



Unit J

Non-consumer situations

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Introduction

Units A – H deal with B2C transactions after 1st October 2015 and this unit concentrates on those situations that do not fit into this category, including:

- ✓ where T is the customer buying from another T, B2B contracts
- ✓ private sales, where both parties are Cs, C2C contracts
- ✓ C2B contracts, where C may sell something to T
- ✓ public auctions, where C is often treated as a T
- ✓ B2C transactions before 1/10/15

The honest business person needs protection from the dishonest T and the small company needs protection from a more powerful competitor so that a level playing field is ensured. The rights and remedies available in a B2B situation will be the main areas examined in this unit but there will be references to the other scenarios too where relevant including consideration of C's rights before the CRA came into force.

Whatever the status of the buyer, they will be potentially embarking on the same customer journey as a C, from needing pre-shopping information through to enforcement of a court judgment if they take a supplier to court and win but receive no satisfaction. The rules and processes along the way will however, be quite different in some instances.



The areas for discussion in this unit are:

- J1 The non-consumer landscape
- J2 Contract law
- J3 Basic statutory rights
- J4 Misrepresentation
- J5 Auction sales
- J6 Payment methods
- J7 Redress mechanisms

J1 The Non-consumer landscape

The law gives trade buyers some rights but not as many as Cs and regulation in this area is often referred to as commercial law. CTSI has the responsibility for providing businesses with information, advice and education and BIS has overall responsibility for businesses generally, in addition, some LA TSS may provide business advice. CTSI runs a “Business Companion” section on its website, which is sponsored by BIS, and this provides information and guidance for businesses on their obligations to consumers and general compliance with trading standards law.

The same legal principles apply to B2B situations as they do to B2C ones and the court structure, doctrine of precedent, statutory interpretation and principles relating to liability are also the same. However, when it comes to TSS work in this area and any legislation enforced to protect businesses, the picture is very different. Some regulators do have roles in relation to micro-businesses, e.g. Ofgem have introduced protective measures for small business customers in the energy industry covering marketing activities and entering into contracts.

J1.1 Trading Standards Services

There are very few pieces of legislation that aim to protect businesses against the unfair practices of other businesses, the main ones, discussed below, being:

- ✓ the Business Protection from Misleading Marketing Regulations 2008 (BPRs)
- ✓ the Unsolicited Goods and Services Act 1971 (UGSA)
- ✓ the Electronic Commerce (EC Directive) Regulations 2002 (ECRs)
- ✓ the Provision of Services Regulations 2009 (PSRs)

However, in addition some legislation does not specify that the victim of a trade practice has to be a C for an offence to be committed or for a civil remedy to arise, so some activities are regulated regardless of who they affect. Table J1 contains examples, but not an exhaustive list, of legislation often covered by TSS, indicating whether they protect only consumers, only businesses or both.

Table J1: Application of legislation to consumers and businesses

Consumer protection	Business protection	Consumer and business protection
Consumer Rights Act 2015	Sale of Goods Act 1979	Electronic Commerce (EC Directive) Regulations 2002
Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2014	Supply of Goods and Services Act 1982 (Scottish common law)	Provision of Services Regulations 2009
Consumer Protection from Unfair Trading Regulations 2008	Supply of Goods (Implied Terms) Act 1973	Misrepresentation Act 1967
Enterprise Act 2002, Part 8	Unfair Contract Terms Act 1977	Consumer Credit Act 1974
	Business Protection from Misleading Marketing Regulations 2008	
	The Unsolicited Goods and Services Act 1971	

J1.2 Compliance

Seeking compliance with laws that protect businesses will work in a similar way to that for consumers, however, civil enforcement will not often be available as the EA only applies if trader activities affect Cs. Businesses are likely to receive advice and guidance about compliance if they have an established Home or Primary Authority Relationship with their LA, however, what exactly is included in this will depend on the terms of reference. Some LAs may only give guidance on complying with criminal legislation that they have a duty to enforce and this may not extend to advice about a T's rights against another T from a civil point of view. The Primary Authority Scheme also allows LAs to agree charges with businesses for certain elements of work.

LA TSS that administer a trader approval scheme are more likely to offer Ts advice about their civil obligations than those that do not have such a scheme.

J1.3 The Business Protection from Misleading Marketing

Regulations 2008 (BPRs)

The BPRs prohibit businesses from advertising their products in a way that misleads other businesses or Ts. They also set out conditions under which comparative advertising may be permitted. The controls are aimed at Ts who:

- market their products to other Ts
- make comparisons that identify a competing business

Advertisements are the basis for both of these controls and they are defined as:

- ✓ any form of representation
- ✓ made in connection with a trade, business, craft or profession
- ✓ in order to promote
- ✓ the supply or transfer of a product, which includes: goods; services; intangible rights and obligations; immovable property; cancellation rights and cash back offers.

J1.3.1 Misleading advertising

An advertisement is misleading if it:

- deceives or is likely to deceive
- the Ts to whom it is addressed or reaches
- AND is likely to affect the economic behaviour of those Ts, e.g. if it induces them to part with money for what is being advertised
- OR injures or is likely to injure a competitor, e.g. where an advertiser misleads Ts into using their services when the T intended to use a competitor

In order to decide whether advertising is misleading, account shall be taken of all the features and in particular:

- Product characteristics
(Includes: availability, nature, execution, composition, method & date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin, expected results from use, results and material features of tests or checks)
- Price

- Conditions relating to supply or provision
- Nature, attributes and rights of the advertiser
(Includes: identity, assets, qualifications, ownership of industrial, commercial or intellectual property rights, awards and distinctions)

So, an advertisement can be deceptive if it:

- contains a false statement of fact
- conceals or leaves out important facts
- promises to do something when there is no intention to do so
- creates a false impression even if everything stated in it is literally true

J1.3.2 Comparative advertising

The use of comparative advertisements is regulated whether they are addressed to Cs or businesses. Comparative advertising means advertising that “in any way, either explicitly or by implication, identifies a competitor or products offered by a competitor”, e.g. supermarket price comparisons. This would be explicit if products and supermarkets are named and implicit if an own-branded product was compared with a “leading brand” if there is an obvious brand leader.

J1.3.2.1 Compliance conditions

Comparative advertising is only permitted when the following conditions are met:

- it is not misleading, either under the CPRs or the BPRs
- comparisons are with products meeting the same needs or intended for the same purpose
- comparisons are objective and concerned with material, relevant, verifiable and representative features, including price, e.g. features that are characteristic of the product and therefore an identifying feature, such as bagless vacuum cleaners or low emission cars
- confusion amongst Ts is not caused between either the advertiser and a competitor or between trademarks, trade names or other distinguishing marks or products of the advertiser or a competitor
- it does not discredit or denigrate any such marks, names, products, activities or circumstances of a competitor
- it relates to products with the same designation of origin
- it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing mark of a competitor or the designation of origin of competing products
- it does not present products as imitations or replicas of products bearing a protected trade mark or trade name

J1.3.3 Enforcement

TSS have a duty to enforce the BPRs, with the CMA and Ofgem also having the power to do so. A business may commit a criminal offence [r6 BPR] by engaging in advertising which is misleading and the Regulations contain their own provisions for civil enforcement too, allowing for an application to be made to the court for an injunction to prevent further misleading advertising. Alternatively, undertakings from Ts can be accepted. This could be for:

- ✓ engaging in misleading advertising

- ✓ using comparative advertising that does not meet the prescribed conditions
- ✓ a code owner, who promotes misleading advertising or non-compliant comparative advertising

The BPRs need to contain their own injunctive provisions as the EA only applies to activities that affect Cs. There is however, no equivalent of the ECMs in the BPRs.

J1.4 The Unsolicited Goods and services Act 1971 (UGSA)

The UGSA creates a number of criminal offences in relation to the demanding of payment for:

- sending unsolicited goods to businesses
- including or arranging unsolicited trade directory entries

In addition, the Act makes it an offence to send, or cause to be sent, unsolicited material, e.g. books, magazines, leaflets or other advertising material to anyone, T or otherwise, if it describes or illustrates human sexual techniques (*DPP v Beate Uhse (UK) Ltd*).

J1.4.1 Unsolicited goods

The elements of the offence [s2 UGSA] can be summarised as follows. The sender:

- ✓ sends unsolicited goods to a business, e.g. till rolls, books or calendars
- ✓ is acting in the course of a trade or business
- ✓ knows that the goods are unsolicited
- ✓ makes a demand for payment
- ✓ has no reasonable cause to believe that there is a right to payment (*Reader's Digest Association Ltd v Pirie*)

An offence will also be committed where in the above circumstances the sender:

- threatens to bring legal proceedings
- places the name of any person on a defaulters list
- invokes any collection procedure

J1.4.2 Unsolicited trade directory entries

These provisions are aimed at controlling the widespread practice of demanding payment for unsolicited entries in trade directories, which are like a business phone book, and sometimes contain advertisements for the recipients' business [s3 UGSA].

An entry will be unsolicited if one of the following has not been made out by the recipient:

- ✓ a signed order form
- ✓ a signed note of agreement
- ✓ an electronic communication stating agreement to the charge

As with goods, *mens rea* needs to be proved. The prosecution must show that the sender demanded payment 'without knowing or having reasonable cause to believe' that the entry was ordered, or that there was a note of an agreement or an appropriate electronic communication.

In addition, the UGSA provides the targeted business with civil rights as they will be either [s3(1)]:

- ✓ not liable to make any payment, OR
- ✓ entitled to recover any payment made

J1.4.3 Enforcement

There is no duty on TSS to enforce this legislation and there are no accompanying powers to support the investigation of offences. The Act will not be covered by the EA civil enforcement procedures as for the main two sets of offences, only businesses are protected. The BPRs do however apply and activities constituting offences under the UGSA may well also amount to offences under the BPRs.

J1.5 Electronic Commerce (EC Directive) Regulations 2002 (ECRs)?

Some provisions in the ECRs apply to businesses as well as Cs. In particular the provision of certain information is required, regardless of whether T is selling to Cs or other Ts and even if only advertising rather than actually selling something. The main provisions and remedies are listed in unit B, table B2 and the main information requirements are included in unit C in Appendix C2.

J1.6 Provision of Services Regulations 2009 (PSRs)?

The PSRs were implemented following an EU Directive, the aim of which was to enhance cross border trade. The emphasis is on making details about a business available for potential customers so they can compare them with other providers. There is some overlap with the ECRs and also the CCRs, although the former only apply to electronic communications and the latter to B2C transactions. The PSRs apply to services normally provided for payment, but not employment. They also apply to services supplied face to face as well as at a distance, although there are some exceptions, so this will include:

- services for businesses and consumers, e.g. estate agents, construction, restaurants, storage services, financial advisers
- consumer services, e.g. tourism, leisure services, childminders, private schools, universities, driving instructors, cleaners
- business services, e.g. advertising, waste management, training, professional services such as lawyers and accountants

A brief summary of the main provisions appears in Appendix C2 in unit C.

J1.7 Private sales etc.

It is rare for TS legislation to apply to private supplies and the main ones to consider are:

- ✓ s75 Road Traffic Act 1988 (RTA)
- ✓ s90 CRA
- ✓ Fraud Act 2006

In addition, much TS legislation, including the CPRs [s16], contains a by-pass provision, which allows enforcement action to be taken against someone whose act or default caused T to commit an offence. In most instances such a person would not have to be a T themselves for action to be taken (*Olgeirsson v Kitching*).

The RTA creates a number of offences and regulation falls mainly to the police but TSS often enforce s75, which deals with the supply of an unroadworthy car, regardless of whether this is by a T or a private individual, although some LA TSS will only, as a matter of policy, take action against suppliers who are Ts.

