



# LPC BUDDY

Commercial Law  
2024



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## Commercial Law

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<b>Colour Coding Guide</b>	<ul style="list-style-type: none"> <li>❖ <b>Blue Text</b> – Reference to legislation and case law.</li> <li>❖ <b>Green Text</b> – Reference to textbook<sup>1</sup> paragraphs, workshop tasks<sup>2</sup> and other notes in this guide.</li> <li>❖ <b>Orange Text</b> – CPR references, and European Commission and CMA guidance notes in respect of competition law<sup>3</sup>.</li> </ul>
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<sup>1</sup> Textbook references are to the CLP Legal Practice Guides by CLP Publishing.

<sup>2</sup> References to Workshop tasks are to University of Law workshop tasks (which may be adopted by other LPC institutions). The content and structure of Workshops is subject to change at short notice and so task references should be treated as a general guide only.

<sup>3</sup> Please note that this guide has been written in advance of the publication of the Digital Markets, Competition and Consumers Bill, which may impact competition law and e-commerce topics.

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# 1. Introduction to Commercial Contracts

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**Introduction to Commercial Contracts<sup>1</sup>**

❖ *Commercial and IP Law & Practice, Chapter 1*

<b>Overview</b>	<ul style="list-style-type: none"> <li>❖ <i>Chapter 1 of Commercial and IP Law &amp; Practice</i> provides an introduction to the basics of commercial contracts.</li> <li>❖ This note considers the essential points that this chapter covers, which in summary, are:             <ul style="list-style-type: none"> <li>➤ An overview of <b>the supply chain</b>.</li> <li>➤ The pros and cons of the use of <b>standard terms</b>, as opposed to an individually negotiated contract; and</li> <li>➤ An overview of the <b>basic structure</b> of a commercial contract.</li> </ul> </li> </ul>
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<p><b>The Supply Chain</b></p> <p><i>Commercial and IP Law &amp; Practice, 1.3</i></p>	<ul style="list-style-type: none"> <li>❖ “Supply chain procurement” is a term given to the <b>sourcing of raw materials</b>, services and utilities necessary to produce goods.</li> <li>❖ There are <b>three primary routes</b> through which raw materials are ultimately procured and become goods that are sold to a consumer:             <ul style="list-style-type: none"> <li>➤ By way of a <b>direct sale</b> (Manufacturer 1 in the diagram below).</li> <li>➤ By way of <b>distribution</b> (Manufacturer 2 in the diagram below).</li> <li>➤ By way of <b>an agency agreement</b> (Manufacturer 3 in the diagram below).</li> </ul> </li> </ul> <div style="text-align: center; margin: 20px 0;"> <pre> graph TD     SRM[Supplier of raw materials] -- sells to --&gt; M1[MANUFACTURER (1)]     SRM -- sells to --&gt; M2[MANUFACTURER (2)]     SRM -- sells to --&gt; M3[MANUFACTURER (3)]          M1 -- sells to --&gt; R1[Retailers]     R1 -- sells to --&gt; EU1[End user]          M2 -- sells to --&gt; D[Distributor]     D -- for resale to --&gt; R2[Retailers]     R2 -- sell to --&gt; EU2[End user]          M3 -- appoints --&gt; A[Agent]     A -- negotiates/concludes sales --&gt; R3[Retailers]     R3 -- sell to --&gt; EU3[End user]             </pre> </div> <ul style="list-style-type: none"> <li>❖ Each of these processes is explained in the table below.</li> </ul>
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<sup>1</sup> [Workshop 1, Prep Task](#); we have not reproduced the research required by this task (as this is not needed for an exam); we merely cover the commercial basics students are expected to understand.

