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Notes & commentary on contract clauses

1. Parties to the contract

General

This agreement is made between

[REDACTED]

This draft is intended to cover the provision of advertising services by a full service agency handling creative work, production, planning and media buying. If more limited services are being supplied, a shorter version will be more appropriate, using only such of the provisions that follow as are required.

a company incorporated in South Africa (Registration No:

[REDACTED])

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 therefore be slavishly copied but "modelled" and used as a template.

("the Client"); and

[REDACTED]

a company incorporated in South Africa (Registration No:

[REDACTED])

("the Agency")

2. Agreement to act as Agency

- 2.1 The Agency agrees to serve under this Agreement as the Client's advertising agency to handle their advertising in [South Africa] ("the Territory") for the products, services and brands ("the Accounts") stated in Schedule 1 upon the terms and conditions set out in this Agreement. From now on in this Agreement all advertising produced by the Agency for the Client under this Agreement shall be called the "Advertising".

As advertising becomes increasingly international it is important to define the territorial limits of the agency's responsibility.

3. Exclusivity and competitive accounts

- 3.1 The Client undertakes not to appoint another advertising agency for the advertising of the products, services and brands stated in Schedule 1 during the term of this agreement.
- 3.2 The Agency undertakes that it will not, without the written consent of the Client, which shall not be unreasonably withheld, act for or represent any other direct market competitor which competes directly with the products, services and brands of the Client described in Schedule 1.

To avoid future misunderstandings there should be clear agreement as to whether any level of exclusivity on either side is appropriate and if so what. This will ensure that the Client is clear as to its

freedom to use other advertising service suppliers and the Agency knows from the start what ability it has to undertake directly or indirectly (e.g. subsidiaries) competing business. Naturally any exclusivity that might be agreed between the parties will only apply to such of the services as are set out in Schedule 2.

Exclusivity will impact on other aspects such as agency compensation and notice entitlement.

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

4. Agency's status

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

Despite its name, it has become accepted custom and practice in the industry that an advertising agency contracts with all its suppliers as principal at law, in other words as an independent contractor taking responsibility in its own right. The system of agency recognition by the media rests on this legal basis.

5. Term of appointment

This Agreement shall commence on [REDACTED] (“the Commencement Date”) and continue for an initial period of [REDACTED] months. After that initial period it will continue indefinitely until terminated by giving of [REDACTED] months notice in writing by either party. Notice to terminate cannot expire until one year has elapsed. From now on in this Agreement the period from the Commencement Date to the end of this Agreement will be referred to as the “Term”.

The initial terms should be commensurate with the need to create stability in the 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.

6. Co-operation

The Client will give the Agency clear briefings and ensure that all the facts given about the Accounts are accurate, while the 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 advertising agency. The Client will help the Agency do this by making available to the Agency all relevant information and co-operating with the Agency.

7. Agency services

- 7.1 In order to provide the Advertising, the Agency will perform for the Client the services detailed in **Schedule 2** to this Agreement (“the Services”). The Agency shall not be obliged to perform any service on behalf of the Client which is not specifically included in Schedule 2.

Schedule 2 contains a list of possible services. The parties should treat this as a menu and either add to this or choose only those services that are required.

- 7.2 To the extent that the Client requires work to be performed by the Agency which is not specified in Schedule 2, the work concerned and the remuneration payable therefore, shall be separately negotiated between the parties and be in addition to any amounts provided for in this Agreement.

- 7.3 The Agency will ensure 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 Agency, the Agency will with the Client's consent appoint a suitable replacement, such consent not to be unreasonably withheld or delayed.

7.3 is an optional provision for cases where it is important to the Client that particular individuals within the Agency work on the account.

8. Approvals and authorities

- 8.1 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 Agency's work and whose names are set out below:

"Authorised Person"

Name		Title	
Name		Title	

Any change to the Authorised Persons during the Term will be notified in writing by the Client to the Agency.

To avoid misunderstandings, the contract should leave the parties in no doubt as to who within the Client's organisation has the authority to approve what may be significant expenditure. The parties may also consider it appropriate to indicate whether particular named individuals have authority to approve expenditure up to a specified level.

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

- 8.2 For the purposes of this Agreement "written approval" shall include approval signified by:

- 8.2.1 fax on the Client's notepaper bearing the signature of an Authorised Person;
- 8.2.2 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 three "working days" by way of contact report from the Agency to the Client.
- 8.2.3 [e-mail emanating from the personal e-mail address of an Authorised Person.]

The reference to approval by e-mail is in square brackets as it may be regarded as inappropriate, because it does not require a signature which can authenticate the identity of the person giving the approval.

