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# **CLIENT / AGENCY CONTRACT MEDIA SERVICES 2005**

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## **Foreword**

Lawyers understand that other professionals do not share their fascination with contracts. In the real world inhabited by our clients, people have better things to do with their time. So it comes as no surprise that advertising agencies and their clients often have no signed contract in place.

Yet the need for certainty and clarity in client/agency relationships is greater than ever. Most relationships break down eventually, prompting questions about issues such as entitlement to a notice period and ownership of intellectual property rights. Experience suggests that when the parties have executed a contract based on the IPA/ISBA/CIPS suggested terms, the cost and time involved in resolving these issues can be minimised. On the other hand, when there is no signed contract, both parties are exposed to considerable cost and uncertainty.

Over the last seven years since launching the first IPA/ISBA/CIPS suggested terms, we have learned many lessons from observing how the suggested terms are used in practice. We believe that this new version incorporates these lessons. As ever, the suggested terms are only intended to be a template and either party may adapt the terms to suit their particular requirements. However, in doing so, it is important to bear in mind that the fair balance between the parties which the IPA, ISBA and CIPS have sought to achieve may be disturbed.

Finally, some of the changes to this version of the suggested terms are a result of comments and feedback received from clients and agencies. Thank you for that, and please keep it coming, in anticipation of the next version!

**Brinsley Dresden**

**Partner**

**Head of Media, Brands and Technology Department**

**Lewis Silkin**

## **Introduction**

The advertising and marketing communications business is a partnership between advertisers, agencies and the media. With this in mind, these new contracts have been prepared by Lewis Silkin on behalf of the three trade associations, with the aim that they will be used as the foundation of client-agency relationships.

The new contracts build on the first and second contracts launched in 1998 and 2002 and take account of important changes to the bodies regulating advertising in the UK, and the creation of the ASA (Broadcast).

One of the other main changes is that the contract no longer contains suggested clauses in relation to intellectual property rights. A wider menu of suggested clauses and guidance on intellectual property rights is now available as a separate document. Other notable amendments include the clauses relating to audit rights, force majeure and confidentiality. The Freedom of Information Act 2000 (which came into force on 1 January 2005) is also touched on, although agencies contracting with a 'public authority' (as defined in the Act) should seek separate legal advice and consider incorporating additional terms. A comparison document highlighting all of the changes between this and the previous 2002 contract is available from Lewis Silkin.

There are three new versions of the contract for creative, media and full service agencies. The contracts contain helpful explanatory notes and optional clauses which are open to negotiation depending on specific requirements. We hope that both clients and agencies will save considerable time, money and effort in their negotiations by using the new contracts. ISBA, IPA and CIPS also hope the contracts will raise industry standards and reduce misunderstandings and disputes between their respective members.

A special thank you is extended to Jo Farmer and Brinsley Dresden of Lewis Silkin for their efforts in drafting and mediating between the three interested bodies.

**DATED**

**2005**

[Insert name of Client]

- and -

[Insert name of Agency]

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**CLIENT / AGENCY CONTRACT**

**FOR MEDIA SERVICES ONLY**

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## Contents

<b>1</b>	<b>Parties</b>	<b>4</b>
<b>2</b>	<b>Definitions and Interpretation</b>	<b>4</b>
<b>3</b>	<b>Agreement to Act as Agency</b>	<b>5</b>
<b>4</b>	<b>Term of Appointment</b>	<b>5</b>
<b>5</b>	<b>Media Agency Services</b>	<b>6</b>
<b>6</b>	<b>Co-operation</b>	<b>7</b>
<b>7</b>	<b>Media Agency's Status</b>	<b>7</b>
<b>8</b>	<b>Other Appointments</b>	<b>8</b>
<b>9</b>	<b>Approvals and Authority</b>	<b>9</b>
<b>10</b>	<b>Contact Reports</b>	<b>10</b>
<b>11</b>	<b>Amendments to Work in Progress</b>	<b>11</b>
<b>12</b>	<b>Remuneration</b>	<b>11</b>
<b>13</b>	<b>Media Space and Time Charges</b>	<b>14</b>
<b>14</b>	<b>Discounts and Rebates</b>	<b>14</b>
<b>15</b>	<b>Materials, Services and Disbursements</b>	<b>15</b>
<b>16</b>	<b>Market Research</b>	<b>16</b>
<b>17</b>	<b>Other Services and Advertising Outside the Territory</b>	<b>16</b>
<b>18</b>	<b>Fluctuations in Currency Values</b>	<b>16</b>
<b>19</b>	<b>Value Added Tax</b>	<b>17</b>
<b>20</b>	<b>Evaluation</b>	<b>17</b>
<b>21</b>	<b>Terms of Payment</b>	<b>17</b>

<b>22</b>	<b>Audit</b>	<b>19</b>
<b>23</b>	<b>Media: Business Terms and Selection</b>	<b>21</b>
<b>24</b>	<b>Ownership and Custody of Material</b>	<b>22</b>
<b>25</b>	<b>Insurance</b>	<b>22</b>
<b>26</b>	<b>Confidential Information</b>	<b>23</b>
<b>27</b>	<b>Warranties and Indemnities</b>	<b>25</b>
<b>28</b>	<b>Limitation of Liability</b>	<b>26</b>
<b>29</b>	<b>Termination</b>	<b>27</b>
<b>30</b>	<b>Survival of Obligations on Termination</b>	<b>29</b>
<b>31</b>	<b>Advertising Standards and Levies</b>	<b>29</b>
<b>32</b>	<b>Financial Promotions</b>	<b>30</b>
<b>33</b>	<b>Data Protection</b>	<b>31</b>
<b>34</b>	<b>Waiver</b>	<b>32</b>
<b>35</b>	<b>Force Majeure</b>	<b>32</b>
<b>36</b>	<b>Non-solicitation</b>	<b>33</b>
<b>37</b>	<b>Severance</b>	<b>33</b>
<b>38</b>	<b>Assignment</b>	<b>33</b>
<b>39</b>	<b>Third Party Rights</b>	<b>34</b>
<b>40</b>	<b>Entire Agreement</b>	<b>34</b>
<b>41</b>	<b>Notices</b>	<b>35</b>
<b>42</b>	<b>Governing Law and Jurisdiction</b>	<b>35</b>
<b>43</b>	<b>Dispute Resolution</b>	<b>36</b>
	<b>SCHEDULE 1</b>	<b>38</b>
	<b>Definitions and Interpretation</b>	<b>38</b>

<b>SCHEDULE 2</b>	<b>41</b>
<b>The Accounts</b>	<b>41</b>
<b>SCHEDULE 3</b>	<b>42</b>
<b>The Services</b>	<b>42</b>
<b>SCHEDULE 4</b>	<b>43</b>
<b>Key Individuals</b>	<b>43</b>
<b>SCHEDULE 5</b>	<b>44</b>
<b>Hourly Rates of Media Agency Personnel</b>	<b>44</b>
<b>SCHEDULE 6</b>	<b>45</b>
<b>Payment by Results</b>	<b>45</b>

# **Suggested Terms and Provisions for use in CLIENT/AGENCY AGREEMENTS MEDIA SERVICES ONLY VERSION**

*General Note: This draft is intended to cover the provision of media planning/buying services. Separate versions have been prepared for full service and creative only appointments.*

*The draft should not be approached as if it were set in stone. It has been designed as a “starter” to be tailor-made to suit particular parties’ needs. It should not be slavishly copied, but “moulded” and used as a template.*

**This agreement** is made the [...] day of [...] [2005].

## **1 Parties**

- 1.1 [Insert name of company] a company incorporated in [e.g. England or England and Wales or Scotland] with registered number [insert company number] whose registered office is at [insert registered office address] (the “Client”); and
- 1.2 [Insert name of company] a company incorporated in [e.g. England or England and Wales or Scotland] with registered number [insert company number] whose registered office is at [insert registered office address] (the “Media Agency”).

## **2 Definitions and Interpretation**

- 2.1 The words defined in Schedule 1 shall have the meanings assigned to them in that Schedule.
- 2.2 All other defined words or phrases shall have the meaning given to them when they first appear in that form.

*Note to Clause 2: The definitions are mainly set out in alphabetical order in Schedule 1. Capital letters are used in the body of the Agreement to indicate defined terms. Where a term only appears*

*once or twice in the same clause but nowhere else, the definition will be given at the appropriate place in the body of the Agreement.*

### **3 Agreement to Act as Agency**

3.1 The Client appoints the Media Agency to carry out and the Media Agency agrees to provide the Services to the Client in [insert name of country/countries] [excluding/including] [advertising on the world wide web or any other globally accessible medium] (the “Territory”) in relation to the Accounts during the Term in accordance with this Agreement.