Method	Steps	What happens?
<b>1. Direct Sale Agreement</b>	<b><u>Manufacturer &gt; Retailer</u></b>	<ul style="list-style-type: none"> <li>❖ The supplier of raw materials sells these to a manufacturer.</li> <li>❖ The manufacturer uses the raw materials to <b>create a good</b> which is <b>sold to a retailer</b>.</li> <li>❖ The <b>retailer then sells the good to the end user</b> (customer).</li> </ul>
<b>2. Distribution Agreement</b>	<b><u>Manufacturer &gt; Distributer &gt; Retailer</u></b>	<ul style="list-style-type: none"> <li>❖ The supplier of raw materials sells these to a manufacturer.</li> <li>❖ The manufacturer uses the raw materials to create a good which is sold to a distributor.</li> <li>❖ The distributor <b>buys goods from the supplier</b> in order to re-sell these to the retailer.</li> <li>❖ The <b>retailer then sells the goods to the end user</b> (customer).</li> <li>❖ Unlike an Agency Agreement (see <a href="#">below</a>) the <b>distributor buys the goods from the supplier and therefore owns the goods</b>.</li> <li>❖ There is, therefore, <b>no direct contractual relationship</b> between the supplier and the distributor's customers (retailers).</li> <li>❖ The pros and cons of this method of procurement are set out in our note on <a href="#">Agency vs Distribution Agreements</a>.</li> </ul>
<b>3. Agency Agreement</b>	<b><u>Manufacturer &gt; Agent &gt; Retailer</u></b>	<ul style="list-style-type: none"> <li>❖ The supplier of raw materials sells these to a manufacturer.</li> <li>❖ The manufacturer uses the raw materials to create a good.</li> <li>❖ The manufacturer <b>appoints an agent</b> who acts <b>on the manufacturer's behalf</b> to negotiate and conclude sales.</li> </ul>

