

# Contents

<i>Forewords</i>	<i>v</i>
<i>Prefaces</i>	<i>xi</i>
<i>About the authors</i>	<i>xvii</i>
<i>Table of Statutes</i>	<i>xxxiii</i>
<i>Table of Statutory Instruments</i>	<i>xxxv</i>
<i>Table of European Legislation</i>	<i>xxxvi</i>
<i>Table of Cases</i>	<i>xxxvii</i>
<b>Chapter 1 Introduction</b>	
A General	1
B The IT industry	2
C Contractual relevance	3
1 Types of agreement	3
2 IT contract characteristics	4
Innovation	4
Technical complexity	4
Flexibility and change control	4
Regulation	5
Effect of case law	5
D Legal trends	5
1 IT-related law	5
2 Information	6
3 Law for the IT industry	7
E Principal objectives of this book	7
1 Guidance in negotiating IT contracts	8
2 Practical advice in structuring and drafting IT contracts	9
F Structure of the book	10
G Conclusion	11
<b>Chapter 2 The legal context</b>	
A Introduction	13

B	Legal perspectives	13
1	Sources of law	14
2	International sources	15
3	Which law applies?	15
	Governing law	16
	Jurisdiction	17
4	EU law	17
C	Competition law	19
1	EU competition law	19
	Prohibition of agreements which prevent, restrict or distort competition	20
	A company's abuse of its dominant position	21
	Competition law in the UK	22
D	Intellectual property rights	24
1	Copyright	24
2	Copyright ownership	27
3	Database right	28
4	Patents	29
E	Introduction to contract law	30
F	Making a contract: the essential elements	31
1	Contract elements	32
	Offer	32
	Acceptance	33
	Consideration	34
	Legal enforceability	35
2	Formalities	37
3	Online contract formation	39
G	Legislation and case law on contractual terms	40
1	Terms implied by law	40
2	Standard terms and reasonableness	43
3	Misrepresentation	47
H	Performing a contract or ending it	49
1	Performance	49
2	Agreement to discharge or vary the contract	51
3	'Frustration'	51
4	Contractual provisions to end the contract	52
	Time limit	52
	Notice	52
	Insolvency	53
	'Time of the essence'	53
	Breach of contract	54
I	Remedies	54
1	Terms, conditions, warranties and innominate terms	54
2	Damages	56
3	Injunctions and orders	58
4	Unjust enrichment	59

<b>Chapter 3 Principles of contract negotiation</b>		
A	Introduction	63
1	The relationship a negotiator has with his or her own organisation	64
2	The reasons for having a negotiation	65
3	The need for careful preparation	66
B	Negotiating guidelines	70
C	Training	75
1	The benefits	75
2	Who should receive training?	76
3	Methods of training	76
4	Subject matter of training	77
D	Standard terms and conditions	77
1	Why have standard terms and conditions?	78
2	Whose terms and conditions should apply?	79
3	The 'Battle of the Forms'	80
E	Government and other standard form purchasing contracts	80
<b>Chapter 4 Construction of an IT contract</b>		
A	General	83
B	The development process	84
C	Points of construction	86
D	Definitions	89
E	Using Chapters 5-22	91
<b>Chapter 5 Standard provisions</b>		
A	Introduction	93
B	Typical standard clauses	93
C	Specific clauses	94
1	Charges	94
	Charges	94
	Variation of charges	98
	Expenses	99
	Payment terms	99
2	Risk allocation: promises, indemnities and liability	102
	Indemnities and limits of liability	102
	Intellectual Property Rights Indemnity	106
	Integrity of data	109
	Employment restriction	110
3	Other parties' interests	112
	Rights of third parties	112
	Assignment	113
4	Contract framework	114
	Entire agreement and variations	114
	Notices	117
	Duration	118
	Severability	120