*Note to Clause 3: As advertising becomes increasingly international it is important to define the territorial limits of the Agency’s remit and deal with responsibility for global media such as the worldwide web.*

*The scope of the “Services” and the “Accounts” are set out in Schedules 2 and 3 respectively. It is essential to ensure that these reflect the intention of the parties. If the parties subsequently decide to add further Services, Accounts or Territories to the scope of the appointment, the agency shall be entitled to require additional remuneration. The definition of “Accounts” may also be extended so as to include an option to handle new accounts.*

*Most appointments for media agency contracts are on the on-going basis that is provided for here. If the parties want to make an appointment to a roster or for a project, a different form of words will be appropriate. Guidance can be found in the standard form contract for below-the-line appointments agreed by ISBA, CIPS and MCCA.*

### **4 Term of Appointment**

4.1 This Agreement shall commence on [insert date on which the agreement is to come into effect] (the “Commencement Date”) and continue for the period of [...] months from the Commencement Date (the “Initial Period”), unless terminated sooner by either party under clause [29]. After that Initial Period the Agreement will continue in full force and effect (subject to clause 29) unless and until terminated by either party giving [...] months’ notice in writing to the other party. Notice to terminate cannot expire until the Initial Period has elapsed.

*Note to Clause 4: The agreement provides for an initial term, during which neither party can terminate unless there has been a breach of contract by the other party. The duration of the initial term should be commensurate with the need to create a stable relationship. Our combined experience is that 12 months is often regarded as appropriate, though there may be cases where a shorter project or campaign would involve a reduced commitment.*

*A period of notice should always be agreed in advance to avoid dispute and uncertainty. The duration of the notice period can be any length that the parties choose, but is often three or six months. The impact of the duration of the notice will depend upon the drafting of other parts of the contract, such as the exclusivity provisions.*

*The contract is expressed to be on a rolling basis, so if the parties agree that it should be a fixed term appointment that will expire after a certain time in any event, a suitable amendment will be required.*

*Termination for breach or insolvency is dealt with in Clause 29.*

## **5 Media Agency Services**

- 5.1 The Media Agency will perform the Services detailed in Schedule 3 for the Client.
- 5.2 [The Media Agency will allocate suitable personnel with appropriate levels of experience and seniority to service the Accounts. The Client acknowledges and agrees that it may be necessary for the Media Agency to replace the personnel servicing the Accounts with alternative personnel with similar levels of seniority and experience.]
- 5.3 [The Media Agency will procure that the Key Individual(s) named in Schedule 4 [is] [are] actively involved in the provision of the Services. Should any Key Individual leave the Media Agency, [or cease to be involved in the provision of the Services for any other reason], the Media Agency will with the Client's consent appoint a suitable replacement, such consent not to be unreasonably withheld or delayed.]
- 5.4 Media Agency shall not in any way be responsible for the preparation, content, production or supply of copy for any of the Client's advertising.
- 5.5 The Media Agency shall act in willing co-operation with creative agencies and other communications suppliers appointed by the Client from time to time when developing all communications plans and activities. The Client shall ensure that its creative agencies and other communications suppliers act in willing co-operation with the Media Agency.

*Note to Clause 5: Schedule 3 contains a list of possible services, which the parties should treat as a menu and either add other services or delete those that are required, as appropriate. Where the Media Agency is to be paid on a fee or "time spent" basis (see Clause 12) it is essential that only those services which are listed in this Schedule and have been costed in the remuneration fall within the defined Services. See also Clause 17.*

*The Transfer of Undertakings (Protection of Employment) Regulations 1981 (known as "TUPE") may apply when a business or part of a business is transferred. It is theoretically possible for an account to constitute part of an agency's business for these purposes, particularly if a team of agency staff work exclusively for one client. In cases where TUPE applies the employment of staff assigned to the business in question automatically transfers to the new employer. Moreover all such staff are entitled to be consulted about any measures the new employer is planning to take. The penalties on employers for breaching these obligations can be very high. The question as to whether TUPE applies is a complex one and a decision on this aspect of the agreement should only be taken after having taken specific legal advice.*

*Clause 5.2 now allows for a general requirement about the suitability of the Agency staff who work on the Client's account. An additional option is set out in Clause 5.3 that can be used if it is important to the Client that particular individuals within the Agency work on the Account. A 'Key Personnel' provision is most likely to be used in relation to the Creative Director or the Creative Team in a creative only or full service appointment, and is less likely to be appropriate in a media only appointment.*

## **6 Co-operation**

- 6.1 The Client will give the Media Agency clear briefings and ensure that all the facts given about the Accounts are accurate. The Media Agency will co-operate fully with the Client and use reasonable care and skill to make the Advertising as successful as is to be expected from a competent media agency. The Client will help the Media Agency do this by making available to the Media Agency all relevant information and co-operating with the Media Agency.

*Note to Clause 6: The provision of clear briefings is fundamental to the whole process of creating successful advertising. It is in the interests of both parties to ensure that they both commit the time and resources required to the production of clear and unequivocal briefings.*

## **7 Media Agency's Status**

- 7.1 The Media Agency acts in all its contracts as a principal at law.

*Note to Clause 7: Despite its name, it has become accepted custom and practice in the advertising industry that a media agency contracts with all its suppliers as principal at law. In other words as an independent contractor accepting legal liability in its own right. The system of agency recognition by the media rests on this legal basis. This also means that the Agency has to protect itself against the possible insolvency of the Client, as the Agency may still retain liability under its contracts with third party suppliers (see Clauses 21.8 and 29.3)*

## 8 Other Appointments

8.1 During the Term the Media Agency will not [and will procure that Media Agency Group Companies do not] provide services which are the same or similar to the Services in the Territory without the Client's written agreement [(not to be unreasonably withheld or delayed)]:

*Insert one of the following:*

- to a direct market competitor with any of the Accounts [or any of the Client's other products or services as of the Commencement Date].
- in respect of a product or service which is [by manufacture or industrial or commercial classification in a category] similar to any of the Accounts [or any of the Client's products or services as of the Commencement Date].

8.2 During the Term the Client will not use another outside agency to provide any of the Services in respect of the Accounts in the Territory.

*Note to Clause 8: The issue of exclusivity is dealt with in relation to 'other appointments'. The arguments for and against an exclusive appointment will vary according to the type of appointment and may involve compensation issues. In a 'media only' appointment, the Client may achieve economies of scale by placing all its media buying requirements through a single media buying agency and therefore more inclined to agree not to use other agencies. The Client may also be more inclined to allow media buying agencies to act for its competitors than it would its' creative agencies, and it is not uncommon for media buying agencies to work on competing accounts. With consolidation increasing all the time, media agencies are increasingly acting for competitors. The Client can look for the protection from abuse of this situation in the confidentiality clauses. The parties may therefore agree to delete clause 8 completely.*

*Clause 8.1 deals with the exclusivity restrictions imposed on the Media Agency that prevent it from acting for competing advertisers. Clause 8.2 is the reciprocal clause that sets out the restrictions on the use of other agencies by the Client. Clarity is essential about the level of exclusivity, if any, granted by either side. This will ensure that the Client understands its freedom to use other advertising service suppliers and the Media Agency knows to the extent to which it may undertake directly or indirectly competing business if at all. Naturally, any agreed exclusivity will only apply to those Accounts and Services set out in Schedules 2 and 3 respectively. Exclusivity will also impact on other aspects such as agency compensation and notice entitlement. It may also have competition law implications on which legal advice should be obtained, especially if the Client has a significant share of its particular market.*

*These provisions should be drafted in the light of the possibility of the Client entering into new areas of business or either party merging with or being taken over by another company.*

*This clause has been simplified by putting the definition of Agency Group Company into Schedule 1, but the parties must consider the impact of extending exclusivity to their respective group companies. The parties must also consider the applicability of the definition of Agency Group Company to their particular group.*

**9 Approvals and Authority**

9.1 Any reference in this Agreement to the Client’s “written approval” shall mean written approval by directors or employees of the Client authorised to approve the Media Agency’s plans and schedules and/or expenditure and whose names are set out below:

“Authorised Person”

Name [.....] Title [.....]

Name [.....] Title [.....]

The Client will notify the Media Agency in writing of any change to the Authorised Persons during the Term. The Media Agency shall not be responsible for any delay in the performance of the Services resulting from the unavailability of an Authorised Person to provide approval.

9.2 For the purposes of this Agreement written approval shall mean approval signified by:

9.2.1 any fax, letter or purchase order on the Client’s notepaper bearing the signature of an Authorised Person;

9.2.2 oral approval given by an Authorised Person provided this is in circumstances where time does not permit written approval and the said oral approval is confirmed within one Working Day by way either of a contact report from the Media Agency to the Client or a fax, letter or purchase order in accordance with the preceding clause;

9.2.3 e-mail emanating from the personal e-mail address of an Authorised Person.

9.3 The Media Agency shall, after obtaining the Client’s general written approval of its campaign plans, submit to the Client for its specific written approval:

9.3.1 media schedules for time, space and other facilities; and

- 9.3.2 estimates or quotations of the cost of the various items of advertising and other services covered by this Agreement together with terms of payment.
- 9.4 The Client's written approval of media schedules and estimates will be the Media Agency's authority to make reservations and contracts for space, time and other facilities under the terms and conditions required by media or suppliers.
- 9.5 The Media Agency will advise the Client immediately of any changes in the estimated cost of media or any changes in plans, schedules or work in progress previously approved in writing by the Client.

