



Your Commercial Starter for Ten

FOR ENTREPRENEURS OWNERS, DIRECTORS AND MANAGERS

Guide | [Contracts-Direct.com](https://contracts-direct.com) | June 2022

Contents

Introduction	2
What do Contract specialists do?.....	2
What are Contracts?	3
Contract Structure & Content.....	4
Contract Variation	5
Terms and Conditions of business.....	5
Joint Ventures.....	6
Outsourcing	6
Franchising	7
Intellectual property	7
Trade-Marks	7
Copyright for Business.....	8
Agency and distribution	9
Sale and supply of goods and services.....	9
Advertising, marketing and sponsorship	10
Shareholders' Agreements	10
Company Directors' Duties	11
Contractual joint ventures	11
E-commerce	12
Publisher's Notice:	13

Introduction

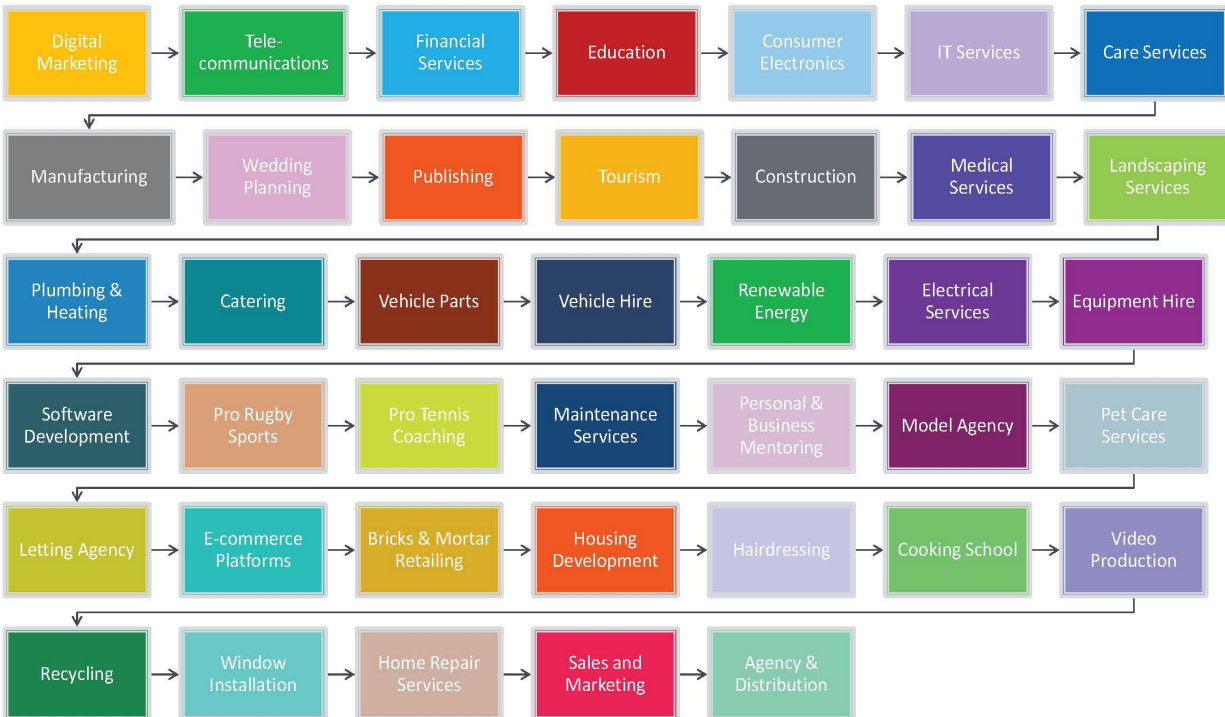
The aim of this short guide is to provide useful information on some key topics that frequently come up in running and owning a business. It is written in plain English and avoids using any over-legalistic language and explains the important role that a contract specialist, such as Contracts-Direct, can and does play alongside and for businesses of all kinds.

What do contract specialists do?

Contracts-Direct works for businesses and organisations providing guidance on an on-going basis in connection with our clients' trading and operational requirements.