			<ul style="list-style-type: none"> <li>❖ The Retailer <b>buys the goods from the Agent</b> (acting on the Manufacturer’s behalf) and sells them to the End User (Customer).</li> <li>❖ Again, the pros and cons of this method of procurement are set out in our note on <a href="#">Agency vs Distribution Agreements</a>.</li> </ul>		
<p><b>Upstream and Downstream Contracts</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 1.3</a></p>	<ul style="list-style-type: none"> <li>❖ Contracts entered into during the course of business can be categorised as being either “upstream”, or “downstream”.</li> </ul> <table border="1" data-bbox="316 548 1511 1661"> <tr> <td data-bbox="316 548 521 1262"> <p><b>Upstream Contracts</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 1.3</a></p> </td> <td data-bbox="521 548 1511 1262"> <ul style="list-style-type: none"> <li>❖ Upstream contracts provide a business <b>with the resources needed to carry on business</b>.</li> <li>❖ They are contracts which <b>require some sort of financial outlay</b>, e.g.:                             <ul style="list-style-type: none"> <li>➤ The supply of goods or services <b>to</b> the business;</li> <li>➤ The <b>supply of funds</b> (loans);</li> <li>➤ <b>Permission to manufacture</b> through intellectual property licences;</li> <li>➤ ‘<b>Overheads</b>’, such as <b>utilities, employees, IT, maintenance, and security</b>.</li> </ul> </li> <li>❖ For example, BP’s upstream contracts include oil and natural gas exploration, as well as “midstream” services such as transportation, storage, and processing.</li> </ul> </td> </tr> <tr> <td data-bbox="316 1262 521 1661"> <p><b>Downstream Contracts</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 1.3</a></p> </td> <td data-bbox="521 1262 1511 1661"> <ul style="list-style-type: none"> <li>❖ Downstream contracts are those under which a business <b>passes on and gains a commercial benefit from the fruits of their labour</b>.</li> <li>❖ E.g., contracts for the <b>supply of goods and services by the business</b>.</li> <li>❖ In general, they will <b>generate income</b> for the business.</li> <li>❖ For example, BP’s downstream contracts include fuel refineries and marketing; convenience retail businesses; lubricant sales; manufacture, sale and distribution of petrochemicals for use in consumer products.</li> </ul> </td> </tr> </table>	<p><b>Upstream Contracts</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 1.3</a></p>	<ul style="list-style-type: none"> <li>❖ Upstream contracts provide a business <b>with the resources needed to carry on business</b>.</li> <li>❖ They are contracts which <b>require some sort of financial outlay</b>, e.g.:                             <ul style="list-style-type: none"> <li>➤ The supply of goods or services <b>to</b> the business;</li> <li>➤ The <b>supply of funds</b> (loans);</li> <li>➤ <b>Permission to manufacture</b> through intellectual property licences;</li> <li>➤ ‘<b>Overheads</b>’, such as <b>utilities, employees, IT, maintenance, and security</b>.</li> </ul> </li> <li>❖ For example, BP’s upstream contracts include oil and natural gas exploration, as well as “midstream” services such as transportation, storage, and processing.</li> </ul>	<p><b>Downstream Contracts</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 1.3</a></p>	<ul style="list-style-type: none"> <li>❖ Downstream contracts are those under which a business <b>passes on and gains a commercial benefit from the fruits of their labour</b>.</li> <li>❖ E.g., contracts for the <b>supply of goods and services by the business</b>.</li> <li>❖ In general, they will <b>generate income</b> for the business.</li> <li>❖ For example, BP’s downstream contracts include fuel refineries and marketing; convenience retail businesses; lubricant sales; manufacture, sale and distribution of petrochemicals for use in consumer products.</li> </ul>
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<p><b>Pros and Cons of Standard Terms</b></p>	<ul style="list-style-type: none"> <li>❖ An important consideration for a client is whether to (a) use a <b>standardised set of terms and conditions</b>, or (b) <b>individually negotiate</b> a particular contract.</li> <li>❖ The pros and cons of using standard terms are as follows:</li> </ul> <table border="1" data-bbox="316 1864 1511 1902"> <tr> <td data-bbox="316 1864 911 1902"> <p><b>Advantages of Standard Terms</b></p> </td> <td data-bbox="911 1864 1511 1902"> <p><b>Disadvantages of Standard Terms</b></p> </td> </tr> </table>			<p><b>Advantages of Standard Terms</b></p>	<p><b>Disadvantages of Standard Terms</b></p>
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<a href="#">Commercial and IP Law &amp; Practice, 1.4</a>	❖ Ensures <b>contractual terms which are favourable to the client</b> , as opposed to negotiated compromises.	❖ <b>Lack of flexibility.</b>
	❖ <b>Standardised and well-known procedures</b> : this allows more junior staff to enter into contracts.	❖ It is <b>still necessary to train staff</b> to use the terms correctly to enter into contracts e.g., to ensure terms are effectively incorporated.
	❖ <b>Commercial certainty</b> : you know exactly what the terms of the contract provide.	❖ <b>Incorporation difficulties</b> / “battle of the forms”.
	❖ <b>Cheaper</b> : avoids the <b>cost of drafting a potentially lengthy negotiated contract</b> .	❖ <b>Need for regular review to ensure regulatory compliance.</b>
	❖ Useful <b>starting point for negotiation</b> .	❖ Standard Terms are subject to <b>legal constraints</b> e.g., only Standard Terms are caught by <a href="#">s3 Unfair Contract Terms Act 1977 (UCTA 1977)</a> , which subjects the clause to the test of reasonableness.