*Note to Clause 9: The contract should clearly identify those individuals within the client's organisation who have the authority to approve what may be significant expenditure. It may also be appropriate to specify the ceiling on the level of expenditure which given individuals are authorised to approve.*

*Clause 9.5 Clients should be kept informed of changes in the various limitations set out in media rate card and other suppliers' terms and conditions. This applies particularly to cancellation conditions.*

*The reference to approval by e-mail may not be acceptable to all Clients. As it does not require a signature, it can be difficult to authenticate the identity of the person giving approval by e-mail. On the other hand, use of e-mail may be a practical reality that should not be ignored.*

## **10 Contact Reports**

- 10.1 Contact reports providing each party with a written record of all matters of substance discussed at meetings or in telephone conversations between the parties will be supplied by the Media Agency to the Client within [...] Working Days following the meeting or conversation. If the subject matter of a contact report is not questioned by the Client within [...] Working Days of its receipt, it will be taken to be an accurate record of the meeting or telephone conversation to which it refers.
- 10.2 The Media Agency shall also produce contact reports recording details of any discussions between the Media Agency and the Client's creative agencies and other communications suppliers on the same basis as set out above.

*Note to Clause 10: The prompt creation and confirmation of Contact Reports are of enormous practical importance for both the Client and the Agency. Contact Reports provide evidence for both parties concerning matters agreed in meetings and during phone calls. The Client will want to ensure that its instructions and approvals have been correctly understood and recorded. Significant consequences will often flow from the decisions recorded in Contact Reports, especially if the Agency,*

*acting as a principal, will be entering into obligations with third parties as a result. As both parties have significant interests to protect, there is a good argument that the two time periods mentioned in this clause should be reciprocal, and kept reasonably short.*

## **11 Amendments to Work in Progress**

- 11.1 The Client may request the Media Agency to cancel or amend any and all plans, schedules or work in progress. The Media Agency will take all reasonable steps to comply with any such request provided that the Media Agency is able to do so within its contractual obligations to media and suppliers.
- 11.2 In the event of any such cancellation or amendment the Client will reimburse the Media Agency for any charges or expenses incurred by the Media Agency to which the Media Agency is committed. The Client shall also pay the Media Agency's remuneration covering the cancelled or amended Services as well as any charges imposed on the Media Agency by third parties arising from the cancellation or amendment.

*Note to Clause 11: For the avoidance of doubt, this clause is not intended to deal with amendments to the terms of this agreement, but to the amendment or cancellation of advertising work-in-progress. See Clause 23 for provisions concerning the terms and conditions which the Media Agency can use with its suppliers and media owners, and which are likely to contain cancellation and amendment charges.*

*An obligation on the Agency to depart from the standard form contracts is likely to give rise to a significant administrative burden in practice.*

*If the Agency is likely to perform most of its work and/or incur the majority of its costs at the start of the a particular campaign, it may wish to seek agreement with the Client about a cancellation charge in case the Client cancels ongoing work. To be enforceable, the cancellation charge should be a genuine estimate of the Agency's likely loss due to such cancellation and must not be a penalty.*

## **12 Remuneration**

*Note to Clause 12 There are many types of agency remuneration package. The various alternatives shown here are designed to give examples of just some of the approaches the parties may consider appropriate.*

*Historically, media owners and advertising agencies have operated a "commission" system. A 15% commission means that for every £100 of media space/time purchased the media will actually charge the advertising agency £85. By charging the Client £100 the Agency therefore receives a commission of 15% of the gross cost of the media or 17.65% of the net cost to the Agency.*

*The charges set out here will cover only the Services set out in Schedule 3. Any other services should be paid for in addition to the sums paid under this Clause 12, usually at the Agency's hourly/daily rate for such services. See also Clause 17. It is possible to provide for the provision of additional services by including an hourly rate charge as a Schedule and stating that it will be used to calculate the cost of such services.*

*Clause 12.2 is intended to provide for a guaranteed minimum income ("GMI") for the Agency. GMI can be used in commission based agreements to ensure that the Agency is paid sufficient fees in the course of a year to recover its costs and make some return on its investment of time and resources, even if the Client decides to reduce its media spend at some point after the commencement of the relationship.*

*If the remuneration is to be on a fee or time spent basis, it is possible to include a provision to say that the parties will review the rates of remuneration periodically. Any such provision should state that the existing rates will continue to apply unless and until new rates are agreed in writing. If no such provision is included, the parties are free to change the financial terms of their relationship from time to time, in accordance with the variation provisions of the Entire Agreement Clause (Clause 40.3).*

*The parties may wish to consider a payment by results mechanism as part of their remuneration package. If the parties wish to include such a mechanism, they should discuss and formalise a structure for payment by results before the contract is signed. The payment by results mechanism will need to define the Key Performance Indicators on which the Media Agency's performance will be measured. It will also need to address how and when performance by the Media Agency will be reviewed against the Key Performance Indicators, and when the Media Agency will be paid. The details of the payment by results scheme can be set out as a Schedule to the agreement and incorporated by reference in clause 12.*

*The parties may also wish to make provision for the currency of the contract to be the Euro rather than Sterling, or to make provision for it to be changed in due course. This is not essential, however, as European Union regulations exist to govern the process of conversion from national currencies to the Euro.*

## **12.1 Commission**

In consideration for the Media Agency's performance of the Services, the Client shall pay the Media Agency a commission of [ ]% ('Agreed Commission') of the "gross equivalent media spend" being the cost to the Client after deduction of negotiated discounts but before deduction of standard agency commission. For the avoidance of doubt, the Client's obligation to pay the Agreed Commission shall be in addition to its obligation to repay the Media Agency for the net cost of all media time and space. The Media Agency's total remuneration for each Year will not be less than £[ ].

*If remuneration is to be by commission but with an agreed minimum remuneration level the next sub-clause may be added to the Commission clause.*

The Media Agency's total remuneration for each Year will not be less than £[...]. If during any Year the Agreed Commission in respect of the Accounts is less than this sum the Client will pay the Media Agency the difference between the two amounts. If it is more the Media Agency will retain the excess. If the Term ends part way through a Year this provision shall apply pro rata on a [monthly] basis.

Or:

### **Fee**

The Client shall pay the Media Agency a fee of £[...] for each Year for the Services, payable in equal monthly instalments. For the avoidance of doubt, this fee shall be payable in addition to all payments for the net cost of media time or space.

Or:

### **Time charges**

The Media Agency's charges for the Services shall be calculated using the hourly charge out rates shown in Schedule 5 to this Agreement, provided that the total charge in each Year, shall not exceed £ [...]. For the avoidance of doubt, these charges shall be payable in addition to all payments for the net cost of media time or space.

*The parties may wish to incorporate an additional element of remuneration for the Media Agency, such as a results-based scheme. If so, the details of the scheme should be set out here, or set out in a Schedule and incorporated here by reference.*

## **12.2 Payment by Results**

In addition to the remuneration set out above, if the Media Agency meets the criteria specified in Schedule 6 for a performance related payment, the Client shall also pay the Media Agency a performance related payment in accordance with the scheme set out in Schedule 6.

## **13 Media Space and Time Charges**

### **13.1 General**

Media charges will be based on the current published rates for Advertising in all media. [Whatever commission is allowed by media, the media charge

passed on by the Media Agency to the Client will be no more and no less than is required to give the Media Agency the Agreed Commission.]

### 13.2 Refunds and adjustments

The Media Agency will credit the Client with any other refund received by the Media Agency in connection with space and time charges which the Client has paid. If the Media Agency is able to purchase space or time at less than current published rates the Media Agency's media charges shall be adjusted accordingly.

### 13.3 Proof of appearance

[The Agency will make use of available industry systems which provide proof of appearance of advertising in various media.]

*Note to Clause 13: The wording in square brackets in Clause 13.1 is designed to ensure that whatever commission is allowed by the media in question, rebates or payments will be made so as to ensure that the Media Agency receives no more and no less than the Agreed Commission which is defined in Clause 12.*

*For the purposes of Clause 13.2, examples of the credits or rebates which might arise include where the planned media activity did not occur or the quantity of such activity was not at the level originally agreed.*

*A number of proof of appearance systems or vouchering schemes are available to check that advertising has appeared in the media it was booked in, and the new clause at 13.3 refers to the Agency making use of these systems. Some of these systems are free to use, but some are commercial systems for which costs will be payable. If the Client wishes to use proof of appearance systems which are not free, the parties should discuss and agree the related costs in writing.*

## 14 Discounts and Rebates

14.1 In a medium operating volume discounts, if the sum paid by the Media Agency for the space or time purchased on behalf of the Client varies from the published media rate card for that medium, the amount of the difference will be disclosed [and an adjusting payment will be made by either the Client or the Media Agency so that the Client pays no more and no less than the net of commission figure charged by the medium].

14.2 [All cash discounts quoted in media rate cards as available to all purchasers will be offered to the Client provided the Client pays the Media Agency invoices on the appropriate due dates.]

- 14.3 The Client shall receive the benefit of all commissions, discounts and rebates derived from the handling by the Media Agency of the Accounts under this Agreement.

