INDEX

acceptance see delivery and acceptance
acceptance see repudiatory breach
see also waiver, by election
acceptance see repudiatory breach
see also waiver, by election
acquiescence, project housekeeping 5.19–20
actionable statements, pre-contractual 2.08–14
ad hoc agreements, dispute resolution 15.55, 15.60, 19.64
adequacy of damages 16.17–27
advance payments, recovery of 17.111
affirmation 13.90–94
agents, pre-contractual statements 2.25–30
agile development model
contract negotiation and project methodology 3.08–17
iterations (sprints) 3.10–11, 3.16
project management 6.02
mitigation of losses 17.205
test driven development (TDD) 3.10
agreement on essential terms, contract negotiation 3.27–32
agreement to agree
contract negotiation 3.24, 3.34
interim dispute resolution 15.31–5
agreements to negotiate
interim dispute resolution 15.31–5, 15.44
pre-contract matters, letters of intent 1.27–30
alpha, beta, and acceptance testing 8.04
alternate systems, savings from 17.118
ambiguity
contra proferentem principle and
exemption/limitation clauses 18.05, 18.16–19
pre-contract matters, letters of intent 1.22
pre-contractual statements, liability for 2.23
anticipatory repudiatory breach, termination rights 13.55–7, 13.62–3, 13.87
appendices, inconsistency with contract 3.20
arbitration
arbitration see repudiatory breach
arbitral tribunal and jurisdiction, interim dispute resolution 15.42–6
arbitral tribunal and mandatory steps, interim dispute resolution 15.16–29
clause, relevance to certainty of agreement 3.27
enforcing a continuing relationship 16.08
balance of convenience, interim injunction 16.14, 16.28–30
balance of convenience, mandatory injunction 16.32–3
baselining of damages, long-running disputes, legacy system retention for 17.161–3
benchmarking, performance and 9.01–4
benefit, overlap between claims for loss of benefit and wasted expenditure 17.33–5
best endeavours 7.02–6, 7.12–16
betterment, and replacement system cost 17.75–7
bilateral negotiation process, interim dispute resolution 15.08, 15.48
binding contract, pre-contract matters 1.18–19
boilerplate terms, contract negotiation 3.16, 3.18
breach of settlement agreement, enforcement mechanisms 14.68–9
breach of confidentiality, contractual indemnities 7.31
see also confidentiality
breach of contract
anticipatory repudiatory breach, termination rights 13.56–7, 13.87
damages see quantification of claims for compensation, damages for breach of contract
delay 10.08–9
deliberate breach, exemption/limitation clauses 18.08–12
and false statements, pre-contractual 2.02, 2.13
indemnity following 17.174–88
limitation of action 11.49–51, 11.53, 11.54
material breach, termination rights 13.12–26, 13.105
and performance and service credits 9.06, 9.20, 9.23–4, 9.31–3
and project housekeeping 5.02–7
repudiatory see repudiatory breach
and subcontracting 7.20
time-bar see limitation of action
treated as incapable of remedy 13.09
see also contracts
breach of injunction or undertaking, penalties 16.09, 16.12
BSkyB v EDS litigation 1.35, 2.12, 6.13–16, 11.21, 12.10–17, 14.61, 17.149–61
bug tolerance, testing 8.05–11
burden of proof, global claims 17.123
burden of proof, quantification of claims for compensation 17.36–41, 17.123
business common sense arguments 13.34
business necessity and obviousness, implied terms 4.20
business and operations information, pre-contract matters 1.07
business-as-usual concerns
project management, change control 6.29
termination 13.96
Cable & Wireless, interim dispute resolution 15.17, 15.19, 15.32–3, 15.35–6
cap levels
liquidated damages, contract variation 14.70
performance and service credits 9.22
settlement sum 14.70
carve-outs from dispute mechanism, interim dispute resolution 15.20–21, 15.23, 15.25, 15.28, 15.78
Case Management Conference, forum for resolving disputes, civil court system 19.22–3
Cavendish Square Holding BV v Maksdesi, quantification of claims for compensation 9.28, 17.16–26
cessation of work, standstill agreements 11.38–47
change control
project management see project management, change control
substantive terms of settlement, Change Control Notice 14.59
civil court system, dispute resolution see forum for resolving disputes, civil court system
claims in deceit, see deceit, re-baselining, representations and see also deceit, damages for fraud
cooperation see collaboration
collateral warranty, pre-contractual statements 2.03
commercial interests
and best endeavours 7.15–16
and reasonable endeavours 7.11, 7.15
commercial reputation issues 11.38
see also reputation
commitment to commence a process, interim dispute resolution 15.41
common law
constraints, performance and service credits 9.25–7
variation 5.21–6
and termination see termination rights, common law and interaction with parties’ agreement
companies, losses suffered within group of see quantification of claims for compensation, damages for breach of contract, losses suffered within a group of companies
compensation cap see cap levels
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>compensation quantification see quantification of claims for ...</td>
<td>3.27</td>
</tr>
<tr>
<td>competing interests, standstill agreements</td>
<td>11.62–4</td>
</tr>
<tr>
<td>compromise, parties’ intention to compromise part of dispute, project</td>
<td>14.66–7</td>
</tr>
<tr>
<td>concessions in commercial negotiations, project resuscitation</td>
<td>14.39</td>
</tr>
<tr>
<td>conditionality of contract becoming binding</td>
<td>3.36–9</td>
</tr>
<tr>
<td>conditionality of settlement terms</td>
<td>14.64–5</td>
</tr>
<tr>
<td>conduct, representation by, pre-contractual statements</td>
<td>2.17</td>
</tr>
<tr>
<td>confidence, loss of</td>
<td>13.68</td>
</tr>
<tr>
<td>confidentiality</td>
<td>2.17</td>
</tr>
<tr>
<td>breach, contractual indemnities</td>
<td>7.31</td>
</tr>
<tr>
<td>clause inclusion, pre-contract matters</td>
<td>1.12, 1.25, 1.31</td>
</tr>
<tr>
<td>of disclosed documents</td>
<td>20.62–4, 20.66–7</td>
</tr>
<tr>
<td>confidentiality club</td>
<td>20.62–20.64</td>
</tr>
<tr>
<td>dispute boards</td>
<td>15.73–4</td>
</tr>
<tr>
<td>mediation</td>
<td>19.41</td>
</tr>
<tr>
<td>configuration control, testing</td>
<td>8.03</td>
</tr>
<tr>
<td>consequential losses, exclusion of liability for</td>
<td>18.13–15</td>
</tr>
<tr>
<td>consultants</td>
<td>6.23</td>
</tr>
<tr>
<td>due care and skill owed by management consultant</td>
<td>17.115</td>
</tr>
<tr>
<td>fees, recovery of</td>
<td>17.115</td>
</tr>
<tr>
<td>continuing relationship, enforcing see</td>
<td>3.27</td>
</tr>
<tr>
<td>enforcing a continuing relationship</td>
<td>3.27</td>
</tr>
<tr>
<td>contingency see conditionality</td>
<td>9.24, 18.05, 18.16–19</td>
</tr>
<tr>
<td>contra proferentem principle</td>
<td>7.28–32</td>
</tr>
<tr>
<td>contractual indemnities enforcement see quantification of claims for compensation, enforcement of contractual indemnities</td>
<td>3.27</td>
</tr>
<tr>
<td>contractual liability, pre-contractual statements</td>
<td>2.02–3</td>
</tr>
<tr>
<td>contractual notice requirements</td>
<td>5.44–51</td>
</tr>
<tr>
<td>contractual protection against</td>
<td>12.05, 12.14–15</td>
</tr>
<tr>
<td>contractual warranty regarding resource levels</td>
<td>6.11</td>
</tr>
<tr>
<td>pre-contract matters see pre-contract matters</td>
<td>3.20</td>
</tr>
</tbody>
</table>

