

## Introduction to Contract Law: Part II

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# OVERVIEW

- I. The Contents of a Contract
- II. Terminating the Contract
- III. When Things Go Wrong: Loss & Liability

# I. The Contents of a Contract



## The Elements of a Contract: Recap

- Legally enforceable (common law) contract **must** contain:
  1. offer
  2. acceptance of the offer
  3. consideration
  4. intention to create legal relations
  5. certainty of contractual terms
  6. capacity of the parties to contract
- **All** of these elements are required for a valid and legally enforceable contract

## The Contents of a Contract

1. **Terms**
2. **Conditions**
  - A. Express
  - B. Implied (“automatic” terms)
3. **Warranties**
4. **Exclusion / limitation clauses**



## 1. Terms

### “Contractual terms” are in essence:

- the ***duties*** which have to be carried out, and
- the ***arrangements*** which have to be made by the parties, in order to realise the effect of the contract.

### Terms have legal and logistical effect:

- *“You will sell us an aircraft*
- *of this type,*
- *at this price,*
- *and deliver it,*
- *at this place and at this time.”*

## Terms have legal and logistical effect:

- Legal:

- Contract law: different types of terms and their legal effect
- 3 strictly technical senses of “term” in contents of contract:
  - a. Express terms
  - b. Implied terms
  - c. Conditions

- These classifications determine:

- How important the term is
- How necessary the term is to give effect to the contract
- What remedies are fair if the term is breached

## Importance of a Written Contract

- Memorialising terms in writing:
  - Evidence of an agreement and its terms
  - Can prevent future disputes over terms
- Some contracts must be in writing:
  - Both common and civil law require a written, signed contract
  - Statute of Frauds (Common law):
    - Sale of land
    - Contracts that cannot be complete within one year
    - Certain contracts for purchase and sale of goods



## A. Express terms

- What?
  - Terms that the parties have *specifically* and *explicitly* (or “*expressly*”) agreed
- Form
  - In writing **or**
  - Verbal
- Example: “*you will sell us an aircraft of this type, at this price, and deliver it to this place at this time*”

## B. Implied Terms

- What?
  - Terms which are not written, but assumed by law to be included
  - Implied terms are essential to give effect to commercial agreements in a free-market economy
  - A key implied term in a contract of sale is (naturally) that goods are of satisfactory quality and are fit for purpose
  - List of typical implied terms
    - Merchantable quality
    - Fitness for purpose
    - Free and clear title
    - Product accords with any sample provided
    - Performance within a reasonable time
  - Consumer & non-consumer contracts treated differently

## 2. Conditions

- What?

- Terms that go to the *root* of a contract

- Function

- Confers or takes away a party's rights,
- Upon the happening (or non-happening) of a specific event

- Example

- B sells an aircraft to A
- Condition of this sale contract: The aircraft is capable of flying

- Forms

- *Express*: “the aircraft must be delivered on 1 May 2016”
- *Implied*: ‘the aircraft will be capable of flying’

Failure to fulfill a condition by one party:

- The other party has the right to:
  - Claim damages **AND**
  - Terminate the contract



### 3. Warranties

- What?
  - A guarantee or promise which provides a party with an assurance that certain facts or conditions are true or will happen
- Importance
  - Less important than a condition: Warranty does not speak to the main purpose of the contract
- Forms
  - Express
  - Implied (often in contracts by consumer-protection laws)  
Eg: Aircraft sold by the maker.
    - Implied warranty that the aircraft is free of [serious] defects and capable of flying

- A warranty can attach to a product:
  - Consumer or end-user can take the benefit of it, despite having no direct contractual relationship with the maker
- If a party does not fulfil a warranty:
  - Other party has the right to claim damages, BUT NOT to terminate the contract



## Condition ≠ Warranty

- Sale contract: “Aircraft to be delivered on 1 May”
- Reality: Delivered one month later, on 1 June.
  - If the delivery date is a **condition**, other party has the right to:
    1. claim damages for financial loss caused by late delivery AND
    2. terminate the contract (refuse delivery).
- If the delivery date is a **warranty** other party **ONLY** has the right to claim damages for financial loss, **NOT** to terminate the contract

## II. Terminating the Contract





## Terminating the Contract

- A contract can come to an end (“terminate”) in different ways:
  - Performance
  - Express agreement
  - Doctrine of frustration
  - Breach
  
- But, what is a breach and when does it terminate a contract?
  - Different rules in common law jurisdictions
  - Different rules in civil law jurisdictions

## A. Termination through Performance

- Parties carried out everything required by the contract, exactly in the way agreed in the contract
  - Then parties have **discharged** their contractual obligations