**Basic Structure of a Commercial Agreement**

- ❖ [Commercial and IP Law & Practice, 1.5](#)
- ❖ [Practical Law: Contracts: structure and terms of commercial contracts](#)<sup>2</sup>

<b>Overview</b>	❖ The terms of a commercial contract may vary from contract to contract, however the fundamental structure of an agreement will often include the following terms.
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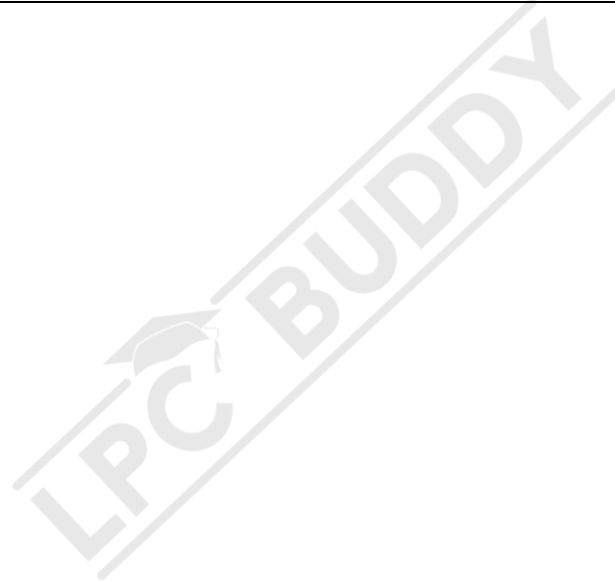
Clause	Explanation
<b>Commencement and date.</b>	<ul style="list-style-type: none"> <li>❖ The “commencement” is the “<b>introduction</b>” to the contract.</li> <li>❖ It:                             <ul style="list-style-type: none"> <li>➤ Repeats the title of the document and its nature;</li> <li>➤ Allows the parties to set out whether the contract is intended to be a deed e.g., “This Deed of...”;</li> <li>➤ Will <b>include the contract date</b> e.g., date of performance and/or date of signature.</li> </ul> </li> </ul>
<b>The parties;</b>	<ul style="list-style-type: none"> <li>❖ <b>Describes the parties to the contract</b> in a numbered list.</li> <li>❖ Usually this will include <b>full names, addresses, and company numbers</b>.</li> </ul>
<b>The recitals, if any;</b>	<ul style="list-style-type: none"> <li>❖ The recitals set out the “<b>background</b>” to the contract.</li> </ul>

