



Max Planck Institute  
LUXEMBOURG  
for Procedural Law

# "English Law and Legal Terminology"

Dr Stephanie Law

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# Topics to be Covered this Semester

Main focus on:

- Contracts - 08.04;
- Torts - 15.04;
- Commercial Law - 13.05;
- Company Law - 20.05.

Exam: 03.06, 16.00-18.00 (HS 2).

Final class and return of exams: 17.06.



# Short Presentations and Written Exam

- Presentation of 3-5 minutes;
- 10 points for the presentation;
- 90 points for the final exam.



# Introduction to Contract Law

- Contract in our daily lives;
- When is a promise or promise enforceable?
- Importance of case law;
- Reforms with statute (legislation) and protections from EU law;
- A chronological study: negotiation; formation; modification; termination.



# Introduction to Contract Law

- Formation of the contract;
- Content of the contract – and modification?
- Contract and their effects on third parties;
- Bringing the contract to an end;
- Remedies for breach of contract;
- Key terminology and questions.



# The Formation of the Contract



# The Concept of the Contract

- Voluntary agreement between two or more parties;
- Creates legal obligations on those parties to perform;
- Bilateral (two promises) or unilateral (one promise).

## Performance?

- Parties do what they promised under the contract; performance can be positive act or negative.

## Legally-enforceable?

- If one party fails to do what he agreed under the contract, the other can obtain legal redress before a court.



# 1. Does an Agreement Exist? Is it a Contract?

What is necessary for a contractual agreement to exist?

1. **Agreement** between the parties – a meeting of minds;
  1. Offer;
  2. Acceptance;
2. **Consideration**;
3. An **intention** between the parties to create a legal relationship;
4. Formal requirements.





# Basis of the contract: an agreement between the parties.

Principle of freedom of contract – laissez-faire philosophy of contract.

- Freedom to decide whether to enter a contract;
- On the terms and content of the contract;
- The agreement and content to be made by parties without interference (e.g. by the courts);
- When might freedom of contract be limited? And why?



# 1. Does an Agreement Exist? Is it a Contract?

**Agreement** = **offer** made by one party and **accepted** by the other.

Has an offer been made? What would the **reasonable person** have thought (objectively established by court)?

Offer = an expression of willingness to contract on certain terms, with intention that offer will become legally binding if accepted.



# 1. Does an Offer Exist?

**Offeror:** makes offer to enter into a contract, with intention that the **offer will be binding** as soon as it is accepted.

**Offeree:** decides if they want to accept the offer on the terms on which it is made – must be **unqualified** and **final** expression of acceptance (i.e. acceptance cannot be conditional on terms being changed).



# 1. Does an Offer Exist?

“Offer” must be distinguished from “invitation to offer”:  
“an expression of willingness to negotiate” or to make an offer, without being legally bound.

May come before contractual negotiations.

E.g. display of goods in shop window = invitation to offer, not an offer (*Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401).



# Has the Offer Been Accepted?

An offer has to be accepted – to show agreement as to terms of offer (also established objectively by court).

- Can be by words or by conduct (e.g. by performance);
- If offeree wants to change terms  $\neq$  acceptance but = counter-offer; original offer is rejected and destroyed (*Hyde v Wrench* (2840) 49 ER 132 – change in price for sale of farm);
- Until offer is accepted, no legal obligation – can be revoked, unless unilateral offer and performance made.



# Has the Acceptance Been Communicated?

- General rule: offeror must be reasonably expected to know acceptance made – not effective until communicated. Why?

## Exceptions:

- Where need for communication is waived by offerer;
- Where unilateral contract made – e.g. the offer of reward for return of a lost pet;
- Postal exception (why?): letter posted = acceptance (where reasonable to use post, and consequence not absurd); email?
- Silence + conduct may = acceptance. E.g. no formal acceptance sent but two years' conduct as if contract existed (*Brogden v Metropolitan Railway Company* (1877) 2 AC 666).