425

Steven Baker, Lawrence Akka and Rachel Glass - 9781784710125
Downloaded from Elgar Online at 03/30/2019 09:11:33AM via free access
INDEX

quantification of claims see quantification of claims for compensation, damages for breach of contract, contractual or liquidated damages
record maintenance 6.40–41
termination rights see termination rights variation 5.27–32
variation and rescission 5.33–7
see also breach of contract; contractual framework
contractual framework 4.01–41
contract for sale of software as contract sui generis 4.38
functional and design specifications 4.09–13
functional and design specifications, collaboration requirements 4.12
functional and design specifications, effective change control procedure 4.13
hierarchy/order of preference clause 4.02–6
implication of terms 4.16–41
as a matter of law 4.21–5
as matter of fact 4.17–20
business necessity and obviousness requirements 4.20
project plans 4.14–15
Sale of Goods Act 4.23–5, 4.29, 4.33, 4.36, 4.39, 4.41
software as goods or services debate 4.26–41
statement of work (SOW) 4.07–8
convenience, termination for convenience right 13.03–5, 17.105–7
corporate defendants, liability for fraudulent pre-contractual statements 2.25–30
costs of/related to dispute resolution expert witnesses 21.09
interim dispute resolution, dispute boards 15.72
sanctions, consideration of 14.28
see also losses; payments; savings
cross-undertaking, interim injunction 16.31
custodians and storage locations, document preservation 20.21
damage to reputation, interim injunction 16.18
see also reputation
damages see quantification of claims for compensation
as adequate remedy, interim injunction 16.17–27
breach of contract see quantification of claims for compensation, damages for breach of contract
breach of contract, repudiatory breach and damages claim 5.05, 5.25
see also quantification of claims for compensation, damages for breach of contract
cross-undertaking, interim injunction 16.31
final injunction, and damages awards 16.13
liquidated damages see liquidated damages termination for convenience clause, impact of 13.04–5
tortious measure see quantification of claims for compensation, tortious measure of damages
see also penalties
de-scoping, project rescue 11.13–16
deadlines
agreement for new project plan, standstill agreements 11.34
see also time factors
debt claim, indemnity as a 17.164–73
deceit, claims in deceit, re-baselining representations 12.06, 12.17
deceit, damages for fraud 17.143–6

deadlines
agreement for new project plan, standstill agreements 11.34
see also time factors
debt claim, indemnity as a 17.164–73
deceit, claims in deceit, re-baselining representations 12.06, 12.17
deceit, damages for fraud 17.143–6
INDEX

decision, challenge to, expert determination 19.75–80
declaration application, enforcing a continuing relationship 16.02–3
deed, insistence on, standstill agreements 11.67
defective notice, potential 5.51
defects, testing 8.05–11
delay 10.01–21
agreed extensions 10.13
breach of contract 10.08–9
damages liability 10.04
milestones 10.04, 10.08, 10.21
prevention principle 10.17–21
reasonable time, determination of 10.06–7
termination at common law 10.10–16
termination rights, contractual 10.04
time available for performance 10.03–7
‘time of the essence’ notice 10.10–12, 10.13–16
see also time factors
deliberate breach, exemption/limitation clauses 18.08–12
delivery and acceptance 7.01–32
best endeavours 7.01–6, 7.12–16
best endeavours, all reasonable endeavours distinction 7.13–16
best endeavours, and commercial interests 7.15–16
contractual indemnities 7.28–32
contractual indemnities, breach of confidentiality 7.31
contractual indemnities, context and definition 7.32
contractual indemnities, intellectual property protection 7.28–30
prime and subcontracting 7.17–21
reasonable endeavours 7.01–6, 7.15
reasonable endeavours, all reasonable endeavours as more onerous obligation 7.07–11, 7.15
reasonable endeavours, and commercial interests 7.11, 7.15
subcontracting, and breach of contract 7.20
subcontracting and vicarious performance 7.17–18
subcontractor selection, duty to exercise reasonable skill and care 7.19
delivery and acceptance, software licensing 7.22–7
duration and termination 7.24
GPL/Open Source 7.26–7
licence scope 7.23
licensee’s right to run and copy object code 7.22
warranties 7.25
design specifications 4.10–13
disclosure in litigation 20.01–67
documents, meaning of 20.20
disclosure in litigation, document preservation 20.10–58
confidential or protectively marked documents 20.20, 20.22
custodians and storage locations 20.21
destruction of documents, potential consequences 20.25–7
destruction of documents, sanctions 20.26–7
‘document hold’ notice 20.18, 20.19–24
filing of disclosure report 20.13
key steps 20.15–18
metadata of electronic documents 20.20, 20.24
modification and amendment of documents 20.19
new documents 20.22, 20.24
third parties holding relevant documents, identification of 20.23
timing 20.11–14
disclosure in litigation, document preservation, electronic disclosure 20.28–58
and confidentiality 20.40
disclosure in stages 20.45
e-disclosure before Technology and Construction Court 20.42–5
EDQ see disclosure in litigation, document preservation, electronic disclosure, Electronic Documents Questionnaire
electronic data 20.31–4
electronic document types 20.46
INDEX

Electronic Documents Questionnaire (EDQ) 20.35–41
Electronic Documents Questionnaire (EDQ), search techniques 20.38, 20.41
e-mail and SMS messaging 20.33, 20.43
encryption and passwords 20.48–50
metadata 20.32, 20.40
review of documents 20.53–8
review of documents and predictive coding use 20.54–8
storage media 20.47
third-party suppliers of eDisclosure services 20.51–2
see also technology
disclosure in litigation, inspection issues 20.59–67
confidentiality of disclosed documents 20.62–4, 20.66–7
documents inaccessible/unreadable without specialist equipment 20.60–61
working examples, demonstrations and access to 20.65–7
disclosure in litigation, solicitors’ duties
solicitor’s duty to act in best interests of client 20.08
solicitors’ overriding duty to court 20.05–9
solicitors’ overriding duty to court, failure to comply 20.09
discretionary remedies, enforcing a continuing relationship 16.54
dispute adjudication board, interim dispute resolution 15.52, 15.61, 15.71–2, 15.77
dispute conciliation board, interim dispute resolution 15.61
dispute impact on project 14.05–7
dispute resolution boards see interim dispute resolution, dispute boards
clause, 3.19, 11.11–12, 11.35
confidentiality, and project resuscitation 14.13–15
forum see forum for resolving disputes
‘heads of terms’ use to record ‘in-project’ dispute settlement 11.17–22
interim see interim dispute resolution
parties’ intention to compromise part of dispute 14.66–7
dispute, resourcing 14.19–20
dispute review board, interim dispute resolution, dispute boards 15.61
contractual documents, failure to draw up 3.21–6
disclosure see disclosure in litigation
‘document hold’ notice see disclosure in litigation, document preservation,
‘document hold’ notice
’in life’ documents, record maintenance 6.46–7
inaccessible/unreadable without specialist equipment 20.60–61
meaning of, disclosure in litigation 20.20
pre-contractual 1.06–51
preservation see disclosure in litigation, document preservation
retention following completion of project 6.48–9
tender documents 17.128–9
types, record maintenance 6.36–8
written see written documents
see also drafting
double counting and over-compensation issues 17.113
drafting
and exclusionary rule, record maintenance 6.42–3
interim dispute resolution, escalation clauses 15.10, 15.47–50
precision, importance of 9.29–30
process, failure to complete 3.21–6
termination rights 13.90
see also documents
due care and skill owed by management consultant 6.23
due diligence, contracting partner selection 1.04
duty of skill and care
and quantification of claims for compensation 17.44–5
re-baselining representations 12.14–15
economic duress, contract voidable if procured by way of 5.24–5
EDQ see Electronic Documents Questionnaire
election, waiver by 11.56–7, 14.81–2
electronic disclosure see disclosure in litigation, document preservation, electronic disclosure
electronic documents, metadata of 20.20, 20.24
Electronic Documents Questionnaire (EDQ) 20.35–41
e-mail
disclosure in litigation, document preservation 20.33, 20.43
project housekeeping, giving of notices 5.40–43
project management, record maintenance 6.38
employees, customer’s costs by way of payments to own employees, recovery of 17.67–8
encryption and passwords, document preservation 20.48–50
enforceability
action in respect of rights accrued before commencement of standstill period 11.28
contractual indemnities see quantification of claims for compensation, enforcement of contractual indemnities
expert determination 19.81
interim dispute resolution see interim dispute resolution, escalation clauses enforceability
mechanisms in event of breach of settlement agreement 14.68–9
service credits 9.34
enforcing a continuing relationship 16.01–54
arbitration clause 16.08
declaration application 16.02–3
discretionary remedies 16.54
final injunction 16.10–13
final injunction, and damages awards 16.13
final injunction, risk assessment 16.11–13
injunction or specific performance order 16.04–9
intellectual property rights protection 16.10
penalties for breach of an undertaking 16.12
quia timet injunction 16.10
specific performance order 16.51–3
enforcing a continuing relationship, interim injunction 16.08, 16.14–50
balance of convenience 16.14, 16.28–30, 16.32–3
damage to reputation 16.18
damages as adequate remedy 16.17–27
damages as adequate remedy, and exclusion and limitation clauses 16.19–27
mandatory interim injunction 16.32–8
mandatory interim injunction, balance of convenience 16.32–3
mandatory interim injunction, and prohibitory injunction, distinction between 16.32
success prospects 16.15–16
termination, prevention of 16.39–50
undertaking as to damages (cross-undertaking) 16.31
errors
notices containing 5.52–6
tolerance, testing 8.05–11
escalation clauses, dispute resolution see interim dispute resolution, escalation clauses
essential terms, agreement on 3.27–32
estimates, pre-contract see pre-contract matters, estimates
estimates of cost
project management, change control 6.29
tendering, estimates of project cost 1.15–9, 1.40–43, 1.46
estoppel
by convention 5.08–9
by representation 5.10
contractual 5.14–15
promissory 5.11–13
reserving rights, termination rights 13.89
waiver by, project resuscitation 14.79–80
INDEX