Waiver	121
Force majeure	122
Termination for cause	123
Governing law and jurisdiction	125
Arbitration/alternative dispute resolution	126
<b>Chapter 6 Confidentiality and non-disclosure agreements</b>	
A Introduction	130
1 Use of non-disclosure agreements	130
2 No general law of privacy	131
3 Remedies for unauthorised disclosure	132
4 Procedures	133
5 Employment and confidential information	134
B Individual clauses: confidentiality and publicity	135
1 Confidentiality	136
2 Publicity	136
C The structure of a non-disclosure agreement	137
1 Terms and conditions	137
2 Schedule contents	138
D Specific clauses	138
1 Definition of 'Confidential Information'	138
2 Recipient's undertakings	139
3 Confidential Information co-ordinator	142
4 Exceptions	142
5 Limitations on Recipient's liability	144
6 Intellectual property rights, warranties and disclaimers	145
7 Non-conflicting activities	146
8 Termination and time limit	147
9 Publicity	148
<b>Chapter 7 Computer product supply contracts</b>	
A Introduction	149
B The structure of a comprehensive form of computer product supply contract	150
1 Front page contents and/or schedules	151
2 Terms and conditions	152
C Specific clauses	153
1 Introduction	153
2 Definitions	154
3 Associated agreements	156
4 Substitutions and modifications	157
5 Cancellation, rescheduling and change orders	158
6 Delivery	159
Late delivery	161
Partial deliveries and refusals	162
Risk and title	163
Quality assurance	164

7 Insurance and guarantee	165
8 Hardware	167
9 Software	170
10 Title	171
11 Price changes	174
12 Export control	175
13 Telecommunications requirements	177
14 Maintenance and support services	178
15 End of product life disposals	178
16 Life-endangering applications	180
D Discount agreements	181
1 Scope	182
2 Discount structure	184
3 Discountable items	184
4 Discount rates	185
5 Reconciliations and mid-year reviews	186
6 'Most favoured customer'	187
E Tripartite leasing agreements	187
1 Definitions	188
2 Scope	189
3 Supply of products	189
4 Payment	191
5 Intellectual property rights	191
<b>Chapter 8 Leasing agreements</b>	
A Introduction	193
1 Capital leases	195
2 Operating leases	196
3 Negotiating factors	197
B The structure of a typical capital lease (here called a Fixed Term Lease Agreement)	198
1 Front page contents and schedules	198
2 Terms and conditions (Schedule Two)	199
C Specific clauses	199
1 Definitions	200
2 Fixed Term Agreement	201
3 Goods	203
4 Maintenance	204
5 Payments	205
6 Insurance	206
7 Remedies	207
8 Ownership of Goods and Exercise of Option to Purchase	208
D The structure of a typical operating lease (here called a Minimum Term Rental Agreement)	209
1 Front page and schedule contents	209
2 Terms and conditions	210
E Specific clauses	210

1	Minimum Term Agreement	210
2	Payments	211
3	Insurance	212
4	Ownership of Goods and Continuation beyond the Minimum Term	213
<b>Chapter 9 Distribution and reseller agreements</b>		
A	Introduction	215
1	Distribution or agency?	217
2	Different distribution definitions and categories	218
3	Exclusive or sole	220
4	Licensing or sub-licensing end users	221
5	Governing law	221
6	Negotiability	221
7	Administration	222
8	Variety of distribution terminology and arrangements	223
B	The structure of a distribution agreement	224
1	Terms and conditions	224
2	Schedules	225
3	Agreements appended to this Agreement	225
C	Clauses specifically relating to distribution agreements	225
1	Definitions	226
2	Distributor's appointment and rights	228
3	Distributor's responsibilities	231
4	Supplier's responsibilities	236
5	Advertising and Merchandising Fund	239
6	Supply of Products	240
7	Software licensing	241
8	Charges	242
9	Termination	244
10	Effect of termination	245
<b>Chapter 10 Software licences *</b>		
A	Introduction	248
1	Functions of licensing	248
2	Licensing arrangements	249
3	Exploiting software commercially	250
4	Software as a service	251
5	Licensing and distribution	251
6	Source code	252
7	Open source software	253
8	Evaluation licence	255
B	The structure of a typical object licence agreement for standard software products	255
1	Terms and conditions	255
2	Schedule contents	256

