Pathclearer

A more commercial approach to drafting commercial contracts

Lawyers spend a huge amount of time drafting and negotiating detailed commercial contracts for their clients. But the in-house legal team at Scottish & Newcastle believe that in many cases detailed contract terms are unnecessary, and can be a waste of time and resources for the businesses involved. Steven Weatherley outlines the group's innovative "Pathclearer" approach.

The problem we faced at Scottish & Newcastle

When I joined Scottish & Newcastle in 1997 the small in-house team of two (now four) lawyers was overwhelmed by paperwork. We were becoming unable to spot the big legal issues or risks facing our business because we were snow-blind from the pages and pages of contracts that passed across our desks.

More worryingly, certain parts of our business were grinding to a standstill because of the length of time it was taking to conclude contracts. We decided that something had to be done.

The drawbacks of going to court

In the event that a business does try to enforce its contracts in court it faces the following problems:

- **Interpretation.** There is seldom a contractual dispute which is absolutely clear-cut. There is almost always scope for each side to take a different interpretation of the contract. Even if the contract gives a relatively clear answer, there are many other ways to challenge its terms, including reliance on pre-contractual misrepresentations; subsequent variations through correspondence, or collateral agreements; invoking the law against penalty clauses or anti-competitive agreements; disputing the authority of the signatories; and invoking the Unfair Contract Terms Act.

- **Tactical battles.** Even with the simplified Civil Procedure Rules in England and Wales, there is plenty of scope for tactical manoeuvres by each side's lawyers.

- **Cost.** The front-loading of cases caused by the reforms to the Civil Procedure Rules in England and Wales and the introduction of pre-action protocols creates greater immediate cost for anyone who wishes to enforce their contracts through the courts.

- **Time.** It can take years to obtain a judgment, during which time both management and in-house lawyers will have invested many valuable hours of work, distracting them from helping to sell their company's goods or services.

- **Appeals.** Clearly, there is the possibility of appeals, leading to long periods of uncertainty about the final resolution of the dispute.

- **Remedies.** The remedies that a court can offer are limited. Damages are generally the only remedy and can be very difficult to quantify. We have seen many cases where a litigant has finally succeeded after many years in winning his claim, but the damages awarded are paltry.

- **Enforcement.** Once you have obtained a judgment, you may still have considerable difficulty in enforcing it, especially if your counter-party is insolvent or of little financial worth. (*see article "Enforcing awards or judgements: why winning is really half the battle" at http://www.practicallaw.com/3-201-2127*).

We decided to go right back to first principles, by asking the question "are contracts really necessary?".

Initially, we found it difficult to get beyond the instinctive lawyer's reaction that without a contract, you have no rights; therefore contracts are essential in business. Years of study of the law seem to result in an unquestioning acceptance by many lawyers that contracts are the only means by which a business can make sure it gets the deal it has struck.

But we decided to challenge this seemingly blind faith in contracts as the only means of protection in business, by using the following three-stage approach:

- We started by considering the fundamental purpose of a contract.

- We then analysed the drawbacks of detailed written contracts.

- Finally, we looked at ways to ensure that a business gets the deal it has struck, without using contractual obligations.

What is the purpose of a contract?

When you think about it, the only purpose of a contract, as opposed to a general statement of what a business intends to do with its business partners, is to ensure that rights and obligations which the parties agree to can be enforced in court (or arbitration).

Put even more bluntly, the essence of a contract is the ability to force someone else to do something they don't want to do, or to obtain compensation for their failure.

As lawyers, we tend to view the ability to ultimately enforce obligations in court as the only way to ensure that a business gets the deal that it has been promised. Lawyers therefore tend to advise clients that they need detailed, watertight contracts that foresee and provide for as many potential future scenarios as possible.

But this approach ignores two important points:

- There may be more effective ways for businesses to ensure that they get the deals they have been promised.

- There are many drawbacks to detailed written contracts.

