markets, especially in relation to access and interoperability. This is a complex area of law, and if it may be applicable to an IT contract, specialist advice is essential. It is important to apply it correctly. Sanctions include imprisonment for cartel activity, extremely large fines, disqualification of directors and the contract becoming unenforceable. The courts can award damages to companies who have suffered from other companies' breaches of competition rules.

Articles 101 and 102[10] contain the major provisions governing anti-competitive market behaviour which may affect trade between member states in the EU. They cannot be ignored whenever contractual circumstances fall within their ambit. Any contractual provision purporting to restrict trade in a way prohibited by Article 101 or 102 would be legally unenforceable.

PROHIBITION OF AGREEMENTS WHICH PREVENT, RESTRICT OR DISTORT COMPETITION

Agreements or concerted business practices which could interfere with trade between member states by preventing, restricting or distorting competition within the EU, are prohibited. There are limited exceptions for agreements which improve production or distribution, or which promote technical or economic progress, provided that they allow consumers a fair share of the benefit, contain only indispensable competition restrictions, and do not eliminate competition[11]. However, the standard of proof that an agreement meets these criteria is very high.

Distribution agreements may be affected. There are some exceptions, depending on whether the parties are competitors or not, and where the parties have low market shares in the relevant technology and product markets. If the parties to the agreement are small businesses with small shares in their market, there will be no significant effect on trade and competition. Specifically if the aggregate market share does not exceed 10% of the markets affected for an agreement between businesses at the same level of supply, or 15% for agreements between businesses at different levels of supply, for example between a manufacturer and a distributor, proceedings are unlikely to be taken against the businesses by the European Commission in respect of the agreements[12].

However, certain terms are always prohibited; these are known as 'hardcore restrictions'. Terms in an agreement setting fixed minimum prices, export bans, restrictions on prices, outputs or sales, and market or customer allocation restrictions, will be void. For agreements under English law, if the contract can still operate without them, it will remain in effect. If there are many anti-competitive provisions, the whole agreement will be invalidated.

Distribution, franchise and agency agreements (between businesses at different levels of supply), where the market share of one of the parties

does not exceed 30%, can automatically benefit from other exemptions from the prohibitions[13]. Again, the exemption will not apply to hard-core restrictions. This exemption recognises that, in certain circumstances, although competition may be harmed by a particular arrangement, the benefits overall will outweigh any damage. The European Commission can focus on major anti-competitive arrangements rather than be distracted by relatively minor contracts.

The parties to an agreement are responsible for assessing its legality to determine that it is not anti-competitive, and is therefore legally enforceable, and whether the pro-competitive effects of the agreement outweigh any anti-competitive effects. They have to meet a high standard of proof.

A COMPANY'S ABUSE OF ITS DOMINANT POSITION

A company that is dominant in a particular market distorts the competitive structure in its market and would find no difficulty in making a competitor company's position untenable. It is therefore not permitted to take advantage of its market power to exploit those with whom it deals. This can occur with a dominant company's refusal to supply existing customers with products, or excessive pricing, or discriminatory terms. It is 'abuse of a dominant position' within the EU[14].

'Dominant position' relates to the particular market in which the company operates and the calculation of its market share, including any other relevant factors such as superior technological knowledge and sales network. Defining the market is not always easy, especially in a technology context. It may relate to a small market in specialised products. A company may be dominant where a market is dependent on its particular supplies, such as spare parts or compatible products.

The European Commission has wide powers to obtain information in relation to anti-competitive conduct, for instance by dawn raids. It may fine companies which breach competition rules[15]. Microsoft Corporation was found to have abused its dominant market position in 2004[16]. Microsoft had refused to supply interface protocols in relation to group server operating systems and media players, preventing their use for the development by competitors of products which would be interoperable with Windows PCs and servers. Microsoft had also tied its Windows Media Player with the company's Windows 2000 PC operating system (ie making the sale of one product conditional on the purchase of another). The effect of this was to stop competitors' activities in the market, effectively reducing consumer choice and increasing prices.

The European Commission required Microsoft to disclose full interface information to enable other workgroup servers to be interoperable with

accepted, consideration and legal intention. Advertisements on websites generally constitute invitations to treat. The supplier's terms and conditions must be available online, so that the supplier's order process should require the customer, prior to making an order, to read and agree that the terms and conditions apply to the contract, and that they are incorporated into the contract.

These terms and conditions should stipulate how acceptance takes place, particularly with automated business processes. Suppliers should make the sequence of contract formation clear, so that it is the potential customer who makes the offer online on the supplier's terms and conditions, which gives the supplier the option to accept or decline, thereby ensuring that it is able to supply the goods or services, and that it can ascertain as far as possible that the customer has the status to enter into the contract, in an appropriate location, for example in terms of delivery, taxes and compliance with the law there. A law and jurisdiction clause, as discussed in CHAPTER 5, is particularly useful for business-to-business contracts online, which may be made between parties in different jurisdictions.

There are also specific additional regulations for consumer contracts, formed online or traditionally.

G Legislation and case law on contractual terms

The conditions set out in a commercial contract are only part of the general legal framework. Statements made before the contract was created may be taken into account. In addition, certain other terms will be implied by law into a contract.

1 Terms implied by law

Some terms do not have to be expressly stated in a contract to be applicable. Under the Sale of Goods Act 1979 as amended, and the Supply of Goods and Services Act 1982, certain terms are implied into contracts relating to the sale of goods or the supply of goods or services, whether or not they are set out explicitly, for business to business sales. (There are also some terms which apply specifically for sales to consumers.)

The most important obligations under the legislation relating to the sale of goods in the course of a business concern quality. In general, goods must correspond with their description, be of satisfactory quality except for defects specifically drawn to the buyer's attention or where the buyer has had the opportunity of examining the goods, and that the goods will be reasonably fit for any particular purpose for which the goods are being bought, which the buyer makes known to the seller[44].

Under the Supply of Goods and Services Act 1982, in a contract for the supply of goods and services in the course of business, the services must be carried out with reasonable skill and care within a reasonable time; and for a reasonable price (although a price or rate will usually be contractually agreed).

For business-to-business sales, certain of these implied terms may be overridden by the specific contract terms insofar as it is fair and reasonable to do this.

'Fitness for purpose' is problematic in relation to software. The concept applies to the supply of goods, not to the provision of services[45]. Suppliers of computer products routinely exclude this term, which would otherwise be implied into the contract. Their rationale is that the concept of 'purpose' is open-ended as far as software is concerned. Its use need not be confined to one sole purpose. All the circumstances and potential uses cannot be anticipated by the supplier. Instead, it is normal for the supplier to give an assurance that the software conforms to a specification, and to require the customer to accept positively that the software meets its needs, by review and acceptance testing before live use.

The supplier is not normally in a position for the customer reasonably to rely on it for assurance that the particular requirements of the customer's business can be met by the supplier's software, especially if it is software provided to many different users. If the provision is not specifically excluded, the customer who finds that the system being developed turns out to be unsuitable for its business requirements – a not uncommon situation in software procurement – may well find it of assistance, even if the system would be satisfactory in other respects by conforming to its supplier's specification.

In one case in the Court of Appeal[46], the judicial opinion was stated that where the software was intended by both parties to perform specific functions, terms would be implied that the program would be reasonably fit for the intended purpose and of satisfactory quality. This would apply unless there is an express or contrary term in the non-standard contract or a reasonable contrary term within the provisions of the Unfair Contract Terms Act 1977, which is discussed in the next section. However, it would be on the basis that the software had the legal attributes of goods when sold or hired as a packaged application rather than software commissioned for development (and in this particular case in the 1990s, the reference was to software supplied on a disc).