We provide support to the board and senior management teams within organisations, advising on the contractual issues relating to commercial agreements and transactions, asset management and value protection.

These are a few of the businesses Contracts-Direct has worked with and advised:



Our role is not limited to commercial contracts and includes dealing with company matters, including arrangement between shareholders, business and corporate sale and purchase, as well as joint ventures and asset disposals.

One of Contracts-Direct's main objectives is providing practical commercial solutions to a client's business issues, with the intention of achieving the best outcome for the organisation.

Balancing commercial needs and risk are essential to the success of a business and Contracts-Direct can provide that level of support, in addition to the drafting and contracts' preparation skills it provides.

Providing a fit-for-purpose solution, means that Contracts-Direct looks beyond the specifics of the task and considers the potential wider impacts of pursuing a particular transaction or course of action.

Working closely alongside clients means that Contracts-Directs can provide a proactive service by having a good understanding of how the client's business operates and its strategic objectives, as well as direct access to the decision-makers in the business.

And where outside business skills are required, Contracts-Direct works alongside other professionals to bring the required insight and advice.

Being involved in commercial discussions at an early stage and engaged in a broader range of business discussions, means that there is an opportunity to help drive business strategy and develop processes for effective and efficient management of commercial and contractual risk issues.

What are Contracts?

A contract is a legally binding promise by one person to fulfil an obligation to another person in return for consideration.

Depending on factors such as what stage the negotiations are at and whom is involved, different contractual issues may arise. For example, one of the first issues to consider when taking steps to put a contractual arrangement in place is to ensure there is a valid contract which is capable of being enforced.

The exclusion and limitation of liability is particularly relevant to businesses dealing in either business-to-business or business-to-consumer relationships.

Other relevant considerations include third party rights and changes in commercial circumstances which may trigger the need to alter the role of the original contracting parties or vary the original contract.

Additionally, a further integral element is the breach or potential breach of a contract. The central issue will be to consider what remedies are available to the innocent party. Contracts may also be terminated for a number of reasons including breach, illegality and frustration.

Contracts-Direct spends a significant amount of our time creating contracts that reflect the commercial arrangements of our clients.

Although all arrangements should be tailored to the specific needs of the client, lawyers frequently use precedent clauses that assist when 'building' a contract. This includes:

- definitions of frequently used terms
- 'boilerplate' clauses which are clauses that are included in an agreement to deal with the mechanics of how the contract works and covering those legal points that are relevant to most transactions
- commercial clauses which, although not standard, are generally considered to be required, and provide a starting point for adaptation

Contracts-Direct works on a wide variety of transactions, but all of them will in some way involve written agreements that will need to be executed by the parties.

Contract Structure & Content

Commercial contracts come in all shapes and sizes and their contents vary depending on their subject matter. But there are many features that will appear in a majority of them, and these are not always understood even though they are sometimes referred to as being 'standard provisions' or words to that effect.

A not untypical list of clause topics (e.g. for a services agreement) will contain the details of what is being agreed, might look something like the following:

- Parties
- Recitals
- Contract formation
- Scope of Services
- Provision of the Services
- Key-personnel
- Home Office Support
- Service Levels & KPIs
- Fees and Payment
- Term of Agreement
- Resources
- Training
- Reporting
- Intellectual Property
- Liability and Indemnity

Schedules:

1. Systems
2. Training Materials
3. Telephone Numbers

4. Resources
5. Reporting procedures

Read more about contract structure and content [here](#).

Contract Variation

It is a commercial reality that parties doing business together do not simply enter into self-contained discrete contracts with each other but engage in a business relationship that evolves over time. This can lead to the need to make changes to contracts already in place.

Variations to contracts may arise and be proposed for many reasons, including:

- changes in the scope of goods or services required
- changes in the contract charges or rates
- extensions of time for performance of contract obligations
- changes in resources required to perform the contract
- clarification of issues which the original contract has not adequately dealt with, or
- other changes to the underlying needs of either party

A contract variation request from one party may indicate an underlying problem in that party's ability to perform its obligations as originally anticipated. In such circumstances, the other party should consider its options and satisfy itself that a variation is the most suitable solution.