*Note to Clause 14: Client and Agency may wish to consider the degree of transparency that is appropriate in relation to sub-contracting. Depending on the position reached, a provision along the lines of sub clause 14.3 may be appropriate. The parties may wish to distinguish between the discounts achieved by the Agency in relation to all its clients, and those that relate specifically to this Client.*

## **15 Materials, Services and Disbursements**

- 15.1 The Media Agency will invoice the Client [at cost] [or inclusive of Agreed Commission if the item attracts Agreed Commission] in respect of the following approved costs incurred by the Media Agency in performing the Services.
- 15.2 Travelling and hotel expenses of Media Agency personnel [when attending studios and locations, company sales conferences and any other travel and overnight stays at the request of the Client] [outside a radius of [xx] miles from the Media Agency's offices] [with the exception of such travelling to the Client's premises by Media Agency personnel as is required in the ordinary course of providing the Services] [in accordance with the Client's travel and expense policy, if any].
- 15.3 Any other item agreed between the parties in writing.

*Note to Clause 15: The parties need to agree which items will be charged for separately and which items will be subsumed within the basic remuneration package. These might include general photocopying, telephone and postage expenses, and if so, the parties should state this expressly here or in Clause 12. Clause 15 contains some suggested categories of rechargeable disbursement that may or may not be agreeable to the parties in any particular case. There may be others that the parties wish to mention specifically. If any rechargeable item is the subject of Agreed Commission the amount invoiced will need to take this into account (see comments on Clause 12).*

## **16 Market Research**

- 16.1 The basis of the charges for any market research carried out by the Media Agency or on its behalf will be agreed with the Client in writing in advance in respect of any projects that are agreed to be necessary to provide data on which to base advertising strategies. Such research may include background studies of the market, consumer attitudes and product acceptance and projects to establish the effect of advertising that has been published.

## **17 Other Services and Advertising Outside the Territory**

17.1 The terms of remuneration set out above do not cover Services in respect of Advertising outside the Territory or services not included in the Services listed in Schedule 3. If such services are required a separate remuneration arrangement will be negotiated.

*Note to Clause 17: This refers to both services outside those set out in Schedule 3, or in countries not within the definition of the Territory. This underlines the importance of ensuring that the drafting of the definitions of the Accounts, Services and Territory are correct.*

## **18 Fluctuations in Currency Values**

18.1 The cost to the Media Agency of media, materials or services purchased overseas for the Advertising may be more or less than the cost anticipated at the date when the Media Agency ordered the relevant media, materials or services, (or obtained the Client's approval for such costs) as a result of fluctuations in the rate of currency exchange. If so, the Media Agency will charge the Client at the rate of currency exchange in operation on the date the Media Agency pays for the relevant media, materials or services, which shall be deemed to be the closing mid-point rate in London for that day as subsequently quoted in the next published edition of The Financial Times.

*Note to Clause 18: This clause states that if there are currency fluctuations between the date an estimate for overseas work is approved and the date the Media Agency sends the payment, the Media Agency will charge the Client in accordance with the exchange rate in force when it makes payment. This puts the currency risk on to the Client, but means that if Sterling has strengthened in the interim, the cost of the overseas work will fall, and the Client will receive the benefit.*

## **19 Value Added Tax**

19.1 VAT will be included and itemised separately on Media Agency invoices, where appropriate, at the rate prevailing from time to time.

## **20 Evaluation**

20.1 The parties will conduct a full two-way evaluation and review of their relationship every [6] [12] months, including (without limitation) the performance of [the Key Individuals and other] staff from both the Media Agency and the Client. Any resulting changes agreed to the Services, the remuneration or any other aspect of the Agreement shall be agreed in writing,

failing which the arrangements in place at the time of the evaluation, for instance as to Media Agency remuneration, will continue to apply.

*Note to Clause 20: A regular formal review is recommended to ensure the best possible communication between the parties and keep the relationship operating at an optimum level. In certain circumstances the Client and Media Agency may decide to use a structured, mutual performance analysis with marks attributed and even with bonuses payable depending on the outcome.*

*To assist this process and at agreed intervals, an agreed form of report might be completed and copied to executives and staff on a "need to know" basis. The reference to 'Key Individuals' is in square brackets and should be deleted if none have been included in clause 5.3 and Schedule 4.*

## **21 Terms of Payment**

21.1 In this clause, payment of an invoice within a specified number of days means payment within that number of days after the [presentation] [receipt] [date] of the invoice in question.

### **21.2 Media Agency Fees**

The Media Agency will invoice the Client in respect of Media Agency fees [monthly in advance] [monthly in arrears] on the [first][last][...] Working Day of each month and the Client will pay the invoice within [...] days.

### **21.3 Media**

The Media Agency will invoice the Client in respect of media costs on the [first][last][...] Working Day of each month in respect of any media committed since the previous invoice and the Client will pay such invoices [immediately upon presentation] [within [...] days.]

21.4 The Client reserves the right to withhold payment of any invoice or part of an invoice which is not in accordance with this Agreement. On receipt of any such invoice the Client shall immediately notify the Media Agency in writing of the reason for such withholding and pay the undisputed part of such invoice.

21.5 The Media Agency reserves the right to charge interest on all invoices presented to the Client which are not paid by the relevant due date at the annual rate of [...]% above the base rate from time to time of [insert name of Media Agency's bank] Bank plc. Such interest will accrue on a daily basis from the date on which payment became overdue up to the date on which the Media Agency receives the full outstanding amount together with all accrued

interest. This right extends to any part of an invoice of which payment is withheld pursuant to Clause [21.4] should it be subsequently established that the amount in question was invoiced in accordance with this Agreement.

- 21.6 Where a surcharge is levied by a supplier of media against the Media Agency due to late payment and this results from late payment by the Client, the Client shall immediately reimburse to the Media Agency the amount of such surcharge, together with any accrued interest charged by the supplier in respect of the overdue amount.
- 21.7 If late copy charges are levied by a media owner against the Media Agency and such charges do not result from the negligent or wilful act or omission of the Media Agency, the Client shall immediately reimburse the amount of such late copy charges to the Media Agency
- 21.8 In the event of the Media Agency's credit insurers revising or withdrawing cover for the Client, the Media Agency reserves the right to revise its terms of payment and if necessary [ask for payments in advance of media bookings] [seek suitable guarantees from the Client]. If it is not possible to reach agreement on suitable revised terms the Media Agency will have the right of termination set out in clause [29.3].
- 21.9 Subject to Clause [] [21.4], each party shall pay all monies which are payable by it to the other without any right of set off, abatement or withholding in respect of monies which are due to it or alleged to be due to it from the other party.

*Note to Clause 21: Optional sub-clauses are included to allow the parties to choose an appropriate method of invoicing and payment for the service provided.*

*Clause 21.2 specifies the day in the month for invoicing the Agency Fee, and whether it is payable in advance or in arrears.*

*Clause 21.5 Normally, the name of the Agency's main bank would be inserted here rather than the Client's bank (or the Bank of England), because the Agency will be paying interest on its overdraft according to that bank's borrowing rate. The interest provision has also been amended to clarify the dates to and from which interest will be payable.*

*Clause 21.6 - Clients should be aware that historically the UK print and broadcasting media have operated a surcharge system by which late payment of invoices for media space and time is penalised by way of a surcharge. This normally takes the form of a significant percentage of the basic figure invoiced.*

*Clause 21.7 – By contrast with the preceding clause, which deals with charges incurred as result of late payment for media time or space, this clause deals with surcharges incurred as a result of the late delivery of copy to media owners. In such circumstances, media owners have to ‘rush’ the process of incorporating the copy in accordance with the media schedule, and therefore impose a surcharge to discourage lateness. If such charges are not due to any fault of the Agency, this clause allows the Agency to pass them back to the Client. Although this may overlap with Clause 11.2 (Amendments to Work in Progress), it will not necessarily do so.*

*Clause 21.8 - Some media recognition bodies require agencies to ensure their clients have credit risk insurance. If that insurance is revoked, the Agency will need to make other arrangements for the purchase of media, or ultimately, terminate the appointment. See Clause 29.3.*

*Clause 21.9 - Depending on the extent to which it is part of the Agency’s contractual obligation to incur outside costs on items such as media or production, the parties may wish to agree an alternative provision allowing a right of set off.*

## **22 Audit**

22.1 The Media Agency shall maintain Records in respect of all expenditure that is reimbursable by the Client under this Agreement.

22.2 The Media Agency will allow the Client by its own personnel or by an Independent Auditor access to all the Records during the Term and for [12] months afterwards, provided:

22.2.1 Records do not include confidential financial, payroll, personnel or other confidential records of the Media Agency that do not relate directly to the Client;

22.2.2 The purpose of such an audit of Records is solely for the purpose of auditing contract compliance and not for the purpose of fee negotiation or the collation by any means of planning information;

22.2.3 The Client and the Media Agency shall meet together with the Independent Auditor not less than 3 working days prior to the commencement of any audit and will agree the scope of the audit; and

22.2.4 Any access for the purpose of auditing or otherwise inspecting the Records shall be on not less than [ ] days’ written notice at any time during normal business hours, provided that, in the absence of exceptional circumstances, the Media Agency shall not be obliged to allow such access or inspection more than once during any [ ] month period unless the Client has reasonable grounds to suspect that fraudulent activity has occurred.

