INTRODUCTION


GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics companies need to know. The Guide to Going Global series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

INTELLECTUAL PROPERTY AND TECHNOLOGY

Inside this guide, we outline crucial aspects of IPT laws in 45 jurisdictions that are particularly relevant to businesses seeking to expand their operations globally. We also summarize some fundamental commercial terms that customarily appear in IPT-related agreements.

You will find answers to such common questions as:

- Which jurisdictions recognize moral rights?
- What does my business need to do to have an enforceable assignment of intellectual property from an employee, from a consultant?
- What kind of liability can be excluded from a commercial contract?

With this edition, we’ve also included a section for each country that discusses the enforceability of electronic signatures.

Our goal is to make the guide as readable and informative as possible, providing you just the background you need to get an overview of the IPT laws in the selected jurisdictions. This is not a substitute for professional legal advice. If you have questions regarding specific matters, we encourage you to contact one of our contributors listed in the contributors section of this guide. With nearly 500 dedicated IPT lawyers around the globe, DLA Piper’s IPT group is ready to handle your legal needs wherever you do business.

Also, please note that the guide’s use of the term “trademarks” also refers to service marks, unless specifically addressed separately. The summary of intellectual property covers only the most commonly used categories worldwide (for example, we have not addressed plant patents). We have also referred to international treaties and conventions with their most commonly used names and not their formal titles (such as the TRIPS Agreement, the Berne Convention, the Paris Convention and the Patent Cooperation Treaty).

We hope that you find this guide valuable and we welcome your feedback.
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This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that intellectual property and technology law is dynamic, and the legal regime in the countries surveyed could change.
UNIVERSAL FRAMEWORK

INTELLECTUAL PROPERTY FRAMEWORK

Overview

Intellectual property rights are governed by a variety of statutes and common law. The substantive provisions are generally equally applicable throughout the United Kingdom (comprising England, Wales, Scotland and Northern Ireland). As the UK is currently part of the European Union (EU), some of its intellectual property law derives from EU legislation.

The UK’s vote in June 2016 to leave the EU has no immediate consequences and does not affect the position of the UK as an EU member state. There are no immediate changes to IP rights in the UK; however, the scope and status of these rights are addressed in the draft agreement for the UK’s withdrawal and, if the draft cannot be finally agreed, will be subject to other changes, in particular as regards EU-wide rights such as the EU trademark.

COMMERCIAL CONTRACT FRAMEWORK

Overview

The UK has three distinct legal systems:

i. English law applicable in England and Wales

ii. Northern Irish law applicable in Northern Ireland

iii. Scots law applicable in Scotland

Commercial contracts are governed by domestic legislation, case law, the operation of EU law and international treaties in certain circumstances. There are specific rules that may apply to certain types of commercial contracts. There are often more stringent rules for consumer contracts, ie, made between a business and a consumer to address the often unequal balance between the parties.

The interpretation and enforceability of commercial contracts is generally a matter for the courts and a number of common law principles have evolved through case law. Each contract and clause will, however, be determined on
an individual basis depending upon the facts of the case in question and some well-established interpretive rules.

In addition, there are a number of statutes which are likely to require contractual protections drafted into the majority of contracts. For example, the Bribery Act 2010, which has extra-territorial effect and potential criminal sanctions for non-compliance; the Transfer of Undertakings (Protection of Employment) Regulations 2006, which provide that in certain circumstances employees of one contracting party may transfer to the other contracting party; and contracts with public sector authorities are generally subject to a more rigorous statutory framework.

COPYRIGHTS

Nature of right

Copyright protection is available for works covered by the categories protected by the Copyright Act, which includes artistic, literary (including software), dramatic, musical, sound recording, film, broadcasts and typographical arrangements. Literary, dramatic, musical or artistic works must be original to qualify for protection.

Copyright owners have the exclusive right to prevent others copying the work, issuing copies of the work to the public, renting, lending, performing, showing, communicating works to the public or making an adaptation of the work.

Knowingly dealing with infringing copies is also prohibited as "secondary infringement."

There is no requirement for a copyright to be registered, and no copyright registration system.

Legal framework

The UK became a signatory to the Berne Convention in 1887.

Copyright Designs and Patents Act 1988, as (extensively) amended (Copyright Act) governs copyrights.