<sup>2</sup> <https://uk.practicallaw.thomsonreuters.com/0-107-4877>

<p><a href="#">Commercial and IP Law &amp; Practice, 1.5.1.1</a></p>	<ul style="list-style-type: none"> <li>❖ They explain the <b>previous relationship</b> between the parties, and the <b>reason for entering into a contract</b>.</li> </ul>			
<p><b>Definitions and interpretation.</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 1.5.1.2-1.5.1.3</a></p>	<ul style="list-style-type: none"> <li>❖ There will be a clause which explains the <b>meaning of defined terms</b> which appear in the body of the agreement.</li> <li>❖ Such terms will be those that are either used repeatedly, or there is a danger of ambiguity.</li> <li>❖ These will be <b>listed alphabetically</b>.</li> <li>❖ Defined terms are normally denoted by <b>capital letters</b>.</li> <li>❖ There will also be an “interpretation” section, which sets out <b>how the agreement should be “read”</b>; e.g., that headings do not form part of the agreement.</li> </ul>			
<p><b>The operative part.</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 1.5.1.4</a></p>	<p><b>Conditions precedent, if any.</b></p>	<ul style="list-style-type: none"> <li>❖ Certain conditions may need to be satisfied <b>before the agreement / or parts of the agreement come into effect</b>. These are known as “conditions precedent”.</li> <li>❖ For example, the supply of goods may be conditional on the buyer obtaining a letter of credit.</li> </ul>		
<p><b>Agreements</b></p>	<ul style="list-style-type: none"> <li>❖ This defines the <b>rights and obligations</b> of the parties.</li> <li>❖ For example, in a sale of goods contract, this will provide that:                             <ul style="list-style-type: none"> <li>➤ The seller is obliged to <b>sell and deliver goods</b> of a certain description and quality.</li> <li>➤ The buyer is obliged to <b>pay the price</b>.</li> </ul> </li> </ul>			
<p><b>Representations and warranties.</b></p>	<ul style="list-style-type: none"> <li>❖ The contract will contain <b>representations and warranties</b> i.e., <b>contractual assurances</b> by each party which will give rise to <b>liability in the event that they are breached</b>.</li> </ul> <table border="1" data-bbox="618 1577 1498 1911"> <tr> <td data-bbox="618 1577 867 1911"> <p><b>Representations</b></p> </td> <td data-bbox="867 1577 1498 1911"> <ul style="list-style-type: none"> <li>❖ A representation is a statement made, before the contract is made, as an <b>inducement to enter into the contract</b>.</li> <li>❖ If a party makes an inaccurate representation, this may <b>give rise to a liability for misrepresentation</b>.</li> </ul> </td> </tr> </table>		<p><b>Representations</b></p>	<ul style="list-style-type: none"> <li>❖ A representation is a statement made, before the contract is made, as an <b>inducement to enter into the contract</b>.</li> <li>❖ If a party makes an inaccurate representation, this may <b>give rise to a liability for misrepresentation</b>.</li> </ul>
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			<ul style="list-style-type: none"> <li>❖ Note that the <b>remedies</b> for a successful claim for misrepresentation are <b>different</b> to a successful claim for breach of warranty (which is a term of the contract). A claim for misrepresentation may give rise to: <ul style="list-style-type: none"> <li>➤ A right to <b>rescind the contract</b>; (i.e., set the contract aside and put the parties <b>back into the position they were before the contract was made</b>); and</li> <li>➤ A right to claim damages on the <b>tortious basis</b>, (i.e., the aim is to put the party in the position it would have been in <b>had the tort not been committed</b>).</li> </ul> </li> </ul>
		<p><b>Warranties</b></p>	<ul style="list-style-type: none"> <li>❖ Warranties are <b>contractual assurances</b> (for example, the seller may warrant that the goods will conform in all material respects with their description).</li> <li>❖ A breach of warranty will give rise to a claim for breach of contract, which may entitle the innocent party to damages (on the contractual basis), and also provide for other remedies (such as provision for repair or replacement).</li> </ul>
	<p><b>Indemnities</b></p>		<ul style="list-style-type: none"> <li>❖ An indemnity is where one party agrees to <b>make good another's loss on the happening of a particular event</b>.</li> <li>❖ These will be included if the parties agree, in advance, that <b>one party should bear the cost of a particular event</b>, should that happen.</li> <li>❖ An example is where a supplier agrees to indemnify a buyer against third party claims arising as a result of the state of the goods.</li> </ul>
	<p><b>Limitations and exclusions.</b></p>		<ul style="list-style-type: none"> <li>❖ The contract may seek to limit or exclude a party's liability for a particular event.</li> <li>❖ Where they are included, in order to be valid, the clause must satisfy the <b>test of reasonableness</b> under <a href="#">UCTA 1977</a>.</li> </ul>

	❖ See notes on <a href="#">Exclusion Clauses</a> .
<b><u>“Boiler-plate” clauses</u></b>	<ul style="list-style-type: none"> <li>❖ “Boiler-plate” clauses are standard clauses which are common to agreements of a certain type.</li> <li>❖ They address the <b>mechanics of an agreement</b> and common legal points which are relevant to most transactions.</li> <li>❖ These are set out in detail in our note on <a href="#">Boiler-Plate Clauses</a>.</li> </ul>
<b><u>Execution clause and signature; and</u></b>	<ul style="list-style-type: none"> <li>❖ The end of the contract will normally provide for the <b>signatures of the parties</b>.</li> <li>❖ The formalities required for execution <b>depend on the identity of the parties and the type of contract</b>.</li> </ul>
<b><u>Schedules</u></b>	<ul style="list-style-type: none"> <li>❖ Schedules are used to <b>remove details from the body of the agreement</b> to make it readable.</li> <li>❖ They can also be used to annex other documents.</li> </ul>