- 22.3 Should any audit or inspection of the Records by the Client reveal that the Client has been overcharged the Media Agency shall reimburse to the Client the amount of the overcharge within 14 days.
- 22.4 The Media Agency will afford to the Client all reasonable assistance in the carrying out of such audit. The Client's personnel and/or the Independent Auditor will ensure that any information obtained in the course of the audit concerning the Media Agency's business is kept in the strictest confidence and not used for any purpose other than the proper conduct of the audit.

*If the parties have agreed a payment by results scheme, they may wish to insert the following sub-clause:*

- 22.5 [As the Media Agency's remuneration is based upon payment by results and the performance of key performance indicators as set out in clause 12.2 above, the Client agrees to maintain such accounts and records as are necessary to enable the Media Agency to conduct an audit of the Client's records and accounts relating to any key performance indicators and the payment by results payments. Any audit by the Media Agency of the Client's records under this clause shall be on the same basis as set out above for the Client's audit of the Media Agency. Should any audit or inspection by the Media Agency reveal that the Media Agency has been underpaid, the Client shall reimburse to the Media Agency the amount of the underpayment within 14 days].

*Note to Clause 22: In the interests of transparency and preserving mutual trust between Client and Agency it is suggested that the Client should have some right to check the records of the Agency in respect of outside expenditure which is being passed on to the Client.*

*The audit rights have been amended to clarify the rights of the Client and the obligations of the Agency in greater detail. If the auditor is to be independent of either party, the parties should agree the identity of that auditor before the start of the audit, but the Agency should not unreasonably withhold or delay its approval of the auditor. A provision to this effect can be inserted if required in the definition of Independent Auditor.*

*ISBA and IPA agree that it is preferable for auditors not to be appointed and remunerated by way of commission as a percentage of any financial irregularities that the auditors detect during the audit. This practice is aggressive and potentially destructive to the client/agency relationship, as it will encourage the auditors to concentrate only on financial recoveries at the expense of the relationship. Such auditors tend not to concentrate on other areas that can assist the ongoing relationship, such as procedural efficiencies and improvements.*

*This audit clause covers only reimbursable expenditure. Should the parties want it to be extended further, for instance to time spent by Media Agency staff in cases where this controls all or part of the remuneration, a modified clause will be needed. If the Client wishes to conduct audits in other areas, such as media performance monitoring, the audit provisions and the definition of Records will need to be expanded.*

*The parties may wish to include provisions which entitle the Client to charge the Media Agency in respect of the costs of the audit if the audit reveals that the Client has been overcharged to the tune of more than, say, 5 or 10% over the period covered by the audit.*

*Some agencies seek a contribution towards their costs and management time spent in preparing for the audit and liaising with the auditors, as such time and costs can be significant for the agency. On the other hand, clients may feel that any co-operation, assistance and time spent by the agency during an audit has commercial advantages for both parties, and that such time should not be charged for. If the parties discuss and agree that the agency can charge for the time spent assisting with the audit, an additional clause will be needed.*

*Clause 22.5 is a new clause which has been inserted to give the Media Agency the right to audit and inspect the Client's records in relation to any payment by results scheme.*

## **23 Media: Business Terms and Selection**

- 23.1 Unless otherwise stated in this Agreement, the Media Agency's contracts with media in respect of the Services shall be made in accordance with media rate cards or other standard or individual conditions and contracts. The rights and liabilities as between the Client and the Media Agency shall correspond to those between the Media Agency and the various media under such conditions, including in particular any rights of amendment, omission and cancellation. On the Client's written request the Media Agency shall supply the Client with the relevant terms and conditions.
- 23.2 The Media Agency shall use reasonable care and skill in the selection and appointment of media supplier and the agreement of the terms and conditions of such appointment. Should the Client request, the Media Agency will obtain more than one quote for a particular supply and discuss these with the Client before placing an order.
- 23.3 The Media Agency shall obtain the Client's consent before commissioning services from any company in which the Media Agency has a financial interest, such consent not to be unreasonably withheld or delayed.

*Note to Clause 23: The Media Agency should ensure the Client is aware of the terms and conditions contained in rate cards, particularly those relating to omissions, amendments and cancellations as*

*well as possible increases in rates. The Client should also be made aware of the terms and conditions of printers and other suppliers of services.*

## **24 Ownership and Custody of Material**

- 24.1 The Media Agency will keep in its care materials entrusted to the Media Agency by the Client (the "Property"). The Media Agency will mark or otherwise identify the Property as being the property of the Client and will be responsible for its safekeeping.
- 24.2 The Media Agency shall not be entitled to destroy Property without the Client's prior written consent. The Media Agency shall be entitled to return the Property to the Client by delivery to the Client's offices at the address shown at Clause 1 by giving the Client 30 days written notice that it no longer requires the Property, provided such notice shall not expire less than [12] months after the Property first came into the Media Agency's possession or on the termination of this Agreement, whichever is earlier.

## **25 Insurance**

- 25.1 Without prejudice to its obligations under this Agreement, the Media Agency shall effect and maintain with reputable insurers such policy or policies of insurance as may be necessary to cover the Media Agency's obligations and liabilities under this Agreement, including but not limited to:
- 25.1.1 Insurance against loss or damage to the Client's Property and items such as negatives, video tapes and software coming into existence for the purpose of producing the Advertising (the "Items") while in the Media Agency's possession (except in the case of software and digital copies, where the obligation to insure shall cease after publication, broadcast or distribution) and regardless of whether ownership of the Items has passed to the Client;
- 25.1.2 Professional Indemnity Insurance with a limit of not less than £[xx] per annum. Upon the Client's reasonable request, the Media Agency shall provide the Client with all such documentation as is necessary to prove the Media Agency's continuing compliance with its obligations to insure under this sub-clause.
- 25.2 [The Client acknowledges and agrees that nothing in this Agreement shall place any obligation upon the Agency to obtain insurance cover in relation to risks arising from terrorism or military action and the Agency shall not be

liable to the Client under this Agreement for any loss of any kind arising from terrorism or military action.]

*Note to Clause 25: In each category of insurance specified here the parties will need to discuss whether the relevant premium may be passed on to the Client by the Agency and who will carry the various risks identified.*

*Clause 25.1.1 has been amended to reflect the reality when agencies insure digital copies of advertisements where insurance of the digital copy stops after the advertising has been broadcast.*

*Clause 25.2 reflects the difficulties in obtaining insurance against risks arising from terrorism and military action since the attacks on the United States of America on 11<sup>th</sup> September 2001. The clause is intended to reflect the advice published in the wake of those attacks by ISBA and the IPA.*

## **26 Confidential Information**

- 26.1 The parties acknowledge a duty not during or after the Term to disclose without the other's prior written permission any confidential information either concerning the other's business, its business plans, customers or associated companies or resulting from studies or surveys commissioned and paid for by the Client.
- 26.2 In particular during and after the Term the Media Agency acknowledges its responsibility to treat in complete confidence all the marketing and sales information and statistics relating to the Client's business with which the Client may supply the Media Agency in the course of any work for the Client.
- 26.3 From now on in this Clause [26] "Information" will be used to describe the categories of information referred to in Clauses [26.1] and [26.2].
- 26.4 The Media Agency shall impose obligations in terms equivalent to those in Clauses [26.1] and [26.2] on its own personnel. Upon written request by the Client, the Media Agency shall also obtain written assurances from any third parties to whom Information has to be disclosed in order to enable the Media Agency to carry out its obligations under this Agreement.
- 26.5 For the avoidance of doubt, the restrictions in this Clause [26] shall not prevent:
- 26.5.1 the disclosure or use of Information in the proper performance of the Media Agency's duties;

- 26.5.2 the disclosure of Information if required by law;
- 26.5.3 the disclosure of Information which has come into the public domain otherwise than through unauthorised disclosure.
- 26.6 The Client acknowledges that nothing in this Agreement shall affect the Media Agency's right to use as it sees fit any general marketing or advertising intelligence gained by the Media Agency in the course of its appointment.

*Consider using the following clauses if the Client is a Public Authority as defined in the Freedom of Information Act 2000, and see note below for further considerations.*

- 26.7 [The Client is subject to the requirements of the Code of Practice on Access to Government Information (2<sup>nd</sup> edition) (and any re-enactments of the same) and the Freedom of Information Act 2000 (and any subordinate legislation, codes of practice and guidance notes issued in respect of the Freedom of Information Act 2000) (“FOIA”).]
- 26.8 [In the event that the Client receives a Request for Information (as defined in the FOIA) in respect of any part of the Information, the Client shall notify the Agency immediately, and shall consult with the Agency as to the requirement to respond to such Request for Information. The parties shall assist and co-operate with one another to determine which parts of the Information (if any) are required to be disclosed by law under the FOIA and which parts of the Information (if any) are exempt from the requirement to disclose under the FOIA.]