Software cannot be guaranteed always to work. It has been accepted by the courts that even software which had not excluded the condition of 'fitness for purpose' would not necessarily be error-free[47]. It was stated in that case:

> 'it is important to remember that software is not necessarily a commodity which is handed over or delivered once and for all at one

supplier and customer must assign resources to the project with relevant seniority and skills.

The supplier needs to take particular care to scope a development project properly. A fixed-price contract for an agile-type development carries great risks, especially if the development is not suited to an iterative methodology in the first place. Such contracts are ill-suited to fixed-price arrangements, although milestones based on estimates, with various defined options available when estimates are likely to be exceeded, may be a reasonable approach to help keep costs under control. At the very least, on a fixed-price contract for complex work, a large contingency needs to be built into the figures, and there should certainly be a well-considered procedure for change control. Software development contracts are discussed in CHAPTER 12.

2 *Damages*

Damages are the normal remedy sought for breach of contract. The amount of damages which will be awarded is a question of fact arising out of the circumstances of the case, relating to the loss suffered. There is generally no 'punishment' in English law for breach of contract. Damages are compensation to the aggrieved party, as an attempt to put that party, as much as money can, into the situation which it would have been in had the contract been carried out as the parties had originally intended.

The injured party may claim not only for loss actually suffered, but also for the loss of the benefit which the performance of the contract would have brought. Damages may be assessed on the basis of what it would cost to have the work carried out by a third party. A supplier's loss of profits may also be recovered unless the goods in question are in such short supply that no real loss will have occurred because of the general demand for the goods.

A consequence of this concept of compensation is that the injured party is expected to take steps to mitigate loss, and should make every effort to do so. If goods have not been delivered as agreed, the injured party should try and purchase the goods elsewhere. On instalment contracts, where default is made in meeting a milestone or in making a payment, the injured party can bring an action for damages for breach, but may not treat the whole contract as discharged for that reason alone. Each party should carry out an evaluation at the start of a case of what the damages are likely to be, to assess the commercial risks.

Damages to compensate the injured party for the loss itself are general damages, which have to be assessed according to the particular circumstances of the breach. These are unliquidated damages in contrast to liquidated damages, which consist of the amount of specific and provable actual losses.

A 'liquidated damages' clause in a contract for a fixed sum payable for a foreseeable breach, such as breach of a restriction on employing any staff of the other party, should be a genuine pre-estimate of the potential losses arising from the breach. An arbitrary amount or a figure which the court considers to be a penalty will not be enforceable. Although the courts will always look at the sense of what has been agreed, rather than assuming the validity or otherwise of a contractual statement that a particular sum is a genuine pre-estimate of loss, it is unwise to express any such sum in the contract as a 'penalty'.

Not all damages necessary to put the injured party in the exact position it would have been in if the contract had been performed will be recoverable. They must arise as natural consequences of the breach, having been reasonably foreseen by the parties at the time of making the contract and not be too 'remote'[73]. If special difficulties are likely to arise if the contract is breached by one party, and those difficulties were not made known to the other party when the contract was made, no damages will be payable in relation to such difficulties in the event of breach.

Supply contracts often routinely (and understandably) exclude certain losses, such as consequential loss. However, in one case, the judge held that 'consequential loss' meant loss that the claimants might prove over and above losses arising naturally and directly out of breaches of contract. This was upheld on appeal[74].

It may be advisable for the parties to consider the categories of losses that a customer might suffer and specify those which are to be included and excluded from potential liability, rather than to rely on the general terms of 'direct' and 'indirect' or 'consequential' damage.

For example, loss of profits may well result naturally and directly from breach of contract in an IT contract. A supplier should specifically seek to exclude this as a category of damages. In one case, over a failure of an automated billing system, the list of exclusions from liability was held to be too general to allow for certain losses under the contract that the supplier had expected to be covered, such as ex gratia payments to customers and charges overpaid to wholesale distributors[75].

Court proceedings arising out of breach of contract must generally be started within six years of the date on which the breach of the contract occurred. There are certain refinements to this. If there has been some concealment or fraud which has prevented the claimant finding out about the right of action, the six-year period will start from the time when it was discovered, or when it reasonably should have been discovered. The six-year period may be extended if acknowledgment is made by the party causing the breach. If a debt is acknowledged or part payment is made, the six years will start from the date of the acknowledgment or part-payment. As stated

of an acceptance of order form cannot be in large print, but they should certainly be readable if they are to have any effect. The Supreme Court itself specifies that it prefers documents in font size 12 and one and a half line spacing 'Documents must be presented in a form which is robust, manageable and not excessively heavy'[1].

(e) Discuss and agree as the negotiation progresses. If a point is worth negotiating, its inclusion in, or absence from, the contract should be established at the time the issue is raised. It is not constructive negotiation, apart from the inherent discourtesy to the other party, to return later on to matters which should have been resolved at an earlier stage. Furthermore, if the contents themselves are not at issue it is neither constructive nor courteous to amend the other party's draft purely so that it conforms more closely to the drafting standards of the modifying party.

(f) Try not to deal with issues in isolation because each one will be only part of the strategy for reaching the final objective. For example, if software ownership is being assigned, the intellectual property indemnity and software warranties should be dealt with at the same time, as these are all aspects of the software assignment. The opportunity to negotiate trade-offs will also be lost if issues are resolved one at a time.

(g) One unfortunate habit still evidenced in too many agreements is the apparently compulsive desire to state the obvious or unnecessary, such as clauses which inform the reader that the masculine includes the feminine, that singular includes plural, and so forth. These particular examples are catered for by statute[2], so that it is normally quite unnecessary to be confronted with such information, which is bound to lengthen an agreement. Complex agreements are difficult enough to read and digest without being side-tracked or put off by unhelpful legalese. It may, however, be useful to include expressly a provision which will apply automatically at law whether it is set out in the contract or not, for the purpose of reminding the parties that it should not be forgotten.

(h) Agreements often also include a clause relating to headings, to advise the reader that clause headings in the agreement do not form part of the agreement. Why not? Any heading which does not logically relate to the content of its clause is not the right heading to use. If a heading accurately represents the clause which follows, there is unlikely to be any difficulty if the agreement should ever be subject to interpretation by the courts.

Strong methodologies are needed to ensure high quality systems. Similarly, formal procedures are important in drafting, negotiating and administering high quality contracts.

D Definitions

It is no exaggeration to state that the Definitions clause is the lynchpin of a contract, particularly a long and complex contract. Getting definitions right will smooth the flow, order and sense of the substantive contract provisions. This requires that, wherever possible, definitions should have self-evident meanings. Definitions should play a similar role to the labelled illustrations found in user manuals of equipment and motor vehicles: their purpose is to aid the reader's understanding of the content which follows.

Definitions clauses are generally approached with little enthusiasm. They tend to be regarded as one of the more tedious elements of contract drafting. This is a great mistake. Whenever a new form of agreement is required for which there are no useful precedents, the definitions are the springboard essential to the contract construction process. This is especially true for a complex bespoke agreement, but it is also very important in drafting a standard form document. Every expression, phrase or term frequently used in the contract should be defined in the Definitions clause, to help the reader and to avoid unnecessary repetition.