The secondary ticketing provisions in the CRA (unit C, Appendix C2) also apply to private individuals [s90 CRA] so someone failing to provide the required information when they resell tickets for a recreational, sporting or cultural event on a secondary ticketing website, could be liable to a TSS imposed financial penalty [s91 CRA]. The details required are those that: enable the buyer to identify where the seat or standing area is located; indicate any restrictions on the use of the ticket; state its face value and identify any connection the seller has to the online facilitator or event organiser.

The Fraud Act 2006 creates a number of offences, which could be used against someone who is not necessarily a T but who nevertheless acted dishonestly, e.g. by making a representation that they knew was untrue or misleading or doing something, intending to make a gain for themselves or cause someone else to make a loss. LA TSS have used the Fraud Act to prosecute people, e.g. car clockers or counterfeiters, when they have suspected that they were Ts but not had sufficient evidence to convince a court and so have been unable to use traditional pieces of TS legislation.

Some of the offences that can be committed contrary to the Hallmarking Act 1973 and the Animal Health Act 1981 can also be committed by someone who is not a T.

Summary

- This unit concentrates on those **situations that do not fit into the standard B2C transaction category**, including: where T is the customer buying from another T, B2B contracts; private sales, where both parties are Cs, C2C contracts; C2B contracts, where C may sell something to T; public auctions, where C is often treated as a T and B2C transactions before 1/10/15.
- Whatever the status of the buyer, they will be potentially embarking on the **same customer journey** as a C, from needing pre-shopping information through to enforcement of a court judgment if they take a supplier to court and win but receive no satisfaction, however, the rules and processes along the way will be quite different in some instances.
- The law gives trade buyers some rights but not as many as Cs and regulation in this area is often referred to as commercial law, with **CTSI having the responsibility for providing businesses with information, advice and education** and **BIS having overall responsibility** for businesses generally; in addition, **some LA TSS may provide business advice**, with **CTSI running a “Business Companion”** section on its website, sponsored by BIS, and providing information and guidance for businesses on their obligations to consumers and general compliance with trading standards law.
- **Civil enforcement** will not often be available to protect businesses, who are also more likely to receive **compliance advice** if the LA runs a trader approval scheme or the business has a Home or Primary Authority Relationship with their LA, however, what this covers will depend

on the terms of reference and may be subject to charges; some LAs may only give guidance on complying with criminal legislation that they have a duty to enforce and this may not extend to advice about a T's rights against another T from a civil point of view.

- The **BPRs** prohibit businesses from advertising their products in a way that **misleads other businesses or Ts** and also set out conditions under which **comparative advertising** may be permitted, with the controls being aimed at Ts who market their products to other Ts or make comparisons that identify a competing business.
- The **UGSA** creates a number of criminal offences in relation to the **demanding of payment for sending unsolicited goods** to businesses and including or arranging **unsolicited trade directory entries**.
- Some provisions in the **ECRs** apply to businesses as well as Cs when T is **trading electronically**; in particular the **provision of certain information is required**, regardless of whether T is selling to Cs or other Ts and even if only advertising rather than actually selling something.
- The emphasis in the **PSRs** is on making **details about a business available for potential customers** so they can compare them with other providers and so there is some overlap with the ECRs and also the CCRs, although the former only apply to electronic communications and the latter to B2C transactions; the PSRs apply to **services normally provided for payment**, apart from employment and those which are exempted, and this covers services for businesses and consumers, consumer services and business services.
- It is rare for TS legislation to apply to **private supplies** and the main ones to consider are concerned with: the supply of unroadworthy cars (**s75 Road Traffic Act 1988**); secondary ticketing (**s90 CRA**) and acting dishonestly while intending to make a gain for themselves or cause someone else to make a loss (**Fraud Act 2006**); some offences contrary to the **Hallmarking Act 1973** and the **Animal Health Act 1981** can also be committed by someone who is not a T.
- Much TS legislation contains a **by-pass provision**, which allows enforcement action to be taken against someone whose act or default caused T to commit an offence and in most instances such a person would not have to be a T themselves for action to be taken.

J2 Contract law

Most of the aspects about making a contract and what applies to them from a general point of view, is the same for B2B contracts as it is for B2C ones. The most important concept for T is that the law often assumes equal bargaining power between the parties and that they will have had the opportunity to negotiate terms, even when this is not the case, e.g. large companies dealing with small Ts. The express terms of the contract become very important in a B2B contract as there is limited regulation of fairness etc and less implied terms, the effect of which can also be excluded in certain circumstances. The main differences are highlighted in table J2 with an indication of where they are discussed.

Table J2: Main differences between B2B contracts and B2C contracts

Topic	Difference	Reference
Whether statements become terms of the contract or remain as mere representations	CCRs do not apply unless buyer is a C	J4 Misrepresentation
Proper incorporation of terms	Same rules as for B2C contracts but has a particular relevance for B2B contracts in the absence of much control on fairness	J2.1
Withdrawing offers before acceptance	Same rules apply but this may help a T buyer who is purchasing online as there will be no statutory rights to cancel under the CCRs, particularly if the seller delays acceptance of the buyer's offer	Unit B, Section B1
Capacity to contract	The same rules apply An additional consideration might be whether an employee is able to enter into a particular type of contract, considered under the law of agency	J2.2
Choice of law clauses	Rome I also applies to B2B contracts but the rules are different	J2.1.2
Remedies	No practical remedies, e.g. repair or replacement, except by negotiation	J3 Basic statutory rights
Factors affecting the validity of a contract	All apply as per B2C contracts, apart from in relation to unfair practices because the CPRs do not apply to B2B contracts	J1.3 BPRs J2.1.1
Privity of contract	Agents used more when negotiating B2B contracts Contracts (Rights of Third Parties) Act 1999 has more relevance for B2B contracts (Scottish CL)	J2. 2
Collateral contracts	Not mentioned in relation to B2C contracts, because of the effect of the CCRs, although technically the provisions apply. They have more relevance in a B2B situation	J2.3
Negligence	Same rules in terms of when a duty of care arise but case law may decide no duty of care between Ts in some situations	J2.4.1

	The UCTA applies to exclusion and limitation clauses Tort of Passing Off	J2.4.2 J2.4.3
Restricting liability	Exclusion or limitation clauses in B2C contracts are subject to the blacklisting or fairness tests in the CRA. For other contracts they are subject to the UCTA	J3.5
Product Liability	Part I CPA 1987 does not apply to: Private sales Business property damage Section 5 does not appear to restrict claims to Cs so Ts suffering personal injury as a result of an unsafe product should be able to make a claim	Unit B, Section B5 and J2.4.3
Cancellation rights	The CCRs do not apply to T buyers so any rights to cancel a contract will be down to the express terms in the contract There may be limited rights to cancel some regulated credit agreements for sole Ts and partners of 2/3	Unit B, Section B2 J5
Package holidays etc.	It is not clear whether the PTRs are restricted to Cs or whether they apply to business travellers too CL principles relating to the following will apply, subject to any provisos already mentioned: contract law; misrepresentation; law of negligence and the UCTA	J2.5
Redress for unfair practices	The CPRs apply mainly to B2C contracts, however, redress may be available if a T buyer engages in a misleading action or aggressive practice where there is a C2B contract for goods	Unit E, Section E3
Payment methods	The CCA 1974 mainly protects debtors in regulated agreements, and this includes individuals who are not incorporated, e.g. sole Ts and partners of 2 or 3 However, not all the provisions in the Act apply to all contracts, in particular there are some exemptions when the debtor is acting mainly for business purposes	J5

J2.1 Contract terms

B2B contracts will contain express and implied terms in the same way that B2C contracts do, however, there will be a heavier reliance on the express terms as there will not be as many ITs and liability is more easily excluded or restricted.

J2.1.1 Proper incorporation of terms

In the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* the Court of Appeal held that a clause in the contract, which imposed a very high daily fee if some photographs were not returned within 14 days, was too onerous. It should have been specifically drawn to the attention of the advertising agency hiring them and so a reasonable charge was imposed by the court. Dillon LJ stated that “In the present case, nothing whatever was done...to draw the defendant’s attention particularly to condition 2; it was merely one of four columns’ width of conditions printed across the foot of the delivery note. Consequently condition 2 never, in my judgment, became part of the contract between the parties”. So even though the hiring agency were aware of the terms as a whole, the fact that one was particularly onerous and was not brought to their attention, meant that the court was prepared to hold that it was not part of the contract, even though this was two businesses making the contract.

J2.1.2 Choice of law clauses

Businesses often trade with other businesses in other countries and so it is usual to include an express term stating which country’s law applies if there is a dispute. This is to some extent regulated by Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

J2.1.2.1 Where the parties have included a choice of law clause

The general rule is that freedom of choice prevails [a3], providing such a choice is expressly or clearly demonstrated by the terms of the contract or the circumstances of the case, so the contract will ostensibly be governed by the law chosen by the parties. However, this is subject to certain exclusions, restrictions and limitations, e.g. consumer contracts [a6] (unit B), contracts of carriage, for goods or passengers [a5] and insurance contracts [a7].

J2.1.2.2 Where the parties have not included a choice of law clause

If there is no choice of law clause in the contract, then the first consideration is whether any of the specific choice of law rules for particular types of contract apply [a4(1)(a) – (h)], e.g.

- a) sale of goods – where the seller has their habitual residence
- b) provision of services – where the service provider has their habitual residence
- g) sale of goods by auction – where the auction takes place

Habitual residence is defined [a19] as being:

- ✓ for legal persons – the place of central administration
- ✓ for natural persons – the principal place of business

The second consideration is that where the contract is not covered by the list in a4(1) or there are parts of the contract that would fall into more than one of the categories (a) – (h), then the contract should be governed by the law of the country where the party who is providing the performance that characterises the contract, usually resides [a4(2)].

Where these two rules are inconclusive, a general “close connection” rule is used [a4(3)]. This applies where it is clear from all the circumstances of the case that a contract is obviously more closely connected with a country other than the one suggested by a4(1) or a4(2) and also where they do not help determine which law should apply.

J2.2 Use of agents

Agents are more commonly used in B2B situations than B2C ones. An agent has the authority to make a contract with a third party on behalf of another, known as the principal. The contract then usually takes place between the third party and the principal, with the agent dropping out of the picture. The agent needs authority to act and there are various ways in which an agency can be created as indicated in table J3.

The situation may be complicated by the involvement of various people representing others in one transaction, e.g. an employee entering into an energy contract on behalf of his/her employer via an agent acting for the energy supplier, thereby utilising two agency relationships.

Table J3: Creation of agency situations

Type of authority	Brief explanation	Example
Actual	<p>Express: the principal and the agent specifically agree that the agent should have authority</p> <p>Implied: the principal and the agent agree that the agent should have authority but do so other than by express words</p>	<p>Express: a seller puts goods into an auction and asks for them to be sold</p> <p>Implied: the principal appoints someone to a certain position, e.g. store manager, thereby agreeing to them entering into all the types of transaction that someone in their position would usually enter into</p>
Ostensible (apparent)	<p>This is based on estoppel so if the principal held out the agent as having authority, they cannot later deny such authority. There are 3 requirements:</p> <ul style="list-style-type: none"> • the principal represented that the agent had authority to enter into the transaction • this was intended to be acted on by the third party • the third party did rely on this <p>A third party who knows or ought to know that the agent had no actual authority cannot claim there is apparent authority (<i>Armagas v Mundogas, The Ocean Frost</i>)</p>	<p>This is important where an agent is appointed to a recognised position but is expressly told not to make certain types of contract</p> <p>The representation may be general, to the world at large</p> <p>A third party, not knowing about the restriction, may assume full usual authority associated with that position (<i>Panorama Developments v Fidelis Furnishing Fabrics</i>)</p> <p>e.g. a store manager entering into an energy supply contract for the managed premises on behalf of the employing company</p>

Legal	Sometimes the law imposes an agency relationship	e.g. s.56 CCA creates an agency relationship for antecedent negotiations, between creditors and some dealers, where there is a business connection
Ratification	<p>If someone acts as an agent but does not have actual or apparent authority, the principal will not be bound unless he/she subsequently ratifies the agent's actions; this would then create retrospective actual authority</p> <p>There are specific conditions which must be satisfied for this to occur</p>	<p>A contract can be ratified if the agent purported to act as agent rather than for him or herself, and when the contract was made, the principal:</p> <ul style="list-style-type: none"> • existed • had contractual capacity • was named or was ascertainable <p>and when ratified, the principal:</p> <ul style="list-style-type: none"> • had full knowledge of the material facts or intention to ratify whatever the facts may be • does so within the stated, or a reasonable time

If the agent discloses that he/she is acting as an agent at the time, it is usual for there to be a *warrant of authority*, which allows the third party to take action against the agent if it transpires there was no authority to make the contract; the agent then drops out of the picture.

