Another tactic is to tell the supplier that the credit or payment terms are to be unilaterally changed. The reason seems to be that in the buyer's view, it is perfectly acceptable, in order to protect its financial position, to expect suppliers to share their (potential) pain.

Some demand a discount on invoices received. One large retailer wrote to its suppliers in 2006 to say that it would be deducting 2% from all invoices, making it clear that if the supplier did not play ball, it would be taking its business elsewhere.

Others, simply (and again unilaterally) extend the payment terms: in one case from 28 to 45 days, and in another from 30 to 60 days.

Terms should define the supplier's rights in the event of the bankruptcy/insolvency of the customer — and in the event of the appointment of an administrative receiver. See *Chaigley Farms Limited* v *Crawford, Kaye and Grayshire* under *The Limitations on the Effectiveness of the Retention Clauses* in chapter 3 — Contracts.

The **Enterprise Act 2002** limits the automatic power of a floating charge holder to appoint an administrative receiver. It also introduces the concept of administration, with an administrator being required to act in the interests of all creditors. Floating charge holders are still be able to appoint an administrative receiver, but have to apply to the court for leave to do so. (See *chapter 12 — Insolvency*). These provisions impact on the rights of creditors as defined in their terms — which must always be subject to review in the light of legislative changes.

Unfair Commercial Practices Directive

This EU Directive, introduced in 2005 (the **Consumer Protection from Unfair Trading Regulations** implementing the Directive in the UK came into force in May 2008), affects the way that businesses sell their products and services. Chiefly, therefore, it impinges on the activities of the marketing and advertising departments, but it also affects the work of their colleagues in the credit department. The essence of the EU Unfair Commercial Practices Directive is that unfair commercial practices must be prohibited by law. But what is "unfair"? An unfair practice is one that:

- does not conform to the standard of skill and care which a trader may reasonably be expected to show when dealing with consumers, and
- materially distorts (or is likely materially to distort) the purchasing behaviour of the "average consumer".

The Directive then goes on to add that practices will be specifically unfair if they are *misleading* or *aggressive*. These terms are defined.

A practice is *misleading* if it gives false information or deceives or is likely to deceive the "average consumer" in relation to one or more or the following matters:

- the existence and nature of the product
- the main characteristics of the product, including its availability, benefits, fitness for purpose, after-sale service, date of production
- the price or the manner in which the price is calculated
- details of the trader, such as qualifications and status, and
- the rights of the consumer, including the right to replacement or reimbursement for the cost.

A practice is deemed to be *aggressive* if it significantly impairs or is likely significantly to impair the average consumer's behaviour through harassment, coercion or undue influence. These rather vague terms are not defined in the Directive; the intention, apparently, is to allow them to be interpreted by reference to other factors – perhaps the manner in which the action was carried out, or the personal circumstances of the consumer.

There are some practices, however, which will always be considered 'unfair', no matter what the circumstances. These are as follows.

- Falsely claiming to be a signatory to a code of conduct.
- Displaying a trade mark or the equivalent if not authorised to do so.
- Inviting consumers to purchase particular products at advertised prices and then trying to promote different products.
- Falsely claiming that products are able to cure illness.
- Including in the marketing material an invoice or other document giving the recipient the false impression that he or she ordered the goods.

The term "average consumer" has been adopted so that implementation of the Directive may reflect different social, commercial and cultural traditions in various member states of the EU. One can imagine both prosecution and defence counsel having fun with this one.

Visit: *www.berr.gov.uk/consumers/buying-selling/ucp/index.html* for further information.

Method of operation

The way in which the business has to trade will need to be considered. However, it will always make sense to review existing practices to see if they are the most effective.

Just because the business has *always* carried out the credit function in a particular way does not ensure it is the *best* way. Can it be improved upon? Can it be made more economic? More customer-friendly? Simpler? Does it comply with an OFT-approved code of practice?

Factors and questions to consider will include the following.

1. The way in which business is obtained. *How* does a new customer obtain credit? Sales may be obtained by:
   (a) selling face-to-face via a salesforce;
   (b) telephone selling, or
   (c) quotation.
   How, in the selling system, is customer identity obtained? How are terms established? How is compliance with the **Data Protection Act 1998** assured in respect of customers who are 'individuals'?
2. The time available to establish terms and creditworth. Ways must be found to carry out these aspects within the available time frame.
   The rapid growth of online credit information, available from credit reference agencies means that even where "instant credit" is required, basic credit checks can still be made. This must be subject to any necessary consent required under data protection law.
3. Whether the credit function is centralised or allocated to depots/branches which each have a credit function.
4. Some firms are appointing specialist companies to administer their entire accounts receivables process — "outsourcing". This can be regarded as a strategic solution to the challenges of cost reduction, quality management and continuous process improvement. The outsourced credit management function operates according to stringent financial performance and service level agreements. It is claimed that significant savings have been achieved.
5. Companies can also consider using receivables finance. It lends itself well to those who wish to offer longer credit periods, since it releases cash tied up in unpaid invoices. Thus they do not have to wait until the end of the payment term to receive their money.

LEGISLATION

As noted, there has been much concern about the impact of slow payment and bad debts on businesses in UK and Europe. The European Union and the UK have introduced legislation to enable businesses (irrespective of size) to charge interest and collection costs on commercial debts that are not paid to terms.

However, legislation will only be effective if it is implemented; used by suppliers in appropriate circumstances. The legislation only comes into effect once payment is "late". An effective credit policy is designed to minimise the risk of bad debt and to secure payment in accordance with agreed terms.

Changes in the Civil Procedure Rules emphasise that legal action must be regarded as a last resort. A credit policy reduces the volume of accounts where legal action is required but, if such action is required, the prospects of getting paid are enhanced.

Changes to the bankruptcy/insolvency regimes under the **Enterprise Act 2002** increase the need for effective credit assessment and prompt collection.

THE CREDIT POLICY

INTRODUCING THE CREDIT POLICY

Call together all relevant staff and managers. Go through the manual and explain *how* it works. Explain how it will benefit the business and make the tasks of sales and credit staff easier.

Staff changes will occur and part of the induction training for new staff must include training on the credit policy (see *Skills and Training* later in this section).

Sales staff, quite rightly, are often sent on training courses. Such courses, quite rightly, concentrate on selling, but how many salespeople are given *any* credit training? How many are trained to be credit aware? How many are made aware of the vital impact *they* have on the ability of credit staff to "get the money in"?

A credit policy can be the basis on which to weld all departments into an effective team, selling more, collecting more and ultimately communicating and cooperating with one objective — to achieve more profitable sales.

REACTIONS TO THE CREDIT POLICY

The decision to formulate a credit policy will often be enthusiastically supported by credit staff and regarded with horror by sales management and staff.

First there is fear that customers will take their business elsewhere. But why should customers take their business away simply because they are asked to pay, on time, for what they have already had? Why should they take their business away when the supplier is simply asking them to honour the contracts they have made?

Often, the answer is that customers were not made aware of the terms of payment at point of sale. The credit policy can cope with "special" customers. They can be offered special terms within the defined framework of the credit policy.

For example, the credit policy may define a level of business that *makes* a customer "special". In this way, it can define that orders up to £X per month are dealt with on 30-day terms. Orders of £X plus may (subject to customer status) entitle a customer to a 60-day account. Orders beyond that amount may (subject to customer status) qualify for 90-day terms.

If a customer who is not special demands extended credit then the salesperson must defend the credit policy. Customers often claim, for example, that they can get 90 days credit elsewhere. Consider the truth of this assertion: if competitors are throwing extended credit around then they may not be viable.

Of course, there may be exceptions to the credit policy. These must, however, be properly authorised and not just agreed on the whim of a salesperson.

The business, in its credit policy, caters for special customers. However, to have "special customers", "exceptional customers" and "the sales manager's best friend" is simply to clog the ledger with accounts all having very different terms. Every business needs to be flexible but it must always be a *controlled* flexibility.

Credit staff, too, must be sensible and flexible. Some customers will run into difficulty and when that happens the credit manager or controller may decide to help them to some degree.

Customer categories

The credit policy will establish the criteria that give a customer "special" status. Using this approach puts customers into defined 'categories' which, as well as assisting and simplifying the tasks of credit assessment and collection, offers additional benefits to both supplier and customer.

1. "Special customers" come to realise that they are "special" — so customer relationships are enhanced.
2. Credit assessment and collection procedures are defined by customer category.
3. Credit department are aware of the "special" status of defined customers — so such customers are not 'upset' by being asked for payment when in fact it is not yet due.
4. All personnel in the suppliers operation know the criteria for "special" status, so internal conflicts are eradicated.
5. Customer relationships improve — and the credit reputation of the supplier is enhanced.

Special arrangements

If, for some reason, a customer *cannot* pay what is due, then suing that customer will achieve nothing. It may even be the last straw for that customer. Instead a special arrangement may be agreed.