Whilst it may seem that an agreement may be easier to understand if full explanations are incorporated in the text at the relevant place, this can considerably lengthen the document and cause the reader to lose track of the principal purpose of that part of the contract. Any expression used several times should be included as a definition. Definitions should be presented in alphabetical order for ease of reference.

One principle of the Definitions clause should be 'the fewer definitions, the better' if the contract clauses are to remain reasonably easy to follow. On the other hand, it is desirable to avoid cross-referencing within the contract as much as possible. In some contracts, definitions are denoted in the text only where they first appear, in inverted commas, and then capitalised in following uses. This is a matter of preferred style, but a Definitions clause does have the practical advantage of avoiding the need to hunt through the document to locate the first use and meaning of a definition. Some contracts adopt both approaches, using contextual definitions where they only appear in one section of the contract.

Definitions are sometimes found as a detachable schedule to an agreement for ease of reference, rather than at the beginning of the agreement. This can be helpful, especially if there are a number of schedules or collateral agreements linked to the main agreement all using the same definitions. Otherwise incorporation within the agreement proper is to be preferred.

In an agreement, defined terms will be given capital initial letters. Where capital initials do not occur for terms so defined in the example clauses in

organisation, it should not be too difficult to justify a payment related to annual salary costs. Using the example of the maintenance engineer, a comparatively low paid professional in the industry, it may be perfectly defensible and realistic to agree (or to impose in standard terms and conditions) a liquidated damages sum equivalent to up to a year's salary. The loss of an experienced engineer can directly cause disruption or even loss of business.

In many senses, the retention of staff is a commercial and management issue, and contractual devices will not prevent an employee wanting to change employment. Moreover, in a continuing relationship between supplier and customer, legal action on this account is often not desirable.

3 *Other parties' interests*

RIGHTS OF THIRD PARTIES

> [Subject to clause (X) ... (*specify which clauses the third party may enforce*)] [a /A] person who is not a party to this Agreement has no right [under the Contracts (Rights of Third Parties) Act 1999] to benefit under or to enforce any term of this Agreement.

A third party has the right to sue to enforce a contractual term if the contract expressly says so, or if the contract confers a benefit. The identity of the third party must be clear in the contract, whether by name or as a member of a defined class, for example, 'Distributor's Customers'. The third party will be entitled to the same remedies as if a party itself to the contract. This will be subject to all other terms of the contract, such as limitations of liability. The parties could, for example, provide that a term would be enforceable by a third party only if certain procedural steps were followed.

Thus end users might have an enforceable interest in a software licence agreed between the software owner and the distributor.

Any potential issues arising from commitments in favour of third parties should therefore be considered carefully.

If it is clear from the construction of the contract that the parties did not intend the third party to be able to enforce the contract, the third party will not be able to do so. But there may well be arguments over the implications arising from the contract. If it is not intended to grant third party rights, it will therefore usually be advisable to include specific wording in the contract to prevent third party rights arising by accident, unless it is entirely clear that the Contracts (Rights of Third Parties) Act 1999 will not apply, either because the contract falls outside the provisions of the Act (for example

because it is an employment contract) or because there is no possibility of the court interpreting the contract as one which confers third party rights. A contract between the parties directly affected will generally be a more practical solution, as part of a nexus of mutual rights and responsibilities.

In practice, the potential exposure would arise only if the contract does contain a relevant contractual provision benefiting a defined third party. It will also depend on the relevant third party's awareness of the contents of the contract and desire to invoke the benefit.

ASSIGNMENT

> Neither party will assign this Agreement [or any benefits or interests arising under this Agreement] without the prior written consent of the other party [which will not be unreasonably withheld or delayed] [except that assignments will be permitted to [subsidiary and] associated companies [of the Supplier/Customer] [as defined in the Companies Act 2006] provided that the transferee compan[y][ies] shall undertake to be bound by and perform all of the obligations of this Agreement as if originally a party to it].

An 'assignment' of a contract is a technical term in this context, meaning that the contract stays in existence, but the rights are transferred by the assignor to another party, the assignee. Unless there is an express prohibition against assignment in the contract, or the contract is of a type which cannot be assigned, such as a contract for personal services, either party can assign the benefit of the contract as a whole, or any of the benefits arising from the contract, to a third party. Thus a supplier may transfer its right to be paid to a factoring organisation.

When a contract is first negotiated, each party should have taken into account the other's standing, financial soundness, long-term viability and capacity for carrying out its part of the bargain. An assignment by one party would transfer its rights under the agreement to a third party. The other party to the agreement will want the opportunity to decide whether or not this should be permitted to happen. There may be reasons for not consenting. The third party may be a competitor. There may have been previous unsatisfactory dealings with the other party. There may be questions of confidentiality to consider.

The true meaning of 'assignment' in law is often overlooked or misunderstood by contracting parties. The legal position is that only benefits can be assigned, not burdens or obligations. This is logical, because assignees have a contractual relationship only with the assignor, and not with any other parties to the agreement. Thus, if a supplier assigned its contract to an alternative supplier, the customer would not be obliged to look to the assignee of the supplier to perform the agreement. That responsibility would remain with the original

be adversely affected, in addition to other significant penalties for deliberate or reckless violation of the regulations, there is naturally going to be some sensitivity to any request for the removal or modification of the export control clause.

Some distribution agreements by American suppliers go so far as to require an indemnity from the distributor in respect of any violations of export regulations by the distributor's customers. This is an extreme requirement which should be strongly resisted. Unless it can be shown that the distributor was careless or worse in establishing the 'ultimate destination' for products supplied, there is no justification for an indemnity. If the products in question are low unit value distributed in high volume to a large number of customers, it is highly unlikely that the distributor will have any means of knowing whether or not such products are going to end up at a prohibited destination.

Resistance to this clause is generally motivated on sovereignty grounds and will rarely be based on any actual intention to re-export to countries prohibited by US regulations. However, a contractual condition imposing such regulations acts as an important additional constraint against unlawful conduct. US suppliers could find themselves in difficulties with their government if violations of US export laws occurred in relation to their products and they could not demonstrate their imposition of contractual prohibitions. As a result, failure to submit to the US regulations might mean that the purchase could not proceed.

The example clause gives prominent reference to the UK regulations, as well as imposing the US regulations for US-sourced products.

If agreement of the clause genuinely does prove to be an insurmountable difficulty, there are some alternative forms of wording which could still enable an American or American-parented supplier to demonstrate to the authorities its reasonable efforts to ensure that the US regulations will not be infringed, or that they have at least been drawn clearly to the customer's attention.

For example:

> The Customer confirms that the Products identified in this Agreement are solely for the Customer's own use within the United Kingdom and are not intended for re-export.

This will be acceptable to some US organisations as representing an absolute undertaking not to re-export goods obtained under the contract mentioned. However, the wording could be construed as amounting only to a declaration of intention at the time of agreement and failing to cater for a subsequent change of mind.

Alternatively:

> The Customer is advised that United States Department of Commerce Export Administration Regulations may apply to some or all of the Products and that these regulations prohibit the re-exporting of applicable products to certain destinations. In any event, Software Product licences are not transferable without the prior written consent of the Supplier[5].

This 'demotes' the clause from being mandatory to advisory in nature. While purists will argue that such wording has no place in a contract since it does not constitute an obligation, its inclusion will be of assistance to US suppliers in their dealings with their Department of Commerce.

