

LEGAL ADVICE ARTICLES

CONTRACTS

REQUISITES FOR A LEGALLY BINDING CONTRACT

- I am often surprised at the almost 'casual' view taken by some individuals I chat to at the various conferences about the legalese pertaining to their business – even the simple question as to what constitutes a binding contract.
- Well, as I always say, don't assume (too much) knowledge on the part of your client, so let me not fall into the same trap!
- Let's make one thing clear right at the outset - a verbal agreement DOES constitute a legally enforceable contract
- The DEFINITION of a contract is *"An agreement entered into with the intention of establishing a legally binding obligation(s)"* i.e. nothing about it being in writing!
- A contract consists of the following COMPONENTS:
 1. Offer and acceptance
 2. A legally binding obligation
 3. Consensus ad idem
 4. Performance must be possible
 5. Performance must be permissible
 6. The parties must have the capacity to contract
 7. Formalities (if any) have to be complied with
 8. Obligations must be certain or ascertainable
- Consider the first requirement, namely 'OFFER AND ACCEPTANCE' - The 'transactional cycle' would normally be initiated by an enquiry from the customer. Such an enquiry could come via various mediums: a telephone call from a new or existing customer, an e-mail, via your website or a new customer popping into your offices. Your response to the enquiry will constitute your OFFER to the customer. Once accepted, that ACCEPTANCE constitutes the 'final episode' in the sequence and you now (should) have a legally binding contract.
- At this point it must be quite evident what the MOST IMPORTANT IMPLICATION of the above is: if you say the wrong thing or omit certain facts and the customer accepts, the customer will be getting something you did not really (want to) offer him or her! 'Yes', you can attempt to contest that on the basis of e.g. a lack of consensus (More about that later), but would it not be better to have systems (e.g. a properly structured 'transactional cycle') in place that assist you in saying the right thing and/or handle the enquiry the right way and/or 'builds in' safeguards' (e.g. starting with an estimate and incorporating your standard terms and conditions)?

TYPES OF CONTRACT

How does the first requirement (for a binding contract), namely '**OFFER AND ACCEPTANCE**' impact on your business? The 'contract cycle' is initiated by an enquiry from the customer:

- a telephone call, an e-mail, via your website or a new customer popping into your offices.
- Your response to the enquiry will constitute your OFFER.
- The ACCEPTANCE constitutes the 'final episode' in the sequence
- You now (should) have a legally binding contract.

The MOST **IMPORTANT IMPLICATION** of the above is: if you say the *wrong* thing or *omit* certain facts and the customer accepts he/she will be getting something you did not really (want to) offer him/her!

- You can attempt to contest that on the basis of e.g. a lack of consensus; **but**
- It is better to have **systems** in place that assist you in saying the right thing and/or handle the enquiry the right way and/or 'builds in' safeguards'.

TELEPHONE ENQUIRY:

- Confirm the telephone conversation via e-mail.
- It is then up to the customer to dispute (any of) it.
- The offer extended by you via e-mail and the ultimate acceptance **must** incorporate your standard terms and conditions ('STC').

E-MAIL:

- The comments in the previous paragraph will apply to such communication.
- The prevailing legal view seems to be that an agreement concluded via (exchange of) e-mail is binding.

WEBSITE 'HIT':

- It is imperative not only that your website contains your STC **but**
- It must work on the '**click and accept**' principle

'OFF THE STREET'

- Such a person must sign your STC as well.
- This can be a business application form which captures all the pax details, serves as a marketing tool and also contains your.

VERBAL AGREEMENTS – CONSENSUS & ESTIMATES

Is a verbal agreement a **legally binding and enforceable contract**?

- "Yes" - it's not a prerequisites that an agreement be in writing.
- Telephone calls constitute a perfectly **legally binding** contracts

A **written agreement** is preferable:

- Proof: In lieu of a written document a court will have to assess the factual situation based on the oral evidence presented
- Best done by having a **standard agreement** (e.g. standard trading conditions) to which can be added the facts in question

It is imperative that any such an agreement reflects **consensus of the parties**:

- There must be the least possible or ideally no difference between **expectation and deliverable**
- There is a direct correlation between a disgruntled client and the size of the 'gap' between the client's expectation and your deliverable.

How do you **avoid this 'consensus gap'**?

- areas where your business and the products and services **create expectations** and make sure that you can deliver.
- Keep your records and facts updated
- Provide fully detailed estimates and/or quotes and ensure that the client vets each of these and **signs off** the final version.