Clearly, it is always necessary to capture in writing the key terms of a deal, for example the price, specification and so on. This applies whether your business is buying a company, entering into a lease, taking out a loan or selling widgets.

However, whether you need to go further and provide detailed contract terms for a particular deal depends largely on the type of deal involved.

We started by acknowledging that there are many situations in which a detailed written contract is vital, for example share purchases, loan agreements, and guarantees.

However, there are also many other commercial relationships for which a much lighter legal touch can be taken. This is generally the case when the parties are in a continuing business relationship, rather than just carrying out a snapshot transaction.

These tend to be longer-term commercial relationships, for instance between a supplier and a customer. Distribution agreements also fall into this category.

The first thing to recognise about continuing commercial relationships is that it is actually very difficult to force a partner to continue with a long-term relationship if the contract ceases to be mutually beneficial.

If either partner in a continuing relationship ceases to believe that the deal they originally struck is in its best commercial interests, then the other party is often best advised to address that imbalance rather than try to compel the first party to perform its contractual obligations.

This may sound defeatist. But consider the alternative: you force your contract

Pathclearer in action at Scottish & Newcastle

Example 1: Can supply contract

We entered into a contract with a can supplier. The contract included an annual retrospective rebate payable to us if we bought a certain volume of cans during each year.

The external lawyers that we asked to review the contract for us spent several weeks amending the words, displaying the usual Pavlovian reaction by lawyers to stock clauses. For example:

- "Best endeavours" was amended to "all reasonable commercial endeavours".

- Change of control clauses were inserted and debated (even though we had no obligation to buy from the supplier, so we could simply let the contract "wither on the vine" if we did not like a particular takeover).

Crucially, our external lawyers did not amend the rebate clause. The can supplier went bust towards the end of the year. Our finance colleagues had factored into our accounts the retrospective rebate they expected to receive on the basis that we had already purchased sufficient cans, so they believed that we had already earned the money.

They were shocked to discover that they would not receive the rebate, worth over GB£200,000 (US$356,000). Instead, they were told they were an ordinary creditor and might get a few pence for each pound of debt.

In other words, they did not understand, and no one had explained to them, how insolvency law works.

This substantial loss could have been easily avoided by the external lawyers identifying this key legal issue of insolvency or counterparty risk, rather than fiddling around with unnecessary clauses in the contract.

The lawyers should have suggested simple protections, like:

- Paying the retrospective rebate monthly on account with an annual reconciliation, rather than annually. This way, we would only have been exposed to losing a month's worth of rebate; or

- Paying the rebate monthly into an escrow or trust account, so that it is ring-fenced from any liquidation.

Example 2: Outsourcing of services

We had a contract in place with a service provider. The contract was for a fixed term of ten years and contained over 200 pages, including the Service Level Agreement with key performance indicators (KPIs) and liquidated damages.

The relationship did not go well. We were disappointed with the service, but the service provider insisted that they were complying with their obligations in the contract. It was very difficult to work out who was correct. Hostility, loss of trust and respect crept into the relationship.

An opportunity arose to re-negotiate the contract. We proposed to the service provider that we should adopt the Pathclearer approach with the new contract. The key issue was to ensure that we could terminate the contract at any time by giving a reasonable period of notice (in this case, 12 months, because it was a core business service). We accepted that if we terminated, then we would have to meet the un-depreciated cost of any dedicated assets and a TUPE transfer of dedicated employees.

By giving ourselves the ability to terminate at any time, we avoided the need to have to negotiate detailed terms in the contract. There still needs to be a general understanding of the type and level of service to be provided. But this does not need to be spelled out in the contract, because we will not wish to enforce service levels through the courts. We would simply rely on our "nuclear button". If the service provider continually failed us, we would threaten to terminate.

This is a much more powerful way of influencing the service provider than a technical debate over whether they were complying with the words set out in the contract. We do not need to have that debate if we are unhappy with the service for any reason, or if we just feel that we could get better value in the market, then we can report the concerns to the supplier and walk away if they are not addressed.