## Formation of a Contract

### ❖ [Commercial and IP Law & Practice, 3.2](#)

<b>Overview</b>	<ul style="list-style-type: none"> <li>❖ The central focus of the Commercial Law elective is dealing with contracts, in particular, international sale of goods agreements. It is therefore important, as a starting point, to have a good understanding of the <b>basic principles of contract law</b>.</li> </ul>
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<b>How is a contract formed?</b>  <a href="#">Commercial and IP Law &amp; Practice, 3.2.1</a>	<ul style="list-style-type: none"> <li>❖ A contract is formed when the following elements coincide:                     <ul style="list-style-type: none"> <li>➤ <b>Offer:</b> one party (the offeror) must make an identifiable offer on certain terms, showing intention to be bound.</li> <li>➤ <b>Acceptance:</b> the other party (the offeree) must accept those terms unconditionally (conditional acceptance will be a counter-offer).</li> <li>➤ <b>Consideration:</b> one party must give or promise something in exchange for the other parties' performance, or promise of performance.</li> <li>➤ <b>Intention to be Legally Bound:</b> it must be clear, from the facts, that both parties intended to enter into a legally binding arrangement, in which the rights and obligations of the agreement are enforceable.</li> <li>➤ <b>Certainty of terms:</b> "unless all the material terms of a contract are agreed, there is no binding obligation" (<a href="#">Foley v Classique Coaches Ltd [1934] 2 KB 1</a>).</li> </ul> </li> </ul>
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<b>Offer and Acceptance</b>  <a href="#">Commercial and IP Law &amp; Practice, 3.2.2</a>	<ul style="list-style-type: none"> <li>❖ The courts establish that an agreement has been reached by looking for:                     <ul style="list-style-type: none"> <li>➤ An <b>offer</b>; and</li> <li>➤ <b>Acceptance</b> of that offer.</li> </ul> </li> <li>❖ Where a valid offer is made, it <b>requires only acceptance to turn it into a binding agreement</b>.</li> </ul>	
<b>What constitutes an "offer"?</b>	<b>It is distinct from an "invitation to treat".</b>	<ul style="list-style-type: none"> <li>❖ An invitation to treat is, broadly, an action which <b>invites another to make an offer</b> to contract.</li> <li>❖ The case of <a href="#">Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953] EWCA Civ 6</a> is a good example of the distinction; the Court held that the <b>display of products on a shelf</b> in a shop is <i>not</i> an offer which is accepted by the shopper placing items in their basket. Instead, the offer is made by the customer, which could be accepted or rejected by the</li> </ul>

