

# *Business Contracts Handbook*

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# *Preface*

## The Aim of This Book

Almost everyone involved with business deals in one way or another with contracts, ranging from high-profile and complex agreements to the day-to-day. Major deals, such as takeover, business purchase and property transactions, tend to be planned for and negotiated from the outset with specialist help and documentation drafted and reviewed at each stage by lawyers experienced in the field. But, with middle-range contracts, such as terms of business, website terms, outsourcing contracts and agreements for agency, distribution or even critical IT purchases, the process is often haphazard. The tendency is for the contract to be given too little thought and considered too late to be integrated effectively into the negotiation process. Yet these contracts can be just as important to a company's future well-being and may give a nasty and potentially expensive bite when overlooked.

The aim of this book is therefore to provide a practical handbook for all those involved in the contract process, so that they can understand the background, anticipate the issues, plan the structure, identify the key points, negotiate with confidence and ensure that the whole package is properly recorded in a contract that can be relied on. Those who have little prior knowledge will be able to acquire a working background quickly; those with years of experience will still benefit from a checklist – a reminder of what is important and why, and easy reference to up-to-date language and drafting. Even in researching and writing this book, and although I have given regular update seminars on the issues, I was drawn back to a re-examination of a number of legal aspects that I had worked with over the years; there is always more to learn.

This is a book written for, but not solely for, executives and managers. Having had personal experience on both sides of the corporate fence, I know that much of the detail will be relevant to professional advisers, including qualified lawyers, as well as to their in-house or external clients. Commercial law is often the Cinderella of the legal profession, just as business contracts are regularly underappreciated (and sometimes locked away) by those who deal with them. Managers and lawyers could often do much more to develop a really effective working relationship as, too often, time is not put into a proper briefing at the start or effort is wasted on peripheral issues at the cost of more vital ones. One principle of this book is that a dedicated manager should be able to handle most aspects of a company's business contracts, but should also know when to seek help. So practical tips are given throughout on how and when it is advisable to seek specialist support. When that help is called for, the text suggests approaches which, if applied, will save valuable time and could save substantial cost in the process.

## Sources of Law

As a lawyer in private practice, I often found that when I needed more guidance there was a lack of variety or suitability in the material available. The top textbooks, such as

*Chitty on Contracts*, are a wonderful mine of information for helping distinguish the finer points, but tended to absorb valuable time in arcane issues. Student companion volumes were at the other end of the scale, with a strong set of key points but geared to grounding students to answer exam questions. Reported cases have always been fascinating in their own right, especially in terms of human interest and why people go to court, but, as we were always taught at law school, each case depends on its own facts. And, of course, there are always appeals which often seem to confuse complex law yet further. (Non-lawyers should appreciate that the appeal courts concentrate on specific grounds of appeal and do not rehear the whole case; they do not therefore hear the witnesses live, sometimes leaving the reader perplexed as to why either the trial judge or the appeal court reached the decision in question.)

In my earlier years in the law, know-how, being the benefit of expertise and experience, was often locked away in the heads of the senior practitioners who were too busy, and sometimes disinclined, to share it. Over the last 15 years or so, however, law firms have built up their own legal know-how systems through librarians and professionally qualified support lawyers (PSLs), complemented in turn by detailed legal journals such as *PLC (Practical Law for Companies)* and specialist legal search and retrieval websites, such as Lexis, Lawtel and Westlaw. In addition there are many excellent works on specialized areas of law or legal practice, mostly written by lawyers for lawyers. Gower books are a notable exception in their management focus. Even then, whilst slices of detail are now much easier to find, it is difficult for anyone in business – lawyer or non-lawyer – to grasp enough of the broader picture and framework of the contracts they deal with to be able to maximize their input into them. Just because nearly everything can be found on the Web does not mean it is correct or up-to-date, and browsing rarely leads to a broad understanding of a subject as complex as contract law. And there is even less on the craft of creating contracts to achieve their desired effect. Those drafting contracts need to be as precise as sculptors moulding clay heads; press too hard in one place and the clay will distort the head in another aspect!

## Background to This Book

Faced with this, and wishing to record some of my ideas, I wrote the predecessor to this book, *A Concise Business Guide to Contract Law*, published by Gower in 1998. The Introduction started: ‘This book has been written for people in business.’ That objective has not changed, nor has my wish to write in an accessible style. What has changed is the move from setting down the principles of contract law to seeking to relay these in the practical style of a handbook with recommended wording.