## 2. Consideration

- Necessary that there is **reciprocity** in a contract – the idea of exchange and mutual benefit;
- In England, a promise must be supported by consideration to be binding – to distinguish between binding and non-binding agreement (e.g. promise to gift);
- A contract = a bargain; each party must give something or be disadvantaged, for what he receives from the other party.



## 2. Consideration

*Layhoarp v Bryant* 3 Scott 238, 250:

“Any act of the plaintiff from which the defendant derives a **benefit or advantage, or any labour, detriment or inconvenience** suffered by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff with the consent, either express or implied of the defendant”.

- Related to “intention” to create legal obligations.





## 2. Consideration

What might this consideration be?

Legally, of “some value”; a benefit to the promisor or detriment to the promisee. Hard to define exactly.

- 1) Must be sufficient (of some value) but need not be adequate (i.e. does not need to be the same value as that for which it is given);
- 2) Past consideration is not good;
- 3) A person to whom a promise is made can only enforce a promise if he himself has provided consideration for it (cannot be given by a third party).



### 3. An Intention to Create Legal Relations

→ Intention of parties that dispute arising from agreement will be decided by a court.

Intention is examined objectively and in context; the court does not look at the state of minds of the parties.

Assumption by court of such intention in commercial agreements.

Assumption against such intention, e.g. agreement between spouses for payment of money (e.g. *Balfour v Balfour* [1919] 2 KB 571).

Assumption **can be rebutted** where parties prove such an intention did/did not exist.



# Example: Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ 1

- Advertisement for a flu remedy (smoke ball), with reward if it did not work;
- Mrs Carlill bought it, used it, caught the flu;
- She claimed the reward; ultimate reply – she would have to prove she used it;
- Mrs Carlill sued, arguing a contract existed: advert = offer, and her reliance = acceptance.
- Is there a contract?



# CARBOLIC SMOKE BALL

WILL POSITIVELY CURE

- |   |  |   |  |   |  |
|---|--|---|--|---|--|
| <b>COUGHS</b><br>Cured in 1 week              | <b>CATARRH</b><br>Cured in 1 to 2 months | <b>HOARSENESS</b><br>Cured in 11 hours  | <b>THROAT DRAFFS</b><br>Cured in 1 to 1 1/2 days | <b>INFLUENZA</b><br>Cured in 10 hours   | <b>COUGH</b><br>Subdued in 10 minutes                  |
| <b>COLD IN THE HEAD</b><br>Cured in 10 hours  | <b>ASTHMA</b><br>Subdued in 10 minutes   | <b>LOSS OF VOICE</b><br>Fully restored  | <b>SMOKING</b><br>Cured in 3 weeks               | <b>HAY FEVER</b><br>Cured in many cases | <b>WHOOPING COUGH</b><br>Subdued the first application |
| <b>COLD OF THE CHEST</b><br>Cured in 10 hours | <b>BRONCHITIS</b><br>Cured in many cases | <b>SORE THROAT</b><br>Cured in 11 hours | <b>SORE EYES</b><br>Cured in 7 weeks             | <b>HEADACHE</b><br>Cured in 10 minutes  | <b>NEURALGIA</b><br>Cured in 10 minutes                |

As all the Diseases mentioned above proceed from one cause, they can be Cured by this Remedy

## £100 REWARD

WILL BE PAID BY THE

CARBOLIC SMOKE BALL CO.  
to any Person who contracts the following Epidemic.

### INFLUENZA,

which, in any District, is caused by using COLD STEAM and the CARBOLIC SMOKE BALL according to the printed directions applied each week.

### £1000 IS DEPOSITED

with the ALLIANCE BANK, Regent Street, should any one contract it in the winter.

During the last epidemic of INFLUENZA many thousand CARBOLIC SMOKE BALLS were sold as preventives against the disease, and in an unaccounted case was the disease recovered by their using the CARBOLIC SMOKE BALL.