This enabled us to substantially reduce the size of the new contract and save a lot of management time and the legal cost involved in negotiation. The relationship has improved, and the need to involve lawyers in minor disputes over service standards has been virtually eliminated.

partner to do something it does not wish to do. At best, you will get begrudging performance or work to rule (for example a service provider may deploy its weaker staff to work on your account if it is being screwed down on price, or a distributor may sell just enough of your products to prevent you from terminating). At worst, you have to take your partner to court, with all the problems that entails (*see box, The drawbacks of going to court*).

In a continuing relationship, neither of these scenarios is satisfactory.

In our view, it is often better to leave continuing commercial relationships largely to the irresistible forces of free market economics, rather than attempt to place continuing contractual obligations on each other.

In other words, commence doing business together, but make no commitments about the duration of your relationship or the level of business you will transact. Simply accept that for so long as the relationship remains mutually beneficial, you will continue to do business. If it ever ceases to be so, you will part company, but you will give a reasonable period of notice to enable an orderly transition.

This approach simply recognises the fact that economic forces are too powerful to be constrained by contracts.

If a contract blocks a person from doing something that is economically necessary for their business, the contract will often be overridden. This may be done lawfully: it is fairly easy to create credible legal arguments against apparently watertight clauses (*see box, The drawbacks of going*

to court for some of the ways in which clauses can be challenged).

Or it may be done unlawfully: by simply breaching the contract and facing the consequences.

Either way, it is unsatisfactory to get into a situation where the contract forces either party in a continuing relationship to do something they do not wish to do because it does not make economic sense for their business.

The key point is that contracts are unlikely to offer any real solutions when you are faced with an unwilling contract partner in a continuing relationship. It is almost always better to re-negotiate or simply walk away.

What are the drawbacks of detailed written contracts?

Conventional wisdom from the legal profession is that detailed written contracts are necessary to:

- Have certainty of the rights and obligations of each party.
- Avoid future disputes over what was intended.
- Provide compensation if either party doesn't do what it said it would do.

At Scottish & Newcastle we discovered that in the vast majority of our business relationships, these assumptions about the role of contracts were largely wrong. There are a number of reasons for this:

Certainty

The apparent certainty and protection of a detailed written contract is often illusory. Our experience showed that the more detailed a contract is, the greater the likelihood that there will be ambiguity or internal inconsistency within it.

"We digress briefly to make an important point of general application. Our civil and criminal courts are over burdened with work. At such a time, it is incumbent on judges, counsel, solicitors... to select and concentrate on points of real significance and to disregard the rest as dross". (Judgement by the High Court in Porter & Others v Magill [1997] EWHC Admin 1170)

Given the chance, lawyers are often keen to demonstrate their drafting skills by trying to predict and provide for every conceivable situation. This leads to highly complex lengthy contracts that can only be understood by the lawyers.

So the law firms win twice: they get paid for drafting the contract and they get paid each time they have to advise on what it means.

This obsession with the pursuit of certainty can be seen in the often bizarre attempts by lawyers to define industry terms. For example, I have seen external lawyers spend hours drafting and debating the precise legal definition of beer for insertion in a simple beer supply agreement.

Avoiding disputes

Without a detailed contract, business people who become involved in a dispute will generally discuss the issue and reach a sensible agreement on how to resolve it. It probably would not even occur to them that it is a "legal dispute", so they are unlikely to involve their lawyers.

However, where a detailed contract exists, the same parties will feel obliged to consult their lawyers. This is because:

- They believe that the contract contains the answers to every conceivable situation that may arise within their relationship - surely, that is the whole point of that rather impenetrable lengthy document that took so long to agree?
- They are often nervous that they may not fully understand the contract, and if they don't check with a lawyer then they may accidentally give away some benefit or right which the company is entitled to. This may expose them, as managers of the company, to accusations of negligence.

When the parties consult their respective lawyers, the lawyers have a natural tendency to support their client's position by emphasising the points that are in their client's favour and minimising the points that are against. This drives the parties' expectations further and further apart, until often only a court judgment can resolve the issue.