Copyright and Rights in Databases Regulations 1997 govern separate sui generis rights in relation to databases in which an investment has been made in obtaining/verifying/presenting their contents.

Duration of right

Provided the work qualifies for protection, protection arises automatically on creation of the work.

For literary, dramatic, musical and artistic works, duration is the author's life plus 70 years after the author's death, unless it is computer generated, in which case copyright subsists for 50 years from the end of the calendar year in which it was made. Film copyright expires 70 years after the last death of the director, author and composer. Copyright in broadcasts expires 50 years from the end of the year of the broadcast. Copyright in typographical arrangements of published editions expires 25 years from the end of the year of first publication.

Ownership / licenses

Joint ownership of copyright is recognized, and arises automatically where a work has more than one author. Joint ownership can create limitations on the ability of a joint owner to independently exploit the relevant work.
Remedies for infringement

Principal remedies are injunctions (or interdicts in Scotland), damages or an account of profits, delivery up, seizure, or destruction of infringing goods. No statutory damages are available. The starting point for the damages calculation is generally a reasonable license fee. Aggravated damages for flagrancy are possible.

It is also possible to prevent the import and export of infringing copies. Criminal penalties are also possible for certain infringements.

MASK WORKS / TOPOGRAPHIES

Nature of right

The equivalent to a "mask work" right is a semiconductor topography right. However, this is rarely used. Integrated circuit layouts are protected through use of other intellectual property rights, eg, copyright.

The right protects a UK unregistered design (within the meaning of the Copyright Act) which is:

i. A pattern fixed or intended to be fixed in or upon
   ○ A layer of semiconductor product
   ○ A layer of material in the course of and purpose of the manufacture of a semiconductor product

ii. The arrangement of patterns fixed, or intended to be fixed, in or upon layers of a semiconductor product in relation to one another.

A semiconductor product is defined as an article consisting of at least two layers, at least one composed of semiconducting material, and in or upon one or more of which a pattern is fixed. The article must have as a purpose the performance of an electronic function.

The right is infringed by reproducing the design, either by making articles based on the design, or by creating design documents for the purpose of making such articles.

Legal framework

Design Right (Semiconductor Topographies) Regulations 1989 (as amended) governs semiconductor topographies.

Duration of right

Provided the design qualifies for protection, protection arises automatically on creation of the design.

Protection expires 15 years from when the design was first recorded or an article made to it, or, if the design or an article made to the design is made available anywhere in the world during that 15-year period, it expires 10 years from the end of the calendar year in which the design or an article made to the design was first made available anywhere in the world.
Ownership / licenses

The designer is the first owner of any semiconductor topography right if the design is not created under commission or in the course of employment.

For commission, the commissioner is the first owner of any semiconductor topography right, subject to agreement to the contrary. If created in the course of employment, the employer is the first owner of the right, subject to any agreement to the contrary between the parties.

Remedies for infringement

Principal remedies are injunctions (or interdicts in Scotland), damages or an account of profits, delivery up, seizure or destruction of infringing goods. No statutory damages are available. The starting point for the damages calculation is usually a reasonable license fee. Aggravated damages for flagrancy are possible.

It is also possible to prevent the import of infringing copies.

PATENTS

Nature of right

Patents are a registered right which may be obtained to protect inventions (which may include, for example chemical compounds, products, systems, processes and methods). Designs are protected by means of design rights, not by design patents. To be patentable, an invention must:

- Be novel
- Involve an inventive step over the prior art
- Be capable of industrial application (which will be satisfied in almost all cases)
- Not solely consist of excluded subject matter (such as discoveries, scientific theories, mathematical methods, aesthetic creations, business methods and computer programs)

Hence business methods and computer programs are patentable provided the invention makes a technical contribution to the art over and above the fact it is a business method or computer program.

It is possible to apply for a patent within the UK through the national route, the Patent Cooperation Treaty or under the European Patent Convention (a centralized process administered by the European Patent Office). There are also preparations to introduce a new European patent with unitary effect and a single Unified Patent Court. For more information consult the dedicated UPC page.