Another solution for a major customer who has refused to sign a contract containing the standard clause is to omit the clause altogether, but to write a letter in the same terms as the clause, advising the customer of the regulations.

The negotiation of special wording with smaller customers is unlikely to be considered appropriate or worthwhile by most suppliers. Customers who are significant on the grounds of their expenditure or prestige may justify the effort of finding a compromise.

13 Telecommunications requirements

> When computer equipment is connected to a public network, ie a switchboard or telephone network, certain regulations of the telecommunications provider apply. It is the sole responsibility of the Customer to ensure compliance with all such regulations.

Systems are increasingly purchased for use in networks and, except in the case of local area networks within one site location, this will involve connection to the public telephone system. Suppliers will wish to provide that any such connections, including compliance with relevant statutory regulations, are the responsibility of the customer. Customers should at least ensure that their suppliers' equipment can be connected to the telephone system without undue difficulty, before committing themselves to contracts. Where the customer is placing full reliance on a supplier's experience, it will be an entirely reasonable negotiating stance to require more active assistance from the supplier.

The rapid development of ever-more sophisticated wireless technologies will doubtless result in the emergence of additional rules and regulations in the foreseeable future. Contracting parties will need to ensure that

[(g) The Licensee undertakes to use the Source only for the purposes of its business and not for any form of commercial exploitation, and that it will not supply any copy of all or any part of the Source to any third party for any purpose without the prior written consent of the Licensor.]

It is generally desirable to have a source licence agreement which is a self-contained document incorporating all of the terms of licence, but for illustrative purposes the above supplemental terms emphasise the very issues which need to be considered in addition to the terms of the object licence. Some of these terms will replace certain provisions in the object licence, such as warranty, and a special licence fee to reflect the significance of the supply of source will be negotiated. Strong confidentiality terms may well be required. 'Object Licence' will thus have been defined.

For the most part, these supplemental terms are self-explanatory. In this example, the licensee's use of source remains confined to the purposes of its business: it is not being handed a product which it can freely market for its own commercial benefit. There will be occasions, however, when a source licence might be negotiated to permit more or less unrestricted use. The paragraphs in square brackets also tend to be negotiable areas, and some licensors will wish to expand paragraphs (e) and (g) to include fairly comprehensive indemnities where the source is a high value asset of the licensor.

It should be noted that a source licence which has been negotiated commercially and paid for will usually be much wider in scope than one which is granted by operation of an event of release in a source code deposit agreement. The latter will usually confine the licensed use to maintenance for the purpose of running the object code version of the software only.

E Evaluation licence

To permit a prospective licensee to try out the software, an evaluation licence will be simpler and more narrowly specified than an object licence for business use. Terms for how the Software may legitimately be used replace the Licensee Undertakings. Licensor's Warranties will be replaced by Conditions of Use provisions. Other terms of the object licence, such as Charges and Payment Terms, will not be relevant. The terms may be in more user-friendly language.

1 Licence to use the Software

(a) We grant you a non-exclusive, non-transferable licence to use the Software free of charge subject to these terms and conditions, and limited in time to whichever of the following occurs first:
  (i) 6 months from the date you receive the disk containing the Software; or
  (ii) the date on which you and your staff cease using the Software; or
  (iii) until the time limit embedded in the Software takes effect, at which point the Software will no longer work.

(b) We license you to use the Software only for demonstration, [training and educational] purposes at your business premises. You are not entitled to use the Software for commercial purposes.

(c) We have the right to grant you this licence. We are not transferring any rights of ownership, copyright or other intellectual property in the Software to you.

This provision restricts the licence to the Software for using only for demonstration, and if specified, training and educational purposes only, for a limited time.

2 Your use of the Software

(a) You agree that:
  (i) you and your staff will keep the Software confidential;
  (ii) you will not copy the Software or allow anyone else to copy it;
  (iii) you will not make the Software available to anyone else.

(b) You agree that you have accepted the use of this Software on the basis of this licence, recognising that we must limit and exclude our liability to the extent legally possible.

(c) You also agree that if we suffer any loss, damage, fine or expenses as a result of unauthorised access to or any use or misuse of the Software because of your breach of any provision of this Agreement, you will indemnify us.

Even for the purposes of evaluation of software especially tailored to enable this, there should be a commitment to keep the software confidential.

It would be unusual for a customer to commission a development project without being concerned to ensure that an outside completion date was agreed as part of the contractual arrangement. The development or implementation plan should identify an end date and the parties then need to consider what is to happen if this date is not achieved. In some instances, they will also wish to extend their thinking to key milestone dates along the way. If the contract is silent about the consequences for later delivery, failure to meet an absolute date will constitute a breach of the contract entitling the customer to claim damages and also to serve a notice requiring completion within a reasonable time from the date of the notice ('reasonable' itself producing a different result according to the circumstances: one month may be appropriate in one type of contract but three months might be necessary for a long-term complex contract). If this later date is also not met, the customer will be entitled to end the contract as well as pursue a damages claim.

At the other end of the spectrum, the completion and key milestone dates could be agreed to be 'time of the essence' dates, when failure to meet them would entitle the customer to terminate the contract immediately and claim damages.

Most suppliers in most situations will be unhappy about agreeing 'time of the essence', particularly if the development project is large. There are likely to be all kinds of variables which cannot be anticipated or quantified at the time the contract is made and committing to a 'hard stop' is something of a hostage to fortune.

The compromise solution tends to be an agreement for pre-agreed liquidated damages to be paid in the event of late delivery. The example clause follows this approach and highlights a number of issues which the parties will need to negotiate. The main decisions are on the amount of liquidated damages, the length of time for which they are to be paid, and whether or not they should constitute the exclusive remedy of the customer for late delivery.

The supplier will also want to be certain that no liability can arise where a customer's actions have caused or contributed to the delay.

Another question is whether the liquidated damages should be in monetary form as an absolute amount or as a percentage, or in the form of credits against future requirements or for substitute products or services, for example free hardware of an equivalent value. There must be no implication that any monetary amount could be construed as a penalty, which would not be enforceable.

Where the customer can be shown to be at fault, it may not be sufficient for the supplier to be allowed an appropriate extension of time. Rescheduling and other consequential costs may be incurred by the supplier and provision should be made for their recovery from the customer in such circumstances.

In practice, it often happens that the parties become embroiled in disputes over the reasons for implementation delays. It is advisable to link any consequences of late implementation to that part of the agreement which deals with project supervision, so that a mechanism for escalation is invoked automatically and the agreed negotiating procedures exhausted before a claim for liquidated damages is made. Arbitration or Alternative Dispute Resolution procedures, discussed in CHAPTER 5, may also need to be invoked.

Unless the relationship between the parties has deteriorated to the point where all confidence in the supplier has been irrevocably lost, it is of no great long-term benefit to the customer to seek unreasonably high payments from the supplier in the event of late implementation. This may even have the unwanted effect of putting a small but basically competent supplier out of business. The fundamental contractual goal is to provide the customer with a system which works and which is capable of carrying out the intended functions. It is not just a matter of expense for a customer to terminate an agreement and start again with another supplier. It is necessary to consider whether it is in the best interests of the customer's business to persevere until a system is operating satisfactorily, albeit later than intended.

9 *Supplier's personnel*

(a) The Supplier will use the personnel identified in the Personnel Schedule to perform its obligations under this Agreement. The Supplier will not without the consent of the Customer (such consent not to be unreasonably withheld or delayed) change the personnel allocated to perform its obligations unless it has to do so because of reasons beyond its control.