- 8.3 The Agency shall, after obtaining the Client's general written approval of its campaign plans, submit to the Client for its specific written approval:

- 8.3.1 copy, layouts, artwork, storyboards and/or scripts.
 - 8.3.2 media schedules for time, space and other facilities; and
 - 8.3.3 estimates or quotations of the cost of the various items of advertising and other services covered by this Agreement.
- 8.4 The Client's written approval of copy, layouts or artwork will be the Agency's authority to purchase production materials and prepare proofs. The Client's written approval of proofs will be the Agency's authority to arrange for publication of the relevant material.
- 8.5 The Client's written approval of television, cinema and radio scripts and/or storyboards with estimates or quotations of the production cost will be the Agency's authority to enter into production contracts (and engage producers, directors, artists and suitable qualified technical assistance).
- The Client's written approval of films and recordings will be the Agency's authority to arrange for transmission/broadcast thereof.
- 8.6 The Client's written approval of media schedules and estimates will be the Agency's authority to make reservations and contracts for space, time and other facilities under the terms and conditions required by media or suppliers.
- 8.7 The Agency will advise the Client immediately of any changes in the estimated cost of items of advertising or any changes in plans, schedules or work in progress previously approved in writing by the Client.
- 8.8 Notwithstanding that the Agency will enter into all contracts with third parties in its own name and as principal, the Client hereby indemnifies the Agency against all costs and expenses which it will incur in terms of such contracts with third parties, provided that the appropriate level of approval and authority has been adhered to.

9. Amendments and cancellation

9.1

The Client may request the Agency to change, reject, cancel or stop any and all plans, schedules or work in progress and the Agency will take all reasonable steps to comply with any such request provided that the Agency is able to do so within its contractual obligations to media and suppliers.

9.2

In the event of the cancellation of a campaign/project, the circumstances of which are outside the Agency's control, then the Agency will be entitled to charge a fee for the work completed up to the date of cancellation, based upon remuneration structures set out in Schedule 3. The Client will further reimburse the Agency for all outside costs payable to third parties, including any damages or charges arising from the early cancellation of a contract with a third party.

9.3

In the event of a material change to a previously agreed strategy or brief of a campaign or project, the Agency will be entitled to charge a fee for the work completed up to the date of the change based upon the remuneration structures set out in Schedule 3.

10. Contact reports

Contact reports will be issued by the Agency dealing with matters of substance discussed at meetings or in telephone conversations between the Client and the Agency within [REDACTED] working days following the meeting or conversation. If the subject matter of a contact report is not questioned by the Client within [REDACTED] working days of its receipt, it will be taken to be a correct record of the meeting or telephone conversation to which it refers.

11. Remuneration

11.1 General remuneration principle

The parties confirm that the Agency will be entitled to the remuneration specified in Schedule 3. The Agency will also be reimbursed by the Client for all bona fide out-of-pocket expenses incurred by the Agency performing its obligations under this Agreement, save to the extent specifically excluded in Schedule 3.

11.2 The remuneration structure agreed to by the

parties has been devised to ensure that the Agency receives adequate compensation for the services rendered and that the Client obtains the services at reasonable cost. However, in order to ensure adequate levels of compensation for the Agency, the parties agree to review the basis (individually and/or as a whole) of the remuneration structure at the end of the initial period and thereafter on an ~~annual~~ basis.

11.3

Until such time as a revised remuneration structure has been implemented, the then prevailing rates will apply, subject to the right of either party to terminate this Agreement as provided in Clause 24.

12. Advertising outside the territory

The terms of remuneration defined in Schedule 3 do not cover Services in respect of Advertising outside the Territory. If such services are required a separate remuneration arrangement will be negotiated.

13. Fluctuations in currency values

The Client agrees that due to currency fluctuations, the final cost to the Agency of obligations to third parties outside of South Africa may well differ from the anticipated cost at the date when such obligations were committed.

Forward cover should be discussed with Client as an option when overseas obligations are considered to be material.

The Agency will be entitled to charge the rate applicable at the time when actual payment is made to the third party.

14. Value Added Tax

VAT will be included on Agency invoices, where appropriate, at the prevailing rate.

15. Terms of payment

15.1 Two fundamental principles exist regarding financial payment terms:

15.1.1 the Agency will finance its own services but not the advertising of Client; and

15.1.2 as a principal at law, the Agency is held by media and other suppliers as solely liable for payment. Accordingly, it is essential that the Agency is paid by the Client in time to pay media owners and other suppliers.

15.2 Unless otherwise specifically agreed, the Agency is not obliged to make payments to third parties under the Agency's agreements with such contractors, unless the Agency has received such funds from Client to enable the Agency to fulfil these obligations.

15.3 Client confirms that all invoices will be settled within [30] days of the statement date on which these invoices first appeared.

15.4 If the payment date falls on a weekend or public holiday, then such payment date will be deemed to be the last working day immediately prior to the weekend or public holiday.

15.5 The Agency will invoice the Client in respect of Agency fees [monthly in advance] [monthly in arrears] and the Client will pay the invoice within [] days.

Optional sub-clauses are included to allow the parties to choose an appropriate method of invoicing and payment for the service provided. Regarding sub-clause 15.6 Clients should be aware that it is standard practice for agencies to demand advance payment for certain expenses.