Many variations will have an impact on cost, time or quality and this can potentially impact the viability of a contract for either party.

As such, an assessment of the impact of a proposed variation should be carried out and any unintended consequences identified, and the appropriate sign-off should be sought from the business before a variation is concluded.

At Contracts-Direct, we deal with many variations to contracts and they require careful attention to the details. More information can be found [here](#).

Terms and Conditions of business

A business' terms and conditions document is the contract between you and your customer for your supply of goods or services, and which regulates your business relationship.

The same document could be called many other names, from simply "business terms", to "terms of sale" or "T&C". The general assumption of meaning in all these variations is that you are offering your goods or services on a "take-it-or-leave-it" basis.

To many business managers "terms and conditions" presents an image of incomprehensible legal jargon comprising a document of awe-inspiring length or incorporated into a box so small you can read only six words at a time.

The purpose of a set of terms and conditions is to record what you have agreed, or to present the inflexible terms under which you will accept business, including those that:

- define the contract
- set out business procedures
- protect your business and your rights
- limit your liability

If payment is made up front, it still matters to have a record of the contract. Quite simply, to have been paid for the goods or services already does not protect a business from a later claim.

Litigation is stressful and takes key managers away from the business. Defending a claim can also be expensive. It is easier to have good set of T&Cs in place to help avoid litigation, than to defend an unclear contract later.

Joint Ventures

At its core, a JV is a business arrangement between two or more parties, in which they agree to pool or combine some or all of their resources to undertake a specific task or to achieve a particular outcome or to develop a project together.

JVs can therefore be used for a very wide variety of commercial (and non-commercial) purposes.

At Contracts-Direct.com, we believe that JVs are going to be one of the key foundation stones for achieving economic recovery across a wide range of businesses.

We help set up strategic long-term and single-purpose JVs and we have a range of documents and services to support our commercial drafting services.

UK JVs commonly take one of the following forms:

- An unincorporated, contractual arrangement
- A private limited liability company incorporated under the Companies Act 2006
- An unlimited liability partnership- under the Partnership Act 1890 (yes 1890!)
- A limited liability partnership (LLP)- under the Limited Liability Partnerships Act 2000
- A limited partnership (LP)- under the Limited Partnership Act 1907 (as amended)

Outsourcing

An outsourcing deal involves transferring responsibility for delivering a service to an external provider (or from one external provider to another).

Outsourcing deals are more complex than straightforward contracts for the supply of goods or services and often involve the transfer of people, assets and contracts.

Outsourcing agreements tend to be longer in duration than standard service agreements (typically three to seven years) to allow sufficient time to transition existing services, undertake transformation and enable the supplier to recover its initial investment.

Franchising

Franchising is the grant of specified rights by one party to another in return for a fee and exists in various forms.

A key area to understand is the business method of franchising, under which a franchisor (A) grants a franchisee (B) a licence to distribute A's products or services, using A's business method and technology and under A's trade-marks.

As Franchisor, A supervises that use and provides training and other assistance (e.g. publicity) to B to help B in running the franchise. A franchise is thus a licence to use a business method for a period, subject to a royalty.

Intellectual property

There are four main intellectual property rights (often referred to as simply 'IP'):

- trademarks,
- designs
- patents and
- copyright.

IP rights are extremely important for the commercial sector.

Businesses need to ensure that they are protecting IP their rights so that competitors cannot copy their products. They also need to check that new products do not infringe the IP rights of others.

The creation, ownership, licensing and transfer of intellectual property rights regularly features in commercial transactions.

Furthermore, clear identification of intellectual property rights, their protection and management can assist with the optimisation of revenue opportunities for an organisation.

Trade-Marks

A trademark is a sign used to distinguish the goods and services of one undertaking from those of another. In other words, a trademark enables consumers to identify goods or services as originating from a particular company or relating to a certain product or service.

What constitutes a trademark?

Typically, trademarks take the form of words or logos though it is possible to protect more unusual forms of trademarks such as colours, slogans, shapes of products or packaging, sounds, motions and even smells.

Trademarks may be registered or unregistered. Registering trademarks usually offers the best protection (see below) but unregistered trademarks can be enforced in certain circumstances under the law of passing off.