Special arrangements, unfortunately, frequently break down. Often this is because they were not clearly agreed at the outset and not, thereafter, effectively monitored.

If a special arrangement is agreed, then:

- the supplier's money is at continuing risk;
- the supplier's profit is eroded, and
- the credit manager or controller has to spend time monitoring and following up to ensure compliance.

those for labour and materials the legislature have now intervened with the **Supply of Goods and Services Act 1982**, under which terms are now implied into such contracts through statute (see below).

TERMS IMPLIED BY STATUTE

Terms are implied into contracts as a result of statutory provisions. Some of the terms to be implied relate to the quality of the goods or services, some do not.

NON-QUALITY TERMS

Price

It seems absurd that contracting parties may reach agreement about everything except price but this has been known to happen. If the contract contains no provision with regard to price, there is an implied term that the buyer will pay a reasonable price in both contracts for the sale of goods (**Sale of Goods Act 1979**, s.8) and for services (**Supply of Goods and Services Act 1982**, s.15).

Time for Performance

A contract for sale of goods or for the supply of services may specify a date by which the goods or services are to be provided. If, however, no date is fixed the goods or services must be provided within a reasonable time (for goods see the **Sale of Goods Act 1979**, s.29(3); for services see the **Supply of Goods and Services Act 1982**, s.14). Failure to perform the contract by the agreed date constitutes a breach of contract by the supplier of the goods or services. Where a buyer wants goods delivered by a fixed date it is wise to make this clear in the contract by stating that "time is of the essence".

TERMS AS TO QUALITY

The terms as to quality are more numerous and vary depending on whether the contract is one for the sale of goods or for work done and materials supplied on the one hand, or for services on the other. In the case of the contract for services the obligation of the supplier of the services is the relative one of exercising reasonable care. Section 13 of the 1982 Act provides that in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable skill and care.

A recent illustration of this concerned the supply of a foreign holiday by a holiday firm. In *Wilson v Best Travel Ltd* (1993) 1 All ER 353, the plaintiff was injured whilst on holiday in Greece when he tripped and fell through glass patio doors at his Greek hotel. The door complied with Greek Safety Regulations, but not British Standards. He sued, not the hotel but the British holiday firm through which the holiday had been booked, and was unsuccessful. The court concluded that the holiday firm had exercised reasonable care by selecting a hotel which complied with local Greek standards. The duty on the operator did not extend to exclude a hotel whose characteristics, so far as safety was concerned, failed to satisfy standards currently applicable in England, provided always that the absence of the relevant safety feature was not such that a reasonable holiday-maker might decline to take a holiday in the hotel in question, eg if a hotel included in an operator's brochure had no fire precautions at all.

By contrast, in the case of contracts for the sale of goods and work done and materials supplied, there are several obligations, all more absolute than this. These obligations are that the goods:

(a) will correspond with any description which has been given of them
(b) will be of merchantable quality
(c) will be fit for the purpose for which they are supplied.

Sale by Description

Where there is a contract for the sale of goods or for the transfer of goods in a contract for labour and materials, there is an implied condition that the goods will correspond to the description (for goods see the **Sale of Goods Act 1979**, s.12; for labour and materials see the **Supply of Goods and Services Act 1982**, s.3). It will usually be necessary for goods to be described in the sale to enable them to be identified and allow the contract to be performed. The only case where no real description of the goods is necessary is where the goods are specific, that is actually known to the seller and buyer. Thus, a contract for the sale of a copy of the novel *Black Mischief*, published by Penguin, is a sale by description, since seller and buyer need to refer to the description to be able to identify the goods sold. By contrast, a contract for the sale of *this* book, which the seller holds out to the buyer, is a sale of a specific book identified by sight by both parties to which no description is attached.

Of course, a description may be attached to goods which is far more extensive than is necessary to identify the goods and which, apart from identifying the goods, also contains information as to their quality. Thus, a contract for the sale of a three-year-old copy of *Black Mischief*, published by Penguin, in good condition, combines both identification and a statement of quality. The very highest courts have now held that it is only that part of the description which relates to the identity of the goods that constitutes the description for the purposes of the operation of these statutory provisions; descriptions of quality do not fall within the implied term.

If the implied condition is broken by the seller, there is a serious breach of contract.

Satisfactory Quality

Where a seller sells goods in the course of business, there is an implied condition that the goods will be of an appropriate quality. Under earlier legislation, this was defined as "merchantable quality". This definition resulted in many decided cases which attempted to define merchantable quality. Most standard terms of sale exclude these implied terms and this will be a valid exclusion in business contracts where this is reasonable under the **Unfair Contract Terms Act 1977**. In the place of such implied terms express warranties are given.

For example, in *Brown & Son v Craiks Ltd* (1970) 1 WLR 752, the buyer of industrial fabric found that it was unsuitable for making into dresses. It was, however, suitable for other industrial purposes. As such it was commercially saleable even though at not quite the same price. It was held that the fabric was of merchantable quality. If it had only been commercially saleable for a much lower price, the opposite conclusion would have been reached.

The purposes for which goods are commonly bought can include cosmetic purposes such as the "look" of a coat or car. This is well illustrated by the case of *Jackson v Rotax Motor and Cycle Co* (1910) 2 KB 397, which concerned a contract for the sale of 600 motor horns. The horns were nearly all dented and scratched due to bad packaging, although they could have been put right at minimal cost. The court concluded that the goods were unmerchantable.

The approach of the courts has been based on common sense and commercial principles. Thus, there can be liability in respect of second-hand goods because it is

(c) in respect of the whole or any part of Q's contractual obligation to render no performance at all, except so far as the exclusion satisfies the requirement of reasonableness in all cases.

4. In contracts for the sale of goods (including contracts for labour and materials) implied terms as to title cannot be excluded at all. Implied terms as to conformity of goods with description, or as to their quality or fitness for a particular purpose, cannot be excluded as against a person dealing as consumer. As against a non-consumer they can only be excluded subject to the requirement of reasonableness (s.6). These provisions are not limited to business liability.
5. The fact that the contract containing the exclusion clause is breached does not prevent the requirement of reasonableness remaining effective and it matters not for this purpose that the innocent party treats the contract as terminated by the breach (s.9).

The Requirement of Reasonableness

The requirement of reasonableness is set out in s.11 of the **Unfair Contract Terms Act 1977**. It requires that the term shall be a fair and reasonable one to be included, having regard to the circumstances which were, or ought reasonably to have been known to, or contemplated by, the parties when the contract was made.

It is for those claiming that a contractual term or notice satisfies the requirement of reasonableness to show that it does (s.11(5)).

Guidelines of general application to which particular regard should be paid are contained in s.11. These are the resources which the profferer of the term could expect to be available to him or her for the purpose of meeting the liability should it arise and how far it was open to the profferer to cover him or herself by insurance.

Further guidelines are set out in Schedule II of the 1977 Act applicable to the imposition of the reasonableness test on exclusion clauses contained in contracts for the sale of goods falling within s.6 of the 1977 Act. These are:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met
(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term
(c) whether the customer knew, or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties)
(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable
(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

International aspects

The **Unfair Contract Terms Act 1977** does not apply to international supply contracts, that is contracts under which the ownership of goods is made between parties in different territories. The whole of the UK, the Channel Islands and the Isle of Man are one territory for this purpose (s. 26).

Most commercial contracts of suppliers will exclude liability for consequential loss, loss of profit, revenue, goodwill and indirect loss and limit or cap liability for direct loss to a figure such as 125% of the price paid. This will often be held to be a reasonable exclusion. However, if the clause says this without more, it may be void as the clause must also state that nothing in the agreement excludes or limits liability for death or

personal injury caused by negligence (or fraudulent misrepresentation) otherwise the entire clause can be void. Caution should be exercised when tampering with exclusion clauses and ideally legal advice should be taken before changing them.

Unfair Terms in Consumer Contracts Regulations 1999

A consumer is an individual not acting in the course of his or her business or profession.

A consumer is not bound by a standard term in a contract with a seller or supplier if that term is unfair. Standard terms are those devised by a business in advance and not individually negotiated with the consumer. They are not necessarily in writing but are often to be found in the "small print" on the back of order forms and other documents.

A standard term is deemed unfair if it creates a significant imbalance in the parties' rights under the contract to the detriment of the consumer contrary to the requirement of good faith.

These Regulations do not cover price-setting terms or "core terms": terms defining the product. All terms, including core terms, must be in plain intelligible language. If they are not they are open to challenge as unfair. Neither do the Regulations cover terms reflecting the law, provided that they do so adequately.

The Office of Fair Trading (OFT) and some other agencies have powers under the Regulations to stop businesses using unfair standard terms and anyone from recommending the use of such terms. The OFT has a duty to consider any complaint sent to it to the effect that a standard term is unfair.