- 15.6 Suppliers, particularly film production companies, market researchers and exhibition contractors, require payment in advance or at various stages of production: the Client will pay the Agency's invoices in respect of such production costs ~~[within days]~~ **[immediately upon presentation]**.
- 15.7 The Client reserves the right to withhold payment of any invoice or part of an invoice which is not in accordance with this Agreement and shall on receipt of such invoice forthwith notify the Agency in writing of the reason for such withholding and, where applicable, pay the undisputed part of such invoice.
- 15.8 The 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 prime rate of interest from time to time as specified by the Agency's bankers. This right extends to any part of an invoice on which payment is withheld pursuant to sub-clause 15.7 should it be subsequently established that the amount in question was invoiced in accordance with this Agreement.
- 15.9 Where a surcharge is levied by a supplier of media or other supplier against the Agency due to late payment and this results from late payment by the Client, the Client shall immediately reimburse to the Agency the amount of such surcharge, together with any accrued interest charged by the supplier in respect of the overdue account.
- 15.10 Each party shall pay all monies which are payable by it to the other without any right to 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.

Surcharge would also refer to forfeiture or loss of commission.

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 to set off.

16. Media and suppliers: business terms

16.1 Unless otherwise stated the Agency's contracts with media and suppliers for the Clients advertising will be made in accordance with media rate cards or other standard or individual conditions and contracts. The rights and obligations between the Client and the Agency shall correspond to those between the Agency and the various media and other suppliers under such conditions.

16.2 The Client therefore acknowledges that the terms and rules of the Agency's contracts with the media and suppliers are subject to revision in accordance with the Agreements made by the various bodies concerned and that the bookings required by the Client can only be made within the provisions relating to amendment, cancellation and omissions etc. as indicated in media rate cards and other standard conditions.

16.3 The Agency shall use reasonable care and skill in the election and appointment of media and suppliers and the agreement of the terms and conditions of such appointment. Should the Client request, the Agency will obtain more than one quote for a particular supply and discuss these with the Client before placing an order.

16.4 If in the course of providing the Services during the Term the Agency decides to use the services of any company in which the Agency has a financial interest, the Agency will declare this and before commissioning such services obtain the Client's consent thereto, such consent not to be unreasonably withheld.

The Agency should ensure that 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.

Depending on the circumstances, the parties may wish to consider alternative terms relating to the appointment of suppliers. For instance the Client may wish to have the contractual right to nominate its own suppliers for particular services or goods or to require a minimum number of quotes to be obtained, perhaps if expenditure above a certain level is anticipated.

Regard should also be held to the procedures for the production of TV commercials.

If different services are rendered by separate agencies within a group it may be easier to specify this in the contract.

17. Evaluation

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 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 Agency remuneration, will continue to apply.

If the parties have agreed a performance related bonus arrangement then the following should be added.

The evaluation and review meetings will also operate the performance-related scheme described in Schedule 3.

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 Agency may decide to use a structured, mutual performance analysis with marks attributed and perhaps bonuses payable depending on the outcome. To assist this process and at agreed intervals, a budget status report might be completed and copied to executives and staff on a "need to know" basis.

18. Audit

18.1 In respect of all expenditure which is reimbursable by the Client under this Agreement the Agency shall maintain such accounts and records (the “Records”) as are reasonably necessary for the purpose of enabling the Client to conduct an audit of that expenditure.

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.

18.2 The Agency will allow the Client’s own personnel or a professionally qualified independent auditor access to all the Records during the Term and for [3] months afterwards on not less than [7] days written notice at any time during normal business hours for the purposes of auditing or otherwise inspecting them [provided that in the absence of exceptional circumstances the Agency shall not be obliged to allow such access or inspection more than once during any [3] month period].

18.3 Should any audit or inspection of the Records by the Client reveal that the Client has been overcharged the Agency shall reimburse to the Client the amount of the overcharge within 7 days.

18.4 The Agency will afford to the Client all reasonable assistance in the carrying out of such audit, whilst the Client and its auditor will ensure that any information obtained in the course of the audit concerning the Agency's business is kept in the strictest confidence and not used for any purpose other than the proper conduct of the audit.

This audit clause covers only reimbursable expenditure. Should the parties want it to be extended further, for instance to time spent by Agency staff in cases where this controls all or part of remuneration, a modified clause will be needed.

The parties may wish to include provisions which entitle the Client to charge the 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.

19. Copyright and other intellectual property rights

19.1 The copyright for all purposes in all artwork, copy, storyboard and all other work created by the Agency for the Client's advertising will vest in the Agency unless agreed to the contrary in writing.

19.2 The Client undertakes not to make any use in or outside of South Africa of advertising material produced by the Agency, except with the written consent of the Agency.

19.3 The Agency will in all cases retain the copyright in any material contained in any presentation made in competition with any other agency in the event of the presentation of the Agency being unsuccessful.

19.4 The Client will notify the Agency if it uses any of the Agency's originated advertising material in or outside of South Africa. The Client agrees under the circumstances to pay an agency fee of 16.5% of gross media costs, excluding VAT. These fees are payable within 30 days of the placement date.

Both parties should be acutely aware of contractual obligations to artists/models appearing in advertising material.