## THE CARBOLIC SMOKE BALL,

### TESTIMONIALS.

The Duke of Devonshire writes: "I am much obliged to the Carbolic Smoke Ball which you have sent me, and which I find most efficacious."  
 Sir FRANCIS BASSSETT, Bart., M.P., writes from Elm Street, 5, 20th: "My Wife and my children have derived much benefit from the Carbolic Smoke Ball."  
 Lady MORLEY writes from Grosvenor, City Grand, Telegraph, Jan. 26, 1891: "My Mother before the Carbolic Smoke Ball is in a certain state and a cure for a cold, and will soon give pleasure in communicating to her friends. Lady Wharfedale has the Carbolic Smoke Ball, will soon let the same to her friends."  
 Lady BARNARD writes from Grosvenor, M.B. Northampton, Jan. 2, 1891: "Lady Wharfedale is pleased to say that the Carbolic Smoke Ball has given every satisfaction, she considers it a very good remedy."  
 Sir GILBERT TRICE writes: "The Duke the Carbolic Smoke Ball has done a great deal of good."  
 Madame JEROME writes: "Madame Fort has found the Carbolic Smoke Ball very beneficial, and she only being that would make her friends well or give them better health and ease."

AS ENDORSED BY  
**SIR MORELL MACMENZIE, M.D.**  
 HAS BEEN ADVISED TO  
**W.M. THE GERMAN EMPRESS.**  
  
 H.H.H. The Duke of Edinburgh, K.R.  
 H.H.H. The Duke of Devonshire, K.G.  
 The Duke of Fife, K.T.  
 The Marquis of Salisbury, K.G.  
 The Duke of Argyll, K.T.  
 The Duke of Westminster, K.G.  
 The Duke of Richmond and Gordon, K.G.  
 The Duke of Buccleugh.  
 Duke of Hamilton.  
 The Duke of Norfolk.  
 The Duke of Rutland, K.G.  
 The Duke of Northumberland.  
 The Marquis of Epsom, K.G.  
 The Earl of Derby, K.G.  
 Earl Spencer, K.G.  
 The Earl of Clarendon.  
 The Lord Chief Justice.  
 Lord Treasurer.

### TESTIMONIALS.

The Baron de Lorraine writes: "The Carbolic Smoke Ball has benefited me greatly."  
 The Viscountess de LITZ writes from Palermo, Sicily, Jan. 21, 1891: "The Marquis de Pisa has had the Carbolic Ball sent for the treatment of the epidemic of Influenza, and has seen the Influenza, although accompanied by acute catarrh of the throat."  
 Dr. J. BARNARD, M.D., writes from 4, Elm Street, London, West, 1st, 1891: "My children came of past winter season, which have not only been cured, but have gained the Carbolic Smoke Ball."  
 A GENTLEMAN, Editor of the Daily Standard, writes from 111, Strand, N.Z., Feb. 11, 1891: "Being a great sufferer from the prevailing epidemic I had seen of the excellent and efficacious and beneficial properties of a remarkable remedy in the name of the Carbolic Smoke Ball."  
 The Rev. Dr. CHURCHMAN & W. BARNARD, M.A., D.D., writes from London, Dec. 1890: "Being a great sufferer from the prevailing epidemic I had seen of the excellent and efficacious and beneficial properties of a remarkable remedy in the name of the Carbolic Smoke Ball."  
 The Rev. Dr. CHURCHMAN & W. BARNARD, M.A., D.D., writes from London, Dec. 1890: "Being a great sufferer from the prevailing epidemic I had seen of the excellent and efficacious and beneficial properties of a remarkable remedy in the name of the Carbolic Smoke Ball."  
 The Rev. Dr. CHURCHMAN & W. BARNARD, M.A., D.D., writes from London, Dec. 1890: "Being a great sufferer from the prevailing epidemic I had seen of the excellent and efficacious and beneficial properties of a remarkable remedy in the name of the Carbolic Smoke Ball."

One CARBOLIC SMOKE BALL will last a family several months, making it the cheapest remedy in the world at the price—10s., post free.

The CARBOLIC SMOKE BALL can be refilled, when so ply, at a cost of 6s., post free. Address:  
**CARBOLIC SMOKE BALL CO., 27, PRINCES ST., HANOVER SQ., LONDON, W.**



# Example: Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ 1

- Advert = could be offer; not only invitation to offer;
- General rule, acceptance required BUT implicit waiver of need for acceptance here;
- Also, full performance = acceptance of offer (no need for communication);
- Consideration – both advantage (use generates sales) and disadvantage (having to use the smoke ball);
- Intention to create legal obligations – statement that 100 had been deposited in a bank account.