A patent owner may prevent third parties performing certain specified activities in relation to products or processes embodying the invention, or products derived from a patented process, including manufacturing, offering for sale and using a product or using or offering for use a process knowing that such use is an infringement in the UK.
Knowingly offering, for supply, an essential feature of the invention for putting the patented invention into effect in the UK is also prohibited.

**Legal framework**

The United Kingdom became party to the Patent Cooperation Treaty in 1978 and the Paris Convention in 1884.

The Patents Act 1977 governs patents.

**Duration of right**

Patents have a duration of 20 years from the filing date, subject to payment of renewal fees and as long as the patent is not invalidated. For medicinal and plant patents, supplementary protection certificates are available and extend duration up to the lesser of five years after expiry of the patent or 15 years from first marketing authorization.

**Ownership / licenses**

The UK has a "first to file" system. Subject to an employee's responsibilities and duties, ownership will normally vest in the employer.

Co-owners are considered to have an equal undivided share in a patent subject to agreement to the contrary and consequently cannot assign or license their share without consent of the other unless otherwise agreed.

There are certain advantages to be obtained from registering assignments or assignations and licenses, eg, binding third-party acquirers, but there is no strict requirement to do so.

When granting licenses it is generally advisable to include quality control and use provisions and controls on sublicensing.

**Remedies for infringement**

Remedies for infringement can include injunctions (or interdicts in Scotland), damages, an account of profits, an order for delivery up, seizure or destruction, as well as a declaration of validity and/or infringement. No statutory damages are available. The starting point for the damages calculation is generally a reasonable license fee.

It is also possible to prevent the import of infringing products.

The Patents Act provides an actionable right against those who make unjustified threats of patent infringement.

**TRADEMARKS**

**Nature of right**

A registered right which may be obtained to protect a distinctive, non-descriptive sign consisting of words, slogans, designs, letters, numbers, domains, shapes, smells, sounds, colors, gestures or moving images that can be represented graphically and can be used to distinguish goods and services of one undertaking from those of
It is possible to register a sign as a national UK trademark or as a European Union Trade Mark (EUTM) that applies to all EU member states.

A trademark is infringed by use of an identical sign for identical goods or services for which the mark is registered, or by use of an identical/similar sign for identical/similar goods or services for which the mark is registered where there exists a likelihood of confusion on the part of the public. Additional protection is given for well-known marks. Infringement of an EUTM potentially gives a trademark owner EU-wide relief.

**Legal framework**

The United Kingdom became member of the Madrid Protocol in 1995.

The United Kingdom became party to the Trademark Law Treaty in 1996.

Trademarks are governed by the Trade Marks Act 1994 (UK marks) and Regulation EU/2017/1001 on the European Union Trade Mark (EUTMs), both as amended.

**Duration of right**

Trademarks are perpetual (subject to renewal every ten years and as long as the trademark is not revoked).

**Ownership / licenses**

Both the UK registry (UKIPO) and EUTM registry (EUIPO) have a "first to file" system, though the registration may be refused or revoked if it conflicts with prior rights including unregistered rights.

There are certain advantages to be obtained from registering assignments or assignations and licenses, eg, binding third-party acquirers of the mark, but there is no strict requirement to do so.

When granting licenses, it is generally advisable to include quality control provisions to preserve the mark's reputation and distinctiveness, and controls on sublicensing.

**Remedies for infringement**

Remedies for infringement include injunctions (or interdicts in Scotland), damages, an account of profits, orders for erasure, removal or obliteration of offending sign, orders for delivery up or destruction. No statutory damages are available. The starting point for the damages calculation is generally a reasonable license fee. Criminal penalties are also possible for certain types of infringement. There is also a customs seizure regime.

There is an actionable right in the UK against those who make unjustified threats of trademark infringement including if relying on EU Trade Marks as well as UK national marks. Companies should take care when writing to a third party alleging infringement or use of a similar mark.

**TRADE SECRETS**
Nature of right

The status of trade secrets as an item of property is not clear; the more generally accepted view is that trade secrets are not property. However, trade secrets may be protected either through a breach of contract action, where a non-disclosure agreement exists or can be implied, another obligation of confidentiality, or a common law action for breach of confidence.

A common law action for breach of confidence is based on the principle that, for information received in confidence, a person cannot take unfair advantage of that information or prejudice the person giving the information. The same principle applies both in Scotland and in England.