Extensions for use of material in other territories require prior artist/model approval to avoid invoking breach of contract conditions.

OR

If the Client so requests and provided that all obligations arising from this contract have been complied with, the Agency will assign to the client on termination of this contract, such copyright and other rights throughout the world in the Client's advertising material as may be vested in the Agency and capable of assignment. This assignment will be subject to the rights of third parties and will be made only by special arrangement on terms indemnifying the Agency against subsequent claims by third parties.

19.5 Save with the consent of the Agency, the Client will not at any time before or after termination of this contract use or license any use in or outside South

If the Agency wishes to retain copyright.

Africa of any cartoon figure, model or other character whose visual appearance has been created exclusively by the Agency, other than the above or below-the-line advertising or on the packaging of the Client's products. The Agency's permission for other uses of such characters shall not be unreasonably withheld, but where income is to be generated, the Agency's permission will be conditional on prior agreement with the Client on reasonable fees or royalties.

20. Ownership and custody of material

20.1 Ownership

All advertising material prepared for the Client's account by the Agency and paid for by the Client will be the Client's property but not necessarily the Client's copyright. This does not apply to 'stock' photographs obtained from news or photographic agencies for particular advertisements, nor to photographic or film negatives or to any other medium in which this material may be supplied.

The ownership of "stock" negatives remains with the photographer, who does not usually sell them.

20.2 Custody

20.2.1 The Agency will keep in its care advertising materials entrusted to it as the Client's property for a maximum period of [1] [2] [3] years but will not be required to recover typesetting, colour separations, printing plates and the like from media and suppliers once they have left the custody of the Agency.

20.2.2 The Agency shall be entitled to destroy all such material left in their custody after [24] months, or after giving notice to the Client at such earlier time as the Agency considers reasonable.

20.2.3 The costs of storing negatives and film, on behalf of Client, at film stores will be recharged to the Client.

21. Confidential Information

21.1 The Agency agrees not to disclose without the permission of the Client during or after its term of appointment, any confidential information resulting from studies or surveys commissioned and paid for by the Client. The Client, in turn agrees that the Agency will be entitled to use as it sees fit any general marketing or advertising intelligence in the field of the Client's product or services which the Agency has gained in the course of its appointment.

21.2 For the duration of this Agreement and thereafter, the Agency agrees that it will treat in complete

confidence all the marketing and sales information and statistics which the Client has supplied to it during the course of any work performed for the Client.

21.3 The Client acknowledges and agrees that any identifiable and original idea, or concept presented by the Agency in relation to any promotion or advertising campaign invented or developed by it shall be acknowledged as being available only for such promotion or campaign and will not be used for any other purposes whatsoever without the Agency's express prior written agreement.

Even where no promotion or campaign is agreed, the ideas and concepts presented to the Client shall remain strictly confidential and shall not be used in any way, including communication to any third party, without the Agency's prior written consent.

The law will imply into a client/agency contract certain obligations to respect confidential information. However, it is wise to make the position clear in the agreement.

The issue of confidentiality is a two-way matter. The Agency must safeguard the Client's sensitive commercial information. However, the Agency can require the Client to acknowledge the confidentiality of its own ideas and concepts, particularly those which remain unused.

21.4 The Agency shall where so requested by the Client impose obligations in terms equivalent to those in sub-clauses 21.1 and 21.2 on its own personnel and obtain written assurances from any third parties to whom information has to be disclosed in order to enable the Agency to carry out its obligations under this Agreement.

21.5 The restrictions disclosed in this clause 21 shall not prevent:

21.5.1 the disclosure or use of information in the proper performance of the Agency's duties;

21.5.2 the disclosure of information if required by law;

21.5.3 the disclosure of information which has come into the public domain otherwise than through unauthorised disclosure.

21.6 The Client acknowledges that nothing in this Agreement shall affect the Agency's right to use as it sees fit any general marketing or advertising intelligence gained by the Agency in the course of its appointment.

21.6 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.

22. Insurances

22.1 Legal liability

The Agency will endeavour to obtain a legal liability policy for the Client, if it so wishes upon payment by the Client of the appropriate premium.

This insures against negligence, defamation, errors and omissions and legal risks of this nature. In certain instances it may not be appropriate to include such a clause.

22.2 Client's risk

22.2.1 The Agency will insure the Client's articles, negatives, film, photography etc. retained in its hands or at outside film stores for a maximum period of ~~(1)~~ ~~(2)~~ ~~(3)~~ years although legal ownership has been transferred to the Client as a result of charging the Client for such production costs. All insurance premiums payable by the Agency will be charged on to the Client.

The Agency should cover its own property, and that of its Client when in its hands. Agencies may find it appropriate to be more specific as to the extent and nature of "articles".

22.2.2 The Client will undertake to insure its property when in transit between the Agency and printers, production companies etc. Alternatively, the Agency will insure the property and will recharge any premiums payable to the Client.

The Client (or the Agency on his behalf) should insure his property when in transit.