waiver by, standstill agreements 11.56–7

evidence
documentary evidence see disclosure in litigation
giving evidence which is within expertise, expert witnesses 21.15
legacy systems see baselining of damages, long-running disputes, legacy system retention for requirement, additional or ‘wasted’ staff time 17.102–3
valuation evidence, expert evidence of difference in value, damages on lost benefit basis 17.53
‘without prejudice’ negotiations, admissibility of 14.53
witness evidence see witnesses and witnesses, expert witness statements see witnesses and witnesses, expert
exclusive remedy, performance and service credits 9.24
exclusionary rule, drafts and negotiation materials 6.42–3
exemption/limitation clauses 18.01–27 contra proferentem principle and ambiguity 18.05, 18.16–19
clauses, relevance to adequacy of damages, interim injunction 16.19–27
common law rights, termination rights 13.48–52
contractual indemnities 17.196–7
deliberate breach 18.08–12
exclusion of liability for consequential losses 18.13–15
interpretation 18.04–7, 18.08–10
liability for consequential losses 18.13–15
loss of future profits 17.80
statement of intent 18.06–7
Unfair Contract Terms Act 18.20–27
Unfair Contract Terms Act, ‘requirement of reasonableness’ 18.23, 18.25–6
Unfair Contract Terms Act, ‘written standard terms of business’ 18.24
existing agreement, impacts of settlement, project resuscitation 14.70–72
expenditure see cost factors

expert determination, dispute resolution see forum for resolving disputes, expert determination

experts
consultant review, re-baselining representations 12.09
and dispute resolution see forum for resolving disputes, expert determination
versus lawyers, mediator choice 19.47–52
witnesses see witnesses, expert
see also third parties
expiry issues, dispute boards 15.69
extensions, agreed extensions provisions and effect on rights re delay 10.13

factual basis of proof, global (composite) claims 17.124–6
failure to identify risks, standstill agreements, time-bar considerations 11.55
failure to make payments, termination rights 13.20–23
false statements and contractual liability 2.02–3, 2.13
final injunction, enforcing a continuing relationship 16.10–13
fitness for purpose
breach of implied term as to 8.07–11
software as goods or services debate 4.26–41
‘fix first, argue later’ provision 11.11, 14.07, 14.84
forum for resolving disputes 19.01–83
arbitration 19.24–7
forum for resolving disputes, civil court system 19.02–23
case management conference and procedural matters 19.22–3
designation of judge 19.21
High Court divisions 19.04–6
initial procedural timetable 19.18–20
letter of claim 19.15, 19.19–20
pre-action 19.13–17
professional negligence cases 19.17
Technology and Construction Court
forum for resolving disputes, expert
determination 19.57–83
‘ad hoc’ agreement 19.64
advantages 19.58
challenging the decision 19.75–80
clause 19.60–64
enforcement 19.81
and expert choice 19.63, 19.65–8
fraudulent or collusive behaviour 19.76
impact on ongoing project 19.82–3
impartiality 19.77
manifest error, challenging 19.78–80
naming expert issues 19.65–8
reasoned decisions 19.72–4
technical disputes, defining 19.69–71
weaknesses 19.59
forum for resolving disputes, mediation
19.28–56
advantages 19.31, 19.33
benefits against non-facilitated negotiation
19.43–6
closing statement 19.40
confidentiality and privilege in 19.41
interim, and impact on ongoing project
19.53–6
mediator choice, industry expert versus
lawyer 19.47–52
meetings 19.32–7
position papers 19.33, 19.55
refusal to engage in 19.30
structure 19.32–42
technical presentation 19.36
without prejudice privilege 19.41
forum for settlement negotiations, project
resuscitation 14.37
fraud
 damages for 17.143–6
defence of contributory negligence to
fraudulent misrepresentation 12.06
fraudulent or collusive behaviour, expert
determination 19.76
negligent misrepresentation and ‘fiction of
fraud’ 17.142
pre-contractual statements, liability for,
misrepresentation 2.21–4, 2.33, 2.39,
2.40–41
see also deceit
friendly discussion, clause requiring 15.43–6
‘full and final settlement’ qualification
14.60–63
functional and design specifications,
contractual framework 4.09–13
global (composite) claims see quantification
of claims for compensation, global
(composite) claims
good faith, contractual duty of 9.25–7
goodwill, recovery of costs incurred in
preservation of customer 17.104
GPL/Open Source licensing 7.26–7
group of companies, losses suffered within
see quantification of claims for
compensation, damages for breach of
contract, losses suffered within a group
of companies
hard copy documents, document
preservation 20.20, 20.24
hardware, practical mitigation steps
17.200–201
‘heads of terms’ use to record ‘in-project’
dispute settlement 11.17–22
hierarchy/order of preference clause 4.02–6
High Court divisions, civil court system
19.04–6
housekeeping see project housekeeping
impartiality, expert determination 19.77
implication of terms 4.16–41
as matter of fact 4.17–20
as matter of law 4.21–5
business necessity and obviousness 4.20
cooperation in technology contracts
6.03–9
fitness for purpose of software generally
8.07–11
Sale of Goods Act 4.26–41
see also software as goods or services
debate

431

Steven Baker, Lawrence Akka and Rachel Glass - 9781784710125
Downloaded from Elgar Online at 03/30/2019 09:11:33AM
via free access
implied terms see implication of terms
‘in life’ documents, record maintenance 6.46–7
inaccessible or unreadable documents, disclosure in litigation, inspection issues 20.60–61
incomplete agreements, contract negotiation 3.33–5
indemnities contractual, delivery and acceptance 7.28–32
following breach of contract 17.174–88
independence, expert witnesses 21.14, 21.20
indispensable condition, contractual notice requirements 5.46–7
inducement, pre-contractual statements, liability for, misrepresentation 2.20
injunctions and injunctive relief applications, interim dispute resolution, escalation clauses 15.20–29
final 16.10–13
interim see enforcing a continuing relationship, interim injunction interim, termination rights, exit clauses and intellectual property transfer 13.110
quia timet 16.10
or specific performance order 16.04–9
inspection issues, disclosure in litigation see disclosure in litigation, inspection issues
instalment payments entire agreements 17.112
non-payment, material breach, termination rights 13.23
intellectual property letters of intent, pre-contract matters 1.31
protection and contractual indemnities 7.28–30
and step-in rights 11.73
transfer and termination rights see termination rights, exit clauses and intellectual property transfer intention, pre-contractual statements 2.10–11, 2.13–14, 2.19
interest accruing during standstill period 11.31
see also cost factors
interim dispute resolution 15.01–83
interim dispute resolution, dispute boards 15.51–83
ad hoc 15.55, 15.60
and adjudication, similarities between 15.52
advantages and disadvantages 15.70–78
Cable & Wireless 15.17, 15.19, 15.32–3, 15.35–6
carve-out clauses 15.78
case law relating to 15.79–83
and confidentiality 15.73–4
cost factors 15.72
dispute adjudication board’s decisions and enforcement 15.61, 15.71–2, 15.77
dispute conciliation board 15.61
dispute review board 15.61
expiry issues 15.69
member appointments 15.56–60, 15.67–8
‘position papers’ 15.65
procedure and timetable 15.65–6, 15.76
referral procedure 15.71–3
rules 15.62–5, 15.75
rushed or ill-considered decisions, potential for 15.75–6
‘standing’ 15.54, 15.56, 15.60, 15.68–9, 15.70, 15.72
interim dispute resolution, escalation clauses 15.02–50
advantages and disadvantages 15.11–30
arbitral tribunals and mandatory steps 15.16–29
bilateral negotiation process 15.08, 15.48
carve-out agreement 15.20–21, 15.23, 15.25, 15.28
common structures 15.05–10
court’s jurisdiction to grant stay of proceedings 15.16–21
drafting considerations 15.10, 15.47–50
identity and availability of individuals to whom disputes will be referred 15.48
injunctive relief applications 15.20–29
managerial negotiation stage 15.06
mandatory or optional 15.05, 15.48
INDEX