J2.2.1 Undisclosed principal doctrine

If the agent fails to disclose the agency relationship, then the third party can hold either the principal or the agent liable; this may have the effect of changing the status of the seller (*Boyer v Thomson*). The undisclosed principal, as well as the third party, can also enforce the contract. This does not apply if there is evidence that the third party intended to contract only with the agent or would not have made a contract with the principal.

J2.3 Collateral contracts

The “parol evidence rule” applies to contracts that are written and means that the parties cannot argue that there is anything additional that changes or adds to that written contract. However, this rule can have harsh consequences if interpreted strictly and over the years the courts have developed ways of circumventing it. One of these is to argue that in fact the contract is only partly made up of the written document and is also partly oral, or there are in fact two contracts, where the written one was only secured following an oral assurance.

This is sometimes referred to as a collateral contract, the argument being that the written one would not have been made without the oral one (*J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd, Shanklin Pier Ltd v Detel Products Ltd*). The terms in the collateral contract can override conflicting terms in the written contract and even avoid the problems presented by the doctrine of privity. To avoid such arguments, some Ts may include an “Entire agreement clause” in their contracts, which in effect says that the parties cannot later argue that anything other than what is in the written document, forms part of the contract (*Deepak v Imperial Chemical Industries plc*).

Collateral contracts could also be relevant for B2C contracts but the CCRs mean that many statements made by T to C may form part of the contract anyway.

J2.4 Law of negligence

The rules concerning when a duty of care arises and when liability for its consequences may be excluded or limited, may differ in B2B and C2C circumstances.

J2.4.1 Duty of care

Whether someone owes another person a duty of care under the law of negligence, is a legal consideration, for determination by the courts or Parliament. In some circumstances, including B2B situations, it has been decided that a duty of care does not arise, so the issue of negligence does not need to be considered.

In the case of *Scullion v Bank of England* the CA held that a surveyor did not owe a duty of care to a borrower, when giving advice on the value of a property, when the purchase was not for residential purposes but was a buy-to-let investment.

As a matter of policy, in terms of whether it is fair, just and reasonable to impose liability in any given situation, it was held that the LA did not owe a duty of care to the neighbour of a violent man living next door, to warn him about a meeting taking place where eviction would be threatened, even though it was reasonably foreseeable that harm may occur to the neighbour, who was in fact then killed by the violent man following the meeting (*Mitchell & Anor v Glasgow CC*).

J2.4.2 Exclusion of negligence liability

The UCTA allows for the exclusion or restriction of liability for negligence, except with regard to death or personal injury [s2], subject to the reasonableness test in s11. So this means that liability for property damage or financial loss caused by negligence can be excluded or limited if it is reasonable to do so.

Hedley Byrne & Co Ltd v Heller & Partners Ltd was the case that established the basis for a claim in negligence for financial loss in relation to a negligent misstatement. This case was before the UCTA came into force but nevertheless, a valid disclaimer prevented the claim from being realised.

J2.4.3 Liability under Part I CPA

The product liability provisions, in Part I CPA, do not apply to either private sales [s4(1)(c)] or damage to business property [s5(3)]. Any claim that loss, damage or injury, was caused by an unsafe product, must be as a result of a supply by a T and in the case of property damage must be property ordinarily intended for private use, occupation or consumption and intended mainly for such by the person suffering that loss or damage.

Section 5 does not appear to restrict claims to Cs so Ts suffering personal injury as a result of an unsafe product should be able to make a claim, providing the relevant criteria for making such a claim are met. Once liability is established within these parameters, it cannot be excluded [s7].

J2.4.3 Tort of Passing Off

The basis of the tort of passing off is to protect the financial interest a T has in his property, by way of reputation or goodwill, which has been acquired in relation to goods, a name or a trade mark. It is committed by a T passing off their goods as another T's There are five essential elements that need to occur for this tort to be committed (*Even Warnink BV v Townend & Sons (Hull) Ltd*):

- a misrepresentation
- by a T in the course of his trade

- to prospective customers or ultimate Cs of goods or services supplied by the T
- which is calculated to injure the business or goodwill of the claimant T, or is likely to do this
- and which causes actual damage to the claimant T's business or goodwill, or is likely to do so

The main remedy for T is to seek an injunction to prevent the continuing use of the name or trade marks. Damages could also be claimed for loss of profit. Specialist legal advice would be necessary to make any claims. The three main ways in which a T can commit this tort, are by:

- using another T's name
- imitating the appearance of another T's goods
- claiming that another T's goods belong to them

A T who has engaged in this tort may well be breaching the BPRs also.

J2.5 Holidays etc.

Whether the PTRs apply to non consumers is an undecided area of law. This could apply to both those taking out packages and also those organising them.

J2.5.1 Organisers

Organisers do not have to be operating in the course of a business to come within the remit of the PTRs, although the Government guidelines suggest that members of a non-trading organisation are not selling or offering holiday packages for sale when they arrange events for their members, where:

- ✓ the members share the cost
- ✓ there is no element of profit (although a surplus is acceptable)
- ✓ the organiser is acting on a voluntary basis

The security arrangements can be different if an organiser is not acting in the course of a trade or business [r21 PTRs].

J2.5.2 Consumers

None of the definitions relating to a consumer in the PTRs refers to a requirement for non-work related arrangements, so it may be that, as long as the definition of a package is met, someone going on a business trip may be a consumer for the purposes of the PTRs.

The Denied Boarding Regs appear to apply to business travellers as they refer to passengers not consumers.

J2.6 Private contracts

An absence of intention to create any legal relationship may mean that a court finds that there is no contract between 2 private individuals, however, this is unlikely if it is what would otherwise be a normal commercial transaction, e.g. the sale of car by one private individual to another.

In the law of negligence the courts have been prepared to hold that a private individual owed a duty of care to a friend when asked to choose a first car for them and decided that he was negligent in doing so since the car turned out to be unroadworthy. As a negligent misstatement had been made, the claim for financial loss was successful (*Chaudhry v Prabhakar*).

Summary

- Most aspects about making a contract is the same for B2B contracts as it is for B2C ones. The most important concept is that the **law often assumes equal bargaining power and an opportunity to negotiate terms in a B2B situation**, even when this is not the case, so the express terms of the contract become very important in a B2B contract as there is limited regulation of fairness etc and less implied terms, the effect of which can also be excluded in certain circumstances.
- There is no general requirement for fairness in a B2B contract but the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* dealt with a situation between 2 traders where a **clause in the contract was too onerous and was not therefore properly incorporated** into the contract because it should have been specifically drawn to the attention of the other party.
- The **general rule for deciding which country's law will apply to a B2B contract, is that freedom of choice prevails**, providing such a choice is expressly or clearly demonstrated by the terms of the contract or the circumstances of the case, however, **if no choice is made, which country's law applies may depend on a number of factors**, including, whether it is a particular type of contract or whether there is a close connection with a specific country.
- Agents are more commonly used in B2B situations than B2C ones and an **agent has the authority to make a contract with a third party on behalf of another, known as the principal**, so the contract is between the third party and the principal, with the agent dropping out of the picture; the agent needs authority to act and there are various ways in which an agency relationship can be created or ratified, namely, actual, ostensible or legal.
- The "**parol evidence rule**" applies to contracts that are written and means that the parties cannot argue that there is anything additional that changes or adds to that written contract; however, as this is potentially harsh the courts have developed **ways of circumventing it**, e.g. by arguing that the contract is made up of the written document and also the oral elements, or there are in fact two contracts, where the written one was only secured following an oral assurance, i.e. a **collateral contract**.
- The principles behind the **law of negligence** can apply in the business and private transaction worlds, and there are examples of cases where the courts have placed a duty of care on a private individual and others where they have held that in a business situation a duty of care may not arise; the law allows for the exclusion or restriction of liability for negligence, except with regard to death or personal injury, subject to the reasonableness test in the **UCTA**.
- The **tort of passing off aims to protect the financial interest a T has in his property**, by way of reputation or goodwill, which has been acquired in relation to goods, a name or a trade mark and is committed by a T passing off their goods as another T's, allowing an injunction, with or without damages, to be sought providing the five essential elements are present.
- **Organisers do not have to be operating in the course of a business to come within the remit of the PTRs**, and maybe therefore have to provide suitable security arrangements, although the Government guidelines suggest that members of a non-trading organisation are not selling or offering holiday packages for sale when they arrange events for their members in certain circumstances.
- **None of the definitions relating to a consumer in the PTRs refers to a requirement for non-work related arrangements**, so it may be that, as long as the definition of a package is

met, someone going on a business trip may be a consumer for the purposes of the PTRs in addition the Denied Boarding Regs appear to apply to business travellers as they refer to passengers not consumers.

J3 Basic statutory rights

People who are not Cs may acquire basic statutory rights under contracts as well as Cs, but the main differences are that for buyers who are Ts:

- there are less rights available
- the range of remedies is more limited when there is a breach
- there is more scope for the supplier to exclude or restrict liability in relation to these rights
- the rights relating to the provision of information do not apply as they are based in the CCRs which only apply to B2C contracts (although the ECRs and or the PSRs may apply)

J3.1 Types of B2B contract

The rights are not conveniently contained in one piece of legislation as they are for B2C contracts. There are various pieces of legislation that could apply, depending on the type of contract and there is no specific legislation to cover digital content. The types of contract are listed in table J4, along with an indication of the legislation that applies.

Table J4: Legislation containing contractual rights for B2B contracts

Contract type	Definition	Legislation	Abbreviation
Sale	Transfer of ownership in goods for money	Sale of Goods Act 1979	SGA
Conditional sale	Same as for C	Sale of Goods Act 1979	SGA
Hire	Same as for C	Supply of Goods and Services Act 1982	SGSA
Hire-purchase	Same as for C	Supply of Goods (Implied Terms) Act 1973	SG(IT)A
Other supplies of goods	Same as for C	Supply of Goods and Services Act 1982	SGSA
Service	Any service that is not specifically exempt	Supply of Goods and Services Act 1982 (Scottish common law)	SGSA
Digital content	None <i>St Albans City and District Council v International Computers Ltd</i> considered the problems of classifying faulty poll tax computer software, as goods or services	None	N/A

J3.2 Rights when goods are supplied

Regardless of which piece of legislation applies, the SGA, the SG(IT)A and the SGSA provide for the following ITs, concerning goods, in B2B contracts. Goods should be:

- ✓ of satisfactory quality (SQ) (*R and B Customs Brokers Ltd v United Dominions Trust*)
- ✓ fit for any purpose made known (FFPMK) (*Slater v Finning Ltd*, *Flynn v Scott*)
- ✓ as described (*Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd*)
- ✓ in compliance with any sample used
- ✓ the supplier's to supply
- ✓ free from any charge or encumbrance

These all appear in the list of C's rights when acquiring goods and for the most part have the same definitions and operate in the same way; however, public statements are not included when considering the "all other relevant circumstances" aspects of the SQ definition.