This process has been accentuated by two things. First, having written the *Concise Guide*, I realized I wanted to know more about the broader issues as to why people react to contracts, and the responsibility that goes with them, the way they do. So, while still a partner at my law firm, I took a part-time M.Phil degree, between a masters and a doctorate, in ‘Critical Management’ at Lancaster University Management School. The first two weeks left me dazed from trying to master the new language of management and with an introduction to philosophy, sociology, anthropology, psychology and spirituality to explore. The course was an eye-opener to another world, but I remained happy to have the legal grounding. Looking back, my thesis on ‘Privacy at Work’ seems to have

anticipated my move into publishing where the emerging law of privacy has become a major legal growth area.

For the last five years I have been the Group Legal Director of The Random House Group Ltd, one of my former clients and the leading UK consumer book publisher with subsidiaries in several Commonwealth countries. In this role, with an initial sharp focus on publishing risks and agreements, contracts of all kinds from all parts of our business have come across my desk, further accentuated by our development of digital publishing. This has enabled me not only to be even more aware of the business side of contracts but also to have the freedom to approach them in a fully commercial way, without timesheets to complete, and with the 'client' able to walk into my office or book a meeting at any time! The converse is that, with no 'client' paying directly for my time, prioritization and issues of practicality became paramount. In turn, many of the recommendations in this book have resulted from my in-house experience and have often been tested on my non-legal colleagues.

## Scope of the Book

The problem with writing a book of this sort of that its scope is potentially vast. This gives two major problems. The first is what to leave out and the second is how to cover reliably the whole of the canvas on which I have chosen to paint. On what to leave out, I have made a personal choice, largely as to what I thought would be most relevant to most potential readers. On the second issue, I have had to research some areas more thoroughly than I would normally need to and shoehorn others, like competition law, into a succinct space. I have enlisted the services of some professional colleagues, acknowledged above, in specialist areas. Any mistakes are, of course, mine alone.

The book covers only English law, but cross-refers where possible to other jurisdictions, with a separate chapter on the international element. It does not tackle land law or company law, although, again, it cross-refers in several aspects. Likewise, it does not go into specialist areas such as consumer finance or bills of exchange or shipping. These points are flagged where appropriate. In terms of layout I have chosen my own format, with five sections: Part 1 starts with the general principles of creating and writing contracts and Part 2 picks up a series of typical key issues found in contracts. There follow two sections on specific types of contract: Part 3 on contracts for goods and services generally and Part 4 on contracts with a technology bias. Part 5 covers the wider world and issues that typically arise after the contract is created, such as transfers, changes of control, breaches and disputes, remedies and termination.

## How to Use This Book

A manager faced with a contract issue would do well to read Part 1 either as a general introduction or as a reminder of salient points, such as: how to negotiate by e-mail, when to use 'subject to contract', how to plan cost/ risk and benefit and how these are to be dealt with in the contract and a reminder to keep to the main issues with the 90:10 rule. Part 2 should be checked if there are (highly likely) issues of confidentiality, dealings with companies, damage limitation clauses or legal restrictions which might be

serious enough to have a competition law implication. These areas all need to be planned carefully up-front, or the damage can all too easily be done. Then the manager can turn to whichever of Chapters 9–16 is most relevant to the subject-matter of the contract, such as the appointment of a marketing consultant (Chapter 12 on ‘Contracts for Services’), an outsourcing project (Chapter 13) or a web-design agreement (Chapter 12 and also 16 on Internet-related contracts). If reviewing an existing and now burdensome contract, it may be best to start with Chapter 18 on problem contracts and work from there. There are supporting checklists at the end of chapters.

Clearly, much cross-relates. Dealing with even more typical contracts separately at length might have doubled the length of the book, but the cross-referencing is assisted by a combination of chapter and sub-chapter headings, a comprehensive index and a glossary of technical terms and abbreviations. In addition there are a number of specially written appendices, including some template contract forms.

## Limitations

This book is intended as general guidance with wording as sample drafting, but not provided, nor can the author or publishers accept liability for it, as legal advice; readers must take their own legal or other professional guidance on specific issues. The law also continues to change, and current checks should always be made on the latest law and technical developments. Wherever possible I have tried to flag areas expected to change. Although there are one or two references to later developments, the law is generally stated as at July/August 2009 with major developments from then to the end October 2009 being highlighted in the Stop Press! section at the end of the book.

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