To qualify, information must have the "necessary quality of confidence" and must be "disclosed in circumstances importing an obligation of confidence," eg, imposed by contract, implied by the circumstances of disclosure, or implied due to the relationship between the parties, such as employer/employee. However in employer/employee relationships in particular, there are limits as to how far information can be protected after termination of the relationship (information must be confidential to a sufficiently high degree, with highly confidential trade secrets possibly being protected indefinitely).

In May 2016, the European Council adopted the EU Trade Secrets Directive, which EU member states (including the UK) were required to implement by May 2018. The Directive was implemented in the UK through the Trade Secrets (Enforcement, etc.) Regulations 2018, although these do not significantly change existing case law.

The Directive defines a trade secret as information that:

- Is secret (ie, not generally known or readily accessible to persons within circles that deal with such information)
- Has commercial value as it is secret
- Has been subjected to reasonable steps by the person in control to keep it a secret

The meaning of "reasonable steps" will be developed as the courts apply this law. Labelling something a trade secret is unlikely to be enough of itself.

The Directive prevents unlawful acquisition, use or disclosure of trade secrets (including unauthorized access). "Unlawful" requires the act to be unauthorized, or contrary to honest commercial practices.

Legal framework

Trade secrets are governed by the Trade Secrets (Enforcement, etc.) Regulations 2018 and case law.

Duration of right

Trade secret protection has a potentially indefinite term.

However, information can lose the necessary quality of confidence and hence no longer be protectable, for example, if it enters the public domain, becomes out of date or loses its commercial value. Also, where the obligation of confidentiality arises under a contract, the duty of confidentiality will only apply for the duration
specified in the contract.

**Ownership / licenses**

Trade secrets are protected by the common-law tort action of breach of confidence. They do not give rise to property rights or "ownership" in the conventional sense. They may be exercised by anyone who is able to establish the necessary conditions (described above). Contractual licences to use trade secrets may be granted; while there is no legal requirement for these to be in writing or signed by either party, it is generally desirable for them to be signed and in writing, for certainty and evidential purposes.

**Remedies for infringement**

Injunctions (or interdicts in Scotland), damages, an account of profits, and delivery up or destruction of records of confidential information illegitimately retained are possible remedies for misappropriation.

**OTHER KEY IP RIGHTS**

**Nature of right**

**Passing off**

The tort (or delict in Scotland) of passing off relates to misrepresentations made by one trader that damages or may damage the goodwill of another. It can be used to protect unregistered business and product names, logos and "get-up."

The "classic form" of passing off is generally defined by reference to three requirements:

- Goodwill in the UK attached to goods or services
- A misrepresentation by the defendant to the public (intentional or not) leading the public to believe its goods or services are those of (or connected with) the plaintiff
- The plaintiff suffers or likely to suffer damage due to that misrepresentation

However, the misrepresentation may be as to other matters, such as:

- That the plaintiff's goods are those of the defendant (reverse passing off)
- Misrepresentations as to quality
- False endorsement

The misrepresentation must be one which confuses or deceives the public or is likely to. Goodwill has been described as the "benefit and advantage of a good name or reputation..." or the "attractive force that brings in customers." Goodwill can be limited to certain areas/geographic locations.

An extended form of passing off requires:
A misrepresentation

Made by a trader in the course of trade

To prospective customers or ultimate consumers

Which is calculated to injure the business or goodwill of another, ie, such injury must be reasonably foreseeable

Which causes actual damage to a business or goodwill

**Designs**

There are four types of design rights in the UK: registered and unregistered UK design rights, and registered and unregistered European Community design rights.

A registered design and a Community unregistered design can be the whole or part of a product resulting from features of lines, contours, colors, shape, texture or materials of a product or its ornamentation. This can include packaging, get up, graphics and typefaces parts of products, icons, maps, web design etc.

Registered designs and Community unregistered designs must be new (not previously disclosed or available to the public anywhere in the world) and have individual character (creating a different overall impression on the "informed user" taking into account design freedom). There are exceptions to this and features dictated by function (must fit and must match exceptions) cannot be protected.