*Note to Clause 26.1 refers to “general marketing or advertising intelligence”. This is intended to describe generic information about a particular type of product rather than confidential information about the Client’s product. Examples of the former might be consumption patterns of whisky in the UK or the appeal of fish fingers to particular socio-economic classes in England.*

*The Media Agency should also ensure that its contracts with its freelancers also include appropriate confidentiality provisions.*

*Clauses 26.7 and 26.8 are only relevant where the client is defined as a “public authority” under the Freedom of Information Act 2000 (“FOIA”). The FOIA came into force on 1 January 2005. It defines a large number of bodies as public authorities, which includes government bodies, the COI, various museums and libraries, the BBC, the Greater London Authority, PFI entities and many more. If a public authority receives a request for information from a third party, it will be obliged by law to disclose the information under the FOIA. This can include information about third parties, such as information about agencies who provide marketing services to a public authority. There are limited exceptions to the duty to disclose in respect of commercially sensitive information, but the exceptions do not necessarily cover sensitive information such as costs, fees and agency rate cards. Under the*

*FOIA, the public authority may be obliged to disclose sensitive information about an agency if a request for disclosure has been received, even if to do so puts the public authority in breach of its confidentiality obligations with the agency.*

*To limit the effects of this, both client and agency may wish to consider listing confidential and sensitive information in a Schedule, rather than relying on the wide ranging definition of "Information" above. It is recommended that legal advice is obtained on this subject if the client is a public authority. Lewis Silkin, ISBA and the IPA have prepared a guidance note on this matter.*

## **27 Warranties and Indemnities**

- 27.1 If there is an error in Advertising as published or publication is delayed or does not occur as planned, the Media Agency will not be liable unless this is caused by its default or neglect.
- 27.2 Should either party or its employees sustain any loss or liability, costs (including legal costs) or damages as a result of the other's breach of this Agreement, the party in breach shall indemnify the other subject to the provisions of Clause 28.
- 27.3 The Client warrants that to the best of its knowledge information and belief all Account information supplied to the Media Agency before and during the Term will be accurate and not in any way contrary to [English law] [any law applicable in any part of the Territory].
- 27.4 [For the avoidance of doubt any costs incurred in taking legal or other advice and undertaking trade mark or other searches and enquiries as the parties may agree should be undertaken are for the account of the Client.]
- 27.5 The Media Agency warrants that its personnel working on the Services are and shall be competent and suitable in every respect, whether as to qualifications, experience or otherwise, to perform the Services.
- 27.6 The Client confirms that it is expressly understood and agreed that in planning and buying the Client's media activity, the Media Agency shall use its [best] [reasonable] endeavours to ensure the accuracy of all estimated and target figures relating to:
- 27.6.1 the number, proportion or type of people likely to be exposed to the Advertising;
- 27.6.2 the number of exposures each person is likely to receive; and
- 27.6.3 the cost of achieving these exposures.

Since these are matters which are ultimately beyond the Media Agency's control, no warranties can be given by the Media Agency as to the accuracy of such estimates/targets or as to the figures actually occurring and no liability shall attach to the Media Agency in respect of any losses suffered by the Client or by any third party by reason of the Client's reliance on such estimates/targets.

*Note to Clause 27: Regardless of which of the optional clauses set out here the parties consider to be appropriate for their particular circumstances, they should not lose sight of the possibility of the Media Agency being joined to any proceedings brought in respect of the advertising by third parties. Media owners who publish unlawful Advertising may also be sued and will inevitably wish to pass on any such claim to the Agency under the media rate card terms and conditions.*

*There is no simple rule to explain the difference between 'best endeavours' and 'reasonable endeavours', but broadly speaking it can be explained as follows. Where there is an obligation on the Media Agency to use its 'best endeavours' it must attempt to complete the obligations as if it was doing so on its own behalf. This is sometimes described as 'leaving no stone unturned', but the Agency is not under an obligation so stringent that it would have to bankrupt itself in the process. An obligation to use 'reasonable endeavours' allows the Agency to balance the importance of fulfilling the obligation against the time and cost involved in doing so.*

## **28 Limitation of Liability**

28.1 Nothing in this Agreement shall exclude or in any way limit the Media Agency's liability for fraud, or for death or personal injury caused by its negligence or any other liability to the extent such liability may not be excluded or limited as a matter of law. Subject to this but including any liability arising under any indemnity under this Agreement:

28.1.1 the Media Agency's maximum aggregate liability under or in connection with this Agreement, whether in contract, tort (including negligence) or otherwise, will in no circumstances exceed [the total remuneration payable to the Media Agency hereunder during the preceding 12 months] [£xx]; and

28.1.2 the Media Agency will not be liable under this Agreement for any loss of actual or anticipated income or profits, loss of contracts or for any special, indirect or consequential loss or damage of any kind howsoever arising and whether caused by tort (including negligence), breach of contract or otherwise, whether or not such loss or damage is foreseeable, foreseen or known.

28.2 This Agreement states the full extent of the Media Agency's obligations and liabilities in respect of the Advertising and the performance of the Services. The parties agree that any condition, warranty representation or other term concerning the Advertising and/or the performance of the Services which might otherwise be implied into or incorporated in this Agreement, whether by statute, common law or otherwise, is excluded to the maximum extent permitted by law.

*Note to Clause 28: Some form of limitation on the supplier's liability is often found in contracts for the supply of goods and services. This clause provides a form or words that can be used if the parties agree that the Media Agency shall be entitled to limit its liability.*

*The opening wording of the clause is essential for its enforceability. It records that the parties do not intend to exclude those types of liability that English law does not allow to be excluded.*

*It then continues to deal with the maximum liability of the Media Agency for damage to the Client's property and for breach of contract. In agreeing these limits, the Media Agency should check the levels of insurance cover that it maintains, to ensure these are not exceeded. The two sets of words in square brackets in Clause 28.1.1 are mutually exclusive. These offer a choice between a fixed amount, or an amount linked to the fees paid to the Agency in the previous 12 months.*

*The clause excludes (rather than merely limits) liability for consequential loss. The details of the drafting is important, because the English Courts may only allow liability for such loss to be excluded if it has been set out in detail, and not if there is merely a general exclusion of consequential loss.*

## **29 Termination**

29.1 Either party may terminate this Agreement by service of notice in accordance with Clause 4.

29.2 Either party may terminate this Agreement forthwith by notice in writing to the other if the other party:

29.2.1 is in material breach of any of the terms of this Agreement and, in the case of a breach capable of remedy, fails to remedy such breach within [30] days of receipt of written notice giving full particulars of the breach and of the steps required to remedy it; or

29.2.2 (being a company) passes a resolution for winding up (otherwise than for the purposes of a solvent amalgamation or reconstruction) or a court makes an order to that effect; or

29.2.3 (being a partnership or other unincorporated association) is dissolved or (being a natural person) dies; or

- 29.2.4 becomes or is declared insolvent or convenes a meeting of or makes or proposes to make any arrangement or composition with its creditors; or
- 29.2.5 has a liquidator, receiver, administrator, administrative receiver, manager, trustee or similar officer appointed over any of its assets; or
- 29.2.6 ceases, or threatens to cease, to carry on business.
- 29.3 The Media Agency shall be entitled forthwith to terminate this Agreement by written notice to the Client if the Media Agency is unable to obtain normal credit insurance in respect of the Client and advance payments or suitable guarantees have not been made available by the Client within [...] days after the Media Agency's written request under the provisions of Clause [21.6]. During the period between the Media Agency's request for advance payments and suitable guarantees and the earlier of either the Client providing them or the end of the Term, all the Media Agency's obligations in relation to the booking of media shall be automatically suspended, as will any other Media Agency obligation to enter into any commitments involving significant expenditure as principal on the Client's behalf.
- 29.4 The parties' rights, duties and responsibilities shall continue in full force during the agreed period of notice and whether or not there is a period of notice, the Client shall pay all sums due in respect of work done and expenditure committed by the Media Agency until the end of the Term.
- 29.5 Upon the termination of this Agreement and payment by the Client of all items properly chargeable to the Client hereunder, the Media Agency will give the Client all reasonable co-operation in transferring, subject to the approval of third parties where required, all reservations, contracts and arrangements with media or others for space or time yet to be used and subject to, all rights and claims thereto.

*The following sub-clauses 29.6 and 29.7 may be inserted in commission only contracts.*

- 29.6 If, prior to notice of termination of this Agreement, the Media Agency has at the request of the Client prepared detailed plans or proposals for future advertising in respect of which the Media Agency has not been remunerated, the Media Agency shall be entitled to receive from the Client [payment on the basis of fair compensation for work done] [the equivalent of [...] % of the remuneration received by the Media Agency from the Client in the [6/12] months prior to the date of notice], less any remuneration which the Media

Agency may otherwise receive from the Client in respect of its work under this Agreement during the period of notice.

- 29.7 [If the Client wishes to use, after the Term and through another agency, a media plan drawn up by the Media Agency during the Term for the Client's future use, the Client shall not do so without the Media Agency's prior written consent and agreement being reached regarding appropriate remuneration for the Media Agency.]