Those which do not apply are those relating to:

- compliance with a model
- correct installation
- conformity with PCI detail supplied to comply with the CCRs

J3.2.1 The supplier's to supply

Whether a trade purchaser of a vehicle, which is subject to outstanding HP/CS finance, obtains a good title to that vehicle, may depend on at what point in the chain of supply the finance company is trying to repossess it. If the trade buyer is the first purchaser and the finance company claims ownership at that point, then this will be correct because of the non-consumer status of the buyer, regardless of whether there is good faith and or no knowledge. If however, there has been a first private purchaser, who acquired good title in accordance with s27 Hire Purchase Act 1964 (see unit C) then this good title remains with the vehicle and can be passed onto any purchaser, regardless of status.

J3.2.2 Delivery

The SGA does not lay down any rules about the time of delivery, it merely states that it depends on the terms of the contract [s10(2)], however, case law (*Hartley v Hymans*) has clearly laid down that in an ordinary commercial contract concerned with selling goods, the delivery time is presumed to be "of the essence", or essential. In other words, a failure to deliver in accordance with the time specified in the contract is a breach of a condition (material breach) in a B2B transaction, which would allow a refusal of delivery. Where no delivery time is stipulated, the obligation is to deliver in a reasonable time [s29(3) SGA].

If the buyer accepts a late delivery then this will be binding.

J3.2.3 Risk

In a B2B situation there is a need to consider who bears the risk of accidental loss or damage to goods. Section 20(1) of the SGA states that risk remains with the seller until ownership is transferred and then risk passes with ownership, which may be before delivery. The parties can expressly agree otherwise, either that:

- risk does not pass until delivery (as in B2C contracts), or
- risk passes on delivery even though ownership does not (reservation of title clauses)

A modern approach is to assume that the person who is required to, or most likely to, insure them, will bear the risk and that will usually be the person who has physical possession of the goods. If delivery is delayed through the fault of either party, then that party bears the risk [s20(2) SGA].

There is also the possibility that a contract may be frustrated, e.g. specific goods perish before property passes, which will have the effect of making the contract void, therefore, not only would the buyer not be liable to pay the price but the seller will also avoid liability for non-delivery [s7 SGA].

This is a complicated area of law since the SGA contains various rules about when risk and ownership are transferred according to various factors, such as whether the goods are specific or one of several types of unascertained goods [s18 SGA].

J3.3 Rights when services are supplied

Three of the four implied terms that Cs acquire under a contract for services are also implied into B2B contracts. These are that under the SGSA (Scottish CL), the service should be performed:

- ✓ using reasonable care and skill (RCS) [s13]
- ✓ within a reasonable time (unless fixed under the contract) [s14]
- ✓ for a reasonable price (unless fixed under the contract) [s15]

These all work in the same way as they do for B2C contracts.

There are no ITs relating to compliance with information supplied, but the law on misrepresentation may assist (section J4). The PSRs require certain information to be supplied by service providers but do not give rise to any remedies. Remedies for breaches of the ECRS, when contracts are made electronically, are listed in unit B, table B2.

J3.4 Remedies for breaches of contract

There are really only two main remedies available for breach of B2B contracts, whether the contract is for goods or services, and these are ending the contract or damages and this is regardless of whether terms are implied or express. In order for ending the contract to be an option, there must be:

- ✓ breach of a condition in the contract (major term or material breach)
- ✓ non-acceptance or non-affirmation
- ✓ more than a slight breach (in relation to acceptance)

So damages may well be the most likely remedy, as they are available:

- ✓ because the buyer may choose them
- ✓ when the term breached is a warranty (**immaterial breach**)
- ✓ if the contract has been affirmed, or goods accepted in a sale contract [s11(4) SGA]
- ✓ where goods have not been accepted but the breach is slight (and there was a breach of a condition, or a major breach) [s15A SGA, s15B SGA].

In E&W and NI, the ITs are all classed as conditions, apart from the ones requiring goods to be free from charges and encumbrances.

Damages are assessed in accordance with *Hadley v Baxendale*, i.e. for loss that arises directly and naturally from the breach. Special loss can be claimed if it was known or ought reasonably to have been within the contemplation of the parties.

J3.4.1 Affirmation

Whether a contract has been affirmed or not has the same effect on common law remedies as it does in a B2C contract. Once a repudiatory breach is known, a choice must be made quickly about whether to continue with the contract or end it. Once a contract has been affirmed the only remedy will be damages. The common law doctrine of affirmation applies to all contracts apart from sales, which are subject to whether the goods have been accepted or not (*Farnworth Facilities v Attryde*, *Shine v General Guarantee*).

J3.4.2 Acceptance

For sales, as defined in the SGA [s2], the CL doctrine of affirmation is replaced by a statutory one referred to as acceptance. If a buyer has accepted the goods in a sales contract, then any breach of a condition must be treated as a breach of warranty [s11(4) SGA] and the remedy for breach of warranty is damages only. The amount claimed as damages would reflect the difference in value between what was expected for the price paid and what was received [s.53(3) SGA]. The measure of damages is the estimated loss “directly and naturally resulting, in the ordinary course of events”, from the breach [s53(3) SGA] as based on *Hadley v Baxendale*.

There are three ways in which a buyer can accept goods [s35 SGA and table J5]:

- ✓ intimating to the seller that the goods have been accepted
- ✓ doing something to or with the goods after delivery that is inconsistent with the seller's ownership
- ✓ retaining the goods for a reasonable period of time without rejecting them

Table J5: Acceptance of goods in a B2B contract

Method of acceptance	Possible examples
Intimation	Telling the sales person that they are happy with the goods Signing a delivery form that includes a term that says the goods are in good condition Completing feedback on an internet auction site
Inconsistent acts	Selling goods on to someone else Painting a wooden cabinet Engraving a postcode on the goods
Reasonable period of time	What amounts to a reasonable period of time will vary depending on the nature of the goods <i>Clegg v Olle Andersson, Fiat Auto Financial Services v Connelly Senior</i>

J3.4.2.1 Non-acceptance

The following do not necessarily amount to acceptance [s35(6) SGA].

- agreeing to a repair with the seller
- delivering the goods to someone else, e.g. as a gift

J3.4.2.2 Opportunity for examination

If the goods were not examined before they were delivered, the buyer has a reasonable opportunity to examine them to check that they are in conformity with the contract. Until that reasonable opportunity has passed the buyer will not be deemed to have accepted the goods [s35(2) and (3) SGA]. This applies whichever of the three methods of acceptance is relevant (*Cruickshank v Specialist Cars (Aberdeen) Ltd.*).

In Scottish law the implied terms are not categorised so they are all treated as intermediate or innominate terms. The nature of the breach will determine the availability of the remedy, along with acceptance or affirmation:

A major or material breach = rescission, subject to acceptance or affirmation

A minor or non-material breach = damages

J3.4.2 Other remedies

Other remedies, discussed for B2C contracts apply in the same way to B2B contracts, namely, specific performance etc. as indicated in table J6, where all the potential remedies are listed and briefly explained.

Table J6: Summary of alternative remedies

Remedy	Examples
Damages	Money to cover the cost of repairs to a faulty van supplied to a business customer – not available for disappointment or distress in commercial contracts
Ending the contract	Repudiating the contract with a construction company part way through due to major lack of RCS
Offset or counterclaim	Claiming for damage to office furniture occasioned when the contract work was carried out, when an electrician takes action for the unpaid price
Recovery of money paid	Where a trade customer has paid a plumber up front to fix a leak in the office bathroom and the plumber fails to turn up at all
Specific performance	A court order for the supply of an antique when the trade buyer has paid and the trade supplier has failed to deliver
Guarantee	The manufacturer of a photo-copying machine may choose to include a free guarantee with the goods offering specific remedies against faults, regardless of the status of the buyer
Buildings insurance	The express terms of a trader's buildings insurance policy may offer compensation for accidental damage to computers

J3.5 Restricting liability

Unlike with B2C contracts, in a B2B situation, the supplier can usually exclude or restrict liability in relation to liability for the supply of goods and services. Often, however, this will be subject to a test of reasonableness, which is similar to the test of fairness under the CRA.

J3.5.1 Implied terms for goods

T can exclude or restrict liability in relation to all the ITs relating to goods, if it is reasonable to do so, apart from the right to supply them [s6 & s7 UCTA]. A summary of the relevant provisions can be seen in table J7.

J3.5.2 Implied terms for services

RCS is part of the definition of negligence in the UCTA [s2], so liability for death or personal injury caused by a lack of RCS cannot be excluded. Liability for other loss or damage can be restricted or excluded if it is reasonable to do so. Liability for the time taken to perform a service is not covered specifically by the UCTA so it will fall within the general provision in s3, discussed below, and will be subject to the reasonableness test.

Table J7: Summary of ITs, remedies and liability for B2B goods contracts

Contract	Implied term	Status	Remedies	Liability	References
Sale CS HP Other transfers	Title	Condition*	Damages or Repudiation**	Not excludable	SGA s12(1) SG(IT)A s8(1)(a) SGSA s2(1) [s11B(1)] UCTA s6(1) & 7(3A) [s20(1), 21(3A)]
Sale CS HP Other transfers	Freedom from charges and encumbrances	Warranty	Damages	Not excludable	SGA s12(1) SG(IT)A s8(1)(b) SGSA s2(2) [s11B(2)] UCTA s6(1) & 7(3A) [s20(1), 21(3A)]
Hire	Title	Condition*	Damages or Repudiation**	Can be excluded or restricted if reasonable	SGSA s7(1) [s11H] UCTA s7(4)(a) [s21]
Hire	Freedom from charges and encumbrances	Warranty	Damages	Can be excluded or restricted if reasonable	SGSA s7(2) [s11H] UCTA s7(4)(b) [s21]
Sale CS HP Hire	Description SQ FFPMK Sample	Condition*	Damages or Repudiation**	Can be excluded or restricted if reasonable	SGA s13, 14, 15 SG(IT)A s9,10, 11 SGSA s8, 9, 10 [s11I, 11J, 11K]

Other transfers					SGSA s3, 4, 5 [s11C, 11D, 11E] UCTA s6(1A) & 7(1A) [s20 & s21]
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* Conditions only apply in E&W and NI, NOT in Scotland, where they are all simply terms, so the nature of the breach, material or non-material, will determine which remedy applies.

** Repudiation is subject to whether goods have been accepted (sales under SGA, s35) or contracts affirmed (other contracts, including conditional sales) and whether the breach is slight – SG(IT)A s11A (not Scotland), SGSA s10A (hire), SGSA (other transfers) s5A (s11F).

J3.5.3 General breaches of contract

Where there are “written standard terms of business” [s3(1) UCTA] liability for any breach of contract can only be excluded or restricted if it is reasonable to do so. *Pegler v Wang* confirms that it does not matter if the whole contract is not in a standard format so long as the exclusion clause is in the part that is. This will include terms that exclude liability for things like:

- a substantial alteration of obligations
- a failure to perform obligations, either completely or in part
- late delivery or performance

Sovereign Finance Ltd v Silver Crest Furniture Ltd, Regus (UK) Ltd v Epcot Solutions Ltd

J3.5.4 Reasonableness tests

There are various reasonableness tests in the UCTA, depending on what the exclusion clause is trying to do, but basically it is about considering all the circumstances surrounding the transaction to try and establish what would have been fair in such a situation. If the term is limiting or restricting liability to a specified sum of money, rather than excluding it altogether, then the reasonableness test includes considering the resources available to the person seeking to rely on the clause and their ability to insure against it.

The BOP is on the person wishing to rely on the clause, to show that it is reasonable.

Other legislative provisions that may apply to business customers, restricting the extent to which liability for them can be excluded, are indicated in table J8.