What is not a trademark?

It is important to distinguish trademarks from other types of registration, such as company names or domain names.

Registering a company name at Companies House does not provide trademark protection for that name.

If a person registering a company name wishes to prevent third parties from using an identical or confusingly similar name in the course of trade, it is important to file a separate trademark registration to better protect the name.

Likewise, a domain name registration alone will not enable the registrant to prevent others using the name in another context, in the absence of registered or possibly unregistered trademark rights. It is advisable to underpin a domain name registration with a trademark registration to maximise protection and scope for enforcement.

Read more about trade-marks and their registration [here](#).

Copyright for Business

Copyright recognises the intellectual creation of an author when a work is created. Copyright is, put simply, a right to copy a work (the copyright owner may also restrict acts other than copying).

The law is set out mainly in the Copyright, Designs and Patents Act 1988 (CDPA 1988), which took effect from 1 August 1989. In practice, one work tends to give rise to multiple copyrights. When considering copyright works, rights distinct from copyright, e.g. design rights should also be considered as they may also apply to creative works.

Subsistence—no requirement to register

In the UK, copyright arises automatically on creation, provided that a work is not copied and is sufficiently original.

'Originality' requires that the work is an intellectual creation.

Following a series of court rulings, an original work is now one which expresses the 'intellectual creation of an author'. Courts no longer use the traditional skill, labour and judgment test.

There is no requirement for novelty in the sense that the work must be new in the marketplace. A work need not be unique; separate copyrights may exist in two similar, independently created works.

The subject matter must be expressed in a permanent form such as in writing, in a film, in a broadcast, on a computer or as a recording.

'Expression' is more than a mere recording of a work and is linked to originality. Ideas not reduced to permanent form may be protected by the law of confidence.

Copyright does not subsist in a work unless certain qualification requirements are met. An author's status is important when considering whether a work qualifies for copyright protection.

A work must have a qualifying author or if an author does not qualify, qualification for published works may occur through place of first publication. The place of first publication or broadcast must have been the UK or other specified country.

Recognising, exploiting and protecting copyright as a key business asset is essential.

Read more about copyright for business [here](#).

Agency and distribution

Agency and distribution are examples of channels to market; means by which a manufacturer, producer or an intermediary, such as a wholesaler, gets its products to end-user customers.

Agency is an arrangement under which a principal appoints an agent to act at its direction for specified purposes.

In business, agents are commonly appointed for the purposes of introducing and concluding agreements with new customers, marketing or customer support. In contrast to distribution, in agency agreements, the agent does not buy the goods but arranges sales for the manufacturer.

Distribution, on the other hand, is an arrangement under which the distributor buys goods from a manufacturer and resells them on its own behalf.

The Commercial Agents Regulations impose various terms on the relationship between principal and commercial agent, many of which the parties may not exclude by contract. In particular, we normally entitle the agent to a payment on termination of the agency arrangement.

Sale and supply of goods and services

The sale and supply of goods and the supply of services are broad areas that cover a multitude of potential legal and business issues. In relation to goods, areas for consideration include key legislation, price and payment terms, title and risk, delivery and acceptance, implied terms, limitation of liability and supply chain issues.

The legal framework relating to the sale and supply of goods is covered by both statute and common law and differs when dealing with a consumer or another business.

The law relating to the supply of services is also set out in various statutes and contained within the common law and also differs when dealing with a consumer or another business. Key areas include key legislation, price and payment terms, performance and acceptance, implied terms, limitation of liability and supply chain issues.

The Consumer Rights Act 2015 is also relevant to the commercial sector, affecting both the sale of goods and supply of services in relation to consumer rights and remedies.

Advertising, marketing and sponsorship

Advertising and marketing activities in the UK are regulated by several agencies and many legal controls.

There are different regulatory regimes affecting different types of advertising and some regulations cover both. Regulation is aimed at: method of delivery, content, recipient group and type of product. The law in this area covers general sales and marketing activities, direct marketing and its associated data protection implications, prize and sales promotions.

Brands are increasingly looking to align themselves with events or content that consumers care about. English law does not recognise the existence of proprietary rights in a sport (or other) event. It follows that there is no such recognised right as 'sponsorship rights' to an event, team or league.