Principal provisions

The principal provisions are similar to those in the **Unfair Contract Terms Act 1977**, with the following additions.

1. It is an offence for a trader selling goods to use an exclusion clause which purports to restrict the right of consumers to goods which are as described and of satisfactory quality.
2. If a trader is selling or hiring goods to a person who is not a consumer he or she can only restrict or exclude his or her legal liability if the clause in question satisfies the test of reasonableness.
3. When a trader is providing a consumer with a service he or she can only restrict or exclude his or her liability for breach of contract or allow himself or herself to provide an inadequate service if he or she can show that the term or condition satisfies the test of reasonableness.
4. When a trader undertakes to provide a service for any person (whether or not a consumer) on his or her own written terms of business he or she similarly can only use those written terms to exclude or restrict his or her liability for breach of contract or allow himself or herself to provide an inadequate service if he or she can show that the term in question satisfies the test of reasonableness.

Requirement of reasonableness

Ultimately, whether or not a term is unreasonable is something that only a court can decide. If a term were to be challenged it would be for the party seeking to impose it to demonstrate to the court that it was reasonable.

To ensure compliance, trade creditors must have in place effective systems and appropriate documentation. The wording of the notification and consent clauses should be carefully checked, and the appropriate legal advice obtained.

It is not possible, in the context of this publication, to give a definitive and all embracing form of words for such clauses. The wording must depend on the use to which the data will be put. The Information Commissioner's Office has issued guidelines to assist businesses to understand and to implement the requirements of the Act.

Individuals are also entitled to see what information creditors hold on them. This includes all information held on the sales ledger, so it becomes even more important that such information is accurate and kept up-to-date.

A creditor approached with a request for information held must supply it within 40 days of the request and may charge a fee of not more than £10. Again, data must be kept secure, and a creditor faced with a request will need to verify the identity of the person making it and ensure that it is not disclosed to anyone other than the data subject.

Creditors who are members of credit circles will be required to set out a notice, in their credit account application forms, to the effect that the customer's trading performance may be made available to other businesses within the circle.

Trade references are often given "in confidence" and it must be realised that under the legislation such references are not totally "confidential" — the subject (the customer) is entitled to be provided with a copy on request.

Data protection guidelines

The Office of the Information Commissioner has issued guidelines to assist creditors to comply with the legislation. There are several areas of the credit function which are affected by the **Data Protection Act 1998**. Insofar as credit assessment is concerned, the basic concept is that an individual is entitled to know that credit searches may be made against him or her, and must give consent to that being done.

Information must be obtained lawfully — that means that no information should be obtained by deception or by any unlawful means. For example, a creditor seeking to obtain information from an individual's employers must not obtain it by deception (eg by pretending to be a friend or relative). Nor must that individual's financial position be disclosed to the employer or to any other third party. If the employer or some third party agrees to forward mail to the individual, the envelope used should be marked 'confidential'.

Data must be accurate, and must be kept up to date. Data is inaccurate if it is "incorrect or misleading as to any matter or fact". In the event of a data subject challenging the accuracy of data, this should be noted on the data holder's records and should be apparent each time the data is used.

Whilst the Act requires personal data to be 'accurate' — and defines "inaccurate" — it makes an exception in respect of data obtained from a third party. For example, a creditor obtains information from a credit reference agency. The individual concerned may challenge that data but, clearly, the creditor cannot change that data. As noted, the fact that the data has been challenged must be recorded and the "challenge" must be notified to any other person the data may have been passed to. However, for the purposes of the Act, the data provided by a third party meets the requirement of accuracy.

It is for the individual concerned to take up the alleged inaccuracy with the third party who provided it.

The information covered under the legislation is "personal data". Thus creditors are entitled to use public information — information as to county court judgments, information filed at Companies House about limited companies and, currently, the electoral roll.

Information obtained from a recognised credit reference agency concerning individuals will be obtained "fairly and lawfully", as long as the individual concerned has been advised that it will be obtained and has given consent.

A data protection policy

Businesses who hold personal data about living individuals must comply with the eight data protection principles, see *Data protection principles in Extract of Relevant Legislation*. This creates the need for a data protection policy, and businesses need to develop this to ensure that they have procedures and systems in place to ensure compliance with those principles.

This involves conducting a survey to ascertain who in the business holds data, how it is dealt with and how the principles are complied with. It is for each business to decide how they will come within the guidelines laid down in the Principles, but the following matters need, among others, to be considered.

1. What steps are taken to advise customers that a credit search will be made — and to obtain consent?
2. Are systems in place to ensure that the data is only used for the purposes specified, and not for any other purpose?
3. How long is data kept and can the period of retention be justified, if challenged?
4. What steps are taken to ensure 'security' of data?
5. Are all personnel with customer interface aware of their obligations under the **Data Protection Act 1998**?
6. Are personnel trained to ensure this — and to implement the policy effectively?

On the issue of "security" there is a need to ensure that notes and papers containing data concerning living individuals are not left on desks at close of business, where anyone, perhaps office cleaning staff, could look at them. How is waste paper disposed of? Is it shredded "in house" or passed to a waste disposal company? What security measures do that company have in place?

Impact of the Durant case

In 2004, the Court of Appeal dealt with two questions arising from the **Data Protection Act 1998**. In the case of *Durant v The Financial Services Authority* (CA 749 [2004]) they considered the following.

1. What makes data "personal"?
2. What constitutes "a relevant filing system"?

The Court held that, "Not every document which names an individual is 'personal data' about that individual." For example, minutes of a meeting which simply name a person are not personal data about that person. The test is whether the information affects a person's privacy — in personal or family life or in his or her business or professional capacity. If it is 'focused' on the individual, is biographical and/or contains opinions about that person, then it becomes 'personal' within the meaning of the Act.

On the second question, the Court of Appeal held that (contrary to popular belief) the Act does not apply to all manual files. To fall within the confines of the Act a manual file must be structured and indexed in a similar format to a computer file. Suppose there is a manual file on an individual — Mr X. It is a simple folder with no sub-divisions and every item of correspondence and all notes and documents concerning Mr X are put into it.

'types' of letter — how and when they can be used, and the benefits they offer. See *chapter 11 — Debt Recovery Through the Courts* as to the rules that apply.

In some cases there will be additional 'non-standard' letters that need to be used. It always makes sense, whenever possible, to confirm agreements, query resolutions and special arrangements in writing. Sensible correspondence which addresses the issues can be helpful in building a case, defining areas of agreement or conflict and bringing matters to a conclusion.

It must be remembered that such letters may ultimately be produced to a court as evidence which can strengthen — or damage — a party's case. The writer must be able to justify what was said if necessary.

A debt recovery protocol

As noted in *The protocol approach* above, creditors are required to adopt a protocol approach to collection but, currently, there is no defined protocol. The Law Society set up a committee to consider the form of protocol to be used in respect of debt recovery. They proposed a formal letter of claim — giving particulars of the debt, the action that the creditor would take if it remained unpaid, and an address and telephone number for the debtor to contact, if action was to be avoided. The debtor was given seven days in which to respond.

The Lord Chancellor did not adopt the proposal so, in effect, there is no standard protocol which applies to debt recovery actions. A Consultation Paper, issued in 2001 by the Lord Chancellor's Department considered the need for a general protocol — with a final letter allowing the debtor a longer time (21 days) to respond.

This proposal met with significant opposition from the credit industry and the Lord Chancellor's Department have now confirmed that the concept of a 'general protocol' has been abandoned.

However, claimants in a court action will be required to show that they have taken all reasonable steps to resolve the matter before legal action was taken. Creditors will no doubt have in place a collection process. That process, giving the debtor an opportunity to raise any genuine queries and ending with the 'formal letter of claim' *Figure 5.5* should satisfy the requirements of a "reasonable approach".

The time factor

Once payment terms have been agreed, it is for the supplier to determine at what overdue stage any appropriate action should be taken. The Civil Procedure Rules 1998 do not require a creditor to give a debtor more time to pay. The only requirement — and this is a best practice guide — is that the final letter before action should give the debtor seven days from the date of the letter to respond.

In any contact with the debtor prior to that, it is for the creditor to fix timescales for response. However, "by return" is not as urgent as "by midday on the 16th", for example. There is nothing wrong with fixing three or four days for a response to a letter. It is only the final letter of claim that should give seven days. Even that time can be reduced, in exceptional circumstances, but if a claim is defended, then the creditor may have to justify the giving of shorter notice.

What action should be taken if collection letters are ignored?

Many suppliers complain that their letters are ignored. If they are ignored it does not mean that suppliers are in a difficult position. Suppliers should simply *take* the action that they said they would take; then move on to the next stage of collection.

If suppliers are ignored *action* is what makes collection letters work. Collection policies must demonstrate to customers that suppliers are *consistent* in their approach to business. For example, if they quote a price — that is the price; if they specify a delivery date — they deliver on time; if they quote "30 days from invoice" they mean 30 days; and if they say "We will take action" they mean it.