Table J8: Legislative provisions that apply to exclusion or limitation clauses

Topic	Restriction	Reference
Goods	Liability in relation to the rights in the SGA 1979, SGSA 1982 or SG(IT)A 1973 can be excluded or restricted if reasonable, except in relation to the right to sell	s6 & s7 (s20 & 21) UCTA 1977
Services	Liability for a lack of RCS if death or personal injury result cannot be excluded (applies to negligence generally and also notices as well as contract terms) But can be excluded or restricted for other loss if reasonable	s2(1) & (2) UCTA 1977 (s16)
Secondary ticketing	An event organiser cannot cancel a ticket or blacklist a seller just because that ticket is resold unless this was in the original T&C and it is a fair term	s91 CRA

Unsafe products	Liability to someone who has suffered damage caused by the supply of an unsafe product cannot be limited or excluded – damage to property is only covered if the property is ordinarily for private use and intended mainly for such use by the person suffering the loss or damage, so business property is not covered	s7 CPA 1987
Regulated credit agreements	Any term which is inconsistent with a provision in the CCA '74, which aims to protect a debtor, will be void	s173(1) CCA
Regulated credit agreements	A negotiator cannot be treated as an agent of a debtor because they are an agent of the creditor	s56(3)(a) CCA
Regulated credit agreements	Liability for the acts and omissions of a negotiator cannot be excluded	s56(3)(b) CCA

J3.5.5 Deposits and other payment clauses

Trade buyers sometimes pay all, or part of the contract price in advance of delivery or performance and difficult questions may then arise about the status of such a payment, and whether it is returnable, if the buyer then decides to breach their contract, by not going through with it.

The amount paid by a buyer in advance may greatly exceed any damages recoverable by a seller, and therefore be recoverable, with an off-set allowed as damages for the breach. On the other hand, a non-returnable deposit, sometimes called a “payment by way of earnest” is not recoverable by a buyer who is in breach of contract. The distinction will depend on the intention of the parties and this may be difficult to determine, particularly if the contract does not specify whether any advance payment is forfeitable. Customs of the particular trade and the amount of the part-payment may also need to be considered. Deposits of around 10% have often been considered as reasonable

A related issue may be that the parties include a clause in their contract that seems to provide for an amount of damages in the event of a breach of contract, particularly in relation to delay in performance.

The effect these payment issues might have, may depend on a number of factors and not necessarily the designation made by the drafting party. Table J9 indicates the main types, features and effects.

Table J9: Types, features and effects of payment clauses

Type of clause	Explanation	Effects	Example
Liquidated damages	Genuine pre-estimate of loss Fixes the amount to be paid on breach, irrespective of actual loss, i.e. whether it is greater or smaller	Enforceable unless appears to be a penalty clause as provides certainty for the parties	“£20 per week for late performance” <i>Cellulose Acetate Silk Co. Ltd v Widnes Foundry</i>
Penalty clause	Designed as a threat to compel performance by penalising non-performance Likely to be one if the amount is: -extravagant and	Unenforceable beyond the actual loss suffered <i>Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd</i>	<i>Jobson v Johnson</i> “ A default on payment of any instalment of the purchase price, requires a retransfer of the shares for £40,000”

	unconscionable -greater than the sum owed -the same, regardless of the extent of the breach		
Limitation clause	Puts a ceiling or upper limit on the loss recoverable	If the loss is below that amount only the actual loss is recoverable May be subject to the UCTA reasonableness test	"In the event of a delay in completing the building work, the maximum compensation payable is £2,000"
Deposit	An advance payment or An incentive to perform ("an earnest to bind the bargain")	Not recoverable if expressed as a genuine non-refundable deposit or forfeiture clause in the contract BUT possibly recoverable if the amount is unreasonable and seen as an unenforceable penalty	<i>Jobson v Johnson</i> The Court of Appeal discussed the relationship between the penalty rule and relief against forfeiture of a deposit

Whether a clause relating to an amount of money already advanced, or to be paid, is a penalty clause, a liquidated damages clause or a deposit, is a matter of construction, which could be resolved by considering the:

- main function of the provision (whether deterrence from, or compensation for, breach)
- amount payable, in comparison with the likely loss in the event of a breach

J3.6 Practical considerations for pursuing a remedy

There are no legal provisions concerning how quickly a remedy should be provided but other practical considerations apply equally to B2B contracts. Some non-consumer debtors will also receive protection under the Consumer Credit Act as the definition of a debtor is defined so as to include sole traders and non-limited partnerships of 2 or 3 people.

If payment was made using a linked credit agreement or a credit card, there is a choice between pursuing the supplier or the creditor for a breach of contract, providing the cash price was over £100 but not more than £30,000 [s75 CCA]. This will apply to any breach of contract, including:

- ✓ breach of an implied term
- ✓ breach of an express term
- ✓ non-delivery or supply

However, s75A, which covers agreements where the cash price is over £30,000, will not apply as it is restricted to non business purchases. It is also possible that s56 CCA could apply, as it makes creditors liable for representations made by third parties in certain circumstances (unit F).

Although usually a feature of B2C contracts, it is possible that B2B transactions may incorporate guarantees or warranties and trader customers may have relevant insurance policies that they can make a claim under, depending on the terms.

J3.7 Fairness

There is no legislation to regulate the general fairness of terms in a B2B contract. A business customer who wishes to challenge a term in a contract, could try arguing that:

- sections 3, 6 or 7 of the UCTA 1977 apply (sections 17, 20 or 21 of UCTA)
- it was not properly incorporated as per *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*
- it is a penalty clause
- sections 56(3) or 173(1) of the CCA 1974 apply (see table J8)
- there is an unfair relationship between the parties [s140A CCA], if there is a credit agreement (see section J5)

Redress under the CPRs may be available if there is a C2B contract for goods. Where T buys goods from a C, e.g. an antique or gold jewellery, and misleads C or behaves aggressively, C may be able to unwind the contract or have a discount, and or claim damages (See unit E3).

J3.8 Consumer contracts made before 1st October 2015

If a C was supplied with goods or services before the CRA became operational, then the legislation that will cover their contract will be similar to that for B2B contracts with the following differences:

- a breach does not have to be slight for repudiation to be available as a remedy in a goods contract [s15A SGA]
- the right to an opportunity to inspect goods before acceptance can take place cannot be taken away from C by T [s35(3) SGA]
- practical EU remedies are available as an alternative but there are some differences from those in the CRA [s48A – s48F SGA]

An indication of which remedies are available for breaches of goods contracts is indicated in table J10.

Table J10: Summary of ITs, remedies and liability for pre 1/10/15 B2C goods contracts in E&W

Contract	Implied term	Status	Remedies	Liability	References
Sale CS HP Other transfers	Title	Condition*	Damages or Repudiation**	Not excludable	SGA s12(1) SG(IT)A s8(1)(a) SGSA s2(1), [s11B] UCTA s6(1) & 7(3A) [s20 & s21]
Sale CS HP Other transfers	Freedom from charges and encumbrances	Warranty	Damages	Not excludable	SGA s12(1) SG(IT)A s8(1)(b) SGSA s2(2), [s11B] UCTA s6(1) & 7(3A) [s20 & s21]
Hire	Possession	Condition*	Damages or Repudiation** Practical EU	Can be excluded or restricted if	SGSA s7(1), [s11H] UCTA s7(4)(a), [s21]

			remedies	reasonable	
Hire	Freedom from charges and encumbrances	Warranty	Damages	Can be excluded or restricted if reasonable	SGSA s7(2), [s11H] UCTA s7(4)(b), [s21]
Sale CS HP Hire Other transfers	Description SQ and FFPMK Sample	Condition*	Damages or Repudiation** Practical EU remedies (not HP)	Not excludable	SGA s13, 14, 15 SG(IT)A s9, 10, 11 SGSA s8, 9, 10 [s11I, s11J, s11K] SGSA s3, 4, 5 [s11C, s11D, s11E] UCTA s6(2) & 7(2) [s20 & s21]

* Conditions only apply in E&W and NI, NOT in Scotland, where they are all simply terms, so the nature of the breach, material or non-material, will determine which remedy applies.

** Repudiation is subject to whether goods have been accepted (sales under SGA, s35) or contracts affirmed (other contracts).

J3.8.1 Consumer rights before 1st October 2015

Table J10 lists the ITs which apply to a B2C contract made before the 1st October 2015. This is a shorter list than in table C2 of unit C as the CRA introduced some new rights for Cs. Therefore, rights relating to the following will not be relevant if the contract was made before the CRA came into force:

- x conformity with information required under the CCRs
- x matching a model seen or examined
- x correct installation

J3.8.2 Practical EU remedies before 1st October 2015

The practical EU remedies of repair or replacement, followed by a refund or deduction, are similar to those discussed in unit C but with some slight differences. Also, as under the CRA, the BOP is reversed for the first six months following delivery [s48A(3) SGA, s11M(3) SGSA], for these practical EU remedies and the courts have similar powers to award whichever of the remedies it thinks is appropriate and or impose whatever terms, conditions or damages it thinks just [s48E SGA, s11R SGSA].

J3.8.2.1 First tier remedies - Repair or replacement [s48B SGA, s11N SGSA]

These practical remedies are available to C if there is a breach of either an express or implied term relating to description, sample, SQ and FFPKM, in a contract covered by the SGA [s48F SGA] or the SGSA [s11S SGSA]. This includes if goods are supplied, even if the problem is possibly due to a lack of RCS [s11S(1)(a) SGSA].

They are not available under the SG(IT)A, so do not apply for HP contracts, nor do they apply to hire contracts [s11M – s11S SGSA only apply to transfer not hire contracts].

They operate as 1st tier remedies and are available alongside the right to repudiate or have damages but there is no restriction to just one repair or replacement before allowing for 2nd tier remedies as there is under the CRA. C's right is to have the goods repaired or replaced:

- ✓ free of charge (so T should bear the costs of any labour, materials and postage involved)
- ✓ within a reasonable time (considering the nature and purpose of the goods)
- ✓ without being caused significant inconvenience (considering the nature and purpose of the goods)

Once C has agreed to one of these options, they must allow T a reasonable period of time to achieve the one chosen before deciding they would prefer the other option or repudiation, unless this would cause C significant inconvenience. This will be a question of fact in each case.

C may choose whether they would prefer a repair or a replacement, however, they cannot insist on their choice if T finds it impossible or disproportionate to comply. One remedy may be disproportionate to the other if it would impose costs on T that would be unreasonable in comparison with the other remedy, bearing in mind:

- the value of the goods
- the significance of the lack of conformity
- whether C would suffer significant inconvenience if the other remedy was provided

If both remedies are possible, it is a question of balancing how long each would take and how much inconvenience each would cause against how much it would cost T to provide each one or one of the 2nd tier remedies, bearing in mind C's preference.

J3.8.2.2 Second tier remedies – reduction or refund [s48C SGA, s11P SGSA]

These 2nd tier remedies, of a refund or a reduction, are available to C if a condition has been breached and C is in a position to move on from the 1st tier remedies. This will be because one of the following applies:

- ✓ the repair or replacement has not sorted the problem out
- ✓ it is disproportionate for T to repair or replace the goods in comparison with giving a refund or a deduction
- ✓ it is impossible for T to repair or replace the goods
- ✓ T has not provided the repair or replacement within a reasonable time
- ✓ T has caused significant inconvenience to C whilst trying to provide the repair or replacement

If C is opting for a refund T can reduce the amount of it but only to reflect any use that C may have had from the goods not for any other reason, e.g. that the goods have simply lost value in the market place because of the length of time that C has had them (their second-hand value).

C could choose to keep the goods and receive a price reduction to reflect the non-conformity, instead of opting for a refund. The reduction should be of an appropriate amount deducted from the agreed price, which would usually reflect the difference between the value of the goods when they were supplied and their value if there had not been a breach.