*Note to Clause 29: Although it is not palatable to discuss these matters at the time of entering into a contract the vast majority of difficulties between Agency and Client arise at the stage of termination of the relationship. It is therefore critical that both the process and the circumstances in which the contract may be terminated are set out as clearly as possible. The first sub-clause deals with termination by notice, with a cross-reference to Clause 4. The second sub-clause deals with termination in the event of a breach of contract. The Force Majeure provisions are also relevant.*

### **30 Survival of Obligations on Termination**

The following clauses shall survive the end of the Term:

- Clause 22 Audit
- Clause 24 Ownership and custody of material
- Clause 26 Confidential information
- Clause 27 Warranties and indemnities
- Clause 28 Limitation of liability
- Clause 36 Non-solicitation
- Clause 41 Notices
- Clause 42 Applicable law
- Clause 43 Dispute resolution

### **31 Advertising Standards and Levies**

- 31.1 Both parties shall comply with all applicable laws and Advertising Regulations issued, made or given by any Advertising Regulator.
- 31.2 The parties will co-operate with each other in ensuring that suitable objective factual product and other information is available as required to satisfy the requirements of any applicable law or Advertising Regulation.
- 31.3 The Client shall inform the Media Agency without delay if the Client considers that any Advertising submitted to the Client by the Media Agency for approval is false or misleading or in any way contrary to law or to any applicable Advertising Regulation.

- 31.4 In order to fund the UK self-regulatory system, a levy is payable to:
- 31.4.1 the Advertising Standards Board of Finance (“ASBOF”) in relation to non-broadcast advertising. This levy will be a percentage (such percentage to be determined by ASBOF from time to time) of the gross media cost of outdoor, cinema and press display advertisements (excluding classified lineage, semi-display and any displays, screenings and publications outside the UK), the postage cost of direct mailings in the UK, and the cost of internet advertising in paid for space; and
  - 31.4.2 the Broadcast Advertising Standards Board of Finance (“BASBOF”) in relation to broadcast advertising. This levy will be a percentage (such percentage to be determined by BASBOF from time to time) of the gross media cost of broadcast advertisements in the UK.
- 31.5 The Agency shall add such levies to all relevant invoices submitted to the Client, but no Agreed Commission (if applicable) shall be payable on the amount of such levies. The parties agree that the Client shall be solely liable for payment of such levy.

*Note to Clause 31: Both the Client and the Media Agency have certain responsibilities under the self-regulatory codes. It is not appropriate for the references to the Client to be deleted, even if the Agency is obliged to create Advertising that complies with all the relevant legal and self-regulatory requirements.*

*For example, it is a fundamental requirement of the British Codes of Advertising and Sales Promotion that an advertiser should, prior to publication of its advertising, have to hand all documentary and other evidence necessary to substantiate any claims being made.*

*There may also be other codes that apply to a particular advertisement, such as the Code of the Proprietary Association of Great Britain in relation to drugs. It would be good practice for the Client to indicate which such codes apply and must be observed.*

*Clause 31.3 - the parties should make the best possible arrangements both internally and with each other to ensure that all advertising is cleared legally before use.*

*Clause 31.4 – This clause and the definitions of Advertising Regulator has been amended to reflect the hand over of responsibilities for broadcast advertising to the ASA (Broadcast). The levy required by ASBOF and BASBOF (from 1 August 2004) is used to fund the advertising industry’s self-regulation system and is currently set at 0.1% of the gross media cost of broadcast advertisements, outdoor cinema and some press display advertisements.*

## **32 Financial Promotions**

32.1 For the purposes of this Clause 32:

32.1.1 “**authorised person**” shall have the meaning set out in as section 31 of the FSMA (rather than the meaning set out in Clause 9 of this Agreement); and

32.1.2 “**Financial Promotion**” means any material created by the Agency for the Client pursuant to this Agreement that comprises or includes an invitation or inducement to engage in investment activity (as those terms are from time to time interpreted for the purposes of the FSMA);

32.1.3 “**FSMA**” the Financial Services and Markets Act 2000 together with any rules, orders, regulations, codes of practice and delegated legislation made thereunder from time to time.

32.2 The Client shall be responsible for ensuring that it, and every Financial Promotion, complies with the FSMA and all relevant rules, regulations and guidance issued by Financial Services Authority from time to time (including without limitation the “Conduct of Business Sourcebook”, as amended from time to time).

32.3 The Client warrants in relation to each Financial Promotion that:

32.3.1 the Client is an authorised person and that such Financial Promotion will be seen and approved by the Client for the purposes of section 21 of the FSMA prior to being communicated to any person; or

32.3.2 if the Client is not required to be an authorised person, that such Financial Promotion will be approved by an authorised person for the purposes of section 21 of the FSMA prior to being communicated to any person; or

32.4 such Financial Promotion is otherwise permitted by the FSMA.

*Note to Clause 32: This should only be included where the “Accounts” include financial products. This clause reflects the change in terminology resulting from the repeal of the Financial Services Act 1986 and its replacement by the Financial Services and Markets Act 2000.*

### **33 Data Protection**

- 33.1 Each party shall ensure that any mailing list or customer database supplied to the other party shall comply with the requirements of all legislation in force from time to time including, without limitation, the Data Protection Act 1998, and that each party shall comply with the relevant obligations of the Data Protection Act 1998.

*Note to Clause 33: This clause reflects the introduction of the new Data Protection Act 1998. As the Client is likely to be the Controller of the Personal Data about its customers generated through the advertising, it is not appropriate for the Client to seek to put all the responsibility for compliance with the Data Protection Act 1998 solely onto the Agency.*

### **34 Waiver**

- 34.1 The failure of either party to enforce or to exercise at any time or for any period any term of or any right pursuant to this Agreement shall not be construed as a waiver of any such term or right and shall in no way affect that party's right later to enforce or exercise it.

### **35 Force Majeure**

- 35.1 Neither party shall be liable for any failure to perform or delay in performance of any of its obligations under this Agreement caused by circumstances beyond the reasonable control of a party to this Agreement (including a labour dispute between a party to this Agreement and its employees as well as a labour dispute between a third party and its employees) (a "Force Majeure Event").
- 35.2 The party claiming the Force Majeure Event shall promptly notify the other party in writing of its reasons for the delay or stoppage and its likely duration and shall take all reasonable steps to overcome the delay or stoppage.
- 35.3 If the party claiming the Force Majeure Event has complied with clause 35.1, its performance under this Agreement shall be suspended for the period that the Force Majeure Event continues and the party will have a reasonable extension of time for performance of its obligations given all the circumstances. As regards the delay or stoppage arising from the Force Majeure Event:
- 35.3.1 Any costs arising from such delay or stoppage shall be borne by the party incurring those costs;

- 35.3.2 The party claiming the Force Majeure Event shall take all reasonable steps necessary to bring that event to a close or to find a solution by which its obligations under this Agreement may be performed despite the Force Majeure Event;
- 35.3.3 If the Force Majeure Event continues for more than [30] consecutive days, the party which is not claiming the Force Majeure Event may terminate this Agreement with immediate effect on giving written notice to the other party and neither shall be liable to the other for such termination.

*Note to Clause 35: The Force Majeure provisions have been amended. These now impose an obligation to notify the other party and to take reasonable steps to try to overcome the Force Majeure Event. They also set out the consequences of the event occurring. Clause 35.3.3 states that only the party who does not suffer from the Force Majeure Event can terminate the agreement. This prevents a party from being able to profit from its own breach or delay of the agreement as a result of being affected by Force Majeure.*

## **36 Non-solicitation**

- 36.1 The parties agree that neither of them will either on their own account or in partnership or association with any person, firm, company or organisation or otherwise and whether directly or indirectly during or for a period of [...] months from the end of the Term solicit or entice away or attempt to solicit or entice away (or authorise the taking of any such action by any other person) any [key] executive of the other party who has worked on the Advertising at any time during the last 12 months of the Term. [Each of the parties shall notify the other in writing of those executives whom they regard as “key” for these purposes.]

## **37 Severance**

- 37.1 If any provision of this Agreement is found by any court or administrative body of competent jurisdiction to be invalid or unenforceable then such invalidity or unenforceability shall not affect the other provisions of this Agreement which shall remain in full force and effect. The parties agree to attempt to substitute for any invalid or unenforceable provision a valid or enforceable provision which achieves to the greatest extent possible the same effect as would have been achieved by the invalid or unenforceable provision.

### **38 Assignment**

38.1 Neither party shall assign, transfer, charge or deal in any other manner with this Agreement or any of its rights under it without the prior written consent of the other party, such consent not to be unreasonably conditioned, withheld or delayed.

### **39 Third Party Rights**

39.1 A person who is not a party to this Agreement has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

*Note to Clause 39: The Contracts (Rights of Third Parties) Act 1999 applies to all contracts made on or after 11 May 2000. The Act amended the old doctrine of privity of contract that meant that a contract could only be enforced by one of its parties. Under the Act, a contract can be enforced by third parties if they are expressly identified individually, or as a defined group, or if they have an obvious benefit conferred upon them by the contract.*

*The clause records the default position that the parties' intention is that no third party shall have the right to enforce the contract. If the parties do want to confer that right on a parent company, for example, the parties could use a clause such as this:*

*"xx may enforce the terms of this Agreement subject to and in accordance with the provisions of the Contracts (Rights of Third Parties) Act 1999. No other person who is not a party to this Agreement shall have the right to enforce any of its terms by virtue of that Act."*

### **40 Entire Agreement**

40.1 This Agreement and the documents referred to in it (the 'Contractual Documentation') constitutes the entire agreement and understanding of the parties and supersedes any previous agreement between the parties relating to the subject matter of this Agreement.