C	Specific clauses	256
1	Definitions	256
2	Duration	258
3	Licence to use the Software	260
4	Rights in the Software	263
5	Supply, Installation and Acceptance	265
6	Licensee Undertakings	266
7	Licensor's Warranties	268
8	Escrow	270
9	Disclaimer	270
D	Source licence supplemental provisions	271
1	Definition	271
2	Supplemental Licence Terms	271
E	Evaluation licence	272
1	Licence to use the Software	273
2	Your use of the Software	273
3	Conditions of Licence	274
<b>Chapter 11 Source code deposit 'escrow' services</b>		
A	Introduction	275
1	Regular support and enhancement	275
2	Use of 'escrow'	276
3	Background	277
4	Negotiating factors	278
5	Different types of arrangements	279
6	Escrow custodian	280
7	Liquidators' rights	281
8	Materials other than software	282
B	The structure of a typical source code deposit agreement	283
1	Terms and conditions	283
C	Specific clauses	284
1	Definitions	284
2	Deposit of Source Code	287
3	Custody of Source Code	288
4	Release of Source Code	290
5	Licensee's Undertakings	293
6	Escrow Custodian's Undertakings	294
7	Licensor's Warranty	294
8	Verifying the Source Code	295
9	Ownership and Confidentiality of Source Code	297
10	Liability of Escrow Custodian	297
11	Charges	299
12	Termination	299
13	Disputes	301
14	Charges Schedule	302

<b>Chapter 12 Software development</b>	
A Introduction	303
1 Two approaches	304
Components	308
Warranty	308
Pricing	309
Ownership	310
Quality	310
2 Complexity, change and co-operation	311
B The structure of a typical software development agreement	312
1 Terms and conditions	312
2 Schedules	313
3 Appendices	313
C Specific clauses	313
1 Definitions	313
2 Supplier's obligations	315
3 Customer's obligations	317
4 Charges	320
Example of Fixed-Price clause	320
Example of Time and Materials clause	320
5 Payment	322
6 System and acceptance testing	323
7 Variations	325
8 Late completion	327
9 Supplier's personnel	329
10 Progress review	330
11 Intellectual property rights (and licence)	331
12 Non-competition	333
13 Supplier's warranties	334
14 Post-implementation support	334
<b>Chapter 13 Maintenance and support agreements</b>	
A Introduction	337
1 Standard or individual agreements	338
2 Original supplier or third party	339
3 Software and intellectual property concerns	340
4 Software support	340
5 Hardware maintenance	341
6 Exclusions	341
7 Warranty and maintenance	341
8 Charges and increases	342
9 Other considerations	342
10 Operations guide	343
B The structure of a maintenance and support agreement	344
1 Terms and conditions	344
2 Schedules	345

C Specific clauses	345
1 Definitions	345
2 Schedules	346
3 Cover	347
4 Eligibility for Hardware Services	347
5 Hardware Services	348
6 Hardware Services Exclusions	351
7 Software Services	353
8 Additional Software Services	356
9 Software Services Exclusions	356
10 Disclaimers	357
11 Customer Responsibilities	359
12 Additional Customer Responsibilities (Software)	361
<b>Chapter 14 Contractor and consultancy services</b>	
A Introduction	363
1 Individual or corporate arrangement	363
2 Contractor v employee	364
3 Conflicts of interest	365
4 Contractual issues	366
Levels of service	366
Copyright ownership	366
Location	366
Decision making	366
Named contractors	366
Fees	367
Tax	367
5 Agreement structure	367
B The structure of a Contractor's Agreement	367
1 Terms and conditions	367
2 Schedule contents	368
C Specific clauses	368
1 Definitions	368
2 Contractor and Project Management Services	369
3 Contractor's Obligations and Warranties	372
4 Client's Obligations	375
5 Contractor's Personnel	377
6 Intellectual Property Rights	380
7 Data Protection	382
8 Termination	382
9 Schedule: Statement of Work	383
<b>Chapter 15 Outsourcing IT services</b>	
A Introduction	385
1 Terminology	385
2 Reasons for outsourcing	386