Thus, in designing collection letters suppliers must consider, and then indicate in them, what they will *do* if they are ignored, ie what sanctions suppliers will use to convince customers to pay.

It may be that the ultimate sanction is for the creditor to bring a claim before the court (see *Debt Recovery Through the Courts*). Prior to such action, the creditor must send a Letter of Claim. This is intended to show the debtor that action will be taken, that this may result in the debtor facing additional claims for interest, court fees and legal costs, and to emphasise the need to pay within the time limited.

Traditionally, a final demand was often produced in red — and in gothic print! It is worth noting that the courts abandoned gothic print many years ago! Such notices often stipulate: 'We will pass the matter to our solicitors'. This indicates to the debtor that there will be another letter, from a solicitor, before any action is taken! Some such notices purport to come from the creditor's legal department — even if the creditor does not have such a department.

These courses of action have little to commend them, are outdated and old-fashioned, and may well be criticised by the courts under the new system.

Obviously, there is no point in making any threats at all unless, at the end of the day, the creditor is prepared to take the action indicated. The new court system should make creditors think again about their collection letters — and their whole collection approach. It must be professional and up-to-date; designed to create a good credit reputation; and demonstrate a consistent and fair approach to recovery of sums due.

Delay is dangerous

Having fixed a deadline and indicated a course of action, the creditor must act! Making "one more call" will dilute the impact of the threat of final action. It will give the debtor more time to pay or to delay payment and give the impression that the creditor is reluctant to take any action.

If the collection process has been completed, and ignored, nothing further will happen unless the creditor makes it happen. The debt can be passed to a collection agency, to solicitors, or the creditor may issue court proceedings without involving solicitors. Those are, in fact, the only remaining options. There is nothing to gain from further delay — and there may be much to lose!

There may be other creditors who are pressing for payment from the debtor, and it may be a case of "first come first served". Delay may mean that other creditors get paid.

The **Enterprise Act 2002** encourages secured creditors and those holding floating charges dated before 15 September 2003 to seek to enforce their security, or appoint an administrative receiver over a company as soon as there are signs that the company is in serious financial difficulty.

Getting a judgment does not give a creditor any additional security, but taking some positive final action will either recover payment, or prove that payment is not going to be made. The sooner the creditor knows the truth of the situation, the better!

company dealing with similar-sized debts, or specialising in a particular trade or industry; or it may be one person working from home.

There is no doubt that a professional, ethical collection agency can support and strengthen the collection effort of a business. Suppliers must choose the agency that provides them with the service best suited to their needs. Clearly, they should satisfy themselves that their chosen agency is run by experienced and well-qualified people, and that it acts with professionalism and integrity.

There are many well-established and highly professional collection agencies to choose from. These are licensed by the Office of Fair Trading (OFT) which means they have to comply with existing legislation to prevent harassment of debtors. Collection agencies employ specialist trained staff who accept that their task is to collect what is due, without unduly upsetting the customer. Thus they seek to collect and then pass customers back to suppliers, if the suppliers want to trade further with those customers.

Such organisations can handle high volumes of business and can thus be used to assist clients dealing with a large number of accounts. They can, if required to do so, provide a clean-up facility by taking over the ledgers and collecting balances, highlighting and resolving queries and providing the client with a fresh start. If required they can also provide consultancy and total ledger management services.

At the stage that a debt is passed to an agency, the creditor has spent time (and money) in attempting to collect. The agency is entitled to charge its agreed fee or commission. If the creditor has not, by that time, imposed interest and collection costs, the agency should be instructed to do so. These sums will, if recovered, be set off against the agency charges.

From 6 April 2007, the Financial Ombudsman Service (FOS) extended its remit to cover all businesses licensed under the **Consumer Credit Act 2006** (CCA). The effect of this is that non-corporate credit customers will be able to turn to the FOS if they believe they have had a raw deal in respect of an agreement regulated under the CCA. Ancillary businesses such as credit reference agencies, collection agencies and debt counsellors are covered by the FOS from October 2008.

As discussed below, creditors must choose their agency with care. Debt collection agencies must be licensed by the OFT. There have been a large number of complaints to the OFT about the conduct of some fringe operators. This has caused them to issue guidance as to what is "fair" in the collection process.

A reputable agency can be of significant benefit to creditors. The fringe operators can create problems that may impact on the creditors themselves. Remember, the agency acts on behalf of the creditor — so the creditor can be held responsible for the actions of the agent.

Types of debt collection agencies

1. Commercial agencies.
2. Voucher agencies.
3. Trade protection associations.

Commercial agencies

Commercial agencies do not usually have formal contracts with clients. They leave clients free to pass as many or as few accounts to them as they choose. Generally, they agree a fixed commission payable on sums collected and work on a *no collection/no fee* basis.

Thus clients do not have to pay out money in advance, can control the amount of business passed to agencies and can monitor both cost and performance.

Many collection agencies pass sums collected to clients as soon as they are received; others keep a separate client trust account.

Collection agencies use letters and the telephone to collect and they employ and train specialist collectors. They agree the method and timescale of collection with clients so that clients know exactly how and when their accounts are dealt with.

Voucher agencies

Voucher agencies sell collection packages to clients, helping them to improve their own credit control and taking over when clients decide to pass accounts to them.

At the outset, clients buy a series of *vouchers* on which they can write the debtors' details. Vouchers are sent to the agencies, who undertake the collections and if they collect the debts then no further sums are payable by the clients. Adopting the no collection/no fee basis, some voucher agencies, if they fail to collect a debt, give clients a free replacement voucher.

Voucher agencies work by letter and telephone and agree with clients the methods they will use. With this type of agency it is usual to have, for the protection of both sides, a standard form of agreement. Again, clients can pass debts to the agency if they choose to do so.

Trade protection associations

Trade protection associations have a long history, starting when traders began to come together for mutual protection. They work for their members who pay an annual subscription and then use the services of the association, which include debt collection.

Choosing a debt collection agency

Suppliers should choose an agency with care — visit its premises, meet the directors or partners and take up references. Check on the method used to process clients' money and whether there is a client trust account. Any good, professional agency will welcome such checks. They are not back-street operators in dirty raincoats but credit specialists seeking to support and enhance the credit reputation of their clients.

The professional body for the credit profession is the Institute of Credit Management. Are the proprietors of the business, or the directors, members of that body? Does the agency hold a licence from the OFT? An agency may not legally operate without one.

A professional collection agency can offer a wide range of services to its clients in addition to collection. Status reporting, credit consultancy and advice will be available from a specialist within the organisation.

Remember, an agency can only work with what it is given. No one can collect a bad debt. Further, the older a debt is, the harder it is to collect — debts die of old age!

Getting the best out of an agency means working *with* it as opposed to *using* it. Suppliers should run their own collection programmes and immediately pass unpaid accounts to their chosen agencies. In this way the collection momentum is maintained; the credibility of suppliers is maintained (they meant what they said); and there is a better prospect of recovering debts.

Legal action should be regarded as a last resort. The legal process takes time and costs money. If the credit policy is consistently implemented, then:

- the supplier collects more of his or her own money — faster
- accounts unpaid go, at the end of the collection programme, to the selected agency
- the agency collects and accounts for the amounts collected, and

import and take delivery of the goods on arrival. The documents, often though not invariably accompanied by a demand for payment addressed to the customer, ie a *bill of exchange*, are then handed to the suppliers' bank together with full instructions for their disposal. These instructions are repeated by the bank to its own agent in the customer's country. The agent then releases the documents to the customer in accordance with the instructions received, usually against either payment of the invoice value or against an undertaking to make such payment on an agreed date in the future. Such undertaking to pay usually means the buyer must sign a bill of exchange due for payment on that agreed future date.

The result is that the interests of both parties are protected to an extent. The suppliers, through their agents the banks, retain control of the documents which are necessary to the customers before they can take delivery, while the customers are not obliged to pay before they have had an opportunity to inspect those documents and possibly the goods themselves.

Advantages and disadvantages

For sellers, the greatest disadvantage is the risk that the buyer fails to take delivery. This cannot be a particular risk where the sale is for commodities and the market price has dropped. The seller is left with the goods in a distant place paying storage costs and facing the expense of reselling them elsewhere or having to have them shipped back. The sharp buyer can use this as a way of forcing a discount as the costs of storage and resale could be much greater than the price offered. An even more sharp practice involves the original buyer waiting until the port sells the goods at auction to pay for the storage (*Demurrage*) costs and freight and clearance charges, and buy them at a significant discount.

