

Key Questions – Licence or Franchise?

- Exactly what rights/property will the licensee/franchisee be entitled to use?
- Are there any restrictions on the use of the rights/property? Are there any restrictions on the territory and/or market where the rights/property can be used?
- Is there any exclusivity in relation to the territory and/or market where the rights/property can be used?
- Is any commission or royalty to be paid? How is it calculated?
- How long will the arrangement last? Is it renewable?
- What are the obligations of the parties? How will performance be monitored?
- Does the licensee/franchisee have to provide any sales/order forecasts? Are those forecasts binding? Do any minimum sales/order obligations apply?
- Are the term and termination provisions adequate, bearing in mind the commercial objectives of the parties?

Key Questions - Contracting Online

- Does the supplier describe the technical steps to follow to conclude the contract and therefore comply with the Electronic Commerce (EC Directive) Regulations 2002?
- Do standard terms and conditions apply? Do they cover the goods and/or services in question?
- If dealing with consumers, do the terms and conditions comply with the Consumer Protection (Distance Selling) Regulations 2000 and any relevant requirements of any professional bodies?
- Have the terms and conditions been brought to the attention of the other party in a way that they are easily accessible?
- Has it been made clear that by progressing with the online procedure the other party accepts the terms and conditions? Does the other party have the opportunity to reject those terms and conditions and cancel the online procedure?
- Has it been made clear that any orders are subject to acceptance? Is it clear that any automated responses do not constitute acceptance of an order?

Key Notes – Dealing with Consumers

Different laws and regulations apply to contracts with consumers. They may result in:

- Terms being implied, despite anything to the contrary in the contract (eg under the Consumer Protection Acts, the Consumer Protection (Distance Selling) Regulations 2000)
- Additional formalities having to be observed (eg under the Consumer Credit Act 1974)
- Terms in contracts being void or unenforceable by the supplier (eg under the Unfair Contract Terms Act 1977 or the Unfair terms in Consumer Contract Regulations 1999)
- Contracts being voidable at the discretion of the consumer (eg under the Misrepresentation Act 1967 or the Trade Descriptions Act 1968)
- Civil and/or criminal liability for the supplier (eg under the Consumer Protection Act 1987)

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Halliwells Contract Facts
The Essentials

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The Intellectual Property, Commerce & Technology (IPCT) department specialises in all aspects of intellectual property (IP) law and commercial and business support, ranging from IP litigation and licensing to IT contracts, commercial trading agreements and outsourcing.

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02 What is a "Contract"?

A contract does not have to be in writing or even be signed to be legally binding.

The essential elements of a legally binding contract are:

- **An offer** – eg "I will buy your car for £1,000"
- **Acceptance of that offer** – "I accept your offer to buy my car for £1,000"
- **"Consideration"** – an exchange of value (which is either money or something else with economic or monetary value)
- **"Capacity"** – the legal ability to enter into an agreement
- **Intention to create a legal relationship**

A legally binding contract could therefore arise as a result of a conversation, exchange of correspondence (by letter or email) or a course of conduct.

03 Typical Contract Terms

Commercial contracts will usually include terms covering some or all of the following issues:

- Contracting parties
- Supply of goods and/or services
- Parties' obligations
- Price and payment
- Ownership of intellectual property rights
- Warranties and indemnities
- Limitation of liability and insurance
- Force majeure
- Term, renewal and termination
- Confidentiality
- Data protection
- Employment matters
- Boilerplate clauses, law and jurisdiction

How these issues are dealt with will depend on:

- Whether you are the "supplier" or "purchaser"
- Whether you are dealing with businesses or consumers (the public)
- The relative bargaining power of the parties

04 Key Questions - Sale and Supply of Goods

- Are the goods standard or bespoke?
- Are there any specifications for the goods?
- Do any legal or industry standards apply to the goods?
- When and where will delivery take place?
- When will risk and title in the goods pass to the buyer?
- Will the buyer do any acceptance testing or checking?
- What is the price of the goods and what are the payment terms?
- What warranties will apply to the goods and for how long?
- What remedies apply if the goods do not comply with any applicable specifications, standards or warranties?
- Are any implied terms excluded? If so what is the relative bargaining power of the parties? (Unfair Contract Terms Act 1977)

05 Key Questions – Supply of Services

- What are the scope of the services and are there any exclusions?
- When and how will the services be provided?
- Does the buyer have to do anything to enable the services to be provided?
- Will anything be created as part of the services? If so, are there provisions for ownership of the intellectual property rights subsisting in the creation?
- What is the price for the services and how is payment to be made?
- Do any service levels or milestones apply?
- Do any service credits apply for failure to meet service levels or milestones?
- How is the satisfactory provision of services to be assessed?
- Is the provider insured and, if so, to what levels?
- Are there any employment issues arising from the provision of any services? (Transfer of Undertakings (Protection of Employment) Regulations 2006)

06 Key Questions – Agency or Distribution?

- Does the agreement provide for continuing authority to negotiate sales on the suppliers' behalf? i.e. will the relationship operate as an agency agreement within the scope of the Commercial Agents (Council Directive) Regulations 1993 or as a distribution agreement?
- Has compensation on termination of an agency been excluded?
- How is the agents'/distributors' remuneration calculated? e.g. does the agent/distributor receive commission or make a profit on the sale?
- Are there any restrictions on the territory and/or market where the goods and/or services can be sold?
- Is there any exclusivity in relation to the territory and/or market where the goods and/or services can be sold?
- Does the agent/distributor have to provide any sales/order forecasts? Are those forecasts binding? Do any minimum sales/order obligations apply?
- Are the term and termination provisions adequate bearing in mind the nature of the relationship?