## **B. Termination by Agreement**

- Parties may agree that the contract should end automatically if:

- an agreed event occurs, or
- after an agreed period of time

= waiver or amendment of the contract's original terms

## C. Termination by the Doctrine of Frustration

- Event occurs that is outside the control of the parties
- That event makes it impossible for the contract to be performed
- Sometimes referred to as “*force majeure*”:
  - an event typically considered to be outside the control of the parties,
  - e.g. labour disputes, war, riot, accident, fire, flood...  
 (“Acts of God”)

## D. Termination through Breach

- Anticipatory Repudiation:

- Party made it clear (by words or conduct) that he will not or cannot carry out the contract
- Innocent party may “accept the repudiation”

- Party is guilty of a substantial failure to perform

- Eg. Breach of a **condition** of the contract

- Performance of the contract has become impossible as a result of a party’s actions

### Consequences (Generally):

- Breach of condition: can terminate
- Breach of warranty: cannot terminate

## D. Termination through Breach

- Some Common law jurisdictions:
  - Parties are in breach of a contract where they do not strictly perform the terms of the contract
  - Failure to perform itself gives rise to an action for breach of contract
- Other Common law jurisdictions:
  - Breach considered to be minor where a party gains the substantial benefit of the bargain despite defective performance
  - Where the non-breaching party does not receive the substantial benefit of the bargain = 'material breach'
  - Non-breaching party can suspend performance until the other party cures the breach
  - If non-performance continues, then non-breaching party can end the relationship and seek damages

## D. Termination through Breach

- Civil law jurisdictions:
  - Failure to perform does entitle a non-breaching party to terminate a contract, generally
  - Fault is taken into consideration in determining whether the contract was breached
  - If a party acted reasonably, then a court might not find breach even though the party did not perform under the strict terms of the contract
- Some civil law systems
  - Mandate a grace period to cure non-performance
- Other civil law systems
  - Allow aggrieved party to end contractual relationship only with breach of essential term, but require legal proceedings to resolve breach of ancillary contractual terms

# III. When Things Go Wrong: Remedies for Breach & Damages





## Remedies

- Where a party fails to perform under the terms of a contract, non-breaching party is entitled to remedies
- Generally, two types of remedies:
  - Specific relief (also known as specific performance)
  - Compensatory damages (compensation for 'loss')

## Specific Relief

- Not a measure of damages but an order from court requiring breaching party to do or not do something
- Generally, non-breaching party has right either
  - To be put back in situation before contract formed and costs refunded, or
  - Be put in position non-breaching party would have been if contract had been performed
- Civil and common law approach from opposite perspectives
  - Civil law: specific relief generally allowed
  - Common law: specific relief as a last resort

## Specific Relief

Includes:

- **Specific performance:** order to make a party perform his obligations under the contract
- **Injunction:** court order to stop someone breaching a term of the contract
- **Suspension of performance:** (not valid in common law jurisdictions)

## Compensatory Damages

### •General aim of damages for breach

- To put non-breaching party into the position it would have been had the contract been performed OR never entered into
- Usually monetary awards in amount that will put non-breaching party in position he or she would have been but for the breach

### •Types of damages (measure of loss)

- Stipulated damages ('liquidated damages')
- Expectation damages ('benefit of the bargain')
- Reliance damages
- Consequential damages

## Compensatory Damages

- Stipulated damages ('liquidated damages')
  - Sum stipulated in contract as payable upon breach
    - Civil law—generally embraced
    - Common law—only when a reasonable assessment of potential harm
  - **Upside**: commercial certainty
- Expectation damages ('benefit of the bargain')
  - Seek to place non-breaching party in place in position it would have been had breach not occurred
  - Allow non-breaching party to purchase substitute

## Compensatory Damages

- Reliance damages
  - Designed to put non-breaching party in place it would have been had contract never been formed
  - Generally not often awarded
- Consequential damages
  - Measured by the amount of any further losses resulting from breach that were reasonably foreseeable by breaching party

All damages must be reasonable and reasonably foreseeable at the time the contract is formed.

## Exclusion / Limitation Clauses

- Exclusion:
  - Exclude all liability for failing to carry out the contract wholly or partly (when things go wrong)
- Limitation:
  - Seek to limit the liability of one party for **financial loss** caused to the other party
- Can be very unfair
  - Consumer-protection laws provide strict rules to prevent the wrongful use of exclusion clauses by businesses
  - Liability for fraud or wilful misconduct cannot be excluded (common law and civil law differ)
- Cannot be used to escape a bad bargain
- Losses claimed cannot be too remote

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