For suppliers, the further disadvantage of the documentary bill for collection as a settlement method is that it is slow, typically taking 30 to 40 days after shipment before payment is received. This is often caused by the buyer not taking up the documents until after the vessel with them has arrived in the destination port. This can be mitigated by charging interest from the shipping date until the date the buyer pays for the documents, within the collection. If the instructions state the bank may not release documents without the buyer agreeing to pay the interest, the seller should be protected.

It is still possible to arrange export finance through a few major UK clearing banks so that the exporter receives an immediate payment. Many UK banks have, however, withdrawn these facilities unless the exporter has credit insurance cover. The main advantage for suppliers using the documentary bill method is that it is relatively simple and cheap.

For customers, the main advantage of this method is that payment can be deferred at least until arrival of the documents which can then be inspected, and frequently, either by agreement or by custom, even until arrival of the goods themselves.

Documentary Letters of Credit

Frequently the level of security provided to the sellers by a collection route is insufficient. Although the exporter retains control of the documents, it loses physical possession of the goods, albeit retaining some control over the disposal of those goods where a document of title such as a bill of lading is used or where the goods are consigned through the suppliers' agent. This may be of small consolation to suppliers whose goods may be 8,000 miles away and must be disposed of by an agent in a forced sale in an unreceptive market. In theory, goods could be shipped back but the cost of such an operation is usually prohibitive.

In this case, suppliers are likely to insist on payment being made by means of a *letter of credit*, also known by banks and other financial institutions as a documentary

credit. This is a document issued by the customers' bank to the suppliers, promising that the suppliers will be paid provided that all the terms and conditions stipulated by the customers, as expressed in the letter of credit, are complied with.

There are a number of types of letters of credit which give the exporter different levels of security of payment, as follows.

1. The *unconfirmed irrevocable letter of credit* (ILC) is commonly used as the terms and conditions cannot be altered without the expressed agreement of both exporter and buyer and the issuing bank and the confirming bank (if any). The advising bank does not commit to pay under the credit, is a final option. In this case, the issuing bank, normally in the buyer's country, will advise the advising bank in the exporter's country. When receiving this type of unconfirmed credit the bank usually adds the words "This Credit does not bear our confirmation". An unconfirmed letter of credit can often take far longer to pay, as the funds often have to come from the issuing bank. However, if the ILC has reimbursement instructions on it, these delays may be minimised.
2. The *confirmed letter of credit* (CLC) is the safest method of payment as a second bank (the advising bank) adds its confirmation that the credit will be paid provided of course that all the terms and conditions have been met by the exporter. A *confirmed irrevocable letter of credit* is opened by an issuing bank whose authenticity has been confirmed by an advising bank.
3. *An irrevocable and without recourse letter of credit:* the advising bank will not be able to recover the money paid to the beneficiary in the case that the issuing bank does not pay the advising bank. This is sometimes referred to as a *silent confirmation.*
4. A *revocable letter of credit* (RLC) may be amended or cancelled by the issuing bank at any time; thus there is less security of payment. The credit cannot be revoked after shipment has occurred. These instruments are extremely rare. They have some advantages where the exchange regulations of the importing country are very strict and utilising an letter of credit facilitates faster transfer, but both buyer and seller must have confidence in one another. They are more secure than a documentary collection as the issuing bank is authorised to pay provided documents comply, and the buyer cannot refuse the goods. However, the international banks and the ICC has reservations about their standing and have excluded revocable letters of credit from the latest rules (UCP 600.)
5. In a *restricted negotiable letter of credit*, the authorisation from the issuing bank to pay the beneficiary is restricted to a specific nominated bank, usually the advising bank.
6. In a *freely negotiable letter of credit*, the authorisation to pay the beneficiary from the issuing bank is not restricted to a specific bank.
7. A *revolving letter of credit* means that once supply has been made and payment received, the letter of credit amount is available again without issuing another letter of credit.
8. A *sight letter of credit* is one where payment is due when the bank has sight of the documents. ie immediately on presentation of documents.
9. A *deferred payment* or *usance letter of credit* is one where payment is due at a certain or ascertainable future date, such as:
   (a) X days after presentation eg 30 days sight
   (b) X days after shipment eg 30 days after bill of lading
   (c) A fixed future date eg 31 December 2009.
10. A *refinanced letter of credit* is one where the exporter is paid on presentation of documents, but the advising bank provides credit to the issuing bank and is repaid at an agreed future date.

When reviewing these various types of credit it must be emphasised that the strength of a credit is based on the financial strength of the buyer and the financing arrangement it has with its banker. The financial strength and even trading experience

effect in some countries can be little short of catastrophic for the customers. On the other hand, the mere threat of protests being carried out may be sufficient to induce customers to honour the drawings. Only suppliers can make these decisions and they should be made *before* the documents leave their control.

Use of Agents (Case of Need)

Another possibility is that the suppliers have their own commercial agents in the customers' countries who may be in a position to mediate between suppliers and the customers in an attempt to reach settlements.

No bank will divulge information regarding its customers' affairs to a third party without written authority to do so and again such authority should be given when the drawing is first sent for collection. Furthermore, instructions should state the precise extent of the powers which may be delegated to the agents, known as the *case of need* since they are only brought into transactions in case of the need arising for their services. Such powers may be *advisory*, in which case the agents' action will be simply to try to use their influence to persuade the customers to take up the goods. Alternatively, agents' powers may be *absolute*, in which case they could, in theory, take documents of title from the bank free of payment and seek to sell the goods elsewhere or even ship them back to the suppliers. Agents' powers may, of course, lie anywhere between these two extremes.

Whatever the extent of an agent's involvement there must be no room for doubt on the part of the bank seeking to put the suppliers' instructions into effect.

Bank Charges

Naturally, banks that are providing the services which have been described above are going to require adequate payment for those services. All too often no provision is made at the contract stage regarding who should be responsible for the payment of such charges and it is important that the suppliers state clearly in their instructions what, if anything, has been agreed on the subject. If, in their perception, the customers are responsible for meeting all bank charges or for perhaps only those levied by the banks handling the collections in the customers' countries, then instructions should be given for the amount of such charges to be collected in addition to the amount of the drawing.

Instructions should also give the banks clear guidance as to the action required of them should the customers' perceptions of the responsibility be different from that of the suppliers. This is usually achieved by stating that charges should be collected but may be waived if refused, or may not be waived, as the case may be. Careful consideration should be given to the matter before the latter alternative is used since, in economic terms, it is often nonsense to sacrifice payment of the principal amount for the sake of what are usually relatively small amounts. Customers are well aware of this and many refuse bank charges as a matter of principle. In this case the law of agency will apply and, as in a collection, the suppliers are the principals, so they are the parties with ultimate responsibility for reimbursement of expenses incurred on their behalf by their collecting agents.

Interest

It is possible to include a claim for interest on the collection instructions. This provides a little extra credit to the buyer, typically covering the period from shipment to arrival, at which point the buyer pays the bank and takes up the documents to arrange clearance. In some cases, the seller grants the credit period normally enjoyed by the buyer, 30 days from shipment, for example, only claiming interest if the period taken to pay exceeds it.

Banks will not generally accept liability or responsibility for delay, loss in transit or other errors arising in delivery of documents when they are sent in accordance with the credit.

SUMMARY

Since imperfect documentation may well result in delayed payment, unnecessary expense or even eventual dishonour of the drawing, it makes good sense to ensure that all the documents called for under the contract have been supplied, that they are properly completed, signed and endorsed where necessary, and that any statement regarding the goods or any other aspect of the transaction which is required to be made on the invoice or elsewhere is present.

HOW THE DOCUMENTARY CREDIT SYSTEM WORKS

The credit is frequently a dauntingly complicated document, at least in its general appearance if not in the actuality, and attempts at defining it frequently lead to complex and verbose descriptions. In reality it is very simple: a *credit* is a promise by a bank that suppliers will receive payment for goods provided that they comply with all the conditions laid down in the credit.

THE PARTIES INVOLVED

The promise made by the *issuing bank* to the suppliers, who are referred to as the *beneficiaries*, constitutes the core of the credit and theoretically no other parties need be involved. Even in the event of the customers (called the *applicants* in a credit transaction) going out of business, the core remains and the promise must be honoured.

In practical terms, other parties are brought into the process for various reasons which will become apparent (see *figure 9.12*). Because of the distance (not to mention national frontiers) which separate suppliers and customers in international trade, the letter of credit on issue will not normally be sent directly to the beneficiaries. Although it is not unknown for this to happen, when it does the credit almost always turns out to be a forgery.

The usual procedure is for the issuing bank to make use of its correspondent bank in the beneficiary's country and it will send the credit to that bank with the request that it advises the beneficiary of its issue. The correspondent thus becomes the *advising bank* and it is by that title that it will be referred to. This is even more prevalent today as most credits are issued by SWIFT in a telex format and no 'written' letter of credit, other than the SWIFT printout ever exists. As most companies are not members of SWIFT themselves, these have to be advised through another SWIFT member, usually a bank.