CONSENSUS

A few years ago the concept of consensus was the buzz word in politics – in the law of contract it is ALWAYS the buzz word i.e. it is one of the so called '**essentialia**' for **there to be a binding contract**. As you know I always stress the importance of ensuring the there must be the least possible or ideally no difference between expectation and deliverable, i.e. there is a direct correlation between a disgruntled client and the size of the 'gap' between the client's expectation and your deliverable. If the client can prove such a lack of consensus, he can argue that there is **no binding contract**, no terms and conditions (i.e. your STC) and no obligation on him or her to pay you!

How do you **avoid this 'consensus gap'**?

- Initiate your dealings with your clients by preparing an estimate, thereby **reducing the possibility of the misunderstanding** and following it up with a quotation, the essence and lay-out of which will (or should) by and large reflect the estimate, thereby avoiding duplication
- Look at the areas where your business and the products and services you present ('The third party providers': TP) **create expectations** and make sure that you and the TP can deliver & can **deliver what the customer expects/anticipates**.
- Keep your **records and facts** updated.
- Ensure that the **brochures and websites** of the TP are up to date.

- Ensure that you have proper & up to date **written & signed agreements with TP** and that such agreements contain suitably worded warranties and indemnities (see the '*Crown Jewels*' article).
- Provide fully detailed **estimates, quotes & orders** and ensure that the client **vets & signs** each of these AND that they ALL include/refer to your STC .

CAPACITY TO CONTRACT

It is a **requirement** for a legally binding and enforceable contract that the parties have the **capacity to contract** or has been **duly authorized** by the party or parties he or she purports to represent.

A recent change in the law now means an individual can enter into a binding contract **at age 18:**

- Agreement with one under that age is NOT a binding and legally enforceable contract.
- View the **identity document** of the party you intend contracting with
- If under 18: obtain the signature of a **parent or legal guardian** of the person.

How do you deal with '**group bookings**'?

- Make sure that the 'team leader' is 'duly authorized' to contract on behalf of the group.
- The power of attorney must be worded as widely as possible.
- All your documents must contain or refer to your STC.
- Get the STC of the third party service provider signed.

Dealing with separate legal entities such as **companies and close corporations** ('the entity'):

- The individual who purports to represent the entity must be 'duly authorized' (e.g. a resolution)
- The resolution must be adequately worded
- If it is for a personal booking/order, ensure that your STC **and** third party service or product provider's are signed
- Do NOT try to rely on 'ostensible authority'

PERFORMANCE MUST BE POSSIBLE

In the recent issues we have been discussing the **requirements** that are required to ensure that your '*agreement*' constitutes a legally binding and enforceable contract.

Well, something that is often glossed over is whether or not the deliverable you have offered ***can be delivered!*** It is a requirement for a valid contract that the performance envisaged by the parties and as provided for in the agreement, must be possible:

- So, if the product or service you've undertaken to provide your client or customer with is not available, then the performance envisaged is not possible and no contract will come into existence and no rights or obligations will arise from the communications between the parties.
- The relevant time for determining whether the performance is possible, is the time when the parties enter into the agreement.
- If the performance is possible at that time, but becomes impossible later, then a legally binding agreement was established at the time of signature, but the issue may be addressed on various possible bases: (1) misrepresentation; (2) breach of contract & (3) force majeure.
- If you are the primary contracting party ('the principal'), then your STC is important.
- Conversely if you are acting as an agent utilizing the services or product of a third party, then such third party's STC should also be applicable.
- Ensure that adequate insurance arrangements have been made by/for the customer where possible
- The situation would of course be different if the agreement is conditional upon a certain event taking place/something being done or if it contains a guarantee or warranty

PERFORMANCE MUST BE PERMISSIBLE

In the recent issues we have been discussing the **requirements** that are required to ensure that your '*agreement*' constitutes a legally binding and enforceable contract.

Well, something that is often glossed over is whether or not the deliverable you have offered or requested ***MAY be delivered!*** It is a requirement for a valid contract that the performance envisaged by the parties and as provided for in the agreement, must be permissible:

- The performance envisaged must be permissible in terms of the current legal regime
- The legal regime = laws on the statute books + the custom and norms of society
- Bad debts: Use of "debt collectors" ('enforcers') has been resorted to by many a legitimate business BUT as these because "contracts" are *contra bonos mores* they are null and void and no rights or liabilities will flow from them!

- So a bribery agreement is also void per se (Extel Industrial vs Crown Mills) & thus unenforceable.