To obtain registered design right protection, it is necessary to register either with the UK Intellectual Property Office (UKIPO) or EUIPO (for a Community registration). The UK is a "first to file" system, although a registration may be refused or revoked if it conflicts with prior rights. Unregistered design rights arise automatically.

The proprietor of the design may prevent any use of the design or any design which does not produce a different overall impression on the informed user (taking into account design freedom). To infringe unregistered Community design right the defendant must have copied the design. Copying is not a requirement to infringe registered design rights.

The regime for subsistence and infringement of UK unregistered design right is different. The right subsists in the shape or configuration of the whole or part of an article that is original and not commonplace, recorded in a design document or the subject of an article made to the design and created by a qualifying person. A key difference is that UK unregistered design right does not protect surface decoration. The UK unregistered design right does not protect methods or principles of construction and is subject to an exception for use in relation to products which must fit or must match the protected design.

**Legal framework**

**Passing off**

Case law governs actions for passing off and they are not the subject of legislation although it is possible to rely on passing off to oppose trade mark applications by third parties under trade mark law.
Designs

The Registered Designs Act 1949 (as amended) governs UK registered designs, the Copyright Designs and Patents Act 1988 (as amended) governs UK unregistered designs, and the Community Designs Regulation (6/2002/EC) governs Community registered and unregistered designs.

Duration of right

Passing off

There is no duration; however, goodwill must still subsist. It is possible that a business may have residual goodwill, even if no longer trading and in some cases can be resumed at a later date.

Designs

Registered designs subsist for 25 years, subject to payment of renewal fees (every five years) for both UK and Community registrations and as long as the registration is not revoked.

UK unregistered design protection expires 15 years from when the design was first recorded or an article made to it or, if the design or an article made to the design is made available anywhere in the world during that 15-year period, it expires ten years from the end of the calendar year in which the design or an article made to the design was first made available anywhere in the world.

Unregistered Community design protection lasts for three years from the date that the design is made available to the public.

Ownership / licenses

Passing off

Goodwill can be jointly owned and is considered to be a form of property right that can be transferred like any other property right.

As a general rule, goodwill accrues to the business and not to individual employees.

Designs

Both the UK and EU registries have a "first to file" system, though the registration may be revoked if it conflicts with prior rights.

Generally, a designer will be the owner of the right. Employers generally own a design if it is created in the course of employment.

In the last five years of a UK unregistered design right any person is entitled to a license. If parties cannot agree on the terms, the Comptroller General of Patents, Designs and Trademarks will settle the terms (this can be a lengthy process but an infringer can manufacture products pending settlement of the terms).

Remedies for infringement
Passing off

Available remedies include injunctions (or interdicts in Scotland), damages, an account of profits and delivery up, seizure or destruction or modification of packaging, products, marketing materials and similar.

Designs

Available remedies include injunctions (or interdicts in Scotland), damages, an account of profits, delivery up, seizure or destruction of goods.

There is an actionable right in the UK against those who make unjustified threats of design right infringement. Companies should therefore take care when writing to a third party alleging infringement or use of a similar mark.

INTELLECTUAL PROPERTY IN EMPLOYMENT CONTEXT

Employees

With respect to copyright and design rights (including semiconductor topography designs), where an employee (as distinct from independent contractors) makes a work in the course of employment, the employer will be first owner of the copyright in the work, subject to agreement to the contrary.

Inventions belong to the employer if the invention was made in the normal duties of the employee or specifically assigned duties.

Consultants / contractors

For copyright in commissioned works, the contractor will own the copyright subject to a written agreement to the contrary. The preferred approach is for a commissioner to take an assignment of all existing and future copyright in the works and any associated materials or documents and obtain a waiver from the contractor of his moral rights in the same.

Without express written provisions to the contrary, legal title in an invention will vest in the contractor unless a court implies a term into the contract granting ownership to the commissioner.

KEY COMMERCIAL CONTRACT CONSIDERATIONS

Registration of commercial agreements

There are no general registration requirements for commercial agreements.

Some commercial agreements may need to be disclosed in certain circumstances, for example, in relation to public companies and contracts with public sector authorities.