manipulation by defaulting parties 15.30
mediation stage 15.07–9, 15.18, 15.35, 15.49
technical compliance with escalation clause 15.15
timeframe consideration, importance of 15.30
interim dispute resolution, escalation clauses enforceability 15.31–46
'am agreement to agree' or 'agreement to negotiate' 15.31–5
arbitral tribunal and jurisdiction powers 15.42–6
commitment to commence a process 15.41
dispute resolution by 'friendly discussion' 15.43–6
sufficient certainty, need for 15.35–46
interim injunction, and continuing relationship see enforcing a continuing relationship, interim injunction
internal inconsistencies in contract, contract negotiation and project methodology 3.20
interpretation disputes, performance and service credits 9.11–12
invitations to tender (ITT), pre-contract matters 1.06–13
iterations (sprints), agile development model 3.10–11, 3.16
ITT see invitations to tender
judiciary, designation of judge, civil court system 19.21
key performance indicators (KPIs), performance and service credits 9.15
knock-on effects
contract variation 14.70
delay 14.30
global (composite) claims 17.121
KPIs see key performance indicators
laissez-faire approach, exemption/limitation clauses 18.02
large-scale projects, pre-contract matters 1.17, 1.19, 1.23
late delivery of a module, standstill agreements, time-bar considerations 11.54
late payment disputes, termination rights 13.67
legacy system, quantification of claims for compensation 17.161–3, 17.207
legal team involvement, project management 6.19–20
legally binding agreement test 3.23–5
letter of claim, civil court system 19.15, 19.19–20
letters of intent
contract negotiation and project methodology 3.24, 3.28–31
pre-contract see pre-contract matters, letters of intent
project rescue 11.17
liability
accruing during standstill 11.30
exclusion of admission of, standstill agreements 11.29
loss of future profits, contractual exclusions of liability 17.80
potential liabilities assessment, project resuscitation 14.16–18
see also exemption/limitation clauses
licensing
and delivery and acceptance see delivery and acceptance, licensing
termination rights, termination for cause provisions 13.24–6
limitation clauses
damages as adequate remedy, interim injunction 16.19–27
and exemption clauses see exemption/limitation clauses
limiting risks of loss of rights, project resuscitation 14.84
liquidated damages
agreed for periods of delay, standstill agreements 11.38
performance and service credits 9.28–33
quantification of claims see quantification of claims for compensation, damages for breach of contract, contractual or liquidated damages

433

Steven Baker, Lawrence Akka and Rachel Glass - 9781784710125
Downloaded from Elgar Online at 03/30/2019 09:11:33AM
via free access
INDEX

listing of issues to be resolved, standstill agreements 11.34
‘litigation risk’ uncertainty, project resuscitation 14.18
lock-out agreement, letters of intent 1.28–30
long-running disputes, quantification of claims for compensation 17.148–63
longstop date, standstill agreements 11.66
losses see quantification of claims for compensation 17.01–212
losses that might be claimed by an aggrieved party expenditure of extra money caused by supplier’s breaches, recovery of 17.07 interest accruing during standstill period 11.31 monies paid to supplier, damages on wasted expenditure basis 17.109–14 out of pocket expenditure, consultants’ fees and wasted staff time, recovery of 17.115 replacement system, betterment 17.75–7 replacement system examples 17.69–76 replacement system as reasonable mitigation of continuing losses 17.63–8 restoration costs 17.58–61 management, project see project management managerial negotiation stage, interim dispute resolution 15.06 mandatory clarification, interim dispute resolution 15.05, 15.48 mandatory contractual notice requirements 5.45 mandatory interim injunction 16.32–8 manifest error, challenging, expert determination 19.78–80 marketing hype, ‘mere puff’ statements, pre-contractual statements 2.08–9 material breach, termination rights 13.12–26, 13.105 mediation, dispute resolution see forum for resolving disputes, mediation stage, interim dispute resolution, escalation clauses 15.07–9, 15.18, 15.35, 15.49 meetings, minutes of, record maintenance 6.44–5 member appointments, dispute boards 15.56–60, 15.67–8 ‘mere puff’ statements (marketing hype), pre-contractual statements 2.08–9 metadata, issues arising in disclosure 20.20, 20.24, 20.32, 20.40 milestones, delay 10.04, 10.08, 10.21 minutes of meetings, record maintenance 6.44–5 mismatch between contract and project 6.19 misrepresentation calculation of damages 17.139–47 contractual protection against, re-baselining representations 12.05, 12.14–15 negligent misrepresentation and ‘fiction of fraud’ 17.142 pre-contractual statements see pre-contractual statements, liability for, misrepresentation risk areas for, re-baselining representations 12.04 see also Misrepresentation Act

Misrepresentation Act damages for claims under 17.142 ‘fiction of fraud’ 17.142 pre-contractual statements 2.31, 2.32–3, 2.39, 2.41 re-baselining representations 12.12 mitigation cost of replacement system as reasonable mitigation of continuing losses 17.63–8 damages on wasted expenditure basis 17.117 indemnified party required to mitigate losses? 17.166–7, 17.170, 17.189–92 indemnity as debt claim, mitigation 17.166–7, 17.170
overlap between damages and cost of mitigation 17.62
steps, compensation claims see quantification of claims for compensation, mitigation steps
modification and amendment of documents, document preservation 20.19
monies paid to supplier, damages on wasted expenditure basis 17.109–14
multi-party projects
performance and service credits 9.32
project resuscitation 14.08–10
multi-tiered performance and service credits 9.21

naming expert issues, expert determination 19.65–8
negligence
defence of contributory negligence to fraudulent misrepresentation 12.06
losses caused by own negligence or 'legal wrong', indemnities 17.195–7
misrepresentation, negligent and 'fiction of fraud' 17.142
pre-contractual statements 2.31, 2.34, 2.39, 2.41
professional negligence pre-action protocol 19.17
remoteness 17.138
and savings from alternate system 17.118
negotiation
materials and exclusionary rule, record maintenance 6.42–3
negotiated settlement, project resuscitation 14.28
service levels and service credits 9.10–12
time, preserving, project rescue 11.08–12
new agreements, rescission and variation 5.33–7
new documents, disclosure in litigation 20.22, 20.24
new project plan, deadline agreement, standstill agreements 11.34
'no variation' clauses, project housekeeping 5.27–30
non-disclosure of material facts, pre-contractual statements 2.15–16
non-payment 13.97
see also failure to make payments, termination rights
'non-reliance' clause and contractual estoppel 5.14
notices
breach notice, termination rights 13.08
and project housekeeping see project housekeeping, giving of notices
standstill agreements 11.65
termination rights, termination procedures 13.08, 13.102–6
object code, licensee's rights 7.22
obviousness, business necessity and obviousness requirements in implication of terms 4.20
Open Source 7.26–7
opinion, statements of, pre-contractual statements 2.10–11, 2.13–14
oral amendments, project housekeeping, variation 5.27, 5.28, 5.31, 5.34
order of preference clause 4.02–6
out of pocket expenditure, consultants' fees and wasted staff time 17.115
over-compensation, double counting and over-compensation issues 17.113
parent company
contracting parent company's recovery of loss 17.43–5
seeking to recover on behalf of subsidiary 17.47–9
passwords, disclosure in litigation 20.48–50
'pay to be paid' clauses, indemnities 17.176
payments
termination payments 13.03
withholding, termination rights 13.97
penalties
breach of an undertaking 16.12
penalty clauses 17.16–26
performance and service credits 9.28–33
see also damages for breach of contract, contractual or liquidated damages
performance and benchmarking 9.01–4
third party 9.04
performance and service credits 9.05–34