3	Scope of arrangements	387
4	The customer/provider relationship	388
5	Service levels	390
6	Charges	390
7	Business assets and human resources	391
8	Intellectual property	393
9	Catering for changes	393
10	Service continuity and transition management	394
11	Offshoring	394
B	The structure of an Outsourcing Agreement	395
1	Services agreement terms and conditions	396
2	Schedules	396
C	Specific clauses	397
1	Definitions	397
2	Term of agreement	399
3	Services and service levels	401
4	Provider responsibilities	403
5	Customer responsibilities	405
6	Contract monitoring arrangements	407
7	Contract management	408
8	Customer software, data, information and know-how	408
9	Third party/provider software	410
10	Relations with third party suppliers	412
11	Change control procedure	412
12	Charges and payment terms	414
13	Data protection	415
14	Audit requirements	417
15	Security	417
16	Dispute resolution procedure	418
17	Transition management	419
D	Service level failure compensation schedule	422
	Specific clauses	422
1	Scope of schedule	422
2	Definitions	422
3	Service credits	423
4	Service failures	424
5	Liquidated damages	424
6	Measurement and payment	425
7	Corrective action and consequences of repeated failure	425
8	Limitation of liability	426
E	Transition plan schedule contents	427
<b>Chapter 16 Cloud computing services</b>		
A	Introduction	428
1	Cloud services	429
2	Service advantages	431
3	Costs	432

4	Security and data protection	432
	Cross-border transfers	433
	The data controller/data processor relationship	433
	Contractual commitments for data protection	434
5	Cloud computing contract requirements	434
B	The structure of a cloud computing agreement for software services	435
1	Terms and conditions	436
2	Schedules	436
C	Specific clauses	437
1	Definitions	437
2	Service provision	438
3	Licences and scope of use	439
4	Customer obligations	441
5	Customer information	442
6	Technical support	443
7	Service availability	444
8	Warranties and disclaimers	445
9	Limitations on use	447
<b>Chapter 17 Website development and support</b>		
A	Introduction	449
1	Costing structure	449
2	Content	450
3	Ownership of rights	450
4	Services	451
5	Hosting	451
6	Liability	451
7	Standards	452
8	Direct marketing and websites	453
B	The structure of an agreement for website development and services	453
1	Terms and conditions	453
2	Schedules	454
3	Appendices	454
C	Specific clauses	455
1	Scope of Agreement	455
2	Definitions	455
3	Website features and content	457
4	Designer's obligations	460
5	Client's obligations	462
6	Website development	463
7	Acceptance testing and launch	464
8	Variations	466
9	Support services	467
10	Service level compliance	468
11	Security and data protection	469

12	Intellectual property rights	470
13	Designer's warranties	472
14	Indemnities	474
15	Acknowledgement	475
16	Obligations on termination	475
<b>Chapter 18 E-commerce</b>		
A	Introduction	477
1	Promoting products and services	478
2	Unsolicited marketing and privacy notices	478
3	E-commerce compliance	479
4	Forming a contract online	480
B	The structure of an e-commerce value added reseller agreement	482
1	Terms and conditions	482
C	Specific clauses	483
1	Definitions	483
2	Services	483
3	Author responsibilities	485
4	Product submission	487
5	Fees and author's charges	489
6	Additional activities	490
7	Reporting	491
8	Customer support	492
D	Source code escrow supplementary terms and conditions	492
E	Distributor's end user software licence agreement	493
F	Privacy notice	495
G	Opt-in notices	498
<b>Chapter 19 Business continuity and disaster recovery agreements</b>		
A	Introduction	500
B	The structure of a basic business continuity and disaster recovery agreement	503
1	Terms and conditions	503
2	Schedule contents	503
C	Specific clauses	503
1	Definitions	504
2	Services	506
3	Insurances	508
4	Testing	509
5	Supplier undertakings	510
6	Privacy rules and indemnities	512
7	Data	512
8	Customer undertakings	514
9	Rehearsals	517
10	Activations	518
11	Exclusions	520

<b>Chapter 20 IT contracts and legal risk management</b>		523
A	Introduction	524
1	Principal means of legal risk management in IT contracts	524
B	Contract	525
C	Administrative procedures	525
1	Order administration	525
2	'The Battle of the Forms'	527
3	Order administration procedures	528
4	Contract administration	528
	Suppliers	528
	Customers	529
	Responsibility for contract administration	529
	Procedures	530
D	Insurances and guarantees	531
E	Compliance	531
1	Data protection	532
2	Personal data	532
3	Data protection clauses	534
4	Freedom of information	536
F	Conclusion	536
<b>Chapter 21 Checklists</b>		
A	Introduction	538
B	Key reminders for negotiation (Chapter 3)	538
1	Is a negotiation going to be worthwhile?	538
2	Careful preparation	539
3	The negotiation	539
C	Developing expertise and obtaining specialist support (Chapter 3)	539
1	Likely requirements	539
2	What might an organisation do for itself?	539
3	The use of specialists	541
D	Principal points: contract construction (Chapter 4)	541
E	Agreement checklists	541
1	Standard housekeeping and administrative provisions (Chapter 5)	545
2	Confidentiality and non-disclosure (Chapter 6)	546
3	Computer product supply (Chapter 7)	547
4	Leasing (Chapter 8)	548
5	Distribution (Chapter 9)	548
6	Software licences (Chapter 10)	549
7	Source code deposit (Chapter 11)	550
8	Software development (Chapter 12)	551
9	Maintenance and support (Chapter 13)	551
10	Contractors and consultants (Chapter 14)	552
11	Outsourcing services (Chapter 15)	553
12	Cloud computing services (Chapter 16)	553