(b) Each party will procure that its employees and sub-contractors comply with the other party's site regulations [including its working arrangements with outside contractors] and other reasonable instructions of the other party whilst at the other party's premises.

(c) The Supplier will be fully responsible and liable for the acts and omissions of its employees, sub-contractors and any employees of such sub-contractors arising out of the Project.

At first sight it would seem sensible from a customer's perspective to ensure consistency of personnel engaged on the development project. In most instances, the customer will have got to know some of the supplier's development team well prior to contract, and may in part have based its purchasing decision on its favourable reaction to those people. However, the clause should not be used without proper thought. It may be inappropriate for a small project. In some cases, the customer's real concern is to secure the continuing involvement of one or more key individuals rather than everyone involved in the project. The more constraints placed upon a supplier, the

- Contractor's Obligations and Warranties*
- Client's Obligations*
- Contractor's Personnel*
- Intellectual Property Rights*
- Intellectual Property Rights Indemnity
- Charges, Expenses and Payment Terms
- Confidentiality
- Data Protection*
- Indemnities and Limits of Liability
- Termination*
- General Contract Provisions

2 Schedule contents

- Statement of Work*

C Specific clauses

In the clauses considered below, which are those above marked with an asterisk, the organisation which commissions work from a contractor is described as the 'Client', and the contractor who carries out the work is described as the 'Contractor'.

1 Definitions

'Agreement' means this Agreement and each Statement of Work together or separately. In the event of any conflict of meaning between this Agreement and a Statement of Work, the Statement of Work prevails.

'Authorised Representative' means the person designated by [the Client] [each party] as such, whose identity is notified in writing to the [Contractor] [other party].

'Intellectual Property Rights' means all intellectual property rights including but not limited to copyright and related rights, database right, patents, design rights and trade marks, trade names and domain names, rights in get-up, goodwill and the right to sue for passing off, and confidential information.

'Project' means the work undertaken as described in a Statement of Work.

'Project Management Services' means the services identified as such in a Statement of Work.

'Project Results' means all material designed, developed, written or prepared by the Contractor in respect of the Project and all related documentation including but not limited to any specification, graphics, programs, data, reports, and all other deliverables produced in the course of providing the Services.

'Statement of Work' means a description of a Project utilising some or all of the Services and forming a Schedule to this Agreement, including:

- the title and description of the Project;
- the nature of the work and the Contractor's responsibilities;
- the time schedule for undertaking and completing the Services;
- the time and other resources which the Contractor will commit to achieve the performance of the Services;
- the amount and/or method of calculation of the Contractor's charges.

'Services' means IT consultancy[, systems analysis, programming, training, project management] and all related services to be provided by the Contractor and more particularly described in each Statement of Work, including as appropriate, the Project Management Services.

2 Contractor and Project Management Services

(a) The Contractor agrees to provide and the Client agrees to take and pay for the Services described in the Statement of Work at the rates or for the sum set out in the Statement of Work.

(b) The Contractor is not generally authorised to carry out any work for the Client which is not the subject of a properly executed Statement of Work. However, if the Contractor carries out any work at the Client's request which is not the subject of a Statement of Work then, unless the parties otherwise agree in writing, the provisions of this Agreement will apply to the work undertaken and if no fee is agreed for this work, the Contractor will be paid on a time and materials basis at its standard published rates of charges, or otherwise at a reasonable rate.

(c) This Agreement is personal to the Contractor who will not be entitled to assign or sub-contract any of its rights or obligations.

(d) This Agreement is not an exclusive arrangement, and subject to the Contractor's obligations in this Agreement, including but not limited to the obligation to avoid any conflicts of interest, nothing in this Agreement will operate to prevent the Contractor from engaging in other consultancy or project management activities. For the avoidance of doubt, there is no relationship between the parties of employer and employee.

Staff issues can be considerable. A significant amount of a business's costs are attributable to IT staffing. The simplest means of cost reduction is to reduce head count. Outsourcing provides an apparently attractive solution to facilitate this, where staff are transferred from the customer to the provider. The personnel may have a chance of developing their careers by working on systems other than those which were the subject of the outsourcing arrangement, and gain more extensive prospects for promotion.

Both the provider and the customer need to understand the position of employees affected by the change to outsourcing under their contracts of employment and statutory employment law generally, including the Transfer of Undertakings Regulations[3] ('TUPE') which apply wherever a commercial business in whole or in part, is transferred through legal transfer or merger as a going concern. The question whether a business transfer is a 'relevant transfer' for the purposes of TUPE is more complicated than is immediately apparent. Case law, both in the UK and in other European Union countries, has determined that the Regulations will generally apply to outsourcing where any staff are transferred, even though this may be only part of a business. These Regulations implement the EC Acquired Rights Directive[4] in UK law. Case law in this area continues to develop, and specialist employment law advice is essential.

If TUPE applies, the employees affected must be transferred on at least their existing terms and conditions of service and they retain the benefit of their previous continuous service. Both the former and the new employer are required to inform and consult employees who are affected by the transfer. The Regulations also provide for the transfer of collective rights. The possible transfer of pension rights and insurance benefits can cause much difficulty. The transferred employees will be deemed for most purposes to have been employed by their new employer company since their original start date of employment with the customer organisation. Entitlement to redundancy in the event of dismissal or a claim for unfair dismissal will be determined as though employment had started on the date on which the employee was first employed by the transferring customer company. Dismissals of the outsourced company's employees occurring at the time of transfer for a reason connected with the transfer will be regarded as unfair, unless it can be demonstrated by the employer that they were made because of economic, technological or organisational reasons entailing changes in the workforce.

For the contract, the provider must evaluate its risk and the likelihood of any legal claims, for example for unfair dismissals. The charges will reflect the cost of this risk, and the provider will also take indemnities in the contract in this respect.

If the premises are to be rented or sold to the provider, a separate property contract will be required. Assets, mainly the computer equipment, might be transferred within this separate contract. A sale, a lease or a licence to occupy

would be negotiated covering the term, cost and duration, with options in the event of changes in the service provision.

If the customer's IT equipment is to be transferred to the outsourcing provider, all the assets will need to be identified and listed, including computer hardware and communications together with all software for running it. Transfer of ownership and ongoing maintenance will require separate agreements including terms for payment to third parties. These contracts will identify whether the assets are to be transferred to the provider or whether there is simply a licence to use them. A transfer will involve a valuation which may be part of the overall financing. The hardware may already be leased and the leasing contract will identify the rules for assignment. Leasing arrangements can often be complex and should be sorted out early on, to allow for the fact that the lessors may have no incentive to move matters forward quickly. It should be the responsibility of the outsourcing provider to secure the transfer.

If the hardware is not transferred to the provider, the contract should identify the allocation of risk and the insurance requirements and responsibilities.

The agreement may need to deal with the purchase of new equipment by the provider, and the extent of any consultation with a customer about the terms of the purchase. It may also need to allocate responsibility for repair and renewal.

8 Intellectual property

One major issue relates to the intellectual property involved, including the software used by and for the services. The ownership of software and databases needs to be ascertained, to ensure that all the correct permissions are in place. This may involve additional third party licence fees, if the outsourcing provider does not have its own licence for running customers' software. This typically involves much negotiation with third party licence holders, who will normally seek extra payment. The customer will also be likely to have software of its own, which it must license to the provider.