435
Steven Baker, Lawrence Akka and Rachel Glass - 9781784710125
Downloaded from Elgar Online at 03/30/2019 09:11:33AM
via free access
and breaches of contract 9.06, 9.20, 9.23–4, 9.31–3
cap levels 9.22
common law constraints 9.25–7
communication role 9.15
communications recorded in writing 9.34
contra proferentem rule 9.24
and contractual duty of good faith 9.25–7
definition 9.13–18
drafting precision, importance of 9.29–30
enforceability disputes 9.34
as exclusive remedy 9.24
function 9.05–6
implementation phase 9.07, 9.18
interpretation disputes 9.11–12
key performance indicators (KPIs) 9.15
limitations 9.09
measurement criteria 9.16–17
multi-party projects and subcontractors 9.32
negotiating service levels and service credits 9.10–12
obligations subject to 9.13, 9.29–30
operational phase 9.07, 9.08, 9.14, 9.18
penalties/liquidated damages, impact of law on 9.28–33
record-keeping (at contract negotiation) 9.32
record-keeping (during contract term) 9.32
remedy for performance failure 9.06
satellite disputes 9.11
solution development 1.02, 1.08–9, 1.15, 1.16
stakeholder involvement 1.02
statements of requirements/invitations to tender (ITT) 1.06–13
subject to contract’ terminology 1.26, 1.31
technical solution feasibility concerns 1.24
tender, parties’ obligations 1.09–12
tendering costs 1.15, 1.19
tendering gaps 1.48
tenders 1.14–20
pre-contract matters, estimates 1.15, 1.34–51
assumptions and caveats 1.44–5
cost estimates, ‘top down’ and ‘bottom-up’ methodologies 1.40–43, 1.46
lessons for customers 1.49–51
lessons for suppliers 1.44–8

pre-action settlement negotiations 14.43
pre-contract matters 1.01–51
binding contract 1.18–19
collaboration, need for 1.45, 1.47
confidentiality clause 1.12, 1.14, 1.25, 1.31
contract award process, process and timetable 1.07, 1.08
contracting partner selection 1.01–5
contracting partner selection, checks and due diligence 1.04
contractual recital 1.20
Customer Relationship Management (CRM) system 1.35
customer’s business and operations information 1.07
deadline for implementation 1.07
intellectual property protection 1.31
key individuals, identification of 1.02
large-scale projects 1.17, 1.19, 1.23
pre-contractual documents 1.06–51
procurement, level of detail 1.02, 1.23
representations made during selection process 1.03
review of scope of project requirements 1.13
scope ‘creep’ limitation 1.08
‘second-generation’ services 1.17
solution development 1.02, 1.08–9, 1.15, 1.16
stakeholder involvement 1.02
statements of requirements/invitations to tender (ITT) 1.06–13
‘subject to contract’ terminology 1.26, 1.31
technical solution feasibility concerns 1.24
tender, parties’ obligations 1.09–12
tendering costs 1.15, 1.19
tendering gaps 1.48
tenders 1.14–20
pre-contract matters, estimates 1.15, 1.34–51
assumptions and caveats 1.44–5
cost estimates, ‘top down’ and ‘bottom-up’ methodologies 1.40–43, 1.46
lessons for customers 1.49–51
lessons for suppliers 1.44–8
see also BSkyB v EDS litigation

pre-contractual statements, liability for,

misrepresentation 2.01–41
actionable statements 2.08–14
agent’s statements 2.25–6, 2.29–30
ambiguous statements 2.23
‘collateral warranty’ 2.03
corporate defendants 2.25–30
false statements and contractual liability
2.02–3, 2.13

fraud 2.21–4, 2.33, 2.39, 2.40–41
inducement 2.20
intention for representation to be acted upon 2.19
legal principles underpinning 2.13
‘mere puff’ statements (marketing hype) 2.08–9

Misrepresentation Act 1967 2.31, 2.32–3, 2.39, 2.41, 17.139, 17.142

negligent 2.31, 2.34, 2.39, 2.41
non-disclosure 2.15–16
reliance 2.01, 2.16, 2.20, 2.29
remedies 2.35–41
remedies, damages 2.41
remedies, rescission ab initio 2.35–40
remedies, rescission ab initio, restitutio in integrum 2.37
representation by conduct 2.17
statement, meaning of 2.06–7
statement of opinion or intent 2.10–11, 2.13–14
statement to the claimant 2.18
statement true at the time it is made 2.16

predictive coding use, electronic disclosure 20.54–8
preference, order of preference clause 4.02–6

preservation

customer goodwill, damages on lost benefit basis 17.104

of documents, see disclosure in litigation, document preservation

negotiation time, project rescue 11.08–12

prevention principle 10.17–21
preventive and compensatory indemnities, distinction between 17.176–9
price adjustment clause, contractual or liquidated damages 17.19
primary vs secondary obligation, contractual or liquidated damages 17.18–19
prime and subcontracting, delivery and acceptance 7.17–21

privilege in mediation 19.41
procedure, civil court system
case management conference and procedural matters 19.22–3
initial procedural timetable 19.18–20
and see generally forum for resolving disputes, civil court system
procurement, level of detail, pre-contract matters 1.02, 1.23
profits, loss of future, damages on lost benefit basis 17.78–85, 17.86
prohibitory injunction 16.32
project abandoned, damages for breach of contract 17.07
project development models 3.05–18
project housekeeping 5.01–57

acquiescence 5.19–20
and breach of contract 5.02–7
and breach of contract, repudiatory breach and damages claim 5.05, 5.25, 5.53
contractual estoppel 5.14–15
contractual right to terminate 5.53
estoppel by convention 5.08–9
estoppel by representation 5.10
‘non-reliance’ clause and contractual estoppel 5.14
promissory estoppel 5.11–13
relief notices and contractual estoppel 5.15
waiver, effect of ‘no waiver’ clauses 5.17–18
waiver, terminology 5.16–18

437

Steven Baker, Lawrence Akka and Rachel Glass - 9781784710125
Downloaded from Elgar Online at 03/30/2019 09:11:33AM via free access
INDEX