PERFORMANCE MUST BE DETERMINED OR DETERMINABLE

- The performance must be determined in or determinable from the contract i.e. the product or service to emanate from the contract must be specifically described in the contract or there must be in the contract a clearly worded formula or definition from which the product or service can be determined.
- If the contract is so poorly worded that the performance is not or cannot be determined with any degree of certainty, then the agreement will be declared to be “void for vagueness” and will be of no force or effect. The court will not look to extraneous facts or factors.
- As stated above, the agreement can therefore either describe specifically what the performance is to be e.g. the customer will fly from Johannesburg to Cape Town on SAA; the price will be increased by 10% annually; or the agreement can provide a formula e.g. the customer will fly from Johannesburg to Cape Town on the cheapest available flight or the price will be increased in line with the Consumer Price Index (CPI).
- I have found this aspect is often overlooked in property leases with reference to the square meterage and bank rates on interest (which bank?).
- Use of words such ‘*as soon as possible*’ or ‘when I can’ are also commonplace, but should be avoided (Sadie vs Annandale).
- Take note also of the following interesting extracts from case law:
 - ‘*A mistaken motive, even if common, cannot invalidate a contract, unless the motive is expressly made part of the contract or a misrepresentation is present*’ (van Reenen Steel vs Smith).
 - The following wording was also held to be void for vagueness: ‘*in the event that (the investor) is not satisfied with the venture returns*’, as, in the context of the contract, it did not create ‘*certain or ascertainable terms*’ (Namibia Minerals v Benguela Concessions)

CONTRACTS – IMPLIED OR TACIT TERMS

Parties from time to time **omit something from an agreement**, be it aspects of the product or service or the related performance. What can be done & how do they go about ensuring that this implied or tacit term forms part of their contractual relationship? When can an aspect, term or requisite be implied or tacitly accepted as being part of an existing contract?

When the **court** assesses the application by a party or the parties to a contract to incorporate a tacit or implied term, it **will consider the following**:

- It must not clash with any express term or terms of the contract.
- There must furthermore be (‘sufficient evidence of’) consensus amongst the parties and more so when the implied term has far-reaching implications.
- The clause was contemplated as included

- The term to be implied must '*be of exact and clear formulation*'.
- The common intention, surrounding circumstances & the conduct of the parties
- It must be apparent that the parties '*must or would necessarily have agreed to (it), but which remained unexpressed*
- It must not be '*inconceivable that both parties, without saying a word, would have contemplated such a term*'

When the terms of the contract are '**clear and unambiguous**' and the tacit term is '**at variance with the express terms**', the request to import an implied or tacit term will be declined. (The case of Kelvinator v McCulloch 1999).

The court stressed the '**common intention**' (consensus) requirement in the case of Multilateral Motor Vehicle Accidents Fund v Thabede (1994) and in the case of Union Govt. v Foux (1916) the court indicated that they would question whether the parties **applied their minds** and if it appears from the express terms of the contract that they had done so, it may be will assumed that the parties had intentionally left out the clause or aspect to be implied.

The moral of the story? If you want something to be contained in the agreement, don't leave it to speculation!

CONTRACTS – CONTRACT NEGOTIATION

- Ensure **consensus** - minute meetings & agree on content & have a 'WWW' (who, what & by when) action list
- **Confidentiality** is crucial – all parties involved in the negotiating process to sign a confidentiality, non-disclosure and non-circumvention agreement ('NDA') at an early (as possible) stage.
- Ensure that the part you are negotiating with is not only a decision maker, but is also **duly authorized** to enter into discussions with you and to sign the ultimate contract.
- If there are issues of concern to either or both parties or matters that have to be resolved before an agreement can be concluded, don't 'walk away' without an agreement – simply incorporate these aspects as '**suspensive conditions**' i.e. matters that have to be resolved before the agreement is of full force and effect.
- 'Talk is cheap but money buys the whisky' the saying goes - Any **warranties and guarantees** must be in writing and part of final written agreement.
- Likewise include your standard terms and conditions ('STC') in any tender, proposal and request for a proposal ('RFP').
- Contract negotiations can take days, weeks or sometimes months to reach final agreement. Cover the **interim period** by using my '**Letter of Commitment**' i.e. a bridging (but binding) agreement as opposed to a (non-binding) MOU, letter of intent or letter of comfort.