Some providers will use their own software in running the systems or in development. This is an area where the customer must have a licence entitling it to continuing use if the outsourcing contract expires or is terminated. It may be advisable for the provider's proprietary source code to be held in escrow in the event of termination or default in providing the services.

9 Catering for changes

The environment of the outsourcing contract is as subject to change as the general business environment in which the customer organisation

in good faith, to ensure a mutually satisfactory handover to the Customer or to the new Outsourcing Contractor. The period of transition will commence as soon as notice has been given of termination of this Agreement, and will continue for a minimum period of 3 months after termination.

(c) The Provider will:
  (i) Provide information on the Services in sufficient detail to form the basis of an invitation to tender for services;
  (ii) Allow the Customer or any New Outsourcing Contractor to conduct a due diligence process in respect of the Services;
  (iii) Promptly answer questions about the Services which may be asked by the Customer or any New Outsourcing Contractor.

(d) The Provider will, if so requested by the Customer, continue to provide the Services or such Services as the Customer selects, for a period of up to 12 months from the date of termination, as specified by the Customer, on the same terms as applied to the provision of the Services immediately prior to such termination.

(e) Except where subject to separate contract, all rights of access, occupation and use granted to the Provider in respect of the Customer's premises will cease when the provision of Services ceases in accordance with this Agreement and the Transition Plan.

(f) Where assets used in the Services are located on the Provider's premises, the Provider will grant reasonable rights of access to enable the Customer or the New Outsourcing Contractor to remove such assets transferred to the Customer or the New Outsourcing Contractor in a reasonable time.

(g) The licences to the Provider to use any Customer Software will continue after termination of the Services to the extent necessary to enable the Provider to perform its obligations under this Agreement.

(h) On termination of this Agreement [and on satisfactory completion of the Transition Plan], the Provider will procure that all Equipment and materials and all Customer Software and documentation, will be returned to the Customer or deleted as appropriate from the System, and the Provider will certify full compliance with this clause.

(i) The Customer will have the right to use and to license any New Outsourcing Contractor to use all the Provider's intellectual property required in providing the Services for such transitional period after termination of the Services as may reasonably be required in order to effect the seamless transfer of the Services.

(j) If the Customer so requires, the Provider will use its best endeavours to procure the transfer at the Customer's expense, to the Customer or to a third party nominated by the Customer at the Customer's sole discretion, of any Third Party Software licences the Provider may have obtained in its own name in order to provide the Services.

If the mechanics of termination and its consequences are not clearly specified, problems are certain to arise. Time and effort spent at this stage may prove an invaluable insurance at some time in the future.

This clause is indicative and general, and will be in addition to the standard wording for termination for breach or insolvency illustrated in Chapter 6. Customers, in particular, should give careful thought to the whole question of termination, trying to visualise and ascertain all the implications for their business. If the outsourcing provider's business should fail, planned transition arrangements may prove difficult or impossible to achieve. If specific problems can be identified in advance, solutions can be devised and, to the extent that they need actively to involve the outsourcing provider, they can be negotiated into the agreement.

The euphoria of finding a suitable provider and reaching agreement on running outsourcing services should not blight the customer's objective view of a long-term outsourcing arrangement in a dynamic business environment, where a situation will not necessarily stay predictable or satisfactory. The more complex the range of services, the more difficult it is to ensure a smooth transition to another provider or back into the customer's organisation.

The situation concerning staff transfer will require addressing in accordance with legal compliance and the wishes of the staff concerned. An indemnity should be sought on termination from the provider in respect of any claims by the provider's employees or former employees that employment or its liabilities have transferred to the customer or new outsourcing contractor, where employment offers have not been made.

Clauses (a) to (d) may be contentious and their inclusion dependent upon the relative negotiating strengths of the customer. The question of reasonable payment for the provider in meeting these obligations will need to be agreed.

Clauses (e) and (f) are effectively a reminder in respect of premises and assets. There may well need to be more detail, if these are elements involved in termination.

The customer will need to use relevant software throughout the process of termination, and the issues are exemplified in clauses (h) to (j). Software and know-how must be transferable as far as possible yet if the provider has been using its own proprietary software, which is not publicly available or not easily replicable, this may raise complications on termination. This is more likely to be the case if the provider has been involved in business process re-engineering, system development and project management.

Caching – the automatic, intermediate and temporary storage of information being transmitted, for the sole purpose of making the onward transmission more efficient – will not incur liability so long as the information is not modified in any way.

Nor will there be liability only for hosting, that is, storing information at the request of a recipient of its service.

A web host will not be exempt from liability if it knows that the recipient is undertaking illegal activity. But if it becomes aware, it will not lose exemption provided that it acts quickly to remove the information or disable access to it.

These provisions do not affect the underlying law governing infringements, such as the law of defamation. The client should not permit infringing or defamatory material to be displayed. However, those only providing systems and services making material available will not be regarded as authors, editors or publishers, and will not be liable if they had no responsibility for the content or the decision to publish, and can prove that they took reasonable care.

7 Standards

If the website is being designed for a customer who belongs to a trade or professional association, there may be recommended guidelines to be taken into account. A website must also comply with disability discrimination law. It is unlawful to discriminate against those who are disabled according to the legislative definitions of disability when providing services, including website services[2]. Service providers must not treat a disabled person less favourably than another person for a reason related to their disability, and must make reasonable adjustments where failure to do so would make it impossible or unreasonably difficult for a disabled person to access their services. It is therefore basically unlawful for a service provider to refuse to provide, or deliberately not provide, any service provided to other members of the public, or provide a lower standard of service. Services include communications and information services and cover the design and functioning of websites.

So far as website accessibility is concerned, the defined areas of disabilities include those relating to: mobility, manual dexterity, physical co-ordination, speech, hearing or eyesight. There are many different disabilities, and therefore diverse requirements for accessibility. Common problems can include fixed text and colour schemes which cannot be altered by the viewer on their screen; or images that have not been provided with a description of the image in text for blind people.

Often small changes can make significant differences. Many sources of advice and assistance are available. There are various accessibility criteria and

guidelines in web design, for example, by the World Wide Web Consortium, (W3C), an international community that develops standards to ensure the long-term growth of the web. The website of the Royal National Institute of Blind People (RNIB) also has much useful information on web accessibility[3].

On the launch of the website, the client should ensure that the site is protected by means of any appropriate disclaimers, privacy statements, copyright and other legal notices, together with any relevant technical controls, such as encryption, time-barring or other devices.

8 Direct marketing and websites

Website visitors must 'opt in' by giving their express informed consent before their personal data may be collected and used. They must be told what data is being collected, who is collecting the data, and for what purpose the data will be used – for instance whether the data will be shared with third parties for marketing, such as other group companies, or credit reference agencies. It is common to publish privacy policies or website terms of use to provide this information.

These rules also apply to cookies and similar technologies. Technical options are required for explaining the use of cookies at the website and getting visitors' consent at the start of their website access. The requirements do not apply to cookies which are technically essential to provide a requested service, such as a virtual shopping basket.

B The structure of an agreement for website development and services

The contract for the development and hosting of the website will have many of the features of software development and services agreements. Other aspects will be specific to web development and hosting. The parties are referred to here as 'client' and 'designer'.

