Any product can have defects – or at least fail to meet the expectations of a purchaser. A range of statutory provisions confer rights on a party acquiring goods if these are not of satisfactory quality. Software and what is referred to as “digital content” is covered by these provisions although their application gives rise to a number of difficulties. Unlike most physical products where defects will be found in one or a small number of the items, every digital work will be an exact copy of the original. If one product is considered faulty, the same fate may await all of the others. In most instances software is licenced rather than sold. It is commonplace for a licence to seek to restrict or exclude liabilities that might otherwise arise. The question may then be whether the terms of the licence are enforceable. In many instances they may be brought to the customer’s attention after the contract for supply has been concluded. The use of “click-wrap” licences where a user has to click on a box indication acceptance of contractual terms prior to using the software may assist but questions of time will again be very significant.
24. Contractual issues