40.2 The parties agree that neither of them have been induced to enter into any Contractual Documentation in reliance upon any warranty, representation, statement, agreement or undertaking of any kind (whether negligently or innocently made) of any person other than as expressly set out in this Agreement as a warranty. The only remedy available to the parties for breach of the warranties shall be for breach of contract under the terms of this Agreement and the parties unconditionally and irrevocably waive any other claims, rights or remedies that may otherwise be available. Nothing in this clause shall, however, operate to limit or exclude any liability for fraud.

- 40.3 No variation of this Agreement or of any of the documents referred to in it shall be valid unless it is in writing and signed by or on behalf of each of the parties.

*Note to Clause 40: This clarifies that there is no liability for any pre-contractual statement unless specifically referred to as a warranty in the Agreement or if it was made fraudulently. The parties may find it helpful to agree a standard "agreement amendment form" for use if amendments are required. This may assist easy reference to previous changes and with this in mind may be numbered sequentially.*

## **41 Notices**

- 41.1 Any notice, invoice or other communication which either party is required by this Agreement to serve on the other party shall be sufficiently served if sent to the other party at its specified address at clause 1 (or such other address as is notified to the other party in writing) as follows:

41.1.1 by hand;

41.1.2 by registered or first class post or recorded delivery; or

41.1.3 by facsimile transmission confirmed by registered or first class post or recorded delivery.

Notices sent by registered post or recorded delivery shall be deemed to be served three (3) Working Days following the day of posting. Notices sent by facsimile transmission shall be deemed to be served on the day of transmission if transmitted before 4.00 p.m. on a Working Day, but otherwise on the next following Working Day. In all other cases, notices are deemed to be served on the day when they are actually received.

## **42 Governing Law and Jurisdiction**

- 42.1 This Agreement shall be governed by and construed in accordance with the law of [England and Wales].
- 42.2 Each party irrevocably agrees to submit to the [non-] exclusive jurisdiction of the Courts of [England and Wales] over any claim or matter arising under or in connection with this Agreement or the legal relationships established by this Agreement.

*Note to Clause 42: With advertising business increasingly moving across frontiers it is important that the parties agree which country's law will govern the contract and which country's Courts will have*

*jurisdiction if any dispute should arise. English law is specified as the governing law; the law of another country may be more appropriate, depending on the home states of the parties and the territory where the services are to be performed. Legal advice should be obtained from lawyers qualified in the relevant jurisdiction as the underlying principles of contract and copyright law, for example, vary from place to place.*

**43 Dispute Resolution**

- 43.1 If any claim or dispute arises under or in connection with this Agreement, the parties will attempt to settle such claim or dispute by negotiation.
- 43.2 If any claim or dispute cannot be settled by negotiation within [21] days after either party has made a written offer to the other party to negotiate a settlement to such claim or dispute, the parties shall, before resorting to court proceedings, attempt to resolve the claim or dispute by mediation in accordance with the Centre for Dispute Resolution (CEDR) Model Mediation Procedure.
- 43.3 If the parties have not settled any claim or dispute by mediation within 42 days from the initiation of the mediation, the dispute shall be referred to and finally resolved by the courts in accordance with clause 42.

*Note to Clause 43: Mediation is a relatively new form of “alternative dispute resolution”. It is a method of resolving disputes which has been shown to optimise the prospects of achieving a settlement in a manner which preserves goodwill between the parties and makes it possible for them to work together in the future.*

*The dispute resolution wording follows the guidelines for such provisions issued by CEDR. In the first stage, the parties go to mediation (assuming direct negotiation has already failed). In the second they go to Court, if mediation fails. This removes the possibility of Courts requiring the parties to go through a further process of arbitration before allowing them to obtain redress through litigation.*

Signed on behalf of

[name of Client]

Signed on behalf of

[name of Media Agency]

.....

.....

Print name

Print name

Job title

Job title

Date

Date

## **SCHEDULE 1**

### **Definitions and Interpretation**

1. The following words and phrases shall have the following meanings (except where the context otherwise requires):

*(The symbol \*\* indicates definitions which may not be required, depending upon amendments made to the drafting of the body of the Agreement).*

<b>Term</b>	<b>Meaning</b>
Accounts	Means [all the Client's products and services] [those products and/or services of the Client listed in Schedule 2] [including the Client's corporate image];
Advertising	Means all the Client's advertising for which the Media Agency performs media buying and planning activity for the Client under this Agreement;
Media Agency Group Company**	Means any company which either owns more than 50% of the issued share capital of the Media Agency or in which either the Media Agency or any subsidiary of the Media Agency owns more than 50% of the issued ordinary share capital;
Agreement	Means this Agreement and its Schedules;
Advertising Regulation	Means any present or future applicable code of practice, adjudication, decision, guideline, direction or rule of any Advertising Regulator and includes any applicable modification, extension or replacement thereof in force from time to time.
Advertising Regulator	Means the Office of Communications ("Ofcom"), the Broadcast Committee of Advertising Practice ("BCAP"), the Committee of Advertising Practice ("CAP"), the Advertising Standards Authority ("ASA"), the ASA (Broadcast) and any other UK or EU regulator or statutory or regulatory body relevant to the Advertising and/or the Services to be provided under this Agreement;

Commencement Date	Means the date specified in Clause 4;
Independent Auditor	Means a suitably qualified and independent auditor;
Initial Period**	Means the period specified in Clause 4;
Key Individual(s)**	Means those of the Media Agency's personnel named in Schedule 4;
Records	Means such accounts and records maintained by the Media Agency of all expenditure which is reimbursable by the Client under this Agreement and as are reasonably necessary for the purpose of enabling the Client to conduct an audit of that expenditure, including (but not limited to) evidence of the appearance of Advertising in accordance with any agreed media schedule;
Services	Means those services the Media Agency will perform for the Client and specified in Schedule 3;
Term	Means the period from the Commencement Date until the termination of this Agreement;
Territory	Means the territory defined in Clause 3;
Working Day	Means a day (other than a Saturday or a Sunday) on which the clearing banks in the City of London are open for business;
Year	Means each period of twelve consecutive months during the Term beginning with the Commencement Date and its anniversaries.

2. In this Agreement (except where the context otherwise requires) the clause headings are included for convenience only and shall not affect the interpretation of this Agreement, use of the singular includes the plural and vice versa and the use of any gender includes the other genders.

3. The Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement and any reference to this Agreement includes the Schedules.
4. References to any statute or statutory provision include a reference to that statute or statutory provision as from time to time amended extended or re-enacted and to any subordinate legislation made from time to time under that provision.

**SCHEDULE 2**

**The Accounts**

### **SCHEDULE 3**

#### **The Services**

*Please note this is a 'menu' only: select only the services required. The parties should add other services or omit those listed as appropriate.*

#### **1 Media**

- 1.1 The evaluation of all advertising media.
- 1.2 The formulation and submission for the Client's approval of marketing and media plans and subsequent implementation.
- 1.3 The development, formulation and submission of a detailed media schedule for the Client's approval.
- 1.4 General media planning and buying.

#### **2 Other services**

- 2.1 Negotiating and agreeing sponsorship deals on behalf of the Client and the formulation of all appropriate sponsorship credits and idents.
- 2.2 Formulation, development and submission to the Client of merchandising and other promotional schemes.
- 2.3 Analysing the relevance and usefulness of new media (e.g. the worldwide web) as they become available and the formulation, submission and with the Client's approval, execution of new media projects.

**SCHEDULE 4**

**Key Individuals**

*If the parties have included a provision for key Agency personnel to be involved in providing the services in Clause 5, they should be listed here.*

**Name**

**Role**

**SCHEDULE 5**

**Hourly Rates of Media Agency Personnel**

*NB. This schedule will only be relevant where remuneration is fee based, or if the parties have included a reference to the provision of additional services on the basis of specified hourly rates. .*

*Every agency will have its own organisational and job title structure. The following list is an indication only of the types of jobs that exist within Agencies. It should not be seen as authoritative or definitive, but merely as an illustration.*

The hourly rates specified below are subject to any agreed written amendment by the parties from time to time.

<b>Agency Personnel</b>	<b>Current Hourly Charge Out Rate £</b>
Managing Director	
Board Director	
Account Director	
Account Manager	
Account Executive	
Planning Director	
Planning Executive	
Media Director	
Media Executive	
Media Planner	
TV Buyer	
Press Buyer	

**SCHEDULE 6**

**Payment by Results**

*The details of the Payment by Results Scheme should be placed here. A provision is needed for the mechanism, e.g. ISBA/IPA PBR Guidance Note. It may form part of the evaluation process, but that process should be undertaken in any event.*