The whole process takes up large quantities of management time and can cost thousands of pounds.

There are long-term contracts we, at Scottish & Newcastle, have entered into which are so complex that each party has spent literally millions of pounds over many years trying to get a clear interpretation of their rights and obligations. The contracts were drafted by two City law firms, and run to several hundred pages.

Scottish & Newcastle and its counterparty to these contracts became so tired of having to consult the contracts, and then the external lawyers who drafted them, before they could do anything in

How did the business react to Pathclearer?

Logan Robb, Head of Direct Procurement:
"I am responsible for putting in place multi-million pound contracts for Scottish & Newcastle to purchase bottles, cans and other production materials. I have been working with Steve and his team using the Pathclearer approach for about five years. Compared to the old approach of convoluted 50 page contracts for every supplier, Pathclearer is a breath of fresh air. My suppliers also like it, because it speeds up and simplifies the contracting process, and lets us focus on the important commercial and operational issues."

Stuart Dalton, Venture Markets Director - Rest of the World:
"At long last, we have a legal document that reflects the operational reality of commercial partnership. Pathclearer enables my team to move swiftly to capture commercial opportunities and develop our business. "

Roy Boulter; Trading Director:
"In my nearly 30 years with S&N I have only ever had cause to refer to contracts on a handful of occasions and when I have had to do so, I am afraid that the contracts did not generally provide much help. So I have, for some time, been a little sceptical of the need for long, detailed contracts. The Pathclearer approach therefore makes eminently good sense to me."

the relationship that both parties now wish to terminate the contracts and start again. However, because their respective lawyers cannot tell them what the contracts currently say, the parties cannot place a clear value on what they currently have.

This means that the parties have found it impossible to negotiate a new, more flexible arrangement because they don't know what they might be losing or gaining in the process.

The parties have therefore become trapped within cumbersome and unclear contracts, and paralysed with no easy way out. This was not what was promised by the lawyers when they created the convoluted arrangements.

Complexity

As a deal mutates from a handshake or an exchange of correspondence by businesspeople, into a 20 or more page legal document, the client feels less and less "ownership" of it.

The client assumes that the lawyers must know what they are doing when his or her original letter is turned into an "agreement" and all the extra clauses are added in. The client feels less inclined and less able to check each draft of the agreement to ensure that the key commercial terms they have agreed are properly reflected. It becomes difficult to see the wood for the trees.

This is a dangerous state of affairs, leaving scope for companies to enter into contracts that are not properly understood by the managers who approve and administer them.

The general law

In the absence of a detailed written contract, the general law will in any event treat parties as having entered into a contract whenever there is money paid for goods or services, or some other business relationship is entered into. It will also imply certain legal terms into the relationship.

The general law tends to provide a fair middle-ground solution to most issues, and there are very few aspects of business dealings that are not in some way regulated by it.

The general law consists of case law and legislation:

- Case law (precedent or common law) has evolved over hundreds of years with the objective of providing fair and reasonable solutions to disputes between parties, including disputes arising in business. It therefore tends to be inherently "fair" or "equitable" in its substance and approach.

- Legislation is generally only created after a long process of intensive consultation with all affected parties and interest groups and scrutiny by many experts. So legislation also tends to strike a fair balance between the interests of various affected parties.

If anything, the general law that relates to business dealings tends to lean in favour of the customer. This is because in a market based economy, it is essential that customers have confidence when purchasing goods and services.

The beauty of simply relying on the "general law", rather than trying to set out the commercial arrangement in full in a detailed written contract, is that there is no need to negotiate the non-key terms of a deal.

In recent years, the general law emerging from the EU has shown a greater willingness to interfere with the long-standing principle in the UK of freedom of con-

How have the law firms reacted to Pathclearer?