There is a distinction in English law between two main forms of contract – those executed under hand (simple contracts) and those executed as a deed. A contract executed as a deed requires additional formalities to be satisfied but does not require consideration to pass between the parties in order to be binding (as is the case for a simple contract).
Documents governed by Scots law are not executed by way of a deed and do not require reference to the concept of “consideration.” Statute sets out formalities which can be followed in order to ensure documents are self-proving: for commercial contracts to be formally valid, a document should be subscribed by an authorized signatory in the presence of a witness.

**Recognized language of commercial agreements**

There is no general requirement that contracts need to be in the English language in order to have legal effect. As a basic principle, in relation to consumer contracts and notices a trader must ensure that the written terms of the consumer contract and written consumer notices are in plain and intelligible language. The courts may strike out limitations or similarly onerous provisions in consumer facing contracts which are not worded sufficiently clearly or with sufficient prominence (or are otherwise blacklisted or deemed unfair by relevant legislation).

**Country-specific issues for online content**

Not applicable.

**Enforceability of online/clickwrap/shrinkwrap terms**

The legal enforceability of shrinkwrap terms has historically been somewhat debated by academics (though common commercial practice). The Consumer Rights Act 2015 now sets out a consumer’s rights and obligations under business-to-consumer supply contracts for digital content (business-to-business being out of scope). Consumers now have statutory rights against the business supplier regarding the quality and title of digital content supplied, whether that be downloaded online or supplied as part of physical goods such as DVDs and CDs.

There are a number of requirements which relate to online terms which govern transactions entered into or services provided over the internet. For example, the Electronic Commerce (EC Directive) Regulations 2002 and Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 set out details of the information that must be provided by the trader.

Certain information regarding the new European Online Dispute Resolution platform must now also be provided by online traders on their website and in their terms, if that trader is statutorily obliged to use this alternative dispute resolution procedure.

**Governing law**

Parties are free under Scots and English law to choose the governing law and jurisdiction of a contract as well as any arbitration institution they may see fit. Generally, both the Scottish and English Courts uphold an express choice of law. However, such freedom of choice is unlikely in the case of a consumer contract. Moreover, in some circumstances, an express choice of law may be challenged and the applicable law modified (eg, if a different law has been chosen solely to avoid the application of the UK’s "unfair contract terms" legislation). In the event that there is no express choice of law in the contract, then, for contracts created on or after December 17, 2009, the provisions of Rome I Regulation apply. For contracts created before December 17, 2009, the provisions of the Rome Convention apply.

Arbitration is often used by parties to resolve commercial disputes. It is private and confidential and governed by the Arbitration Act 1996 and, in Scotland, Arbitration (Scotland) Act 2010. There are also a number of alternative...
dispute resolution procedures. These include mediation, early neutral evaluation and adjudication. Typically, traders now have access to alternative dispute resolution (ADR) providers in their sectors, should they choose to resort to ADR, to resolve any contractual disputes with consumers.

**KEY COMMERCIAL CONTRACT TERMS**

*Enforceability of warranty disclaimers*

In a contract for the sale of goods, the Sale of Goods Act 1979 (SGA) implies a number of terms into an agreement. It is possible, to a certain extent, to disclaim some but not all of these implied terms. The terms implied by the SGA include a condition that the seller has the right to sell the goods (Section 12), that the goods conform to their description (Section 13), that the goods are of satisfactory quality (Section 14 (2)) and a condition that the goods supplied will be reasonably fit for purpose (Section 14 (3)).

Where there is a supply of goods, terms are also implied (but similarly, may to an extent be disclaimed) by the Supply of Goods and Services Act 1982 (SGSA) relating to the description (Sections 3 and 11C) and the quality (Sections 4 and 11D) of the goods transferred. In a supply of services, terms are implied relating to the care and skill with which the work is performed (Section 13), requiring the work to be carried out within a reasonable time (Section 14) and that, where consideration is not expressed in the contract, the party contracting with the supplier will pay a reasonable charge. Sections 13 and 14 are covered by common law rather than statute in Scotland.

The extent to which terms implied by the SGA and the SGSA may be excluded is largely controlled by the Unfair Contract Terms Act 1977 (UCTA). In a commercial contract, some of the implied terms, such as those relating to quality or fitness for purpose, can be disclaimed (commonly referred to as "excluded") but only insofar as this is "reasonable." A typical approach is to expressly exclude an implied term, replacing it in the commercial contract with a more specific express term to cover the same issue. For example, the contract might exclude implied terms as to quality/fitness for any particular purpose but expressly include terms agreeing that the goods will conform with the bespoke specification.