The advising bank incurs no liability under the credit by acceding to the issuing bank's request. However, in advising the credit to the beneficiary it does warrant to the beneficiary, and to any other party who may become involved at a later stage, that it has taken all appropriate steps to check that the credit is genuine. Beneficiaries who may be unfamiliar with the issuing bank may take reassurance regarding that bank's actual existence and know that it is sufficiently highly regarded to have established a correspondent relationship with a bank in their own country with which they are

CREDIT GRANTING

A number of different business entities will be seen in the country, consistent with its former position within the former Soviet Union and developments since then. Types of business undertaking:

Valstybine Imone	State company.
Akcine Bendrove	Public joint stock company with minimum issued share capital 100,000 litas.
Uzhdara Akcine Bendrove	Joint stock company with minimum issued share capital 10,000 litas.
Personaline Imone	Sole proprietor.
Tikroji Ukine Bendrija	Partnership.
Kooperacine Bendrove	Co-operative society.
Zhemes Ukio Bendrove	Agricultural company.

ACCOUNTS FILING REQUIREMENTS

Where filed	All companies are required to register with the State Register, held by the Department of Statistics. Any joint ventures and foreign capital companies register with the Ministry of Economics.
Who has to file	The public joint stock companies must register their share capital on the National Stock Exchange and provide the National Stock Exchange with their annual balance sheets. Only public limited companies are obliged to publish accounts although non-compliance is common.
Search agency	To obtain contact details of the local D&B search agency, please contact Jim Adams at D&B on +44 1628 492 462 D&B Emerging Markets — *dbemc.dnb.com.*

DEBT RECOVERY

Proceedings

Debt collection procedures and legal structures for consumer and commercial debt are in place and technically late payment interest is chargeable although rarely enforced. The EU Directive on late payment (Directive 2000/35/EC) has been taken up by the legislature. Due to language issues, it is recommended that local lawyers are consulted and appointed before the commencement of any formal legal procedures. Many debtors will respond positively to dunning and other reminder letters.

INSOLVENCY PROCEDURES

Regulated by:

- Enterprise Bankruptcy Law No IX 216 20/03/01
- Enterprise Restructuring Law No IX 218.

Composition with creditors (taikossutaris)

- Agreement with credit enable organisation to continue in business
- 100% agreement with creditors required.

Judicial bankruptcy (bankrots byla)

- Adjudicated insolvent
- Court appoints Administrator
- Function to protect assets

Out of court bankruptcy (Bankrots procesas ne teismo tvarka)

- Out of court Bankruptcy process
- Realise and distributes assets to creditors
- Similar to UK Creditors Voluntary Liquidation
- Deemed quicker and cheaper than judicial bankruptcy.

Restructuring proceedings (restrukturizavimo byla)

- Allows company to avoid bankruptcy and continue in business
- Must be prior to bankruptcy
- If already in bankruptcy, then composition would apply.

Liquidation (likvidavimo procedura)

- Part of the bankruptcy process
- Sells and distributes assets realised.

Informal restructuring

Only binding on those who approve.

LUXEMBOURG

LANGUAGE

The commercial languages are primarily French and German but English is very often used.

LOCAL CUSTOMS

Credit Terms

60–90 days.
Drafts are common.
The currency is the euro.
EC regulations apply for payments to other countries in the single market.
No transfer delays.

Credit Insurance

Available locally and in the UK.

Factoring

Available locally and in the UK.

- full particulars of the amount claimed — and what it is for — to enable the debtor to identify precisely how much is claimed — and what it is for;
- if the creditor intends to issue proceedings, notice to that effect should be included;
- if the creditor intends to claim interest, the basis on which it is claimed should be specified — eg "interest at four per cent above the prevailing bank base rate, pursuant to contract";
- how payment can be made, eg cheque, bankers draft, BACS, etc;
- a name, address and telephone number for the debtor to contact, if action is to be avoided, and
- a time frame of seven days from the date of the letter for a reply.

This, in effect, will be little different from the final letter usually sent by a creditor, debt collection agency or solicitor. It does, however, help the creditor to build a reasonable approach to collection, as required by the rules.

STARTING AN ACTION

All claims for up to £15,000 must be commenced in the county court. The forms used in the system are the same whether the action is issued in the High Court or the county court. In many cases a threat to make the other party bankrupt or petition for it to be liquidated is effective however, so do consider all options.

The creditor — *the claimant* — must complete a standard claim form.

Go to *www.moneyclaim.gov.uk/csmo/login_get_started.jsp* (the Government website) and issue proceedings with a credit card and complete the forms there — these inform users how to claim interest and the like. In addition, if the money claim website is not used, forms to issue claims are on the court service website – where forms are at *www.hmcourts-service.gov.uk/HMCSCourtFinder/FormFinder.do*. The claim form N9 is used to start an action, there are notes to download and the defendant must also be sent a pack telling him or her how to defend the action which is also downloadable from that site. When the action is started electronically then this is automatically sent to the defendant.

Interest may be charged under one of three headings.
1. Interest set out in the contract or terms of trade.
2. Interest in accordance with the late payment of commercial debts legislation.
3. Interest under the **County Courts Act 1984** — currently a flat eight per cent per annum. This interest now has no relevance to claims for commercial debt, which are governed by 1 or 2 above. It is, however, used in other civil claims — such as claims for personal injury.

Figure 11.2 – Particulars of Claim: Standard Format Claiming Interest and Collection Costs

On front page of claim form under **Brief Details of Claim:**

The Claimant claims the sum of £xxx (the price of goods sold and delivered) (the cost of repair services) (the cost of work done and materials provided) together with interest at ..... and collection costs pursuant to .....

On second page, under **Particulars of Claim:**

The Claimant claims the sum of £xxx in respect of (the price of goods sold and delivered pursuant to the defendant's order) together with interest at and collection costs pursuant to .....

Particulars

Dates of first and last invoice	To goods sold and delivered in accordance with the defendants order as per invoices on and between these dates.	£
	Interest on the £ (the debt) to date	£
	Collection costs pursuant to	£ xx
	Total	£

The claimant further claims interest at the daily rate of £x until judgment or sooner payment.

Note: The Rules require Claims to be "fully pleaded". It is anticipated that the above will suffice in the majority of claims up to £5,000, which will be dealt with in the Small Claims Track. Claims for larger amounts may need to be set out in greater detail as to the date of the contract and any agreed payment terms etc. The claim seeks to recover both interest and collection costs — which are shown separately — to confirm that interest is being charged on the debt, and not on the collection costs.
The claimant must specify under what provision the interest and collection costs are being claimed, ie under the contract, or under a statutory right.

The Certificate of Value

If the claim is in respect of a commercial debt, there is no need to complete the certificate of value. Completion of this is only necessary if there is a claim for damages, which the court is being asked to assess. In respect of a commercial debt, the amount of the claim is shown in the appropriate box. That figure is the debt, plus any collection costs and interest up to the date of completion of the form.

Claiming Interest and Collection Costs

A claimant wishing to charge interest and collection costs must:
- specify how the right to make these charges arises;
- calculate the interest up to the date of completion of the claim form, and
- show the daily rate in respect of ongoing interest.

Issuing the Claim

The court will require one copy of the claim for the court file, and one for each party to be served.

An important change to the Civil Procedure Rules in 2006 makes it mandatory to provide a postcode for any addresses in the claim form, whether for the claimant or defendant. The claim form must also include the full name of each party:
- **Individual:** full unabbreviated name including title;
- **Individual trading under another name:** full unabbreviated name, title and trading name;
- **Partnership:** full unabbreviated name of the business, and
- **Limited company, PLC or limited liability partnership:** full unabbreviated name of company or partnership.

The court will date stamp the papers on the day they are received unless the claim is issued electronically in which case all these steps are automatically taken. They will

(b) application for an order to obtain information from judgment debtors; under this process an officer of a corporate body can be examined as to the financial circumstances of that body and an individual can be examined as to his or her financial situation (see — *Order to obtain information from judgment debtors*).

The Register of Judgments, Orders and Fines

This new Register has replaced the Register of County Court Judgments. Creditors have access to the new Register, which includes High Court and Magistrate Court fines, County Court judgments, County Court administration orders and Child Support Agency liability orders.

Available enforcement processes

Currently, the enforcement processes available to a judgment creditor are:
(a) order to obtain information from a judgment debtor;
(b) execution against goods;
(c) third party debt order;
(d) charging order;
(e) attachment of earnings order, and
(f) bankruptcy/winding up.

As noted above, there will be changes to some of these processes which are intended to improve their effectiveness. The following pages set out the current procedure in each process.

Order to obtain information from judgment debtors

The previous process of "oral examination" is replaced by this process, which is intended to be faster, and more effective. Application will be made on Form N316 (see *Figure 11.4*) available free of charge from the County Court, and the Application must be made to the Court in which the judgment was obtained. There is a separate form N316A (see *Figure 11.5*) if the person to be questioned is an officer of a corporate body. The questioning will, however, be conducted in the debtor's court.