Scottish & Newcastle requires the law firms on its panel to adopt the Pathclearer approach where appropriate. This is the reaction of a couple of the firms:

Liz McRobb, Partner and Divisional Director, Shepherd + Wedderburn's commercial division:

We support the basic premise of the Pathclearer approach: that it is essential to focus on why a written contract is needed and to use one only where there is a clear commercial justification for it. But there will be situations where, either for commercial or regulatory reasons, a written contract is very likely to be required. These include situations involving:

- Intellectual property ownership/licensing deals.

- Supply companies seeking reasonable notice provisions in key customer contracts.

- Regulatory compliance requirements.

- Sarbanes-Oxley.

Ultimately the board of any business which adopts a radical version of the Pathclearer approach should agree that approach with their key advisers and ensure that a proper risk assessment has been carried out which informs how and when the business chooses to enter into written contracts.

Roland Mallinson, Partner, Intellectual Property department, Linklaters:

The essence of the Pathclearer concept is to make contracts as simple as reasonably possible. As a concept, it is hard to argue against and, where appropriate, one we recommend.

It means the lawyers need to know both the law and commercial practice in order to advise on what may happen where a situation is not provided for in the contract. Here, litigation or insolvency experience can be just as valuable, if not more so, than contractual drafting skills.

The approach can also be made to work outside the UK, relying on terms implied under civil codes. These vary so local legal input is essential. As with all simplifications, there is a limit. For example, in international contracts, a choice of law and jurisdiction clause is essential. Likewise, for IP contracts, clarifying ownership and rights to use upfront is worthwhile. It could have averted litigation in two recent cases about implied assignment and licences of copyright.

So when next drafting an agreement, consider noting in bullet point form what is to be achieved. Instead of being a heads of terms, it might almost suffice as the first draft of a Pathclearer contract.

What does a Pathclearer contract look like?

A Pathclearer contract is just a short letter agreement that our business colleagues can send out on their own letterhead. It sets out the key terms of the deal (goods/services, price and so on) and then states that the general law will be allowed to govern any other issues.

It contains an indemnity in favour of Scottish and Newcastle against third party claims arising from Scottish & Newcastle using the supplier's goods or services, because this is something which the general law does not automatically provide, but which seems to be a fundamentally fair allocation of risk. It also states that English law applies, because we use this Pathclearer approach for international contracts.

Occasionally, other clauses may be added, depending on the deal. But the essence of Patchlearer is to avoid detailed contractual terms unless there is a clear need for them.

A template for a Pathclearer supply agreement can be found online at *http://ld.practicallaw.com/0-201-3576.*

tract. The Unfair Terms in Consumer Contracts Regulations 1999, which introduce a general requirement that contracts must be fair and easy to understand or else they are unenforceable, only apply to business-to-consumer contracts. However, there are indications that legislators in the EU wish to go further and introduce similar requirements for business-to-business contracts.

(*see* PLC *Corporate, Practice note, Contracts: structure and terms of commercial contracts www.practicallaw.com/0-107-4877 and* PLC *Corporate, Practice note, Supply Contracts: overview http://www.practicallaw.com/0-107-3646*).

Anachronisms

We cannot foresee the future and attempts to do so often look laughable in hindsight. Often, lawyers have to attempt to apply a clause written several years ago to today's facts and find that the answer produced is either nonsensical or arbitrary.

Time constraints

It is quicker to proceed without a detailed written contract, and this can be vital in business.

With detailed contracts, draft after draft tends to be produced. External lawyers often find it difficult to fully understand the terminology and practices of certain parts of the business, making the process slow and cumbersome.

There is also a tendency for parties to try to extract extra benefits or protections in a detailed contract, leading to a protracted tug-of-war. Often, the arguments revolve around non-essential clauses. Lawyers tend to exacerbate this confrontational approach. Sometimes the written contract is still being negotiated when the underlying job is already completed.

It is vital that businesses can move very quickly when concluding deals. If the need for detailed written contracts slows us down, this can cost us a lot in lost business opportunities.