The sponsorship rights granted by rights' holders to brands do not exist in and of themselves, rather they are created, exploited and protected via a contractual and legal matrix.

The advertising industry is a significant contributor to the UK economy and culture. Digital media is forecast to hold the majority of all UK advertising investment and continues to be the most robust growth story across the advertising industry.

Advertising on digital and online channels has evolved at a rapid rate which has led to the development of a complex interconnected web of software and tools involved in the process of delivering digital advertisements to end users. With the rise of the digital economy, advertising on digital channels is becoming more prominent and complex.

Shareholders' Agreements

A shareholders' agreement is entered into between all or some of the shareholders in a company. It is designed to regulate the relationship between the shareholders, the management of the company, ownership of the shares and the protection of the shareholders. The agreements also govern the way in which a company is run.

The sort of situations where a shareholders' agreement is commonly used include:

- on company set-up by two or more shareholders starting a business
- a new shareholder (individual or company) buys into an existing company
- a company issues shares to a new shareholder

- a variation of the rights attaching to shares
- to protect a minority shareholder
- where there is a 50:50 shareholding

The agreement can provide for many eventualities, including the financing of the company, the management of the company, the dividend policy, the procedure to be followed on a transfer of shares, deadlock situations and valuation of the shares.

It will also set out the scope of the company's business and commercial objectives (which may include details of any proposed projects or milestones).

The definition and scope of the company's business will be particularly important if the agreement is to contain restrictive covenants preventing the shareholders from competing with the joint venture's business.

The shareholders may want to spend time clearly delineating the scope of the company's business (including its geographic location) to ensure that the shareholders' other business activities do not fall foul of any restrictions included in the agreement.

Read about a shareholders' agreement checklist [here](#).

Company Directors' Duties

It's vital that company directors understand their duties and responsibilities.

Directors are the agents of a company who manage its day-to-day business. They include any person occupying the position of director, whether or not they have that title.

Their duties include:

- to act within their powers
- to promote the success of the company
- to exercise reasonable care, skill and diligence
- to avoid conflicts of interest
- to exercise an independent judgment

Read more about directors' duties [here](#).

Contractual joint ventures

Collaboration (or contractual joint ventures) can deliver significant commercial benefits to business. These can cover arrangements for joint working to deliver a specific project, or the creation of a longer-term relationship to deliver a new product or service to the market.

Businesses frequently use collaborative working to fill a technical knowledge or skills gap, provide a route to market using the other party's market intelligence or customer base, or utilise developed intellectual property thereby avoiding unnecessary expenditure or delay in taking a product to market.

Sometimes collaboration is required by a customer who looks to one or two preferred suppliers to combine forces to deliver a bespoke and seamless solution.

The participants decide in their collaboration or joint venture agreement what the object of their relationship is and how to achieve it.

We decide what each participant must contribute to the relationship and what the rights and obligations of each participant are.

We decide when the object of the relationship has been achieved and how the relationship is disbanded.

E-commerce

Most organisations will engage in e-commerce in some form or other as either the buyer or seller (or both) of goods and services.

There's a distinction between business-to-business (B2B) and business-to-consumer (B2C) e-commerce processes and transactions.

However, it is worth noting that in the UK at least, B2B transactions represent almost 75% of all e-commerce sales by value.

Both the B2B and B2C e-commerce website sectors include the following business models, along with hybrid versions:

- direct sales- websites generally for a trader's own product sales;
- market-places- websites offering a trader's own and third-party products and services; and
- online auctions- website versions of traditional auctions.

The e-commerce landscape introduces a number of challenges to organisations, from the basics of ensuring that a binding agreement has been concluded to privacy issues and the management of customer data.

Contracts-Direct will be bringing out a specific guide on this vital sector in due course.

Publisher's Notice:

Publisher: Atkins-Shield Ltd: Company No. 11638521

Registered Office: 71-75, Shelton Street, Covent Garden, London, WC2H 9JQ

Note: This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. The information contained in this document is intended to be for informational purposes and general interest only.

E&OE

Atkins-Shield Ltd © 2022