project housekeeping, giving of notices
5.38–57
contractual notice requirements 5.44–51
‘in writing’ and by email 5.40–43
‘indispensable conditions’ of notice 5.46–7
mandatory contractual notice
requirements 5.45
notice incorrectly served and time
limitations 5.49–50
notices containing errors 5.52–6
potentially defective notice 5.51
reasonable notice, period of 5.57
reasonable recipient assessment 5.53–5,
5.56
project housekeeping, variation
common law requirements 5.21–6
consideration 5.22–3
‘no variation’ clauses 5.27–30
oral amendments 5.27, 5.28, 5.31, 5.34
rescission, difference between variation
and rescission 5.33–7
and termination provisions 5.32, 5.57
voidable if procured by way of economic
duress 5.24–5
project management 6.01–49
agile development methodologies and
cooperation 6.02
contractual warranty 6.11
cooperation between supplier and
customer 6.01–9
due care and skill owed by a management
consultant 6.23
legal team involvement 6.19–20
managing evolution of project
requirements 6.18–22
mismatch between contract and project
6.19
personnel qualifications and availability
6.10–17
point of contact, nomination of 6.21
resourcing 6.10–17
project management, change control 6.22,
6.24–33
approval 6.30–31
‘business-as-usual’ change requests 6.29
Change Control Note 6.32–3
change requests 6.27–8
changes in scope 6.24–6
impact and cost assessment 6.29
inadequate use of 6.26
processes 6.27–33
recording changes 6.32–3
project management, record maintenance
6.34–49
contractual documents 6.40–41
document retention following completion
of project 6.48–9
document types 6.36–8
drafts and negotiation materials and
exclusionary rule 6.42–3
‘in life’ documents 6.46–7
minutes of meetings and notes of calls
6.44–5
text messages and email 6.38
project plans, contractual framework 4.14–15
project rescue 11.01–75
‘agreement to agree’ 11.19
capable of redemption and re-baselining
11.04–5
consequential disputes 11.16
contractual rights 11.10, 11.14–15, 11.35,
11.45–7
de-scoping 11.13–16
delays and ripple effect 11.08
dispute resolution clause 11.11–12, 11.35
‘fix first, argue later’ 11.11
‘heads of terms’ use to record ‘in-project’
dispute settlement 11.17–22
letters of intent 11.17
negotiation time, preserving 11.08–12
‘relief event’ provision 11.10
reservation of rights 11.74
step-in rights 11.71–5
step-in rights, and intellectual property
11.73
step-in rights, triggers 11.71
‘subject to contract’ 11.20–21
project rescue, standstill agreements 11.19,
11.23–70
cessation of work 11.38–47
cessation of work advantages 11.39, 11.41
cessation of work, pausing of distinct
areas 11.43–5
cessation of work and relationship between parties 11.40–41
commercial reputational issues 11.38
competing interests 11.62–4
deadline agreement for new project plan 11.34
deed, insistence on 11.67
enforcement action in respect of rights accrued before commencement of standstill period 11.28
exclusion of admission of liability or fault 11.29
interest accruing during standstill period 11.31
liability accruing during standstill period 11.30
liquidated damages agreed for periods of delay 11.38
listing of issues to be resolved 11.34
longstop date 11.66
potential benefits 11.68–70
service of a claim form 11.66
steps required to effect standstill 11.58–61
steps required to effect standstill, written terms 11.60–61
and subcontractors 11.63–4
suspension of rights and agreement not to sue 11.26–37
terminable on notice 11.65
termination right 11.36–7
third party liability 11.68
waiver by estoppel and waiver by election 11.56–7
without prejudice discussions 11.32, 11.42
project rescue, standstill agreements, time-bar considerations 11.34, 11.35, 11.42, 11.48–55, 11.59, 11.61, 11.62
cause of action, identifying accrual of 11.49–51, 11.53, 11.54
continuing breach 11.54
‘reasonableness’ test of Unfair Contract Terms Act 1977 (UCTA), contractual limitation periods 11.53
six-year statutory period 11.48, 11.52
project resuscitation 14.01–84
alignment of parties’ interests, multi-party disputes 14.12
claim preservation and potential pitfalls 14.73–84
compensation cap, effect of settlement agreement on 14.70
concessions 14.39
and confidentiality 14.13–15, 14.31
costs sanctions, consideration of 14.28
dispute, impact on project 14.05–7
enforcement mechanisms in event of breach of settlement agreement 14.68–9
escalating effects of dispute 14.06
escalation mechanisms 14.84
existing agreement, wider potential impacts 14.70–72
extant contractual rights and obligations, contract amendment effect 14.71
‘fix first, argue later’ provision 14.07, 14.84
forum for settlement negotiations 14.37
‘full and final settlement’ qualification 14.60–63
interim solution 14.07
‘knock-on’ effects of contract variation 14.70
‘knock-on’ effects of delay 14.30
limiting risk of loss of rights 14.84
‘litigation risk’ 14.18
multiple party involvement 14.08–10
negotiated settlement 14.28
negotiation mechanisms 14.33–6
obligations under settlement agreement, conditionality 14.64–5
parties’ intention to compromise part of dispute 14.66–7
potential liabilities, assessment of 14.16–18
re-baselining 14.72
relationship between contracting parties, assessment of 14.21–3
relevant parties, identification of 14.29–32
reservation of rights 14.75–6, 14.84
resourcing 14.19–20
settlement versus independent ruling 14.04, 14.15
substantive terms of settlement 14.58–9
INDEX

substantive terms of settlement, change control notice 14.59
third party indemnity 14.32
time-bar 14.83
timescale of escalation procedures 14.27–8, 14.84
waiver of accrued rights, risk of 14.77–8
waiver by election 14.81–2
waiver by estoppel 14.79–80
wider changes to project, settlement as a pretext 14.24–5
project resuscitation, 'without prejudice' negotiations 14.38–55, 14.84
admissibility 14.53
admissions made in commercial negotiations prior to dispute 14.49
confidentiality issues 14.52
in court, parties' use of without prejudice correspondence 14.47–8
dispute, existence of 14.42–4
pre-action settlement negotiations 14.43
public policy justification 14.44, 14.49, 14.50
‘sav as to costs’ 14.54
‘subject to contract’ 14.55
‘unambiguous impropriety’ 14.50–51
‘without prejudice to a party's position’ vs without prejudice privilege, difference between 14.56–7
promissory estoppel, project housekeeping 5.11–13
proof, burden of, global (composite) claims 17.124–6
public policy justification, project resuscitation, 'without prejudice' negotiations 14.44, 14.49, 14.50
publicity campaign for new system, pausing, mitigation steps 17.207

quantification of claims for compensation 17.01–212

Cavendish Square Holding 9.28, 17.16–17
damages for breach of contract 17.06–49
burden and standard of proof, causation and remoteness 17.36–41
burden and standard of proof, causation and remoteness, contractual test of remoteness 17.37–9
claimant’s choice, and overlap between lost benefit and wasted expenditure claims 17.33–5
claims by supplier for unpaid sums due under the contract 17.07
compensatory principle 17.09–13, 17.15
damages on wasted expenditure basis 17.27–35
expenditure of extra money and staff time caused by supplier's breaches 17.07
project abandoned 17.07
system defective 17.07
termination clauses 17.42
damages for breach of contract, contractual or liquidated damages 17.14–26
penalty clauses 17.16–26
price adjustment clause 17.19
primary vs secondary obligation 17.18–19
damages on lost benefit basis 17.50–107
additional out of pocket expenditure 17.95–6
additional or 'wasted' staff time 17.97–103
additional or 'wasted' staff time, evidence 17.102–3
anticipated savings 17.85, 17.86–94
anticipated savings, remoteness test 17.89, 17.93–4
anticipated savings, and replacement system performance 17.94
cost of replacement system, and betterment 17.75–7
cost of replacement system examples 17.69–76

Steven Baker, Lawrence Akka and Rachel Glass - 9781784710125
Downloaded from Elgar Online at 03/30/2019 09:11:33AM
via free access
cost of replacement system, expenses associated with procurement and installation of system 17.71

cost of replacement system as reasonable mitigation of continuing losses 17.63–8

cost of restoration 17.58–61

customer’s payments to its own employees 17.67–8

difference in value 17.53–7

loss of future profits 17.78–85, 17.86

loss of future profits, contractual exclusions of liability 17.80

loss of future profits, and performance of replacement system 17.85

overlap between damages and cost of mitigation 17.62

preservation of customer goodwill 17.104

reasonableness of cost of reinstatement or of cost of replacement system 17.58, 17.60, 17.70–4

termination for convenience right 17.105–7

valuation, expert evidence of difference in value 17.53

and wasted expenditure claims 17.50

damages on wasted expenditure basis 17.108–18

damage to existing business 17.116

double counting and over-compensation issues 17.113

entire agreements 17.112

mitigation 17.117

monies paid to supplier 17.109–14

out of pocket expenditure, consultants’ fees and wasted staff time 17.115

recovery of advance payments 17.111

savings from alternate system 17.118

severability issues 17.114

enforcement of contractual indemnities 17.164–97

exclusion clauses 17.196–7

indemnity as debt claim 17.164–73

indemnity as debt claim, mitigation 17.166–7, 17.170

indemnity following breach of contract 17.174–88

losses caused by own negligence or ‘legal wrong’ 17.195–7

losses which would otherwise be too remote 17.180–88, 17.190

mitigation, indemnified party required to mitigate its losses? 17.166–7, 17.170, 17.189–92

