which will entitle the insurer to treat the contract as discharged by breach.

Winding-up. A procedure by which a company can be dissolved. It may be instigated by members or creditors of the company (voluntary winding-up) or by order of the court (compulsory winding-up).

Without prejudice. A phrase used to enable parties to negotiate settlement without implying any admission of liability. Letters and other documents headed 'without prejudice' may not be produced as evidence in any court proceedings without the consent of both parties.

Witness statement. A statement made by a witness for the purpose of court proceedings, which sets out the evidence to which the witness will testify.

Written resolution. A resolution signed by all company members and treated as effective, even though it is not passed at a properly convened company meeting.

About the author

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