## 4. The Form of the Contract

What does “form” mean?

- The way in which an agreement is recorded.
- If form is incorrect, not enforceable.

General rule: no requirements; can be oral and informal.

Exceptions – from statute:

- Contracts for the sale of land must be in writing;
- Deeds (a legal instrument affirming an interest, right or property) – must be evidently a deed, must be signed by person making it and witnessed (no requirement of consideration).



# The Content of the Contract



# The Content of the Contract

- 1) Contract terms: express and implied
- 2) Conditions, warranties and innominate terms
- 3) Standard form contracts

## Key questions:

- (Negotiation of) what should be included in contract?
- What is content is missing?
- What weight is given to different terms (in construction and interpretation)?
- What if a contract is not negotiated?





# The Content of the Contract: Express and Implied

Express terms: parties' statements which are included in contract (can be multiple documents).

Interpretation = not what parties thought but what a reasonable person would have thought (in “factual matrix”).

Compare “representations”: statements made prior to contract formation to induce parties to enter it – not part of the contract itself.



# The Content of the Contract: Implied Terms

Terms implied in fact:

- Not express but one which court finds parties must have intended to include (must be “so obvious...”, i.e. contract cannot function without it – e.g. in contract for the use of a wharf, implied that it was safe for a boat to be there).

Terms implied in law:

- Based on policy (not parties’ intention) and included on legal basis (e.g. implied term that goods sold for a particular purpose will be fit for that purpose);

Terms implied by custom:

- Trade usages and customs, unless conflicts with express terms (e.g. that a repairperson will bring their own tools).



# The Content of the Contract: Conditions, Warranties and Innominate Terms

## Conditions:

- Important terms; if breach, injured party can claim damages and terminate the contract.

## Warranties:

- Subsidiary issues; only leads to right to claim damages – no termination.

## Innominate terms:

- Intermediate importance; remedy available dependent: damages always; termination only if serious failure.



# The Content of the Contract: Standard Terms

Non-negotiated contracts; drafted in advance by one party and offered on a take-it-or-leave-it basis.

Save time, money and effort but open to abuse.

E.g. consumer contracts:

What issues arise?



# Contracts and Third Parties



# Beyond the Parties to the Contract

Can a contract have an impact on third parties (not part of contract)?

Privity of contract = common law general rule;

- Generally, contracts **cannot** confer rights or impose duties/obligations to third parties;
- Concerns who can enforce a contract – often related to consideration;
- A third party cannot enforce the terms of a contract.



# Beyond the Parties to the Contract

Example:

*Tweddle v Atkinson* (1861) 1 B&S 393: John Tweddle and William Guy mutually agreed in writing to pay sums of money (£100 and £200, respectively) to Tweddle's son William (who was engaged to Miss Guy). Guy then died before payment, and when the estate would not pay, William Tweddle then sued Mr Atkinson, the executor of Guy's estate, for the promised £200.



# Beyond the Parties to the Contract

Contract (Rights of Third Parties) Act 1999:

- Exception to common law rule – to avoid injustice;
- Third parties can enforce (same) rights if intended by parties to the contract, and if:
  - Agreement purports to confer a benefit on the third party, either individually or a member as a class;
  - Third party is specifically mentioned and no expressed stipulation that the person was not intended to be able to enforce it.
- Burden on party claiming no such benefit conferred.





# The End of the Contract



# Bringing the Contract to an End

How might a contract be brought to an end?

- By performance;
- By a breach of contract;
- By frustration of the contract;
- By its expiration.



# Bringing the Contract to an End: Performance

Performance:

- Requires parties fulfil their obligations set out the contract;
- Obligations discharged when parties do exactly what they promised under the contract;
- Full performance by all parties will end the contract.
  
- Non-performance or malperformance will not.