CONTRACTS – CONTRACT DRAFTING

There is nothing wrong with **DIY** but involve your lawyer and be guided by the following **principles**:

- 1 **‘Keep it simple’**: pretty obvious – it means it is easier for everyone to understand it!
- 2 **‘Lots of definitions’**:
 - it means everybody will apply their minds
 - consensus is reached on the meaning of key issues
 - it shortens the agreement
- 3 **‘Addendums’**:
 - this goes hand in hand with next point
 - it means that if anything changes in the future you simply have to change the addendum or add a new one, sign and attach it to the agreement
 - it often also means you don’t have to involve the lawyers!
- 4 **‘Commercial components’**
 - this pertains to factual matters which by definition is the province of the parties
 - it does (more often than not) require a legal mind to refine it but there is no harm in the parties themselves preparing this in draft
 - it can be contained in addendums
 - the (often) long hours refining this does not mean concomitant legal fees!
- 5 **‘Create Templates’**
 - Aim to prepare a document that can be used as again in future
 - It will also assist in the parties applying their minds
 - It will save legal fees in future

CONTRACTS – CONTRACT MANAGEMENT

This one of the seriously neglected areas in ANY business, small, medium and large – contracts are entered into but not managed i.e. there is no, very little or inadequate follow up, so may I suggest you consider applying the following **principles**:

SIGNING OF THE CONTRACT

- Ensure that all the parties signing are duly authorized.
- Each page of the contract & any amendment must be initialed
- The principal parties to the contract must sign the last page if full
- Insert place & date the contract is signed
- Sign sufficient copies so that each party has an original
- Date and number each draft
- Mark changes clearly, identify who made it & why

- Keep minutes of meetings pertaining to negotiations
- Keep ALL drafts on your PC

BACK AT THE OFFICE

- Go through the contract & check that all of the have been complied with
- Make a certified copy
- Keep in an agreed, safe place
- Make an executive summary of the key components
- Record separately essential information e.g. renewal, termination and escalation dates AND ensure that these are diarized (AND monitored)!

LETTER OF COMMITMENT– A ‘BRIDGING’ AGREEMENT

You should **‘NOT start doing business until the contract has been signed!’** Well, ‘Easier said than done’ you no doubt whisper under your breath and it is hard to imagine how it is possible to implement my advice.

- **Delays in producing a final draft** are not always the fault of the lawyers - There may be various other factors or a combination of factors:
 - The matter may be extremely complex;
 - The parties may haggle over minor details;
 - Egos often get in the way;
 - One party may have an overseas principal waiting for board approval.
- So you are **caught ‘betwixt and between’**: on the one hand you do not want to proceed without a written agreement and on the other the finalization thereof may take weeks and in the process an opportunity may be lost. The answer lies in a letter of commitment (‘LOC’).
- **Why a LOC?** Some good reasons for parties to sign a LOC are:
 - It ‘locks’ parties in;
 - It commits parties – like people who keep saying ‘We *must* get together’: if you are serious about that get out your diary and commit to a date!
 - If either of the parties are reluctant or in doubt about the intent of any of the other parties’, the LOC deals with that
 - It gives the parties an opportunity to complete outstanding issues (even carrying out a due diligence) and to negotiate ‘in comfort’
 - It ‘bridges’ the time period alluded to above
- **What is a LOC?**
 - You may well wonder how it differs from other similar concepts such as a letter of intent, memorandum of understanding, letter of comfort, heads of agreement and a gentleman’s agreement.

- The latter is generally accepted as not being legally binding as it lacks one of the key components namely intention to enter into a legally binding obligation.
- However, all the others are essentially constitute same thing and the main observation would be to ascertain whether the document constitutes a binding agreement or is '*an agreement to agree*' (which the LOC is not)

ENFORCING YOUR CONTRACT

- **HOMEWORK TO DO BEFORE YOU EVEN CONSIDER**
 - How enforceable is your contract? Role of LOI, MOU & HOA
 - Have the requisites for a binding contract been met?
 - Have you considered the impact on your stakeholders/
 - Have you consulted all the relevant parties?
 - The role of the SLA
- **YOUR AVAILABLE OPTIONS**
 - What these are depends on your contract
 - Should you meet first & if so, with whom, how & on what terms?
 - Have you considered mediation or arbitration & if so what are the implications?
 - How to do go about litigation?
 - Have you considered all the direct, indirect & non-tangible costs?
- **PREPARATION**
 - What role does contract management play?
 - Document management is imperative – how to implement
 - List documents, parties & facts
 - Obtain advice on evidence & the merits
 - Obtaining a quote from your legal team is no longer a 'no no'!
- **IMPLEMENTATION**
 - Prepare & work to a checklist
 - Check on the availability of parties
 - Choice of legal representatives & role of in-house legal advisor
 - Narrow down the issues
 - Reassess
- **MITIGATE**
 - Common law duty – what have you done?