22.2.3 The Client will insure its property when in

the hands of media, printers, production companies etc. Alternatively on specific instruction from the client, the Agency will insure the property and will recharge any premiums payable to the Client.

The Client (or the Agency on his behalf) is recommended to take appropriate insurance cover for his property when it is held by media etc.

22.3 **Television Production**

All television and film production undertaken on the Client's behalf may be covered under the AAA insurance scheme policy at preferential rates. Any premiums applicable to the Client's productions will be included in the Agency's production charges to the Client.

It may be helpful to specify the precise risks covered. Remember the risks covered by the production company. Some Clients may elect not to participate in the scheme and either self-insure or carry the risk.

23. **Legal liability and other claims**

23.1 **Limitation of agency liability**

The Agency shall not be liable for any delay in, or omission of publication or transmission for any error in any advertisement, in the absence of gross negligence on the part of the Agency.

23.2 **Indemnity to the agency**

The Client indemnifies the Agency against any loss which it may incur as a result of any civil claims or proceedings being brought against it based upon any advertising and other work prepared for the Client by the Agency and approved by the Client either orally or in writing before publication. Such indemnity will include all legal costs (as between attorney and own client) and expenses which the Agency may be obliged to pay or incur in defending any such claims or proceedings brought against it.

This should be included because an advertising agency can now be joined in an action brought against an advertiser.

Both full service agencies and media buying companies are liable for copy standards imposed by publishers' standard terms of acceptance and media recognition agreements.

23.3 Force majeure

If due to war, strikes, industrial action short of a strike, import or export embargo, lockouts, accidents, fire, blockade, flood, natural catastrophes or other obstacles over which [a party] [the Agency] has no control, [that party] [the Agency] fails to perform any of its obligations under this Agreement, [that party] [the Agency] shall not be held responsible for any loss or damage which may be incurred as a result of such failure. Should the event of force majeure continue for longer than [one month], the party adversely affected shall have the option of terminating this Agreement immediately without further liability other than such liabilities as have already accrued when the Term ends.

23.4

The Client confirms that it is expressly understood and agreed that in planning and buying the Client's media activity, the Agency shall use its [best] [reasonable] endeavours to ensure the accuracy of all estimated and target figures relating to:

- 23.4.1 the number, proportion or type of people likely to be exposed to the Advertising;
- 23.4.2 the number of exposures each person is likely to receive; and
- 23.4.3 the cost of achieving these exposures.

Since these are matters which are ultimately beyond the Agency's control, no warranties can be given by the Agency as to the accuracy of such estimates/ targets or as to the figures actually occurring and no liability shall attach to the 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.

24. Termination

24.1 Rights and duties during period of notice

24.1.1 The Agency's rights, duties and obligations will continue in full force during the agreed period of notice - including the ordering and invoicing of advertising in media which will be published during such period.

It is important, in the event of transfer of the account, that agreements exist which specify the rights and obligations of the Client, the outgoing Agency and the incoming Agency.

24.1.2 The Agency will be entitled to a minimum level of remuneration during the notice period. This minimum will be based upon the average monthly remuneration earned over the preceding 12 months (or such shorter period if the Agreement was in force for less than 12 months).

Termination provisions should always include the precise period of notice to be given. See clause 5.

24.1.3 In the event that normal remuneration earned during the notice period exceeds the calculation made in terms of 24.1.2 above, then this clause will not be applicable.

24.1.4 If, the Client wishes to place advertising direct or through another advertising agency during the agreed period of notice, the Client may do so provided that it pays the Agency a sum equivalent to the remuneration to which it would have been entitled to receive had it placed the advertising under this Agreement.

24.2 Agency title to unused work

Upon termination, unused advertising plans and ideas prepared by the Agency, or any advertisements not already published or broadcast, shall remain the property of the Agency, regardless of whether or not the physical embodiment of the creative work is in the Client's possession in the form of copy, artwork, plates, recordings, film, videotape, etc.

24.3 Transfer of material and rights on termination

Upon termination of this Agreement the Agency will transfer, assign and make available to the Client, against payment by the Client of all amounts properly chargeable to the Client, all property and material in the possession or the control of the Agency belonging to and paid for by the Client, and all information regarding its advertising.

If the Client wishes to use these plans and ideas an appropriate fee will be negotiated.

The Agency agrees to give all reasonable co-operation towards transferring, with the approval of third parties, all reservations, contracts and arrangements with media or others for space, time or materials yet to be used and all rights and claims thereto, upon being duly released from corresponding obligations.

24.4 Early termination

Without prejudice to any pre-existing liability of either party to the other, either party may (by written notice) terminate this Agreement forthwith on any of the following events:

24.4.1 if the other commits a material breach of any of the terms of this Agreement (whether expressed or implied); or

24.4.2 if the other commits any breach (other than a material breach) of any of the terms of this Agreement and has failed to make good any such breach within ~~14 days~~ of being required to do so by written notice identifying the breach and steps which must be taken to remedy it; or

24.4.3 if the other enters into or proposes a voluntary arrangement of composition with its creditors or reconstruction of its debts, or if its directors make a declaration of solvency for the purpose of a member's voluntary winding-up, or if notice is given of a creditors' meeting in connection with the creditors' winding-up, or if a special resolution is passed that the other be wound up by the Court, or if a liquidator or judicial manager is appointed, or if the Court grants an order for the liquidation or sequestration of the other or the placement of the other under judicial management, or if the other ceases to carry on its business or is unable to pay its debts within the meaning of the Insolvency Act.