The Form will allow the creditor to request that the debtor produce to the Court, on the hearing, such documents as the creditor specifies. The creditor can also set out any questions to be put to the debtor, in addition to those that will be asked by the judge, or Court Officer.

Unless the creditor is an individual, bringing a claim in person, the creditor will be required to serve the debtor with the Order to Attend, which will be drawn up by the Court. The Order will carry a notice, informing the debtor that failure to attend on the date fixed may result in a Committal Order being made for "contempt of court".

The creditor will be required to sign a Certificate of Service, provided by the Court. The debtor will have the right to request that his/her travel expenses are paid by the creditor.

An individual who is a sole trader or a partner in a firm can be examined as to his or her personal finances, as well as the finances of the business. An officer of a corporate body — and this will include a partner in a limited liability partnership — can only be examined as to the affairs of the corporate body.

The examination will be conducted by a judge or senior court officer and a standard form of questionnaires are used. Form EX 140 in respect of an individual and form EX 141 in respect of an officer of a corporate body.

A creditor has the right to request that a judge 'supervise' the hearing and, if the judge agrees, then the examination will be conducted by the creditor, or the creditor's

representative, in the presence of the judge. The questioning will take place under Oath, and the answers given will be noted on the form of questionnaire.

If the debtor fails to attend on the initial hearing, or otherwise fails to comply with the Order, the matter will be referred to a circuit judge on a referral form. That will be sufficient evidence for the judge to make a suspended Committal Order. The committal is suspended, provided that the debtor attends on a new fixed date.

If the debtor again fails to attend, or if the debtor attends but declines to answer questions, a Warrant of Arrest will be issued. This requires the bailiff to arrest the debtor, and bring him/her before a judge. If the debtor agrees to be questioned, the Committal Order can be discharged on such terms as the Court may decide. If the debtor refuses, a Committal Warrant must be issued and the debtor taken immediately to prison. The process is designed to reduce the number of hearings and to achieve the objective of questioning the debtor.

The process of examination may be used as a means of convincing the debtor to pay — or to make a proposal for payment. It may be used to ascertain information to assist the creditor to decide the most appropriate method of enforcement.

In most cases, it will not be necessary for the creditor to attend, unless directed to do so by a judge, or unless the creditor, or creditor's representative, wishes to conduct the examination. It is important to understand that this is not an absolute right for a creditor, and is subject to a judge agreeing to supervise the examination.

As noted, the creditor will be responsible for serving the Order to Attend. The creditor will also, if the debtor requests it, be required to pay the debtor's travel expenses to court. The fact that the hearing will take place in the debtor's court will reduce such expenses. Serving the Order may mean that the creditor employs a process server, which will involve the creditor in additional expense. However, it is only the Order to Attend that the creditor must serve, any suspended Committal Order will be served by the court bailiff.

If the creditor incurs travel expenses or employs process servers to serve the order to attend, these can be added to the debt. Three days before the hearing, the creditor must give written notice of such expenses to the court and provide supporting invoices or receipts.

If the debtor is a corporate body, then, as noted above, the creditor can nominate an officer of that body to attend and be examined. That officer can be examined as to the financial affairs of the corporate body, and not his or her personal finances. However, a creditor can request that the books and accounts of the corporate body be produced for inspection by the court.

If the debtor is a partnership, then the creditor can nominate the partner who is to attend, and that partner may be ordered to produce the books and accounts of the business for inspection. As the partners are jointly and severally liable for the debts, the partner may also be examined as to his or her financial position.

EXECUTION AGAINST GOODS

The essence of execution is that the executing official takes possession of the debtor's goods and sells them, deducting from the proceeds of sale the debt and the costs of effecting the sale. Since only the debtor's goods are available for sale in this way there are traps for the unwary creditor in the use of this procedure.
1. Goods are often on hire-purchase or conditional sale agreement and, therefore, do not belong to the debtor.
2. Goods are often owned by the debtor's spouse and cannot be sold for payment of the debtor's debts. Even if the creditor suspects that the spouse's claim to ownership of the goods is spurious, this is often difficult to prove.

THE REPUBLIC OF IRELAND

When dealing with claims against debtors in the Republic of Ireland it is always necessary to instruct a solicitor if the creditor is a *foreign plaintiff*, ie a plaintiff outside the jurisdiction of the courts of the Republic of Ireland.

It makes good sense to instruct a solicitor direct in the Republic of Ireland rather than instructing an English solicitor to pass the papers to his or her agent in the Republic. This will save costs.

The courts in the Republic of Ireland have, at all levels, what is called a "mixed jurisdiction". This means that they deal with both civil and criminal matters.

Small debts and minor criminal matters are dealt with in district courts and major debts and more serious criminal matters go to the circuit courts. Major criminal matters and large debts are dealt with by the High Court.

District Courts

The Republic is divided into 24 districts. Each district has one justice assigned to it. The one exception is the Dublin Metropolitan District where additional justices are appointed to deal with the considerable volume of work.

There are 267 district courts. Sittings take place at least once a month and claims are dealt with in the court that covers the district in which the debtor resides or carries on business. In addition, the district courts undertake the enforcement of judgments for debts obtained in any court.

The Circuit Courts

There are eight circuits. The Dublin Circuit has four circuit judges and the seven remaining circuit courts have one judge assigned to each court.

The High Court

The High Court deals with civil and criminal matters and sits at Dublin, Cork, Galway, Sligo, Limerick, Dundalk and Kilkenny.

The Supreme Court

The Supreme Court is the appeal court for both civil and criminal matters. It also has powers to review Bills passed by the Irish Parliament and awaiting signature by the President to ensure that they are in line with the Constitution.

Court Procedures

The court procedures in the Republic are similar to those of the English courts. In the High Court, on issue of a summons, the defendant is allowed only eight days to deal with it.

In the circuit courts a claim begins with the issue of a *civil bill* and this gives the debtor the option to pay, to make an offer to pay or to defend.

If a claim is defended, many cases can be dealt with by affidavit. However, if an action is "substantively defended" then it will be necessary for the representatives who can give evidence on behalf of the creditor to travel to the Republic to give evidence.

If the debtor ignores a civil bill a solicitor can make an application for judgment supported by an affidavit of debt which sets out the fact that the claim is still due and genuinely payable and that no notice of intention to defend has been received.

When the affidavit is lodged in court the court will enter judgment.

Enforcement in the Republic of Ireland

Applications to enforce judgment in any court in the Republic must be made to the court for the district in which the debtor resides or carries on business. The available procedures are as follows.

Execution

On application, the district court will issue a warrant which empowers the sheriff to seize and sell the debtor's goods and account to the plaintiffs for the proceeds of sale. As in England, if there is more than one warrant against the debtor the sheriff enforces them in the order in which they come to him or her. The sheriff has power to negotiate with the debtor and if the sheriff feels it is the only way that payment can be obtained, he or she may agree an instalment arrangement.

Instalment orders

The district court can order the debtor to attend and to produce evidence of his or her assets, income and liabilities. It has power to commit the debtor to prison for failure to attend or failure to provide information and it also has power to order the debtor to pay the debt by instalments.

Garnishee order

This is a similar process to that in England. The court can order the customer's debtors to pay money directly into court for the benefit of creditors. This procedure can be used to obtain, in effect, an attachment of earnings order against the debtor's employer.

Examination order

A creditor who has obtained judgment may apply to the court for an order that the customer be brought before the district court to ascertain the means available to discharge the debt.

On the hearing, the court has jurisdiction to make an order directing the debtor to pay instalments according to his or her means. If the debtor fails to make the instalment payments as ordered the creditor may apply for a committal summons ordering the debtor to attend court to show why he or she has failed to pay. If the debtor does not attend or cannot establish to the satisfaction of the court his or her inability to pay, the court has power to issue a warrant for the arrest and imprisonment of the debtor. This will be executed by the police. If the debtor is a company, an application may be made that any director or officer of the company appear in court for examination as to the affairs and assets of the company.

Judgment mortgage — charging order

A creditor may have a judgment registered as a charge against a debtor's property. Once duly registered this has the same effect as any other mortgage.

Insolvency and Bankruptcy

The Republic has its own bankruptcy and winding-up legislation. It is similar to that in the UK and an individual may be put into bankruptcy or insolvent limited company may be put into liquidation.

A creditor can serve a statutory demand under s.214 of the **Companies Act 1963** against a limited company. If the company fails to comply with the demand within three weeks then the creditor can present a petition to the High Court for the compulsory winding-up of the debtor company.

civil remedy in the armoury of creditors. The wrongful trading provisions of s. 214 of the **Insolvency Act 1986** are an attempt to overcome this deficiency.