Cost

The involvement of lawyers in drafting or reviewing detailed written contracts inevitably leads to greater costs. Management time must also be factored in as an expense when negotiating and settling the terms of a contract.

Within a business, every person is there solely for the purpose of profitably selling the company's goods or services. Any time or money spent on anything which is not necessary to achieve that purpose is an unacceptable cost and management distraction.

Souring of relationships

When drafting a detailed written contract (particularly where lawyers are involved) there can be a tendency to focus on worst-case scenarios. Often, the parties can get bogged down in debates over clauses and situations, which, in practice, are unlikely to ever arise. This can lead to the souring of relationships.

I'm sorry to have written such a long letter, but I didn't have time to write a short one.

Rudyard Kipling and many others

Even if you succeed in negotiating a tough written contract, some goodwill can be lost in the process. For instance, by insisting that your supplier signs up to detailed and specific obligations, you can actually de-motivate the supplier and turn them into "box-tickers" rather than competent experts who take pride in going the extra mile for their clients.

Lawyers have to accept that continuing business relationships are like butterflies. They are subtle and hard to capture. When you do try to nail them down, you can kill them in the process.

Not an insurance policy

If entering into detailed written contracts served as a kind of insurance policy, then it would be a relatively simple business decision to:

- Assess the "risk" (i.e. what would happen if you did not have the detailed contract).
- Calculate the "premium" (i.e. the legal costs and time involved in putting the contract in place).

However, in our experience, contracts very seldom provide clear-cut answers to disputes. When a breach of contract arises it is not like making an insurance claim, with a cheque then popping through the letterbox.

The contract is often ambiguous or silent on the particular matter in question. Obtaining compensation tends to be a protracted affair usually ending in a negotiated settlement that often bears little relation to the merits of the legal position and is based more on commercial issues such as a desire to continue doing business.

Going to court

There are further problems to face if a business actually tries to enforce its contracts in court (*see box, The drawbacks of going to court*).

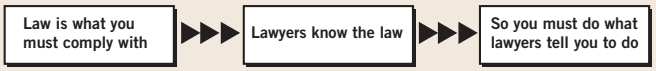
Having listed all these drawbacks, we realised that detailed contracts were not always a particularly effective way of ensuring that our company obtained the deals that it believed it had struck in the context of continuing business relationships.

So, the next question we asked was whether there are more ef-

Why do businesses use detailed written contracts?

How have lawyers managed to convince business people that they need detailed written contracts for all their business relationships?

An explanation may lie within the following flawed chain of logic, which some business people seem to have accepted as true:



The flaw in this logic lies in the first box. There is obviously some law which is compulsory and must be complied with. However the huge body of law that is contract law is completely voluntary.

You can decide at your entire discretion how long or short you want your contract to be. The law will intervene to imply certain terms in some situations. But it is largely up to you.

It is also interesting to speculate about how solicitors first became involved in preparing contracts for business deals. Going back to the early 1900s, the role of a solicitor was, presumably, principally to buy and sell houses, draw up wills, administer executries and "solicit" barristers to appear in court for litigation.

Business deals were done by businessmen. They tended to be dealt with by a simple handshake and the principle of "my word is my bond", or perhaps an exchange of correspondence. There was probably no notion back then that lawyers were in a particularly advantageous position to record the terms of a business deal.

Clearly, at some stage, lawyers were introduced into the process of doing business deals. Presumably, once one business had involved its lawyers, other businesses felt they had to fight fire with fire.

As a result, lawyers have now entrenched their position in the process. However, there is still no inherent reason why lawyers are required to be involved in the negotiation and drafting of most commercial contracts.

The mere fact that business people often refer to having "landed a contract" rather than having "won more business" seems wrongheaded. A contract is, in essence, a legal right to compel someone to do something they do not wish to do. In the context of having agreed a continuing relationship with a customer, this is a very negative concept. It suggests that a company can now take its customer's business for granted, because they have signed a contract so they are obliged to continue doing business with it, regardless of whether it continues to offer good value.

fective ways to achieve this, without the use of contractual compulsions?