The restrictions in UCTA do not apply to international supply contracts (where contracting parties have places of business in different countries and the goods either cross from one country to another, or offer and acceptance take place in different countries).

The rules set out above in this section do not apply to consumer contracts. The Consumer Rights Act 2015 sets out a consumer’s statutory rights over the quality of the goods, services and digital content that are supplied and the consumer’s statutory remedies for the trader’s breach of the supply contract. For example, the same quality requirements of the SGA and the SGSA referred to above are treated as the terms of the consumer supply contract for goods and services, and while similar, but different, rules apply to digital content. There are a number of terms in consumer contracts which cannot be excluded. The terms of consumer contracts and notices may also be considered unfair and not binding on consumers.

*Enforceability of exclusions/limitations of liability indemnification*

With some notable and important exceptions, commercial entities are largely free to agree between themselves how to apportion this risk and to limit their respective liability to each other. These can take varied forms from the complete exclusion of liability for specific types of loss to requiring claims to be made within a specific time...
Parties cannot, however, exclude or limit liability for:

- Certain implied warranties (for instance any clause which purports to supply goods without the right to do so)
- Death or personal injury caused by their, or their employees, negligence
- Fraud and fraudulent misrepresentation

Other common provisions seeking to exclude or limit liability (be they certain types of actions, such as negligence, or certain losses or claims, such as wasted management time) may need to pass the "reasonableness" test set out under UCTA in order to be valid and enforceable; this will however depend on a range of factors, including whether a supplier is contracting on its standard terms and the balance of bargaining power between the parties (in addition, please see the comments as to international supply contracts included in enforceability of warranty disclaimers).

English and Scottish contract provisions are construed Contra Proferentum (against the party that drafted them); therefore, care should be taken to ensure clarity and accurate drafting of liability clauses. Equally, where there is any ambiguity in an exclusion of liability clause this will be interpreted against the party seeking to limit/exclude its liability, so care should be taken when drafting to avoid ambiguous terms.

Liability will continue throughout the contract and may not cease after the contract has been fulfilled, terminated or expired, subject to statute and any warranties and indemnities set out in the contract.

It is common practice for the parties to agree on the total amount which can be claimed in the event that a contract is breached, and to expressly state this cap in the contract. As explained above, such a cap on liability may be subject to the reasonableness test depending on the circumstances.

**Indemnification**

Indemnities are generally enforceable as a promise to be responsible for another’s loss on a pound for pound basis. In addition, depending on the drafting, indemnities may not be subject to a duty of mitigation on the party making such indemnity claim (albeit that case law is not consistent on this point).

Due to the fact that indemnities are primary obligations, they can remain valid even if the underlying transaction is set aside for any reason. This is different to the provision of a guarantee, which, as a secondary obligation, is dependent on the primary obligation existing.

An indemnity remains subject to the usual contractual principles of offer, acceptance, intention to create legal relations and consideration just like any other contractual terms.

**Electronic signatures**

The making of electronic contracts online is commonly accepted and there is no general prohibition at law to using electronic signatures to execute contracts. However, using electronic signatures can be difficult where there is a legislated set of formalities for executing contracts, such as in transactions involving the sale of real property.
or in the execution of deeds (including a deed of guarantee), and it is still commonplace for these agreements to be executed manually (in writing).

An electronic signature is widely defined under the Electronic Communications Act 2000 and can be anything that is incorporated into or associated with any electronic communication or electronic data for establishing the authenticity and/or integrity of that communication or data. Electronic signatures can be in a variety of forms, such as:

- By typing the signatory's name in an electronic document or email
- By scanning a written signature
- By clicking on a button on a website
- By using a signature made on a screen or entering some other form of digital signature that is unique to the signatory

Regardless of its form, it must be clear that the electronic signature is authentic and that the signatory intended to be bound by that communication or data. In 2018, the Law Commission in the UK launched a consultation which sought to address certain legal uncertainty surrounding the electronic execution of documents. The consultation closed on November 23, 2018 and, as at the date of writing, further information on the responses is awaited.
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