- Implied/ tacit terms – applicable?
- Rectification – when can you apply for?
- Contract v Delict – can you sue in the later when you have the former?
- Agree to disagree – There's no shame in walking away – How deep are your pockets?

TERMS & CONDITIONS OF BUSINESS (A.K.A. 'STANDARD TERMS & CONDITIONS')

STANDARD TERMS & CONDITIONS ('STC') – WHY?

- **A new challenge has evolved – the litigious tourist!** Note should be taken especially of the EC regulations by those in the industry dealing with tourists from EC countries
- **Prevention** is better than cure & even if you can't prevent a claim, STC will assist you in negotiating a reasonable settlement.
- The best method of prevention is ensuring that you have the **proper documentation and systems** in place AND that these are implemented AND managed.
- Ensure that the client accepts ALL your STC at the very **first 'interface'** (in the critical transactional path – 'CTP') e.g. quote, estimate or website.
- Your STC should appear on or be referred to **in ALL your documentation** in the CTP.
- It will not only **protect you**, your employees, your business and (depending on the wording) your subcontractors, but should assist you in obtaining a reduction in your insurance premium.
- It will also make any client think twice about lodging a **'dubious' claim**.

STANDARD TERMS & CONDITIONS ('STC') – CONTENT

- STC must 'spell out' is that **all business** is conducted in terms of the STC
- Stipulate the **capacity in which you are acting** i.e. principal or agent
- **Travel agents** by and large are just that i.e. 'agents'
- **Tour operators** as well but only in their relationship with the destination, product or service they are selling e.g. the overseas resort ('third party')
- Indicate the role of the **STC of the third party**

- The terms of **payment** and consequences of non- or late payment
- **Cancellation:** result of such cancellation & of the STC of third party
- **Insurance** – recommendation & what if not taken
- **Health risks** linked to a suitable disclaimer
- **Passports and visas** - leave it to a specialist and/or have a disclaimer
- **Limit your liability**
- Exclude claims due to **force majeure & causes beyond your control**
- Specify which **law and jurisdiction** applies
- Have a **breach clause**
- Address **legal fees**
- Provide for **alternative dispute resolution** ('ADR')
- Indicate that the **STC contains the complete and exhaustive terms and conditions** that govern the relationship between the parties

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STATUTES

THE CONSUMER PROTECTION BILL – ‘THE VERY LATEST’ (ABRIDGED VERSION)!

AIMS

- GREATER CONSUMER PROTECTION

*Promote a **fair, accessible and sustainable marketplace** for products and services and to establish **national norms and standards** relating to **consumer protection**, provide for improved standards of consumer **information**, to prohibit certain **unfair marketing and business practices**, to promote **responsible consumer behaviour**, to promote a legislative and enforcement framework for **consumer transactions and agreements**,*

- A NUMBER OF ACTS ARE ALSO REPEALED I.E.

*The **Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988)**, the **Trade Practices Act, 1976 (Act No. 76 of 1976)**, the **Sales and Service Matters Act, 1964 (Act No. 25 of 1964)**, the **Business Names Act, 1960 (Act No. 27 of 1960)**, the **Businesses Act, 1991 (Act No. 71 of 1991)**, the **Price Control Act, 1964 (Act No. 25 of 1964)**, and **Sections 2 to 13, and sections 16 to 17 of the Merchandise Marks Act, 1941***

IMPORTANT DEFINITIONS

- **“advertisement”** means any direct or indirect visual or oral communication transmitted by or inscribed, recorded, encoded upon any medium,
- **“consumer”**, includes franchisees and a user of goods and a juristic person (which in turn includes associations)

- **“electronic communication”** means communication by electronic transmission, incl. by telephone, fax, sms, bluetooth, wireless computer access, *email, website, internet connection*, or any similar technology