25. Association of Advertising Agencies

As members of the Association of Advertising Agencies the Agency will abide by its constitution.

26. Advertising standards

- 26.1 Both parties shall comply with the rules of the Advertising Standards Authority and other relevant codes of advertising laid down whether on a statutory or a self-regulatory basis. Both parties shall abide by the rulings of the Advertising Standards Authority.

Both advertisers and agencies have duties under the ASA Code.

- 26.2 In order to satisfy the requirements of these codes or any statutory requirements the Client and the Agency will co-operate with each other in ensuring that suitable objective factual product and other information is available as required.

It is for example, a fundamental requirement that an advertiser should have in his hands all documentary and other evidence necessary to substantiate the claims he is making. (Refer ASA Code of Practice)

- 26.3 The Client shall inform the Agency without delay if the Client considers that any Advertising submitted to the Client by the Agency for approval is false or misleading in relation to their product or service or in any way contrary to law or to any applicable code.

The parties should make the best possible arrangements both internally and with each other to ensure that all advertising is cleared legally before use. Reference of scripts, etc. to the AAA legal advisory service prior to production is recommended.

27. Applicable law

This Agreement shall be constructed in accordance with and governed by the laws of the Republic of South Africa and both parties hereby irrevocably agree that the Courts shall have exclusive jurisdiction to resolve any controversy or claim of whatever nature arising out of or relating to this Agreement or any alleged breach of it.

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.

28. Dispute resolution

- 28.1 Any dispute arising out of this Agreement or the interpretation thereof, both while in force and after its termination, shall be submitted to and determined by arbitration. Such arbitration shall be held in Johannesburg, unless otherwise agreed to and shall be held in a summary manner with a view to it being completed as soon as possible.

Whether agencies and clients make use of this arbitration clause must be a matter of judgement. Whilst arbitration can be a cheaper option than litigation and more suitable to settling some types of disputes, there are other situations where it is not appropriate. For example, where a client simply trying to delay payment for as long as possible, an ordinary court action can be more appropriate. Arbitration, however, can be more appropriate where the issue is essentially technical or where a compromise approach is more appropriate.

28.2 There shall be one arbitrator who shall be, if the question in issue is:

If an arbitration clause is left out, there is nothing to prevent both parties, if they both agree, settling their differences by arbitration or by some form of alternative dispute resolution.

28.2.1 primarily an accounting matter, an independent chartered accountant;

28.2.2 primarily a legal matter, a practising senior Counsel of not less than 5 (five) years' standing, or a practising attorney not less than 15 (fifteen) years' standing;

28.2.3 primarily a technical matter, a suitably qualified person; and

28.2.4 any other matter, a suitably qualified person.

The principal benefit of arbitration is that proceedings are held in private, alternatively the parties may prefer to have no dispute resolution clause at all in which case litigation is the first and last resort.

28.3 The appointment of the arbitrator shall be agreed upon between the parties, but failing agreement between them within a period of 14 (fourteen) days after the arbitration has been demanded, either of the parties shall be entitled to request the Executive Director of the AAA to make the appointment and, in making his appointment, to have regard to the nature of the dispute.

28.4 The arbitrator shall have the powers conferred upon an arbitrator under the Arbitration Act, 1965, as amended, or re-enacted in some other form from time to time, but shall not be obliged to follow the procedures prescribed in that Act and shall be entitled to decide on such procedures as he may consider desirable for the speedy determination of the dispute, and in particular he shall have the sole and absolute discretion to determine whether and to what extent shall it be necessary to file pleadings, make discovery of documents or hear oral evidence.

The decision of the arbitrator shall be final and binding on the parties and may be made an order of any Court of competent jurisdiction. Each of the parties hereby submits itself to the jurisdiction ~~[of the Witwatersrand Local Division]~~ of the High Court of South Africa, or any successor thereto, should the other party wish to make the arbitrator's decision an order of that Court.

29. Notices

Each party chooses the address set out opposite its name below as its address at which all notices, legal processes and other communications must be delivered for the purposes of this Agreement.

29.1.1 the Client: _____

Telefax No: _____

29.1.2 the Agency: _____

Telefax No: _____

30. Entire agreement

This Agreement is the complete and exclusive statement of the Agreement between the parties relating to the subject matter of this Agreement which supersedes all previous communications, agreements and other arrangements, written or oral [excepting the copy agreements annexed hereto as Schedule ~~XXXXXX~~]. It is expressly agreed that no variation of this Agreement shall be effective unless in writing and signed by both parties.

The parties may find it helpful to agree a standard "agreement amendment form" for use in the event that amendments are required. This may assist easy reference to previous changes and with this in mind may be numbered sequentially.