1 Terms and conditions

- Scope of Agreement*
- Definitions*
- Duration
- Website features and content*
- Designer's obligations*
- Client's obligations*

- General information about the service provider and the transaction must be provided online for commercial communications, such as the business name, registered office address and e-mail address, alternative contact details, such as telephone or fax number, company registration details and VAT registration number;
- Price information, taxes and delivery costs, and any promotional offers must be clearly shown;
- Contract terms and general conditions must be provided in such a way that the customer is able to store and reproduce them;
- It must be clear how the contract is made, and the point of commitment, and how input errors may be corrected;
- Receipt of orders placed electronically should be acknowledged;
- Codes of conduct to which the e-trader subscribes should be noted.

Further regulation applies to consumers and financial services. Money laundering identification procedures and security systems must be implemented in an online environment, as with traditional client relationships.

Providers of online services will be regulated where they are 'established'. This means the place where the operator pursues an economic activity through a fixed establishment – irrespective of the location of its websites or servers.

It is worth considering whether terms of use separate to the privacy policy should be set up at the website for users, depending on the reasons for access and use of the website.

4 *Forming a contract online*

As discussed in more detail in CHAPTER 2, there are rules on what legally constitutes 'acceptance' for an unequivocal offer by one party and acceptance by the other to form a contract under English law. Online acceptance may be made by keystrokes or pointing and clicking, or by a message transmitted to say that acceptance has taken place. Such acceptance may arguably be regarded as analogous to telex or fax, where acceptance occurs when it may reasonably be expected that the communication has been received.

The rules on acceptance can be overridden if the means of contract acceptance are set out in the terms and conditions. It is therefore ideal to have a clear statement on display about how offers and acceptances are to be communicated and received. Websites offering goods for sale should make it clear whether the advertisements displayed are offers capable of

acceptance, or whether a customer's order must be acknowledged by the seller before a contract is formed.

From the trader's perspective, rather than by making an offer in legal terms, it is normally preferable to invite an offer, that is, a request to buy, by describing the goods available and the procedures for creating the sale. The potential customer may then choose to make an offer which the trader can decide to accept or not. In this way, where the trader is not willing or able to accept an offer, the right is reserved to reject it.

The option for the e-trader to reject an order on-line may arise for all sorts of reasons. A purchaser would normally be expected to register identity, address and any other relevant details. A person claiming to be a company representative may not have the authority to enter into the contract. The address may be in a location where there are legal or political restrictions hindering the validity of the contract, or there may be practical difficulties affecting delivery, taxes or payment. The supplier may wish to avoid business-to-consumer transactions, or need to check that there are enough supplies to fulfil the order, or want to check a customer's credit status.

The supplier should state its geographical or other limits. Technical constraints should be built in as far as possible, to prevent access or interaction by potential purchasers who are of no interest to the supplier. A sequence of web-pages may be constructed for particular languages or regions.

If security is a requirement, and for authenticating certain types of contracts, digital signatures and verification will be important. A party to an online contract ought at least to be aware of, and to be willing to accept, when and where the contract is actually made.

A supplier's terms and conditions of business must be brought to the potential buyer's notice before the contract is made. They should be readily accessible, so that the purchaser is able to understand the context in which the offer and acceptance will be made.

When placing the order, the customer should positively affirm that the terms and conditions have been read and understood. This may be achieved by requiring the customer to scroll through the terms and conditions, ideally by participating in some form of dialogue in so doing, or by means of a hyperlink from the offer-and-acceptance section to separately displayed terms and conditions so that the customer can click as confirmation that they have been read and accepted.

The 'offer' part of an e-commerce contract may be made in one country and the 'acceptance' in another – and theoretically the services may be carried out or the goods delivered in a third. The rules can become complicated in determining which law applies to a contract and which courts have

CHAPTER 19

Business continuity and disaster recovery agreements

A Introduction

The concept of 'business continuity' is part of the risk management process, to ensure that business can continue unhindered by any interruptions. Disaster recovery is a key aspect of business continuity, to restore the operational running of computer systems where normal technology has failed because of the exceptional circumstances of a disaster. Unfortunately there are plenty of real life illustrations of disasters of various magnitudes which have affected computer systems. Terrorist activities, unusually hazardous weather conditions and power outages, are all disasters which have actually destroyed the ability of organisations to continue running their systems at their own premises.

Contingency planning ensures that if a company has prepared for the worst, the consequences of a disaster can be contained. Every company should have properly documented and tested back-up arrangements for its key systems. Copies of software and files should be taken regularly and stored safely. As part of their contingency plans, many organisations invest in expensive standby contracts to provide back-up for their IT systems, one form being an agreement with a disaster recovery service provider for 'hot restart' services, that is, to run high-priority systems at a physically remote location with compatible computing equipment available. It is vital for the enterprise to get the terms of this contract right.

An organisation addressing these risks may choose to maintain its own fully replicated computer systems at a different site, at least in so far as the key elements are concerned. For many businesses this will be an extravagant option, and they will prefer an alternative option of employing the services of a company offering disaster recovery arrangements for selected systems and data critical to their operations.

Service providers in this area are differentiated by the range and comprehensiveness of their service offerings, and by their track records of experience. Only when services are tested in live emergency situations can their quality and efficacy be properly assessed.

Services offered can extend beyond the pure disaster recovery brief to include such things as procurement of equipment (hardware and software), deliveries of back-up equipment to designated emergency sites, provision of temporary office space, extensive testing and system validation programmes, data back-up services, and more. Service charges can be geared to priority levels, the highest priority availability being reserved for the premium customers who really need it and are willing to pay for it.

At the very least, however, a disaster recovery service offered by a third party should be designed to enable its customers to overcome quickly any set of circumstances threatening to disable their key computer systems. This means that key systems must be identified so that they are the ones that receive priority in the event of disaster, to get them back up and running. The object for the customer is for a fast response to enable a return to normal working as soon as possible.

The disaster recovery provider must be able to offer its services immediately, on a 24-hour, seven days per week basis if this is essential for its customers. The computer facilities and office accommodation must be geographically distant from the location of the disaster, yet convenient for customers to secure access. The provider must have compatible hardware and communications, together with security at least as good as that of its customers, and operational support services.

The provider must ensure that it is legally committed only to the back-up services which it is capable of fulfilling. The worst-case scenario would be if all its customers called on its services simultaneously. Its potential liability would be ruinous if it failed to meet its customers' demands for running key systems to meet the strategic needs of each customer's business, so that each customer could carry on as near to normal as practicable. For this reason providers would be wise to limit the numbers of their customers and ensure that they are located well away from each other, policies which vigilant customers should also wish to see adopted.

The disaster recovery contract shares the objectives of an insurance policy in seeking ostensibly to highlight the 'policy' features while being careful to contain the liabilities of the supplier in the actual event of a disaster. Customers therefore need to scrutinise disaster recovery agreements very carefully to ensure that their particular concerns are going to be met without reservation. If not, and if they cannot negotiate the necessary improvements, they should shop around.

These provisions are the essential ground rules for the customer and there will probably be little scope for negotiating reduced responsibilities. Many similar considerations apply to those governing the efficient delivery of maintenance and support services. The supplier will be likely to take the view that it cannot vary these basic requirements from one customer to another when the overall performance is essential for the good order of the system, configuration and site. The customer must be careful to ensure in particular that appropriate insurance is in place to cover the supplier's equipment when under the customer's care and control. Security at the site must include a limit on who will be permitted access. A supplier should ask for confidentiality undertakings from all subscribers to protect everyone.