J3.9 Private sales

If a C buys from another C, then this is classed as a private sale. The only ITs in a contract for the supply of goods, will be those relating to the right to supply and compliance with a description and sample. These rights are contained in the SGA [s12, s13 & s15], both before and after the 1/10/15 as the CRA only applies to B2C contracts.

In a contract for services the only IT in a private contract, relates to the payment of a reasonable price if this is not determinable under the contract [s15]. Table J11 summarises the legal position.

Table J11: Summary of ITs, remedies and liability for C2C goods contracts

Contract	Implied term	Status	Remedies	Liability	References
Sale Other transfers, e.g. exchange	Title	Condition*	Damages or Repudiation**	Not excludable	SGA s12(1) UCTA s6(1) & 7(3A) (s20 & 21 UCTA)
Sale Other transfers	Freedom from charges and encumbrances	Warranty	Damages	Not excludable	SGA s12(1) UCTA s6(1) & 7(3A) (s20 & 21 UCTA)
Sale Other transfers	Description	Condition*	Damages or Repudiation**	Can be excluded or restricted if reasonable	SGA s13 UCTA s6(1A) & 7(1A) [s6(2) & 7(2) before 1/10/15] (s20 & 21 UCTA)
Sale Other transfers	Sample	Condition*	Damages or Repudiation**	Can be excluded or restricted if reasonable	SGA s15 UCTA s6(1A) & 7(1A) [s6(2) & 7(2) before 1/10/15] (s20 & 21 UCTA)

* Conditions only apply in E&W and NI, NOT in Scotland, where they are all simply terms, so the nature of the breach, material or non-material, will determine which remedy applies.

** Repudiation is subject to whether goods have been accepted (sales under SGA, s35) or contracts affirmed (other contracts and whether the breach is slight – SGSA s10A (hire), SGSA (other transfers) s5A.

J3.9.1 Agents and private sellers

If a private seller uses a business agent to sell their goods, the business agent will be liable to any buyer in relation to the SQ and FFPMK of the goods, if the private nature of the sale is not disclosed or reasonable steps were not taken to bring this fact to the attention of the buyer [s14(5) SGA].

The CL rules of agency law would also mean that, in the same circumstances, i.e. non-disclosure of the private status of a seller, the buyer could take action against the seller (*Boyer v Thompson*). This could apply for example, where a car dealer undertook to sell a car for a private individual, using their forecourt facilities. If this agency relationship was not disclosed, or the nature of it was not made clear, then the buyer of a car that was not of SQ or FFPMK, would be able to pursue either the car dealer, as a business agent, or the seller, even though the seller was not a T.

Summary

- **Implied terms**, or rights in a B2B contract, are not conveniently contained in one place and there are **various pieces of legislation** that could apply, **depending on the type of contract**, namely, SGA (sales), SG(IT)A (HP agreements) and the SGA (other supplies) and there is no specific legislation to cover digital content.
- The topics covered by the ITs for B2B contracts are, **SQ, FFPMK, description, sample, title and quiet enjoyment**, but not the additional ones relating to installation and compliance with a model and PCI, which only apply in B2C situations; these are all treated as conditions (material breaches).
- Whether a T purchaser of a vehicle, subject to **outstanding HP/CS finance**, obtains a good title to, may depend on when the finance company is trying to repossess it, because **if the T buyer is the first purchaser and the finance company claims ownership at that point, this will be correct**; however, if there has been a first private purchaser, who acquired good title in accordance with s27 Hire Purchase Act 1964, then this **good title remains with the vehicle and can be passed onto any purchaser, regardless of status**.
- In a **B2B goods contract, delivery time is presumed to be “of the essence”**, so a failure to deliver in accordance with the time specified in the contract is a breach of a condition (material breach), which would allow a refusal of delivery; where no delivery time is stipulated, the obligation is to deliver in a reasonable time, however, if the buyer accepts a late delivery then this will be binding.
- **Risk of accidental loss or damage to goods remains with the seller until ownership is transferred** and passes with ownership, which may be before delivery, although, the **parties can agree otherwise**; a modern approach is to assume that the person who is most likely to, insure them, will bear the risk, usually the person with physical possession and if delivery is delayed through the fault of either party, then that party bears the risk.
- Three of the four **implied terms** that Cs acquire under a contract for services are also implied into **B2B contracts** and these are that under the SGSA (Scottish CL), the service should be performed: using **reasonable care and skill**; within a **reasonable time** (unless fixed under the contract) and for a **reasonable price** (unless fixed under the contract).
- There are really only **two main remedies available for breach of B2B contracts**, whether the contract is for goods or services, and these are **ending the contract or damages**, regardless of whether terms are implied are express; in order for ending the contract to be an option, there must be: breach of a condition in the contract (major term or material breach); non-acceptance or non-affirmation and more than a slight breach (in relation to acceptance).
- **Damages are likely to be the most appropriate remedy in many circumstances** as they are available: because the buyer chooses them; when the term breached is a warranty (**immaterial breach**); if the contract has been affirmed, or goods accepted in a contract of sale, or where goods have not been accepted but the breach is slight (and there was a breach of a condition, or a major breach).
- **Damages are awarded for loss that arises directly and naturally from the breach**, with special loss being claimable if it was known or ought reasonably to have been within the contemplation of the parties.

- Whether a contract has been affirmed or not has the same effect on common law remedies as it does in a B2C contract; as soon as a repudiatory breach is realised, a speedy choice must be made about whether to continue with the contract or end it and **once a contract has been affirmed the only remedy will be damages**.
- For **sales** the CL doctrine of affirmation is replaced by a statutory one referred to as **acceptance** and if it has occurred, by intimation, doing something to the goods inconsistent with the seller's ownership or by retention of the goods for a reasonable period of time, then any **breach of a condition is treated as a breach of warranty and the remedy is damages only**.
- If the goods were not examined before they were delivered, the buyer has a **reasonable opportunity to examine** them to check that they are in conformity with the contract and until that reasonable opportunity has passed, the buyer will **not be deemed to have accepted the goods**; in addition agreeing to a repair and passing goods on to someone else, other than by resale, will not necessarily amount to acceptance.
- In addition to damages and or repudiation, **alternative remedies**, such as an offset or counterclaim, recovery of monies paid, specific performance or even a claim under a relevant guarantee or insurance policy, may be available for breach of a B2B contract.
- In a B2B situation, the supplier can usually **exclude or restrict liability** in relation to liability for the supply of goods and services but often, this will be **subject to a test of reasonableness** in the UCTA, which is similar to the test of fairness under the CRA; and there are **situations where liability cannot be excluded or restricted at all**, such as: in relation to the IT about title when goods are supplied: when death or personal injury are caused by negligence, including the SGSA (Scottish CL) requirement to use RCS; for injury and specific damage caused by unsafe goods under Part I CPA and protection provided by the CCA to sole traders and business partnerships of 2 or 3 people.
- Sometimes the parties require an **advance payment** or include a contract clause to provide for an amount of **damages for breach**, particularly in relation to delay in performance, but whether these are effective may depend on a number of factors and not necessarily the designation made by the drafting party; **liquidated damages or limitation clauses may be acceptable**, although the latter may be subject to the reasonableness test in UCTA, however, **penalty clauses and deposits may not be**, and so the only amount recoverable would be the actual loss suffered.
- If payment was made using a linked credit agreement or a credit card, there is a choice under **s75 CCA**, between pursuing the supplier or the creditor for a breach of contract, providing the cash price was over £100 but not more than £30,000 and this will apply to any **breach of contract or misrepresentation**, however, s75A, which covers agreements where the cash price is over £30,000, will not apply as it is restricted to non business purchases.
- There is no legislation to regulate the general fairness of terms in a B2B contract so a business customer who wishes to challenge a contract term, could try arguing that: sections 3, 6 or 7 of the UCTA 1977 apply (sections 17, 20 and 21 UCTA); it was not properly incorporated as per *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*; it is a penalty clause; sections 56(3) or 173(1) of the CCA 1974 apply or if there is a credit agreement, that an unfair relationship between the parties exists.

- Redress under the CPRs may be available if there is a **C2B contract for goods**, e.g. where T buys goods from a C, such as an antique or gold jewellery, and T **misleads C or behaves aggressively** C may be able to unwind the contract or claim a discount and also seek damages in addition if this is appropriate.
- **If a C was supplied with goods or services before the CRA became operational, then the legislation that will cover their contract will be similar to that for B2B contracts with the following differences**: a breach does not have to be slight for repudiation to be available as a remedy in a goods contract; the right to an opportunity to inspect goods before acceptance can take place cannot be taken away from C by T and practical EU remedies are available as an alternative but there are some differences from those in the CRA.
- **Some consumer rights**, relating to the conformity with information required under the CCRs, matching a model seen or examined and correct installation of goods, **will not be relevant if a B2C contract was made before the 1st October 2015** as this is when the relevant provisions in the CRA, covering these areas, came into force.
- The **practical EU remedies are similar for pre-October 1st 2015 B2C contracts, to those entered into after this date, with some differences**, namely: if goods were supplied as well as a service, they are available even if the problem is due to a lack of RCS; they don't apply to hire purchase contracts or hire; there is no restriction to the number of repairs or replacements before a 2nd tier remedy can be sought and there is an additional factor to take into account when considering whether C can move to tier 2 remedies, which is whether either of the tier 1 remedies would be disproportionate to a tier 2 remedy refund or deduction.
- In a **private sale**, or C2C contract, the only ITs in a **goods** contract, will be those relating to the **right to supply and compliance with a description and sample** and these rights are contained in the SGA both before and after the 1/10/15; in a private **services** contract the only IT under the SGSA (Scottish CL) is that relating to the payment of a **reasonable price** if this is not determinable under the contract.

J4 Misrepresentation

When the parties to a potential contract negotiate, various matters will be discussed and statements may be made about the goods or services which are later contracted for. If any of these statements turn out to be incorrect, the remedy available to the injured party will depend on whether the statement became a term of the contract or not.

If the statement did become a term, then the normal remedies for breach of contract will apply as it may amount to an express term of the contract. Alternatively, the IT of description may have been breached under the CRA, SGA, SG(IT)A or the SGSA if goods were supplied, depending on when the contract was entered into and whether the person to whom the statement was made, was a C or a T.

However, if the statement does not become a term of the contract then it is merely a false representation and the availability of a remedy depends on whether it amounts to an actionable misrepresentation. Such statements are often verbal and so there can be problems with proof and evidence.

The law in this area was originally entrenched in the common law but the Misrepresentation Act 1967 (MA) also applies. Since it is a common law concept it will not be limited to the status of the parties and so will apply regardless of who the seller and the buyer are, but will have particular relevance for B2B contracts and also C2C ones and public auction situations. It has less relevance for B2C

situations as the CRA, or in some circumstances the CCRs themselves, make information provided by T under the CCRs, a term of the contract [s11(4), s12(2), s36(3), s37, s50(3) CRA and r9(3), r10(5), r13(6) CCRs].

The Misrepresentation Act 1967 does not apply in Scotland; however, the Law reform (Miscellaneous Provisions) (Scotland) Act 1985 has some application to this area, although, there are some differences between the two.

J4.1 Difference between terms and representations

There is no definitive way to determine whether a statement has become incorporated as a term of a contract or whether it remains outside the contract as a representation. The guidelines in table J12 have been used by the courts in the past, although none has any particular hierarchy above another:

Table J12: Guidelines for determining the difference between contract terms and representations

Guideline	Reasoning	Relevant case law
Was the contract put in writing?	If the contract is later put into writing and the statement is not included in the contract, then it is likely to be considered to be a representation	<i>Routledge v McKay</i>
When during the negotiations was the statement made?	The closer the statement is to the making of the contract, the more likely it will be considered to be a term	<i>Routledge v McKay</i>
Who, if anyone, had the specialist knowledge about the subject matter?	If the party making the statement has specialist skill or knowledge, the statement is likely to be a term	<i>Dick Bentley Productions Ltd v Harold Smith Motors Ltd</i> <i>Oscar Chess Ltd v Williams</i>
How important is the statement?	If the other party would not have entered into the contract if the statement had not been true, then it is likely to be treated as a term	<i>Bannerman v White</i>
Did the supplier encourage or discourage checking the statement out?	If the party making the statement discouraged checking out the statement, it is more likely to be a term	<i>Schawel v Read</i> <i>Ecay v Godfrey</i>

J4.2 Definition of a misrepresentation

An actionable misrepresentation is:

- ✓ a false statement of fact
- ✓ made during pre-contractual negotiations
- ✓ as an inducement to enter the contract

J4.2.1 Statements of fact

Statements of fact should not be confused with other types of statement for which there will be no remedy in the event of falsity being revealed (table J13).