‘pay to be paid’ clauses 17.176

preventive and compensatory indemnities, distinction between 17.176–9

recoverability of ‘reasonable’ settlement with third party 17.194

global (composite) claims 17.120–36

burden of proof 17.123–6

events resulting in delay or disruption 17.125–6

knock-on effects 17.121

loss not incurred ‘in any event’ 17.127–9

matters for which defendant is not responsible 17.130–31

and preserving tender process documentation 17.128–9

separating claims 17.132–6

long-running disputes 17.148–63

long-running disputes, legacy system retention for baselining 17.161–3

long-running disputes, technology develops beyond the contracted solution 17.148–60

mitigation 17.198–212

and contract with a new supplier 17.209–12

hardware 17.200–201

and indemnities 17.166–7, 17.170, 17.189–92

legacy systems, delaying planned decommissioning 17.207

overlap between mitigation and repudiatory breach 17.208–12
INDEX

recruitment and publicity processes, pausing 17.207
redeploying contractor’s staff to other projects for other customers 17.208
redeploying customer’s staff 17.207
software 17.202–6
software, where using ‘agile’ approach to development 17.205
subcontractor engagement or working with other third parties 17.207
tender for replacement provider 17.207
supplier’s claims 17.119
tortious measure of damages 17.137–47
concurrent claims in contract and tort 17.147
damages for fraud 17.143–6
misrepresentation in technology projects 17.137, 17.139–42
negligence and savings from alternate system 17.118
negligent misrepresentation and ‘fiction of fraud’ 17.142
reasonably foreseeable damage test 17.147
remoteness of damage and negligence 17.138
under the Misrepresentation Act 17.142
quies timet injunction 16.10
re-baselining
and project rescue 11.04-5
project resuscitation 14.19, 14.72
re-baselining representations 12.01–17
BSkyB v EDS litigation 1.35, 2.12, 6.13, 11.21, 12.10–17, 14.61, 17.149, 17.160–61
claims in deceit 12.06, 12.12–13, 12.17
contractual protection against misrepresentations 12.05, 12.14–15
defence of contributory negligence to fraudulent misrepresentation 12.06
duty of care and contractual duties 12.14–15
groundwork 12.03
independent advice, availability of 12.08
Misrepresentation Act 12.12
reliance 12.06–9
risk areas for misrepresentations 12.04
third-party expert consultant review 12.09
reasonable endeavours 7.02–6, 7.12–16
reasonableness of cost of reinstatement or of cost of replacement system 17.58, 17.60, 17.70–4
delay, reasonable time to perform 10.06–7
endeavours, reasonable, delivery and acceptance 7.01–6, 7.11, 7.15
reasonable notice, period of 5.57
reasonable price, contract negotiation 3.27
recipient assessment, giving of notices 5.53–5, 5.56
recoverability of ‘reasonable’ settlement with third party, indemnities 17.194
Unfair Contract Terms Act 11.53, 18.23, 18.25–6
reasonably foreseeable damage, tortious measure of damages 17.147
record-keeping, performance and service credits 9.32
record maintenance, project management see project management, record maintenance
recording changes, project management, change control 6.32–3
recovery of advance payments, damages on wasted expenditure basis 17.111
recruitment and publicity processes, pausing, mitigation 17.207
redeployment of staff 17.207, 17.208
referral procedure, dispute boards 15.71–3
refusal to engage in mediation 19.30
relevant parties, identification of, project resuscitation 14.29–32
reliance on pre-contractual statements 2.01, 2.16, 2.20, 2.29
‘relief event’ provision, project rescue 11.10
relief notices and contractual estoppel 13.09, 13.39–46, 13.53–4
remedies damages as adequate remedy, interim injunction 16.17–27
### INDEX

- **rescission, pre-contractual statements** 2.35–41
- **service credits** 9.06
- **see also** quantification of claims for compensation
- **remoteness**
  - anticipated savings 17.89, 17.93–4
  - in breach of contract claims 17.37–41, 17.89, 17.93–4
  - indemnities 17.180–88, 17.190
  - in tort claims 17.138
- **renunciation** see repudiatory breach, anticipatory
- **replacement system**
  - betterment 17.75–7
  - cost of replacement system as reasonable mitigation of continuing losses 17.63–8
  - performance and anticipated savings 17.94
  - performance, and evidence of loss of future profits 17.85
  - recovery of cost of 17.69–76
  - tender for replacement system as mitigation 17.207
- **representation**
  - by conduct 2.17
  - estoppel by 5.10
  - re-baselining see re-baselining representations
  - **see also** misrepresentation
- **repudiatory breach**
  - common law interaction with contractual rights 13.47–69, 13.105
  - and damages claim 5.05, 5.25, 5.53
  - material breach, contrasted with 13.15–17, 13.21–2
  - overlap between mitigation and repudiatory breach 17.208–12
  - party in repudiatory breach takes remedial action 13.82–5
- **technology project contract** see
  - termination rights, repudiatory breach of a technology project contract, identifying
  - **see also** breach of contract, reputation
  - commercial reputational issues, standstill agreements 11.38
  - damage, interim injunction 16.18
  - rescission and variation 5.33–7
  - rescue see project rescue
  - reservation of rights
    - project resuscitation 14.75–6, 14.84
    - termination rights 13.89–94
    - termination rights, preservation of
      - termination options 13.75–80
      - termination rights, termination procedures 13.104
    - when exercising step-in rights 11.74
  - resourcing of project 6.10–17
  - responsibility, matters for which defendant is not responsible, global (composite) claims 17.130–31
  - restoration costs 17.58–61
  - resuscitation see project resuscitation
  - review of documents, electronic disclosure 20.53–8
  - ripple effect, delays and 11.08
  - risk assessment
    - failure to identify risks, standstill agreements, time-bar considerations 11.55
    - re-baselining representations 12.04
    - risk of future interference with rights, final injunction 16.11–13
    - 'root of the contract', repudiatory breach, termination rights 13.61
  - sanctions, costs
    - sanctions, consideration of 14.28
    - satellite disputes, performance and service credits 9.11
    - 'save as to costs', meaning in 'without prejudice' communications 14.54
    - savings
      - anticipated, damages on lost benefit basis 17.85, 17.86–94
INDEX

from alternate system, damages on wasted expenditure basis 17.118
scope 'creep', pre-contract matters 1.08
'second-generation' services, pre-contract matters 1.17
service of a claim form, standstill agreements 11.66
service credits, and performance see performance and service credits
service levels, negotiating service levels and service credits 9.10–12
settlement
substantive terms 14.58–9
versus independent ruling 14.04, 14.15
severability, failure of consideration, damages on wasted expenditure basis 17.114
side letters, contract negotiation and project methodology 3.34
signed contract, starting work without 3.21–6
SMS messaging, electronic disclosure 20.33, 20.43
software
as goods or services debate, and fitness for purpose 4.26–41, 4.28, 4.36, 4.40
licensing see delivery and acceptance, software licensing
mitigation 17.202–6
object code, licensee's right to run and copy 7.22
provisions for return or deletion of 13.109
retention, and interim injunctive relief 13.110
sui generis categorisation see software as goods or services debate
solution development, pre-contract matters 1.02, 1.08–9, 1.15, 1.16
SOW see statements of work
specialist equipment, documents inaccessible/unreadable without 20.60–61
specific performance order, enforcing a continuing relationship 16.04–9, 16.51–3
staff redeployment, mitigation 17.207, 17.208
staff time
additional or 'wasted' 17.97–103, 17.115
expenditure caused by supplier's breaches 17.07
stakeholder involvement, pre-contract matters 1.02
standard terms, inappropriate use of 3.02–4
'standing' dispute boards, interim dispute resolution, dispute boards 15.54, 15.56, 15.60, 15.68–9, 15.70, 15.72
standstill agreements see project rescue, standstill agreements
statements
invitations to tender (ITT) 1.06–13
pre-contractual see pre-contractual statements, liability for
statement of intent, exemption/limitation clauses 18.06–7
witnesses 21.02–33
statements of truth 20.13, 20.35, 21.11
statements of work (SOW) 4.07–8
stay of proceedings, interim dispute resolution, escalation clauses 15.16–21
step-in rights
and intellectual property 11.73
project rescue 11.71–5
storage media, electronic disclosure 20.47
subcontractors
and breach of contract 7.20
engagement or working with other third parties, mitigation steps 17.207
multi-party projects, performance and service credits 9.32
and project rescue, standstill agreements 11.63–4
selection, duty to exercise reasonable skill and care 7.19
and vicarious performance 7.17–18
see also third parties
'subject to contract'
effect of in heads of terms, project rescue 11.20–21
terminology, contract negotiation 3.25, 3.38
terminology, pre-contract matters 1.26, 1.31
'without prejudice' negotiations 14.55
'substantial breach' by other party, termination rights 13.36
substantive terms of settlement, project resuscitation 14.58–9
sui generis contract for sale of software 4.38
see also software as goods or services debate
supervision of document preservation, 'document hold' notice 20.24
supply contract with a new supplier, mitigation 17.209–12
suspension of work, termination rights 13.97–101
system defective, damages for breach of contract 17.07