The warranty and indemnity in paragraph (b) should be regarded as essential by the supplier. Many software licences do not provide for use on an alternative third party system in disaster circumstances unless licensees pro-actively negotiate the inclusion of such rights. The supplier must avoid the possibility of action by an owner of software based upon unauthorised use of software on the supplier's configuration. A possible alternative is for the supplier to take out its own licences where appropriate. It is in the interests of both parties to ensure that software and hardware is accessible at the supplier's site without any possibility of prevention by a third party.

The final element of the clause focuses on the customer's responsibility for maintaining its own data integrity. This is a reasonable requirement. Every customer should be well aware of the importance of its computerised data and should have back-up procedures in place to reflect that importance. Notwithstanding the supplier's inherent responsibilities under data protection legislation, sensitive data should be backed up frequently. Regardless of any contractual rights, it is going to be of little comfort to any customer if important data is irretrievably lost, or would take so long to reconstitute that the business would founder in the meantime. Therefore, back-up should be sufficient to meet the needs of the customer's business in the event of any accidental, negligent or deliberate destruction of the customer's data.

One undertaking which is not included in the above example but which may be acceptable in some situations, is to provide that, in the event of a disaster or series of disasters affecting more than one customer, a customer should be willing to time-share on the configuration, at least until after a reasonable period of time has elapsed, to give the supplier an opportunity to provide adequate alternative or supplemental computer facilities.

9 Rehearsals

(a) Rehearsals usually consist of [5] consecutive Business Days, including 2 days for set up and clear down. The Customer is entitled to the number of Rehearsal Days in each Year as shown in the Attachment to this Agreement, during which it will have exclusive use of the Equipment/Configuration at the Recovery Location or at a Customer designated Site for training, testing and other non-emergency purposes.

(b) The first Rehearsal in each year is included within the Annual Service Charge. Additional Rehearsals (and the first Rehearsal Day to the extent that it takes place on a non-Business Day), will be chargeable at the Supplier's then current rates for Rehearsal.

(c) An Authorised Representative will notify the Supplier when a Rehearsal Day is required, giving a minimum of 4 weeks' Notice. The Supplier reserves the right not to accept a Rehearsal Day if another customer has pre-booked the Equipment on that date, or to cancel or reschedule a Rehearsal Day and give priority to another customer who has notified an Unplanned Activation Event utilising some or all of the Equipment. If the Supplier receives such an Activation during a Rehearsal the Customer will release the Equipment to the Supplier immediately on demand. Subject to these limitations, the Supplier will use all reasonable endeavours to reschedule Rehearsal Days most convenient to the Customer, and will apply the same rules to its other customers when the Customer has the priority situation.

(d) The Supplier will provide access to recovery specialist support on each Rehearsal Day.

(e) The Customer may cancel or reschedule any Rehearsal Day without liability on 14 days' notice without Charge. If notice is received less than 14 days but more than 7 days prior to the Rehearsal Day a cancellation fee of [£1000] will be payable. If a cancellation notice is received less than 7 days prior to the Rehearsal Day a cancellation fee of [£2000] will be payable. The Customer will not be entitled to compensation for any Rehearsal Days not taken within any applicable year of this Agreement.

(f) For each Rehearsal the Customer may utilise all of the Equipment, unless the Equipment comprises or includes in excess of [20] servers, when not more than 50% of the Equipment may be deployed for a Rehearsal.

(g) The Supplier will prepare and deliver a Rehearsal Report within 14 days of each Rehearsal.

Rehearsals are an important feature of this agreement. After the initial testing has established the compatibility of the customer's system with the Services on offer, a programme of regular practice and review is essential. Again referring back to the risk management objectives, business continuity

2.2 If Goods are included under this Agreement which were subject to a Previous Agreement as identified in Schedule One, then on the Commencement Date of this Agreement, and in relation to the retained Goods only, the Previous Agreement will be treated as cancelled and replaced by this Agreement

2.3 This Agreement is for the Fixed Term and the Lessee may not terminate the leasing of the Goods at any time during the Fixed Term.

2.4 If in breach of this Agreement the Lessee purports to terminate this Agreement or return the Goods to the Lessor at any time during the Fixed Term, without prejudice to the Lessor's other rights in law or equity or under this Agreement the Lessor will charge the Lessee for:

(i) the Minimum Initial Payment and any other sums already due to the Lessor and unpaid;

(ii) all Further Payments the Lessee would have paid had the leasing continued for the Fixed Term, discounted at the rate of 3% per annum from the date each Further Payment would have fallen due to the last day of the Fixed Term;

(iii) the Lessor's reasonable administration costs, and

(iv) interest charged at the rate of 2% per month compound in respect of any late payments, until the date of actual receipt of such payments, whether before or after any judgment.

3 Goods

The Lessee agrees that until such time as ownership of the Goods is transferred to it or the Goods are returned to the Lessor in accordance with Clause 10, the Lessee is solely responsible for:

3.1 selecting the Goods listed in Schedule One;

3.2 ensuring that the Goods are suitable for its requirements in every way;

3.3 ensuring that once it has taken possession of the Goods they are in good working order;

3.4 ensuring that the Goods are used only in the normal course of business and in accordance with the manufacturer's instructions and/or guidelines and in compliance with all health and safety legislation, AND THE LESSEE AGREES TO INDEMNIFY THE LESSOR FROM AND AGAINST ANY LOSS, DAMAGE OR INJURY TO PEOPLE OR PROPERTY CAUSED BY THE GOODS OR THEIR USE, EXCEPT FOR DEATH OR PERSONAL INJURY CAUSED BY THE LESSOR'S NEGLIGENCE;

3.5 keeping possession of the Goods, and not doing anything that will interfere with the owner's interest in the Goods, including without

limitation not selling the Goods or claiming or allowing any other entity or person to claim capital allowances on them;

3.6 ensuring that the Goods remain at the delivery/installation address specified. If the Lessee wishes to relocate the Goods it must first obtain the Lessor's written consent;

3.7 connecting and disconnecting the Goods;

3.8 installing the Goods unless installation is included in Schedule One;

3.9 keeping the Goods in good working order, condition and repair;

3.10 ensuring that the Goods are not altered or modified in any way without the Lessor's prior and specific written consent;

3.11 bearing the risk of any loss or damage to the Goods, however caused;

3.12 complying with all of the Customer's responsibilities in the Terms and Conditions of Supply in Schedule Three, except to the extent that they are varied by provisions in this Schedule Two;

3.13 notifying the Lessor immediately if the Goods are lost, stolen, damaged or confiscated;

3.14 not removing or defacing any notices of ownership of the Lessor or any other party on any of the Goods, and ensuring that the Goods do not become affixed to any land or building.

If the Lessee has any complaints upon taking delivery of the Goods concerning delivery errors, shortfalls, condition of the Goods or any other matter, it must notify the Lessor immediately of its complaint with as much information as possible, and provide the Lessor with a detailed written statement of the complaint within 5 working days of the delivery. The Lessor is entitled to assume that the Lessee is completely satisfied with the Goods if it has not received any such written statement.

4 Maintenance

4.1 Hardware

Except to the extent such maintenance services are included in this Agreement during the Fixed Term as shown in Schedule One, the Lessee is solely responsible for ensuring that the hardware Goods are kept in optimum operating condition at all times, except only for fair wear and tear, and for obtaining any maintenance services required by the Lessee for the hardware Goods.

4.2 Software

The Lessee is solely responsible for entering into and complying with the terms of the licences to use any software Goods and for obtaining any maintenance or support on software Goods and if the Lessee is