Table J13: Differences between representations of fact and other statements

Statement type	Explanation	Example
Sales talk	Some statements are clearly sales hype or advertising puff, which are not based in fact	Probably the best ... in the world This car is unbeatable value
Statements of intention	<p>If the statement maker intended to do what they said, then even if they do not do it, there will not be a misrepresentation</p> <p>If it can be shown that there was never any intention to do it, this could be a misrepresentation, although proof could be difficult</p> <p>If the statement maker is a credit broker or supplier linked to a creditor, liability on the creditor's part could arise, regardless of intention, under s56 CCA '74 <i>(Forthright Finance Ltd v Ingate, Ingate v Carlyle Finance Ltd)</i></p>	<p>Mobile phone service provider stating that they will pay any termination fee if the customer switches supplier and then doesn't but did intend to at the time of making the statement</p> <p><i>Edgington v Fitzmaurice</i></p>
Statements of opinion	Genuine statements of opinion are not factual statements; however, if the statement maker is someone with special skill or knowledge, an expression of opinion may become a statement of fact	<p>I should think your employees will find this range of shoes really comfortable (opinion)</p> <p>I think these shoes should be appropriate for use in a warehouse environment (factual if statement by an industrial supplier)</p>
Failures to disclose	<p>Remaining silent and not disclosing information is not a misrepresentation, UNLESS:</p> <p>(1) the circumstances change</p> <p>(2) it creates a partial truth that distorts the full picture</p> <p>(3) there is a fiduciary relationship, e.g. client and professional, such as an accountant or solicitor</p> <p>(4) it is an insurance contract</p>	<p>(1) <i>With v O'Flanagan</i></p> <p>(2) <i>Gordon & Teixeira v Selico & Select Management Ltd</i></p> <p>(4) Consumer Insurance (Disclosure and Representation) Act 2012 – s2 replaces C's duty to volunteer material information with a duty to take reasonable care not to make a misrepresentation</p>

J4.2.2 Inducement

The innocent party must show that they relied on the false statement and that it, at least, in part, induced or persuaded them to enter into the contract, although there is no legal obligation to check its accuracy (*Redgrave v Hurd*). There will be no inducement where the innocent party:

- was not aware of the statement, OR
- knew the statement was false, OR
- did not rely on the statement (*Attwood v Small*)

J4.3 Remedies for misrepresentation

There are three types of misrepresentation and the remedies available differ according, to some extent to these categories (table J14). Liability for misrepresentation can be excluded or restricted [s3 Misrepresentation Act 1967] if it is reasonable to do so [s11(1) UCTA] [s24 UCTA] (*Walker v Boyle, South Western General Property Co Ltd v Marton*).

Table J14: Types of misrepresentation and remedies

Category	Explanation	Case law	Remedies available
Fraudulent	Made knowingly or without belief in the truth, or reckless as to whether it is true or false	<i>Derry v Peek</i>	Rescission Damages
Negligent	<u>Common law</u> – negligent mis-statement based on a special relationship and reliance (this may be particularly useful where an agent has been used) <u>Statutory</u> – under the Misrepresentation Act 1967, where the statement maker believes the facts stated were true but is unable to show that there are reasonable grounds for this (reverse BOP)	<i>Hedley Byrne v Heller</i>	Rescission Damages
Innocent	An honest and reasonable belief in what turns out to be an incorrect statement Not recognised at common law	<i>Newbigging v Adam</i> <i>Whittington v Seale-Hayne</i>	Rescission An indemnity

J4.3.1 Rescission

This is similar to repudiation, in that it is about ending the contract but it is an equitable remedy and therefore discretionary and subject to bars of: delay; impossibility of restoring goods in the same condition; acquisition of rights by a third party and affirmation. It is however, in theory, available for all three types of misrepresentation. The aim is to restore the parties to their original positions as if the contract had never been made.

J4.3.2 Damages

The CL does not recognise innocent misrepresentation as giving rise to a remedy so damages are only available for fraudulent and negligent misrepresentations. Damages can be claimed in addition to rescission. The MA gives the court the power to award damages *in lieu of* (instead of) rescission [s2(2)], however, this is a matter for the court and is not something a party can request.

J4.3.3 An indemnity

An indemnity is a more limited monetary award than damages and is to compensate only for the necessary costs that a person has incurred as a result of the contractual obligation. It is available for all three types of misrepresentation but is particularly useful for an innocent one, often accompanying rescission of the contract, because there is no right to damages.

J4.4 Private sales

The law of misrepresentation is largely based in the CL and as such is not restricted to B2C contracts and so it applies to private sales too. This could give rise to action under the Misrepresentation Act 1967 [s2] or under the principles established in *Hedley Byrne v Heller*, if there is a special relationship between the parties and reasonable reliance on the statement made, e.g. as in *Chaudhry v Prabhaker*.

Summary

- If a **false statement** is made prior to parties entering into a contract, it is possible that the innocent party may have a claim for **breach of contract or misrepresentation**.
- The courts have established various **guidelines** to assist when deciding if a statement is a contractual **term or a representation**.
- A **misrepresentation is a false statement of fact** which is made during **pre-contractual** negotiations which **induces** a party to enter into a contract.
- Statements of fact should **not be confused with mere sales talk, statements of future intention, opinions and failures to disclose**.
- If the innocent party was **not aware of the statement they cannot be induced to enter the contract on the basis of it**, nor can they argue they have relied on the statement if they choose to check out the details themselves.
- A person making a false factual statement could do so **deliberately, without really caring whether it was true or not, or quite honestly**, believing what they have said to be true and the law makes a distinction between **fraudulent, negligent and innocent** misrepresentations.
- An action in misrepresentation taken under the **Misrepresentation Act 1967** places the **burden of proof** on the maker of the statement to show that he had **reasonable ground to believe that the facts represented were true**.

- The **remedies** available depend to some extent on the type of misrepresentation and include: **rescission, damages, indemnity** and damages in lieu of rescission.
- It is possible for a **private relationship** to give rise to liability if there is a **special relationship and reasonable reliance**.

The Misrepresentation Act 1967 does not apply in Scotland; however, s10 Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 applies with some differences between the two.

The BOP is not reversed but damages are available as a remedy for negligent misrepresentation, although there is no provision for damages to be awarded instead of ending the contract.

Ending the contract is known as reduction not rescission and the same bars apply.

J5 Auction sales

J6 Payment methods

J7 Redress

The customer journey experienced by a trade or private buyer will be the same as for a consumer one and when it comes to the final stage of going to court, the processes will be almost identical, however, the stages in between can be very different. In particular there is likely to be considerably less options available when it comes to finding organisations and bodies that provide businesses with advice and or ADR mechanisms.

J7.1 The customer journey

The differences at each stage of the journey for a business customer have been addressed throughout unit J and the: who, what, where, when, how and why approach for attempting to resolve an issue and potentially enforcing a court judgment are extremely similar to that for C. The main differences are explained below.

J7.1.1 What redress can be sought?

There is a more limited range of redress methods available to a business or private buyer as the practical remedies, such as a repair or a replacement for goods and repeating work for services do not apply to B2B contracts. This does not stop the parties negotiating such solutions however. The most appropriate legal remedy will be damages in many cases, although ending a contract may be an option in some circumstances too. The following remedies may also be available. They are not restricted to B2B or C2C situations but their limited application and or specialist nature means it is more appropriate to discuss them in unit J rather than in the consumer units.

J7.1.1.1 Offsetting a claim

Where a buyer has not yet paid the supplier or has withheld some of the money due because of alleged breaches of contract, the supplier may take court action against the buyer for the price, and the buyer could argue for an offset against the claim to cover the cost of dealing with the breach. This may involve filing a counterclaim with the court.

J7.1.1.2 Recovering money paid

Where a buyer is in the position of having already paid for a service promised but in fact the supplier does not carry it out or perform it, then the buyer may need to pursue the supplier for this remedy to recover the money paid, due to a failure of consideration by the supplier.

J7.1.1.3 Specific performance (specific implement)

This is an equitable remedy and so is not available as of right like CL remedies of damages or repudiation, and is at the discretion of the courts. It involves a court making an order requiring performance in accordance with the contract but will not usually be available where damages will suffice. Unless there is some uniqueness involved, such as the supply of a specific rare antique item, damages will usually be adequate because replacements can be purchased.

J7.1.2 Where redress should be sought?

The first option will always be to pursue the contracting party in the first instance, bearing in mind that some larger companies may have separate business complaint departments because of the different

T&C that may apply. A T buyer will experience the same problems as a C when faced with a company, partnership or sole T that has stopped trading.

J7.1.2.1 Lender liability

Two of the three sections in the CCA, which make a lender liable in certain circumstances, will also protect a T buyer, if they are a sole trader or in a partnership of not more than 2 or 3 people and not involving any incorporated bodies. This will be particularly useful if T has stopped trading or is abroad and there is a valid choice of law clause for a jurisdiction outside the UK. The appropriate criteria in the relevant section would need to be fulfilled for liability to arise, which is for:

- ✓ breaches of contract or misrepresentation under s75
- ✓ representations, including those of certain third parties, under s56

S75A cannot be used as it does not apply to supplies that are wholly or mainly for business purposes.

J7.2 Business advice

A trade or private customer may require advice at any point throughout the 9 stage journey, but in particular, advice is likely to be necessary at stage 5 when knowledge of rights and obligations will be necessary to try and effectively resolve the matter.

J7.2.1 Approach to advice

The 5R staged process applies, whatever the status is of the person requiring advice:

- ✓ Relationship
- ✓ Rights
- ✓ (W)rong
- ✓ Remedies
- ✓ Referrals

However, the limitations at each stage, as addressed in this unit, should be borne in mind.

J7.2.2 Business organisations

There is a limited range of bodies and organisations that may be able to give a T more specialist advice or information than the Citizens Advice consumer service. Brief details of their role and contact details are provided but should be checked and updated at frequent intervals and new information shared with colleagues. They are listed alphabetically, ignoring any use of “the” before a name.

Only business specialist advisory bodies are listed but it is likely to be worth checking whether those consumer organisations listed in section H2 of unit H are prepared to give business advice too. They may have different contact details for business customers, e.g. the business enquiry contact details for the CRA, Callcredit plc, are: **info@callcreditmarketing.com and 0113 388 4300**.

Some may specifically exclude business enquiries, e.g. Shelter does not give advice to business tenants, commercial lets or landlords

British Chambers of Commerce (BCC)

Contact details

Website: www.britishchambers.org.uk

The BCC is the national voice of local business and has a nationwide network of 52 local Accredited Chambers of Commerce, serving tens of thousands of business members across the UK. The BCC is a strong campaigning voice for the interests of business, delivers services that help business grow, and is the premier private sector source of advice and support for international trade. Businesses can search for their local chamber on the website.