THE CONSUMER’S RIGHT TO CHOOSE

- **REPAIR OR MAINTENANCE SERVICE** – must provided an **estimate & the consumer must authorize him to proceed**
- **DIRECT MARKETING** - transaction may be **rescinded by the consumer** without reason or penalty, by notice to the supplier **within 5 business days**
- **BOOKING, RESERVATION OR ORDER** – supplier may not impose any cancellation fee if the consumer is unable to honour contract due to **death or hospitalization** of the person for the booking, reservation or order was made
- **DESCRIPTION OR SAMPLE** - goods delivered must in **all material respects and characteristics** correspond to that which an ordinary alert consumer would have been entitled to expect
- **LARGER QUANTITY or MIXED WITH GOODS OF A DIFFERENT DESCRIPTION** – consumer can reject or accept, BUT only has to pay for correct goods & deal with balance as unsolicited
- **UNSOLICITED GOODS** - consumer can **retain** or **return** the goods to the supplier at the risk and expense of the supplier or deliverer BUT a **‘person has no obligation to pay a supplier for unsolicited goods or services’**

STANDARD TERMS AND CONDITIONS

- **ANY BODY ADJUDICATING A DISPUTE IS INSTRUCTED TO:**
‘strictly interpret the document to the benefit of the consumer’ & must limit any ambiguity or restriction, limitation or exclusion to that which a reasonable person would ordinarily contemplate or expect’
- **ANY DEALINGS WITH THE CONSUMER MUST NOT**
 - *‘frustrate or defeat the purpose & policy of the act’*
 - *be ‘unconscionable, misleading or deceptive’*
 - *‘constitute unfair discrimination’* in terms of the promotion of equality and prevention of unfair discrimination act inter alia in the application of *‘the terms and conditions of a transaction’*
- **CONSUMER MUST BE GIVEN COPY OF THE CONTRACT & ANY CHANGES**
- **ANY CONTRACT WITH THE CONSUMER MUST USE ‘PLAIN LANGUAGE’**

- **EXEMPTIONS FROM LIABILITY - NOT BE BINDING UNLESS THE SUPPLIER DOES THE FOLLOWING BEFORE THE AGMT IS ENTERED INTO & PAID FOR-**
 - *draws the attention of the consumer to the 'fact, nature and effect'*
 - *this must be done in 'plain language'*
 - *if it is a sign, it must be 'conspicuous'*
 - *obtains the consumer's signature or initial*

- **IF CONSUMER HAS A LITERACY, LANGUAGE OR SIGHT IMPAIRMENT, THE SUPPLIER MUST DO FOLLOWING -**
 - *convey it to the consumers that it 'overcomes the impediment &'*
 - *the consumer 'assents' thereto*

- **IT IS 'UNREASONABLE TRANSACTION' & NOT BINDING IF GOODS/ SERVICES ARE 'MATERIALLY UNSUITABLE FOR CONSUMER'S PURPOSES'**
 - *if supplier 'knows or reasonably ought to have known'*
 - *based on 'interaction between the supplier and the consumer' and*
 - *even if goods/services are 'reasonably' fit for customary purpose'*
 - *& depending on consumer's 'age, education, experience & sophistication'*

MARKETING & PROMOTION

- **MUST NOT BE 'MISLEADING, FRAUDULENT OR DECEPTIVE'**

- **'BAIT MARKETING' IS ACCEPTABLE BUT ENOUGH GOODS/SERVICES MUST BE AVAILABLE FOR 'REASONABLY ANTICIPATED DEMAND'**

- **'NEGATIVE OPTION MARKETING' CONTRACTS WILL BE VOID AB INITIO**

- **DIRECT MARKETING IS LINKED TO 10 DAY COOLING-OFF PERIOD & INCLUDES IF CONSUMER 'IS UNABLE TO CHOOSE OR EXAMINE THE GOODS**

- **ELECTRONIC MARKETING : CONCLUDED VIA TELEPHONE, FAX OR INTERNET:**
 - *copies of any agreements involved in the transaction (i.e. third party service providers!!) must be provided*
 - *the consumer must be given a chance to 'correct errors', confirm the details' & to 'accept or decline' the agreement*

BROCHURES

- SUPPLIER MUST ENSURE & IT IS AN **IMPLIED TERM** OF THE AGREEMENT THAT WHAT THE CONSUMER GETS '**CORRESPONDS WITH THE DESCRIPTION**'
- SUPPLIER MUST PROVIDE THE CONSUMER WITH THE **IDENTITY OF THE THIRD PARTY SUPPLIER**
- A SUPPLIER MAY NOT **DISPLAY** (E.G. IN 'A CATALOGUE' OR ON A 'SHELF' OR 'MOUNTED FOR DISPLAY') ANY GOODS '**WITHOUT DISPLAYING A PRICE**'
 - **it must not be** '*misleading, fraudulent or deceptive*' and the supplier **must**
 - '*fail to correct an apparent misapprehension*'