# Bringing the Contract to an End: Breach

Breach of contract:

- When the parties cannot or does not want to fulfil their obligations **when they are due**;
- Failure to make performance without lawful excuse;
- Includes non-performance (failure to perform at all) and malperformance (failure to perform correctly).

Anticipatory breach:

- Where, before performance is due, a party indicates he will not perform or puts himself in a position where he cannot perform.



# Bringing the Contract to an End: Frustration

## Frustration

- Events arising after the formation of a contract;
- Events which parties cannot foresee;
- Events which undermine/interfere with performance.

## Consequences?

- Parties may get out of a contract/their obligations are “discharged” if these events make performance impossible or illegal (not just overly difficult);
- Events must not be due to fault of either party and must not have been anticipated in the contract.



# Remedies for Breach of Contract



# Remedies for Breach of Contract

What is a remedy?

If a party is injured/suffers loss as a result of breach of contract = he can claim a remedy.

Different remedies are available for breach:

- Damages/monetary compensation;
- Specific performance;
- Restitution.



# Remedies for Breach of Contract

Damages/monetary compensation:

- **Main remedy for breach of contract;**
- Available as of right;
- Aim to compensate the injured party for his loss (i.e. for what he has not received under the contract);
- Not necessary to provide loss BUT damages are based on the actual loss suffered;
- If no loss suffered, damages are nominal;
- Compensation, not punishment of the party in breach.





# Remedies for Breach of Contract

Specific performance:

- Remedy in equity – discretionary decision by judge and not available as of right;
- The non-performing party is ordered by the court to perform his contractual obligations;
- Damages must be deemed to be inadequate;
- Will not be ordered in all circumstances – e.g. almost never for contracts of personal service.



# Remedies for Breach of Contract

## Restitution:

- Need arises where one party has performed in part or entirely;
- And where the other party has not performed;
- Where performance is a payment of sum, restitution = repayment of that sum;
- Where performance is a benefit conferred, restitution = payment of a sum equivalent to that benefit.



# Additional Content:

## Against the Formation of the Contract



# Void and Voidable Contracts

If there is a defect in the contract, either:

- Void:
  - Not a contract; no legal effects; treated as if never existed and benefits transferred must be returned.
- Voidable:
  - Possible to bring contract to an end on choice of one party; either affirm (contract has full legal effect as parties would have intended) or avoid it (as no legal effect; parties back to their original position).
- Unenforceable:
  - Contract is valid but cannot be enforced by court; e.g. if limitation period has expired.



# Defences Against Formation of a Contract

Lack of capacity:

Capacity = ability legally to enter a contractual agreement and form the necessary intention to do so.

Who lacks capacity?

Minors;

Persons with mental disorders;

People who are drunk/otherwise incapacitated.

Such contracts are not valid.



# Defences Against Formation of a Contract

Duress (common law):

- An illegitimate threat – to force a party into a contract;
- Actual or threatened physical violence; and
- Conduct which “constitutes a coercion of the will which vitiates consent” (e.g. illegitimate economic duress);

Undue influence (equity):

- Pressure – not duress but creates influence by which consent has been obtained and free will undermined;
- Based on the facts of the case;
- E.g. might result from relationship of dominance: presumption with lawyer/client; parent/child.



# Defences Against Formation of a Contract

## Mistake?

- Unilateral mistake: one party makes mistake and other is aware;
- Common mistake: both parties make same mistake;
- Mutual mistake: both parties mistake the other's intention.

## Effect?

- Negatives consent?
- Nullifies consent?
- Common law – void from the beginning?
- Equity – voidable and can be rectified/fixed by the court?



# Key Questions of Contract Law

Does an agreement between the parties exist?

—————> How is the contract formed?

Should this agreement be characterised as a contract?

—————> Should it be legally enforceable as a contractual agreement?

What are the contents of the contract?

—————> What kind of provisions or terms are included?

How (and where) can the contract be enforced?

—————> What does it mean to enforce a contract?





# Key Contract Law

Read!!!

<http://www.bailii.org/ew/cases/EWCA/Civ/1892/1.html>





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