For a person to fall within s. 214, three conditions must be satisfied.

1. The company must be in the process of insolvent liquidation. The provisions are not applicable to an administration or the processes of an administrative receiver.
2. At some time before the commencement a director must know, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation.
3. The director(s) concerned must fail to establish the defence available to them under the statute. That defence requires the director(s) concerned to show that they took every step that ought to have been taken to avoid loss to the creditors.

The title given to this provision, *wrongful trading*, is misleading. No trading is in fact required. The sins of the directors caught by the provision may equally be sins of omission: namely failing to take proper steps to protect creditors when the true financial position relating to the company had become clear. This could entail failing to collect debts due to the company promptly or paying excessive fees to the directors after the company has ceased trading. In conclusion, wrongful trading can be defined as any unlawful action taken by a director which a careful and sensible person would not have taken. The wrongful trading provisions apply to all three types of director (see *Defining a Director* earlier).

The consequences of improper trading

There are three non-criminal sanctions for improper trading; these are the same for both fraudulent and wrongful trading.

1. The director may be disqualified. Disqualification is an important matter in its own right and is discussed in *Disqualification of Directors* below.
2. The director may be ordered to make such contribution to the company's assets as the court deems fit. The court may make supporting orders to give effect to the contribution order which it has made against any property of the company held by the director, and in respect of any obligations of the company due to the director.
3. If the director is a creditor of the company the court may order the subordination of the whole or part of the director's debt to all other debts of the company plus interest thereon.

It appears that in making a contribution order, whilst the court may have regard to the culpability of the director, the basic purpose of the order is compensatory. In principle, therefore, directors found responsible for wrongful trading should be ordered to make good the loss occasioned to the creditors, regardless of the directors' culpability.

DISQUALIFICATION OF DIRECTORS

The disqualification of directors is now governed by the **Company Directors Disqualification Act 1986**. It governs the disqualification of persons from being directors not the disqualification of directors from continuing to hold office. In short, a person does not have to be a director to be subject to an order under the legislation. If individuals have personal assets and have acted in a way which leaves them open to the making of a disqualification order, the threat that steps will be taken to obtain a disqualification order may result in a debt being paid.

The Department for Business, Enterprise and Regulatory Reform's (BERR) Legal Services D2 section works to identify fraudulent or disqualified directors, obtaining financial retribution or imprisonment. The section's information can come from various sources; for example:

- the Insolvency Service, referred from official receivers, administrative receivers and liquidators;

- the DBERR's Corporate Law & Governance Directorate, referred from the Companies Investigation Branch when statutory enquiries or complaints disclose criminal activity;
- members of the public, mainly hotline complaints against disqualified directors, made to the Insolvency Service or the Companies Investigation Branch;
- the police, and
- Companies House.

Grounds for disqualification

Depending upon the circumstances, disqualification may be automatic, obligatory or discretionary.

Automatic disqualification

By virtue of ss. 11 and 12 of the **Company Directors' Disqualification Act 1986**, persons are automatically disqualified from acting as directors of a company, or directly or indirectly taking part in managing a company or being concerned in the promotion, formation or management of a company, if they are undischarged bankrupts. They are also disqualified in respect of these activities where, as a result of their default in payment under a county court administration order, the court revokes that order. Whilst the disqualification is automatic, the persons concerned may apply to the court for leave to undertake any of the prohibited activities.

Obligatory disqualification

There is one ground which, if established, obliges the court to make a disqualification order. By virtue of s. 6 of the **Company Directors' Disqualification Act 1986** it is obliged to make a disqualification order if it is satisfied:

(a) that the person is or was previously the director of a company which has been insolvent, at any time (it does not matter whether the insolvency was while the person was a director or subsequently), and
(b) that that person's conduct as a director of that company (either taken alone or taken together with that person's conduct as a director of any company or companies) makes that person unfit to be concerned in the management of a company.

For these purposes, a director includes a shadow director (s. 6(3)) — see *Defining a Director* earlier.

A company becomes insolvent if:

(a) the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up
(b) an administration order is made in relation to the company, or
(c) an administrative receiver of the company is appointed.

Whilst the court is obliged to make an order of disqualification, it may give a person leave to act as a director in restricted circumstances. It may do this either at the time of making the original order or on subsequent application by the disqualified director.

Discretionary disqualification

There are seven grounds upon which the court has discretion to order disqualification.

1. The court may make a disqualification order against persons where they are convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management or liquidation of a company; or with the receivership or management of a company's property (s. 2(1)

- in which the files forming part of it are structured or referenced in such a way as to clearly indicate at the outset of the search whether specific information capable of amounting to personal data of an individual requesting it is held within the system and, if so, in which file or files it is held, and
- which has, as part of its own structure or referencing mechanism, a sufficiently sophisticated and detailed means of readily indicating whether and where in an individual file or files specific criteria or information about the applicant can be readily located.

The Information Commissioner has accepted that the decision means that whereas it was thought that all manual files were caught by the Act, the majority are outside its scope.

The Commissioner has issued some guidelines *The Durant case and its impact on the interpretation of the Data Protection Act 1998*. They give some practical guidance and a 'rule of thumb test' to ascertain whether a filing system is 'relevant' under the Act.

'If you employed a temporary administrative assistant (a temp), would they be able to extract specific information about an individual without any particular knowledge of the type of work or the documents you hold?'

For example, if there is a file entitled 'John Smith' but there is no sub-division of its contents; documents are randomly dropped into the file or are filed in chronological order regardless of the subject matter. The 'temp' would have to leaf through the file contents to obtain any specific information required. This is not a relevant filing system.

In simple terms, if specific information about an individual can be found in a file dedicated to that specific individual and that specific information, that is a relevant filing system.

The Information Commissioner's guidelines are available in full at: *www.ico.gov.uk*.

Subject access requests

An individual is entitled to have access to personal data held on him or her. That provision is complied with by providing copies of such data on request. The business holding the data has 40 days from the date of the request to comply and the information provided must be in an understandable format.

Thus, businesses must consider what manual records they have, where those records are and how up-to-date they are. Thus businesses must consider what manual and computer records they have to establish procedures for dealing with access requests and to ensure that all personnel are aware of the provisions of the Act.

A creditor can charge up to £10 for the provision of copies of the data. The request made by the subject must be in writing. A creditor is not required to comply with a telephone or verbal request. This is, in part, to ensure that the person requesting the data is, in fact, the data subject! Creditors need to have some security procedures in place to avoid the provision of data to any third party in error.

As noted under Personal data (above) not every document that refers to an individual is 'personal data' within the meaning of the Act. The mere fact that an individual's name appears in a document does not make that document "personal data" unless it is followed by biographical information. The privacy test defined in the Durant case (See *Personal data*) applies.

Further, when complying with a subject access request the individual is not entitled to copies of the complete document that the data is contained in, but only the personal data it contains. References to third parties should be blanked out.

The Information Commissioner's Office (ICO) has offered some advice on data protection for small and medium sized enterprises (SMEs). Under the Data Protection Act individuals have the right to request digital information relating to them, and the ICO explains how to handle requests from individuals whose data the SME holds. This could include anything from "I seem to have lost my guarantee number – can you tell me what it is, please?" to "I am a solicitor acting on behalf of my client and request a copy of their records".

The guidance includes such matters as:

- whether requests should be dealt with according to the Data Protection Act or less formally as a normal part of business
- how to be sure of an enquirer's identity
- if a fee can be charged for the information when the SME is obliged to share the data, and
- how to prepare a response.

More information can be found on the ICO website: *www.ico.gov.uk*

Preventing 'automated decisions'

An individual has the right to prevent decisions being made about him or her by an automated process such as credit scoring. This right will usually arise on an application for credit being rejected as the result of such a process.

If such a decision is made, and the result is to reject the application, then the individual must be advised of the rejection, and advised that the decision was made by an automated process. The individual then has the right to request that the decision be reconsidered without using that process.

Transfer of personal data outside the EEA

The Eighth Data Protection Principle prohibits the transfer of personal data to any country outside the EEA unless the country in question has adequate data protection legislation in place. The EEA comprises all the EU countries plus Norway, Iceland and Liechtenstein. This prohibition can be excluded if the data subject gives express consent for such transfer or such a transfer is necessary for the completion of a contract.

Transfer may also take place in situations where:

- there is a substantial public interest;
- the transfer is necessary for the enforcement of a legal right, or
- the transfer is authorised by the commissioner.

The concerns about transfer arise as a result of the possibility that data will be transferred to a country or territory that does not provide adequate levels of security and protection for personal data.

Data protection principles

The 1998 Act makes some slight but important changes to the principles established in 1984. The principles defined by the 1998 Act are as follows.

1. Data must be processed fairly and lawfully.
2. Data shall be obtained only for one or more specified and lawful purposes and shall not be further processed in any manner incompatible with those purposes.