Are there other ways of getting what you need?

We identified an intangible yet powerful force in successful continuing business relationships, which we named "commercial affinity".

Commercial affinity arises in mutually beneficial commercial relationships. It is the attractive force that keeps the parties together. It results from the desire by each party to continue doing business with the other, because it is economically sensible to do so.

A customer will have commercial affinity with a supplier who constantly strives to meet its needs and who demonstrates that it is the best supplier in the market.

A supplier may not have any legally binding commitment to continue to supply at a particular price, or at all. But it will have the strongest motivation known to man, namely a desire to continue doing business in order to earn more profit.

If the customer ceases to be satisfied, for any reason at all, it simply tells the supplier and they try to find a solution. If not, they just walk away from the relationship.

There is seldom any need for detailed Key Performance Indicators (KPIs) and penalties to be drafted into the contract.

How can you create commercial affinity?

If you are a customer, you have access to a big nuclear button. You have the right to walk away, depriving the supplier of future business. You don't therefore need a myriad of tactical rights and obligations in a contract.

If you are a supplier, you may not like the idea that your customer could walk away at any time. But you have to face the reality of the situation. Would you really want to try to force an unwilling customer to continue to do business with you? Would it not be better to accept that the only way you will ensure that a customer continues to give you its business is if you continue to delight the customer with your product and price?

The concept of MAD (mutually assured destruction) applies equally in commercial relationships as in global warfare: neither party is likely to be trigger happy with the nuclear button, because walking away is likely to cause significant disruption for both of their businesses.

But, nine times out of ten, the fact that either party could walk away from the relationship is enough to keep the other party honest and keep the relationship running. Again, this is commercial affinity. The fact that there is nothing in writing to state what must happen in a particular situation means that the parties are free to agree a mutually acceptable solution, failing which they can walk away without any impediment.

There are certain situations in which some unwinding of the relationship will be required on termination. For instance, investments made at the outset may need to be compensated for. These exit arrangements (such as obligations to buy dedicated assets from the supplier, or the effects of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE)) do need to be spelled out in the contract.

It is ironic that law firms, perhaps inadvertently, adopt a Pathclearer approach for their own relationships with their clients. Until the relatively recent requirement for UK law firms to use en-

PLC Law Department

Related information

This article can be found on PLC Law Department at http://ld.practicallaw.com/3-201-3377. The following information can also be found on www.practicallaw.com/lawdepartment:

PLC Corporate, Practice note
Contracts: structure and terms of commercial contracts — www.practicallaw.com/0-107-4877

PLC Corporate, Practice note
Supply Contracts: overview — www.practicallaw.com/0-107-3646

PLC Cross -Border
Enforcing awards and judgements: why winning is only half the battle — www.practicallaw.com/3-201-2127

PLC Law Department, Document exchange
Template Pathclearer supply agreement — www.practicallaw.com/0-201-3576

gagement letters, introduced by the Law Society of England & Wales, most law firms did not attempt to put in place any detailed contracts with their clients. The firms seemed to instinctively recognise that continuing relationships would not be assisted by a piece of paper which attempted to demarcate responsibilities, stipulate hourly rates and payment terms and perhaps even limit liability. If a client is unhappy with the service provided, the firm will have to address that. Contracts will not aid that process. Many clients also find it tedious and slightly bizarre that they should have to negotiate a contract with the lawyers that they wish to obtain advice from. So why do the same law firms not apply this logic when creating commercial contracts for their clients?

In summary, in the large majority of continuing relationship contracts that we have encountered, the lack of detailed contractual rights and obligations actually allows the relationship to flourish.

The lesson we have learned at Scottish & Newcastle is that commercial affinity is more effective than a legal straitjacket.

Steve Weatherley is head of the UK legal department at Scottish & Newcastle.

If you are interested in finding out more about the Pathclearer approach to commercial contracts please contact Mary Mullally at mary.mullally@practicallaw.com