13	Websites (Chapter 17)	554
14	E-commerce (Chapter 18)	555
15	Business continuity and disaster recovery (Chapter 19)	556
16	Legal risk management for contract and order administration (Chapter 20)	556
<b>Chapter 22 Precedents</b>		
A	Introduction to precedents	559
B	Agreements	559
	Non-disclosure agreement	560
	Computer product supply terms and conditions	564
	Fixed term lease agreement	576
	Minimum term rental agreement	587
	Distribution agreement	598
	Object/source code software licence agreement	613
	Demonstration and evaluation licence agreement	624
	Source code deposit (escrow services) agreement	626
	Software development agreement (traditional)	635
	Software development agreement (agile)	648
	Hardware maintenance services agreement	658
	Software support services agreement	670
	Contractor and consultancy services agreement	680
	Outsourcing services agreement	695
	Cloud computing services agreement	715
	Website development and support agreement	729
	E-commerce distribution/author agreement	748
	Business continuity and disaster recovery services agreement	758

Index

773

## Table of Statutes

Arbitration Act 1996.....	126	Insolvency Act 1986 – <i>contd</i>	
Bribery Act 2010 .....	80	s 178.....	281, 282
Companies Act 2006 .....	113	181.....	282
s 1159.....	497	268.....	609, 691, 711, 745, 771
Competition Act 1998.....	22	Interpretation Act 1978	
s 2, 46, 18.....	22	s 5.....	119
Computer Misuse Act 1990.....	372	6.....	88
Contracts (Rights of Third Parties)		7.....	118
Act 1999 .....	35, 112, 574, 611, 621, 633, 646, 713	Sch 1 .....	119
Copyright, Designs and Patents		Late Payment of Commercial	
Act 1988 .....	6, 25, 26, 248, 267, 380	Debts (Interest) Act 1998 .....	100, 203
s 77–89.....	28	Law of Property Act 1925	
Data Protection Act 1998.....	132, 382, 415, 416, 432, 495, 504, 512, 513, 530, 531, 533, 534, 536, 556, 689, 696, 707, 759	s 61.....	119
Sch 2 .....	513	Misrepresentation Act 1967 .....	47
Digital Economy Act 2010.....	12	s 3.....	117
Enterprise Act 2002 .....	22, 23	Official Secrets Act 1911.....	80, 141
Enterprise and Regulatory Reform		Official Secrets Act 1989 .....	80, 141
Act 2013 .....	23	Regulation of Investigatory	
Equality Act 2010.....	80, 451, 460	Powers Act 2000 .....	433
European Communities Act 1972...	15	Sale of Goods Act 1979 .....	14, 40, 50
Export Control Act 2002.....	175	s 13.....	40
Freedom of Information Act 2000...	531, 535	14.....	40
Health and Safety at Work etc Act		(2), (3).....	54
1974.....	80	61(1) .....	41
Human Rights Act 1998.....	132	Supply of Goods and Services Act	
Income and Corporation Taxes		1982.....	40, 41, 298
Act 1988		s 13.....	46, 54
s 180.....	711	18.....	41
Insolvency Act 1986		Unfair Contract Terms Act 1977...	41, 43, 44, 45, 46, 104, 158, 159, 169
Pt I (ss 1–7B).....	691	s 2.....	43
s 123.....	123, 609, 620, 645, 667, 677, 691, 711, 727, 745, 755, 771	(2).....	46
		3(2) .....	46
		Sch 2 .....	43
		Value Added Tax Act 1994 .....	97