DEPOSITS

- IF HELD '**FOR AT LEAST 40 DAYS**', IT '**MUST CREDITED WITH INTEREST AT RATES DETERMINED BY ...THE PRESCRIBED RATES OF INTEREST ACT**'

OVERSELLING & OVERBOOKING

- **OFFENCE** TO ACCEPT PAYMENT FOR THE PROVISION OF GOODS OR SERVICES WHEN THE SUPPLIER
 - '*has no reasonable basis to assert an intention to supply; or*
 - '*intends to supply (something) materially different*'
- SUPPLIER WHO '**MAKES OR ACCEPTS A RESERVATION**' AND **FAILS TO DELIVER** BECAUSE '**OF INSUFICIENT STOCK OR CAPACITY**' MUST –
 - refund '*any amount paid ... with interest*' (see above); **and**
 - compensate (for a) 'breach of contract... the full contemplated price'

SAFETY AT SPORTS & RECREATIONAL EVENTS ACT 2009 ('the Act')

- **It is aimed at the physical safety of people attending** sports & recreational events and includes a '**race, tour or procession along a route**' ('the Events')
- **It determines minimum safety and security standards**
- **The impact is pervasive and the Act applies to** all 'event organisers' i.e. anyone who does one or more of the following: **plans, is in charge,**

manages, supervises, sponsors or 'has a material interest' (not defined) in the Event

- **A 'stadium' or 'venue' is defined as an 'enclosed or semi-enclosed structure' that has a 'spectator capacity of at least 2000' (seating or standing)**
- **Parties involved with an Event i.e. Event Organisers, the owner of a stadium or venue need to meet various prescribed requirements and in the process have to work with inter alia the event safety and security planning committee ('the Committee'), the latter being appointed by the SAPS (16)**
- **Event organisers must annually and at least 6 (six) months before an Event submit a schedule of Events/detail of the Event to the SAPS**
- **The SAPS will determine the category of risk of the Event based on a number of factors such as expected attendance [5 (7)]**
- **Safety certificates for Venues must be applied for annually (8)**
- **This also applies to new (9) or alterations and extensions to existing Venues (10)**
- **Event ticketing volumes will be linked to the risk category**
- **If sales pertain to a high-risk Event, then sales on the day of the Event may only take place 1 (one) kilometre from the Venue**

PROTECTION OF PERSONAL INFORMATION ACT ('PPI ACT') 2010

- Purpose: gives effect to and balances right of privacy with right of access to personal information
- Applies to party accessing the information even if such party is not domiciled in RSA
- PPI will not apply if it (i.e. access/disclosure) is in the public interest or if a 3rd party can prove that the right to access outweighs the right to privacy (Chapter 4 – compare PAIA)
- Personal information ('PI') may only be 'processed' (i.e. collected, recorded, stored, disseminated & merged) if the 'voluntary & informed' consent of the person to whom the PI relates is obtained (S 10)
- It is also subject to the purpose being 'adequate, relevant & not excessive' (S 9)
- Information Protection Regulator ('IPR') to be appointed to adjudicate disputes and requests for exemptions (Chapter 5)
- Notification (to the IPR) is required prior to 'processing' (accessing, using, etc) personal information (Chapter 6):
 - This includes names, addresses & identification details as well as purpose

- However there is provision for exemption and it may well be that bodies such as ASATA & SATSA may be able to apply for such an exemption for limited and prescribed purposes
- As with the CPA Codes of Conduct ('COC') are to be introduced (Chapter 7):
 - It may well be that, again as per the CPA, each commercial sector e.g. tourism will be engaged and tasked with drafting their own pro forma COC
 - These COC must also provide for a complaints procedure
 - The IPR may provide guidelines, must keep a record of and may review COC
- Direct marketing is specifically dealt with due to its invasive nature (Chapter 8)
 - It is categorized as communications which are electronic, via directories or which involve 'automated decision making'
 - If a recipient chooses not to avail themselves of the facility, the marketer may not approach the recipient again via that medium – compare current spam legislation
- Cross border and international access and exchange of information will not be allowed unless the non-RSA country involved has 'proper safeguards' in place (Chapter 9)

BUSINESS METHODOLOGY

THE CRITICAL TRANSACTIONAL PATH ('CTP')

Every transaction has a critical path

- Pro-active risk management requires you to **be familiar with CTP of all transactions in your business practice**
- Once you've identified the CTP you can address the areas along the CTP that require risk management.