Technology and Construction Court
civil court system 19.04–7, 19.11, 19.14, 19.18–23
electronic disclosure 20.42–5
tenders and tendering
acceptance 3.40
pre-contract matters 1.09–12, 1.14–20, 1.48
preserving tender documentation, global (composite) claims 17.128–9
for replacement provider, mitigation 17.207
tendering gaps 1.48
termination provisions
clauses, damages for breach of contract 17.42
common law, delay 10.10–16
compliance of termination notices with 5.44–5.56
convenience, termination for, damages on lost benefit basis 17.105–7
prevention, interim injunction 16.39–50
project housekeeping, variation 5.32
standstill agreements 11.36–7, 11.65
termination rights 13.01–113
'business as usual', accidental interference with termination rights 13.96
common law termination: repudiatory breach 13.47–69
express rights and cure provisions 13.01–46
on occurrence of specific event 13.06
operational issues 13.95–6
remediability 13.39–46
remediability and delay 13.46
remediability, assessment of 13.41–5
reserving rights 13.89–94
reserving rights, affirmation and 'no waiver' provisions, interrelationship of 13.90–94
reserving rights, waiver and estoppel 13.89
suspension of work 13.97–101
suspension of work, contractual right to suspend 13.98–101
suspension of work, withholding payments 13.97
termination for convenience clause 13.03–5
termination for convenience clause, and damages 13.04–5
termination payments 13.03
termination rights, common law and interaction with parties' agreement 13.47–54
cure period 13.53–4
damages calculation 13.52
exclusion of common law rights 13.48–9, 13.51–2
termination rights, exit clauses and intellectual property transfer 13.107–14
clauses to survive termination 13.108
interim injunctive relief and software retention 13.110
lack of provision for exit arrangements and use of supplier's product or materials 13.111–12
provisions for return or deletion of software 13.109
termination rights, preservation of termination options 13.70–88
anticipatory repudiatory breach 13.87
contract incapable of specific performance 13.88
'cooperative contracts', impact of 13.86–8
delayed response and affirmation 13.81
election, acceptance and affirmation
13.70–81
party in repudiatory breach takes remedial action 13.82–5
reservation of rights 13.75–80
waiver by affirmation 13.72
termination rights, repudiatory breach of a technology project contract, identifying 13.55–69
anticipatory repudiatory breach 13.55–7, 13.62–3
classification of a contractual term as a condition or innominate term 13.58–61, 13.62, 13.63, 13.69
late payment disputes 13.67
multiple minor breaches 13.64–6, 13.69
renunciation see anticipatory repudiatory breach
'root of the contract' 13.61
term as condition of essential importance 13.62
timely performance as condition 13.62
trust and confidence, loss of 13.68
termination rights, termination for cause provisions 13.07–38
'any breach' by other party 13.27–33
breaches treated as incapable of remedy 13.09
business common sense arguments 13.34
contractual right to terminate 13.10, 13.12–26, 13.27–38
failure to make payments 13.20–23
licensing 13.24–6
material breach 13.12–26
material breach, repudiatory breach comparison 13.15–17, 13.21–2
notice of breach 13.08, 13–105
parties' objective intentions in structuring agreement 13.35
'substantial breach' by other party 13.36
termination rights, termination procedures 13.102–6
'material breach' clause 13.105
notices, serving 13.102–3, 13.105–6
repudiatory breach 13.105
reservation of rights 13.104
and transition provisions 13.104
terms of business, Unfair Contract Terms Act, 'written standard terms of business' 18.24
terms of reference, drafting, expert determination 19.62
test-driven development (TDD) 3.10
testing 8.01–11
alpha, beta, and acceptance testing 8.04
breach of implied term as to fitness for purpose and for failure to provide support 8.07–11
bug and error tolerance 8.05–11
defects 8.10, 8.11
unit tests 8.02
text messages and email, record maintenance 6.38
third parties
holding relevant documents, and document preservation 20.23
indemnity in settlement agreements 14.32
liability, standstill agreements 11.68
performance and benchmarking 9.04
'reasonable' settlement with, recoverability under an indemnity 17.194
suppliers of eDisclosure services 20.51–2
working with, and mitigation steps 17.207
see also experts; subcontractors
time factors
'document hold' notice, period to which notice relates 20.22
interim dispute resolution, dispute boards 15.65–6, 15.76
interim dispute resolution, escalation clauses 15.30
late payment disputes, termination rights 13.67
notice incorrectly served and time limitations 5.49–50
pre-contract matters 1.07, 1.08
pre-contract matters, time estimates 1.37–9, 1.45, 1.46, 1.51, 2.12
settlement, timing of 14.27–8, 14.84
time available for performance, delay 10.03–7
’time of the essence’ notice, delay 10.10–12, 10.13–16
time-bar considerations, standstill agreements see project rescue, standstill agreements, time-bar considerations
timely performance as condition, termination rights 13.62
see also deadlines; delay
tortious measure of damages see quantification of claims for compensation, tortious measure of damages
total failure to perform, standstill agreements 11.54
training, witnesses 21.04–5
trust and confidence breach, termination rights 13.68
truth, statement true at the time it is made, misrepresentation 2.16
truth, statement of 20.13, 20.35, 21.11
‘unambiguous impropriety’, without prejudice 14.50–51
undertaking as to damages (cross-undertaking), interim injunction 16.31
Unfair Contract Terms Act
contract negotiation and project methodology 3.04
exemption/limitation clauses 18.20–27
‘reasonableness’ test 11.53, 18.23, 18.25–6
‘written standard terms of business’ 18.24
unit tests 8.02
unpaid sums due under contract 17.07
unreadable documents, disclosure in litigation, inspection issues 20.60–61
valuation, expert evidence of difference in value, damages on lost benefit basis 17.53
variation see project housekeeping, variation
vicarious performance, and subcontracting 7.17–18
waiver
accrued rights, risk of 14.77–8
by affirmation, termination rights 13.72
by election 11.56–7, 14.81–2
by estoppel 11.56–7, 14.79–80
‘no waiver’ clauses, effect of 5.17–18
project housekeeping 5.16–18
reserving rights 13.89, 13.90–94
warranties
collateral warranty, pre-contractual statements 2.03
contractual, and project management 6.11
and licensing 7.25
wasted expenditure
damages see quantification of claims for compensation, damages on wasted expenditure basis
damages on lost benefit basis 17.50
waterfall development model 3.05–7, 3.12–13, 3.16
weighted or multi-tiered performance, and service credits 9.21
without prejudice
discussions, standstill agreements 11.32, 11.42
negotiations see project resuscitation, ‘without prejudice’ negotiations
privilege, and mediation 19.41
‘unambiguous impropriety’ 14.50–51
witnesses 21.01–24
expert see witnesses, expert
discrimination see witnesses, expert of fact 21.01–5, 21.08
statements 21.02–3
training 21.04–5
witnesses, expert 21.06–20
cost implications 21.09
and court permission 21.08
giving evidence which is within expertise 21.15
identifying 21.07
immunity from suit 21.17
independence 21.14, 21.20
instructing 21.18–20
INDEX

meetings between experts and joint expert statements 21.16–17
role and duties 21.11–17
single joint expert 21.10
substitution of 21.21–4
working examples, demonstrations and access to 20.65–7
written documents
giving of notices 5.40–43
performance and service credits 9.32
Unfair Contract Terms Act, ‘written standard terms of business’
18.24
see also documents