Signed at _____ for and on behalf of [name of Agency].

Signed _____ Name _____

Designation _____ Date _____

Witness 1. _____

2. _____

Signed at _____ for and on behalf of [name of Client].

Signed _____ Name _____

Designation _____ Date _____

Witnesses 1. _____

2. _____

Schedule I

Summary of products, services and brands applicable to this Agreement

The parties confirm that the Agency has been appointed to advertise the following products, services and brands under the terms and conditions contained in this Agreement.

Schedule 2

Summary of Agency services ("the Services")

PLEASE NOTE THIS IS A 'MENU' ONLY: SELECT ONLY THE SERVICES REQUIRED

Parties to add to or omit as appropriate

1. Overall services

- 1.1 A careful study of the business of the Client and the Accounts.
- 1.2 An analysis of present and potential markets.
- 1.3 The identification of problems and solutions in relation to advertising, marketing and merchandising of the Accounts.
- 1.4 The formulation and submission to the Client for its approval of advertising ideas, plans, programmes and campaigns together with estimates of the cost of executing the recommendations.
- 1.5 Proposing, arranging and interpreting market research activity which the Agency judges to be of use to the Client in promoting the Accounts.

2. Media

- 2.1 The evaluation of all advertising media.
- 2.2 The formulation and submission for the Client's approval of marketing and media plans and subsequent implementation.
- 2.3 The development, formulation and submission of a detailed media schedule for the Client's approval.
- 2.4 General media planning and buying.
- 2.5 Check and verify insertions, displays, broadcasts or other media used, to such degree as is usually performed by agencies.

3. Production supervision

- 3.1 Preparation and submission of estimates for press production and quotes for television production.
- 3.2 Supervision of production companies and other suppliers.
- 3.3 Organising the despatch of artwork, prints and other necessary material to the media.
- 3.4 Making the necessary arrangements for the use of artists, models, music etc. including licenses, buyouts and fees wherever practicable prior to commissioning.

4. Other services

- 4.1 Negotiating and agreeing sponsorship deals on behalf of the Client and the formulation of all appropriate sponsorship credits and indents.
- 4.2 Formulation, development and submission to the Client of merchandising and other promotional schemes.
- 4.3 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 3

AGENCY REMUNERATION & CHARGES

1. General remuneration principle

1.1 Media

The Agency will be entitled to invoice for media space and time at gross rates contracted with the media. The Agency will be entitled to receive a commission of ~~16.5%~~ on such gross media rate, excluding VAT. Where the media allow either no commission or a percentage that is different to the ~~16.5%~~ the Client agrees to pay the Agency at current published rates plus an amount that will yield not less than ~~16.5%~~ on the gross media rate.

For Clients who are on a monthly fee system, such media advertising will be at net cost only.

OR

The Client will pay the Agency at current published rates for advertising in all media. Where media allow no commission (~~less than X%~~), the Client will pay the Agency at current published rate plus such amounts as necessary which (together with the commission, if any), will yield the Agency ~~16%~~ of the amount due to media from the Agency.

This can apply to media allowing no commission or commission at any rate.

1.2 Production

The Agency will be entitled to invoice for advertising materials and services at net cost plus a ~~X%~~ mark-up. Items to be billed on this basis include but are not limited to the following:

(Refer Appendix for examples)

- (i) *Agencies are free to negotiate remuneration with each client.*
- (ii) *For clients who are on a monthly fee system, such production costs will be at net cost only.*

1.3 Internal charges

The Agency shall be entitled to charge for internal services on certain applicable production jobs. These services include, but are not limited to:

- Artwork
- Creative direction on television and film shoots
- Art and Photographic direction on print jobs
- Desk top publishing
- Design

These charges will be based upon time utilisation, as agreed from time to time between the Agency and Client.

1.4 Out-of-pocket Expenses

These will be charged to the Client as net cost only. These costs include, but are not limited to:

(Refer Appendix for examples)

2. General fee

In addition to remuneration set out elsewhere in this agreement the Client will pay the Agency a fee of R [] per [year] [month], payable [in equal instalments] on [] of each [year] [month].

For Clients on a monthly fee system. This (additional) fee applies regardless of the amount of commission and other charges. As an example, it can be fixed on appropriations, which are small in relation to the work involved and would otherwise result in uneconomic operation of the account by the agency. However, there are many different ways in which fees can be built into the arrangements with clients, and agencies should consider what best makes sense for them.

3. Minimum remuneration

The Agency's total remuneration for the year (1st January - 31st December) will be not less than R []. If the total Agency income in respect of the Client is less than this amount at the end of the year, the Agency will be entitled to charge the Client the difference between R [] and the amount actually received. If the Agency's income exceeds R [] per annum, the Agency will be entitled to retain the excess.

To ensure a certain return it may be desirable in some cases to require a definite minimum annual remuneration. This is often the case with small appropriations or where, because of the nature of the business, there is valid reason for requiring a fixed minimum sum, irrespective of the commission.