Business Companion

Contact details

Website: www.businesscompanion.info

Business Companion is a free, impartial, online guidance service for businesses, provided by CTSI and backed by BIS. There are 3 levels of advice available for businesses that need to know about TS and consumer protection legislation as indicated by table X, which includes some examples of the in depth guides available. There is a degree of overlap between the 15 Quick guide categories:

- ✓ Get started - the basics (5 groups)
- ✓ Quick guides - concise guidance (15 categories)
- ✓ In depth guides - detailed information (150 + documents and links)

Some of the in depth guides, have links to:

- official government guidance documents, e.g. the CMA Guidance on Unfair Contract Terms and the BIS: Consumer Rights Act: Goods Guidance for Businesses (* in table X)
- relevant legislation
- helpful bodies and organisations
- other in depth guidance documents within Business Companion

The website also allows the business to opt for guidance that applies in Wales or Scotland as well as England.

Table X: Categories of Business Companion guidance documents

Get started group	Quick guide category	No. of in depth guides	Examples of in depth guidance
A) What is for sale	1. Goods	25	Antiques and antiquities * Labelling of footwear Labelling of textiles Mileage of used cars Part-worn tyres Second-hand electrical goods Second-hand upholstered furniture Sale and supply of goods * Used car sales
	2. Digital content	7	Digital content * Online reviews and endorsements *
	3. Services	12	Estate agents – property descriptions Letting agents – display of fees Mixed contracts Motor vehicle servicing and repairs Package tours and holidays The sale and resale of tickets * The supply of services *
B) Where is it being sold	4. On premises	10	Consumer contracts – on premises sales * Single-use carrier bags *
	5. Off premises	9	Consumer contracts – off premises sales *
	6. Distance	12	Consumer contracts – distance sales * Internet auction sites and market places
C) How is it being sold	7. Consumer contracts	12	Returns policies * The sale and supply of goods – before 1 October 2015 * The supply of services/goods with services – before 1 October 2015 * Unfair contract terms *
	8. Good practice	7	Accurately describing goods and services Alternative dispute resolution * Consumer protection from unfair trading * Membership logos and claims of approval
	9. Pricing & payments	5	Credit & other financial matters Displaying prices in hotels etc. Payment surcharges * Price marking of goods for retail sale *
D) Key topics	10. Underage sales	11	Aerosol spray paints Age-restricted products Alcohol Cigarette lighter refills and solvents Crossbows, air weapons etc Fireworks Knives and other bladed items Online sales of age-restricted products Sunbeds * Tobacco and nicotine inhaling products * Video recordings and games for sale or hire
	11. Food & drink	35	Food allergens and intolerance Herbal medicine and health food shops

			Labelling of prepacked food The sale of alcohol in licensed premises Single-use carrier bags *
	12. Product safety	20	Cosmetic products Electrical equipment Food imitations General product safety – distributors General product safety – producers * Goods in rented accommodation Jewellery safety – metal content Mini Motos, off-road vehicles, etc * New and second-hand prams & pushchairs New nightwear New upholstered furniture Ornamental & novelty giftware * Safety of products – due diligence * Second-hand gas cooking appliances * Toys * Unsafe goods - liability
E) Key activities	13. Animals & Agriculture	50	Disposal of waste food Keeping pet pigs * Manufacturing your own pet food *
	14. Weights & measures	10	Packaged goods – average quantity Small bakers and average weight The sale and delivery of oil and gas The sale of alcohol in licensed premises The sale of solid fuel and wood fuel Weighing equipment for legal use Weights & measures for butchers Weights & measures for fishmongers Weights & measures for greengrocers
	15. Business information (other)	22	Business scams Business-to-business marketing * Car boot sales Company and business names Energy performance certificates Energy rating information Intellectual property One-day and occasional sales Primary Authority & Home Authority Trading standards – inspections and powers *

Business Debtline

Contact details

Tel: (0800) 197 6026

Website: www.businessdebtline.org.uk

Business Debtline is part of a charity called the Money Advice Trust, which is funded by a range of organisations including banks, building societies, water companies, energy companies, and Government. It receives funding from these organisations because they recognise that the advice given helps their customers to tackle their debts effectively and sustainably. The website contains a FAQ section as well as numerous factsheets and sample letters. Business Debtline is authorised and regulated by the FCA.

Department of Business, Innovation and Skills (BIS)

Contact details

Tel: (0300) 456 3565 (Mon – Fri, 9am – 6pm)

Business Wales Helpline: 0300 060 3000 (Mon – Fri, 8am – 6pm)

Email: enquiries@businesssupporthelpline.org

Website: www.gov.uk/government/organisations/department-for-business-innovation-skills

BIS is one of 24 ministerial departments and it is supported by 48 agencies and public bodies to invest in skills and education to promote trade, boost innovation and help people to start and grow a business, with the overall aim of promoting economic growth. BIS also protects consumers and reduces the impact of regulation. There is a business support helpline, which is also on Twitter, Facebook, You Tube and web chat, with different contact numbers available on the website for help with starting or increasing an export business.

Business Gateway (Scotland)

Contact details

Tel: (0845) 609 6611

Textphone: 0141 952 7053

Mon – Fri, 8am – 6pm

Corporate Telephone Preference Service (CTPS)

Contact details

Tel: (0345) 070 0707

Website: www.tpsonline.org.uk

This is a central opt out register whereby corporate subscribers (see definition below) can register their wish not to receive unsolicited sales and marketing telephone calls to either all their organisation's telephone numbers, or to certain numbers. It is a legal requirement that companies do not make such calls to numbers registered on the CTPS.

A corporate subscriber includes corporate bodies such as a limited company in the UK, a limited liability partnership in England, Wales and Northern Ireland or any partnership in Scotland. It also includes schools, government departments and agencies, hospitals, PLC's and other public bodies.

Federation of Small Businesses (FSB)

Contact details

Tel: (0808) 20 20 888

Email: tps@dma.org.uk

Website: www.fsb.org.uk

The FSB claims to be the UK's leading business organisation with over 40 years experience of supporting small businesses. Certain services, such as advice on tax, employment and health and safety laws, are part of the membership benefits, but for other services, additional charges will be made. Membership starts at £130 a year for sole traders and increases, depending on the number of employees, up to £940 for 150 employees, with £5 per employee being added to certain standard charges where there are more than 150 employees.

GOV.UK

Website: www.gov.uk

GOV.UK is a public sector information website, created by the Government Digital service to provide a single point of access to HM Government services. Details about the departments listed in table H6 can be found on it.

Intellectual Property Office (UK) (IPO) (previously the Patents Office)

Tel: 0300 300 2000

Website: www.gov.uk/topic/intellectual-property/patents

IPO is the official government body responsible for intellectual property rights including patents, designs, trademarks and copyright. Some types of protection are automatic, others have to be paid

for. Intellectual property can have more than one owner, belong to people or businesses and be sold or transferred. Traders and private individuals can use the website to apply for a patent, register a trade mark, and do searches for registered designs, trademarks and patents.

National Association of Landlords (NLA)

Contact details

Tel: 020 7840 8900

Email: info@landlords.org.uk

Website: www.landlords.org.uk

The NLA offers landlords access to a range of benefits and services with comprehensive representation on a wide range of local, national and international levels, to help them deal with landlord related matters and ensure that landlords' voices are heard wherever their interests are threatened.

J7.3 Alternative Dispute Resolution

The requirements in the ADR Directive and implementing UK legislation, the ADR Regs and the ODR Regs, concerning the provision of ADR, only apply to B2C disputes. There is no requirement to provide ADR for B2B or C2C transactions, however, the CivPR do not make any status distinctions and all parties will be expected to have tried to resolve their conflict using a suitable ADR procedure, before starting proceedings through the courts.

Business customers need to check whether the T&C they have contracted under, make provision for settling disputes in a particular way and whether any trade association or industry scheme applies to their issue and if so whether it includes business customers. Even those schemes that may apply to Ts, might restrict their application to a particular size of business, e.g. the Energy Ombudsman scheme is available for Cs or Micro-businesses, defined in terms of consumption or turnover and number of employees.

Even if an ADR scheme does cover business customers, other differences that might apply include: cost; timescales; range of disputes within the TOR; access to EU ADR schemes; the means of submission; the legal effect of the outcome; the principles used to resolve a dispute and how the procedure is conducted.

J7.4 Court

The Small Claims procedure is also open to Ts. This may be to pursue a dispute with a C or with another T. The fees, procedures, forms and enforcement methods are virtually the same. The CivPR apply and a court would expect the parties to have tried to resolve their dispute using a suitable ADR process (*Egan v Motor Services (Bath) Ltd*).

In particular, the following leaflets, listed in Appendix H1, may be of assistance:

- EX350 - A Guide to Debt Recovery Through the County Courts for Small Businesses
- N1FD - Notes for Claimant - Consumer Credit Act Cases

Summary

- The **customer journey experienced by a trade or private buyer will be the same as for a consumer one** however, what happens at each stage is likely to be very different; in particular there is likely to be considerably less options available when it comes to finding organisations and bodies that provide businesses with advice and or ADR mechanisms.
- There is a **more limited range of redress methods available to a business or private buyer** as the practical remedies, such as a repair or a replacement for goods and repeating work for services do not apply to B2B contracts, however, this does not stop the parties negotiating such solutions.
- The **most appropriate legal remedy will be damages in many cases**, although ending a contract may be an option in some circumstances too and there are alternatives available, including: offsetting a claim; recovering money paid and specific performance (specific implement).
- The **first option will always be to pursue the contracting party initially**, bearing in mind that some larger companies may have separate business complaint departments because of the different T&C that may apply and that a T buyer will experience the same problems as a C when faced with a company, partnership or sole T that has stopped trading.
- **Provisions in the CCA, which make a lender liable, will also protect a T buyer, if they are a sole trader or in a partnership of 2 or 3 people**, which will be useful if the supplier has stopped trading or is abroad and the relevant sections are: s75 for breaches of contract or misrepresentation and s56 for representations, including those of certain third parties; however, s75A would not apply to supplies that are wholly or mainly for business purposes.
- A trade or private customer **may require advice at any point** throughout the 9 stage journey, but **in particular, at stage 5** when knowledge of rights and obligations will be necessary to try and effectively resolve the matter.
- The **5R staged process**, suggested for consumer advice, would be equally **applicable, whatever the status of the person requiring advice**, covering: relationship, rights, (w)rongs, remedies and referrals; however, the limitations at each stage, should be borne in mind.
- There is a **limited range of bodies and organisations that may be able to give a T more specialist advice or information** but it is likely to be worth checking whether those consumer organisations listed in section H2 of unit H are prepared to give business advice too; they may have different contact details for business customers, e.g. as the CRA, Callcredit plc does and some may specifically exclude business enquiries, e.g. as does Shelter.
- The **CTSI Business Companion website**, is a free, impartial resource, backed by BIS, allowing Ts to access in depth online information about compliance with a very long list of TS and consumer protection legislation, with links to many official government guidance documents, relevant legislation, other bodies and organisations that may be able to assist and also various GOV.UK resources.
- **Examples of organisations providing advice and information to Ts, include:** the British Chambers of Commerce; Business Debtline; BIS; the Corporate Telephone Preference Service; the Federation of Small Businesses and the National Association of Landlords.

- There is **no requirement to provide ADR for B2B or C2C transactions**, however, the **CivPR** do not make any status distinctions and **all parties will be expected to have tried to resolve their conflict using a suitable ADR procedure**, before starting proceedings through the courts.
- **Some ADR schemes may apply to T customers but even if they do they may restrict this application to a particular size of T and incorporate different provisions from their consumer schemes**, e.g. in terms of: cost; timescales; range of disputes within the TOR; access to EU ADR schemes; the means of submission; the legal effect of the outcome; the principles used to resolve a dispute and how the procedure is conducted.
- If as a final resort a T buyer has to use the **court system** to settle a dispute, this **will operate in the same way as it does for C buyers** and the fees, procedures, forms and enforcement methods will virtually be the same with the court expecting observance of the CivPR and attempts to settle disputes using appropriate DAR methods beforehand.