Most transactions are initiated by **an enquiry**:

- A telephone call ('cold call' or referral), e-mail, website or 'off the street'.
- It is crucial that the business' contractual terms and conditions ('STC') be brought to the attention of the enquirer right from the outset.
- This is the start of the 'risk management thread' that must run consistently throughout all the phases of the CTP.

The response can be either a **quote or an estimate or tender**:

- The former & latter, once accepted, forms a binding agreement whereas a quote does not.
- Where possible use an estimate - it will contain consultant's perception of the enquirer's needs and leaves the parties with an opportunity to close the gap between expectation and deliverable.

Areas 'within' the CTP that occur with any degree of regularity, will themselves have their own CTP and where applicable, a **standard operating procedure** ('SOP') should be agreed upon, reduced to writing, signed by both/all the parties and incorporated into the agreement between the parties.

The **invoice and statement**, although to an extent 'after the event', should also contain a clear reference to the STC.

The **method of payment** is one of the 'CTP within a CTP' alluded to above: the payment can be cash, by credit card or credit

LIABILITY – ISSUES PERTAINING TO

THE DUTY OF CARE ('DOC')

- The concept of a duty of care is interwoven with the **principle of negligence**.
- A **delict** is '*The breach of a duty imposed by law, independently of the will of the party (so) bound, which will ground an action for damages at the suit of any person to whom the duty is owed and who has suffered harm in consequence of the breach*'
- **Compare with a crime** = wrongdoing against society pursued in the criminal courts & delict = wrongdoing against an individual pursued in the civil courts
- **When and how does such a *duty arise*?**
- **Circumstances, contracts and statutes** can give rise to such a duty.
- A mere **omission** can give rise to such a duty.
- DOC arises when a party is in control of a **dangerous thing**, e.g. a driver of a motor vehicle! Water spillage on floors in the process of cleaning them in supermarkets places a duty of care on the owner to warn shoppers.
- The **relationship** between the parties may give rise to a DOC e.g. a guide.

- **Banks** also have a duty of care towards their clients. However the courts don't require banks to '*become amateur detectives*' (Columbus JV v ABSA).
- An interesting variation of DOC owed by the police came to the fore in Minister of Safety & Security v Rudman (SCA – 2005). The Minister was held liable based on negligence: there is no duty on the police to save people from drowning but the intervention of the policeman in the CPR, given his complete lack of knowledge of CPR, was negligent. It is therefore important to act within the **scope of your professional training and skills**.
- DOC may be placed on persons occupying **offices of public nature**.
- **Statutory duty of care** - landowners to ensure that a fire occurring on their property does not escape its boundaries (Min. Water Affairs v Durr)
- **Breach of the duty of care may give rise to negligence**, if it involves an '*unreasonable risk of harm to others*'. But none if no duty of care is owed.
- The law will not hold any person liable for such **harm that was not foreseeable**, even if caused by such breach. The degree of prudence = the reasonable man test.
- The law places **limitations on the foreseeability concept**: (1) Even if it **is** foreseeable it must be of such a nature that it was likely to come to fruition. (2) It mustn't result in so-called '*mere pecuniary loss*' or '*pure economic loss*'.
- DOC linked to negligence must be distinguished from the Roman Dutch concept of '*dolus*' or **wrongful intent**. It is allied to gross negligence.
- A properly drafted **exclusion and limitation of liability clause and indemnity** will provide protection. (Durban's Water Wonderland v Botha & Afrox v Strydom). BUT Courts will interpret such clauses narrowly & an **ambiguity** will be interpreted in favour of the claimant.
- **Contributory negligence** and **voluntary assumption of risk** could result in an apportionment of blame and the award of damages.
- **Absolute liability** (no proof of fault required), must also be borne in mind. Such liability may arise by statute e.g. the new Consumer Protection Act.

INDEMNITIES & WAIVERS

- An indemnity is a **contractual undertaking** by one party in favour of another in terms of which the latter party is provided with security against loss or damage.
- If there is no contract to govern the relationship between parties, the **common law** will apply and this has certain liability connotations.

- Common law, in the absence of a contract, means **liability** may be absolute ('no fault') or based on negligence but unlimited!
- **Contracts of indemnity** should ideally be in writing but can be verbal (See however CPA).
- Such wording as part of your standard terms and conditions ('**STC**') but also a separate document to be signed.
- Prominent appropriately worded **signage** should also be displayed.
- The **wording** contained in your STC, separate indemnity form and signage must be consistent and NOT conflict!
- Special precautions should be in place to monitor **groups and minors**.

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