OR

The Agency's minimum remuneration is R [] per annum, and if in any month commission from media and suppliers in respect of the Client's account is less than R [] the Client will pay the Agency a fee equal to the difference.

If at the end of the year the Agency's total remuneration (commission plus fee) is greater than R....., the Agency will refund the Client:

- i) The amount of such excess, or
- ii) An amount equal to the total fees paid by the Client, whichever is the lower.

OR

The Agency's minimum remuneration is R..... per month. At the end of each month the Agency will charge the Client the amount (if any) by which R..... exceeds commissions received during the month.

To either of these first two alternative clauses may be added: 'If the Agency's appointment is terminated before the end of the year, the above provision shall apply on a pro-rata basis'.

4. Fees

4.1 Retainer

The Client will pay the Agency a retainer of R..... for each year of the Term beginning with the commencement date, payable in equal monthly instalments.

4.2 Time Spent

The Agency's charges for the Services will be calculated based upon actual hours expended using the hourly rates agreed with Client, provided that the total charge in each year of the Term beginning with the commencement date will not exceed R.....

5. Performance Related Bonus

The Client will pay the Agency a performance related bonus of a maximum of [.....%] of the Agency's [annual fee] [minimum remuneration].

The parties may wish to consider an incentive element in the form of a performance related bonus and/or a risk/reward system. A structure for defining targets may also be identified in advance of the contract being signed. Elements to be considered in such a structure include:

- Client's appraisal of
Agency performance
- Client's achievement of
its brand(s) targets
(Refer clause 17)

6. Space and time charges - Volume discounts

Where, due to the extent of the Client's adspend with a particular media or media owner, a volume discount is negotiated, such discounts will be passed on to the Client.

To deliver total transparency, any discounts negotiated on behalf of a client should be passed back to the client.

7. Space and time charges - refunds and adjustments

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

8. Special Services

Special services are those that may be provided over and above the normal advertising functions described above and which do not result in normal commission bearing media advertising. These services will be charged for by mutual agreement, in advance. The charge may take the form of an agreed fee, or commission structure, or a combination of both.

Such services would include:

- Market research
- Public relations
- Sales promotion
- Sponsorship
- Direct marketing
- Merchandising, collateral materials
- Conventions and special events
- Corporate identity development programmes
- Print and packaging design
- Marketing and business strategy
- Conceptual and/or creative consultancy
- Planning and/or supplying materials for sales meetings and similar functions

Each agency is advised to include in its terms some provisions for all of the services it renders and charges. However, some items may be so complicated that it might be better to have them unspecified but covered by this alternative clause. Care should be taken not to commit the agency to a particular method of charging unless the extent of the service required is known.

9. New product development

9.1

All creative and strategic development work on new products should be paid for on a fee basis. Such fees should be negotiated in advance and are based upon either:

- i) a fixed amount or
- ii) time utilised at an agreed rate per hour.

9.2

Payment of these fees are to be made at regular monthly intervals from commencement of the Agency work. Fees charged should be recoverable from media commission with the following conditions:

- i) Rebates will occur monthly based upon the applicable media commission for that month.
If the campaign for the new product is postponed, and then revived at a later stage with a substantially different brief/strategy, there will be no rebate of the original development fee.
- iii) No rebate should be recoverable from the development fee if planned media has not commenced within 12 months of the commencement of the project.
- iv) Development fees do not include any production costs incurred. These costs will be charged for in the normal manner (as per clauses 1.2, 1.3 and 1.4 of this Schedule 3).

APPENDIX to Schedule 3

Consideration will need to be given to which of the following items will be charged for on the basis of suggested clauses contained herein:

1. MATERIALS & SERVICES (COMMISSION BEARING)

- Artwork
- Authors corrections
- Composers and musicians' fees
- Comprehensive layouts
- Copy
- Copyright and royalty fees
- DTP (including laser printouts, fonts, discs)
- Illustrations
- Mechanical items (e.g. typesetting, colour separations, printing plates, etc.)
- Photography and model fees
- Prints/copies of films, VCR tapes and cassettes
- Hard costs incurred on cancelled projects
- Printwork
- Radio tapes and cassettes
- Retouching
- Comprehensive storyboards
- Special writers
- Storage of film negatives/masters (off-site)
- Translations
- Trace guides
- TV and radio performers' fees
- TV, radio, film and other scripts on continuities
- TV, radio and cinema productions and studio charges

2. OUT OF POCKET EXPENSES (NON-COMMISSION BEARING)

- Client competitive showreels
- Travel expenses (outside local travel)
- Photostats including colour photostats
- Media research costs (Telmar, Adindex, etc.)
- Local telephone and fax
- International telephone and fax
- Research of concept testing (client request)
- Adcheck (client request)
- Freight, delivery and courier charges
- Legal costs (clearance of TV scripts, client requests etc.)
- Studio materials
- Handling fees

N.B. These lists are not exhaustive and agencies may well identify other items arising from their own specific services to clients.

Schedule 4

Key Individuals

Optional provision in cases where it is important to the Client that particular individuals within the Agency work on the account.