			<p>shop staff at the cash desk. The display of products on a shelf is a mere invitation to treat.</p> <ul style="list-style-type: none"> <li>❖ Invitations to treat are:             <ul style="list-style-type: none"> <li>➤ Non-specific;</li> <li>➤ Include non-promissory language; and</li> <li>➤ There is <b>no intention to be bound by acceptance</b>.</li> </ul> </li> <li>❖ By contrast, an offer should:             <ul style="list-style-type: none"> <li>➤ Be <b>sufficiently specific to be capable of acceptance</b>;</li> <li>➤ Include promissory language; and</li> <li>➤ There will be an objective intention to be bound by acceptance.</li> </ul> </li> </ul> <table border="1" data-bbox="748 856 1481 1535"> <tr> <td data-bbox="748 856 943 1335"> <p><b>Generally, the following will not be offers.</b></p> </td> <td data-bbox="943 856 1481 1335"> <ul style="list-style-type: none"> <li>❖ Advertisements</li> <li>❖ Estimates</li> <li>❖ Brochures</li> <li>❖ Price Lists</li> <li>❖ Enquiries/Requests for Information</li> <li>❖ Letters of Intent/heads of terms/memoranda of understanding.</li> <li>❖ However, ultimately these are general rules which may differ depending on the facts of the case.</li> </ul> </td> </tr> <tr> <td data-bbox="748 1335 943 1535"> <p><b>“Subject to Contract”</b></p> </td> <td data-bbox="943 1335 1481 1535"> <ul style="list-style-type: none"> <li>❖ Use of the words “<b>subject to contract</b>” generally indicates that the parties <b>do not intend to be bound by the document in question</b>.</li> </ul> </td> </tr> </table>	<p><b>Generally, the following will not be offers.</b></p>	<ul style="list-style-type: none"> <li>❖ Advertisements</li> <li>❖ Estimates</li> <li>❖ Brochures</li> <li>❖ Price Lists</li> <li>❖ Enquiries/Requests for Information</li> <li>❖ Letters of Intent/heads of terms/memoranda of understanding.</li> <li>❖ However, ultimately these are general rules which may differ depending on the facts of the case.</li> </ul>	<p><b>“Subject to Contract”</b></p>	<ul style="list-style-type: none"> <li>❖ Use of the words “<b>subject to contract</b>” generally indicates that the parties <b>do not intend to be bound by the document in question</b>.</li> </ul>
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	<p><b>What constitutes “acceptance”?</b></p>	<p><b>The offeree’s response must not be</b></p>	<ul style="list-style-type: none"> <li>❖ An offer can be ended by:             <ul style="list-style-type: none"> <li>➤ Rejection;</li> <li>➤ Counter-offer;</li> <li>➤ Lapse of time;</li> <li>➤ Death of the other party; or</li> <li>➤ Revocation before it has been accepted.</li> </ul> </li> <li>❖ The offeree’s response to an offer must exactly match the terms of the offer (the “mirror image” rule).</li> </ul>				

		<p><b>a counter-offer.</b></p>	<ul style="list-style-type: none"> <li>❖ If, when the offeree is responding to an offer <b>they add something else to the terms, it is not an acceptance, it is a counter-offer.</b> This offer effectively dismantles the initial offer.</li> </ul>
		<p><b>An offer can be accepted by conduct.</b></p>	<ul style="list-style-type: none"> <li>❖ Acceptance of an offer may occur by conduct.</li> <li>❖ For example, <b>commencing performance of the contractual obligations</b> after receipt of a party's terms and conditions.</li> </ul>
	<p><b>Battle of the Forms</b></p> <p><a href="#"><i>Commercial and IP Law &amp; Practice, 3.2.2.3</i></a></p>	<p><b>Example</b></p>	<ul style="list-style-type: none"> <li>❖ In a situation where both parties seek to impose their own standard terms on the other, <b>it may not be clear whose terms apply.</b></li> </ul> <ul style="list-style-type: none"> <li>❖ The seller provides a buyer with an invitation to treat, containing the seller's standard terms and conditions.</li> <li>❖ The buyer then makes an offer, introducing their own terms.</li> <li>❖ If the seller does not accept the buyer's terms, and insists instead on reinstating its own terms, the seller has made a counter-offer.</li> <li>❖ If the contract is then dealt with by staff who are not aware of the rules relating to offer and acceptance, the <b>wrong set of terms may be accepted by accident e.g., by conduct.</b></li> <li>❖ For example, in <a href="#"><i>Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401</i></a>, the return of a signed acknowledgement slip amounted to acceptance of the buyer's terms.</li> </ul> <ul style="list-style-type: none"> <li>❖ The critical point is that: <ul style="list-style-type: none"> <li>➤ A <b>traditional offer and acceptance analysis</b> is used to decide a battle of forms dispute (<a href="#"><i>Tekdata Interconnections Ltd v Amphenol Ltd [2009] EWCA Civ 1209</i></a>).</li> <li>➤ The terms which bind are those that <b>were accepted first.</b></li> </ul> </li> <li>❖ Where neither party has done enough to bring its terms and conditions to the attention of the other, the court may find that</li> </ul>

		<p><b>neither party's terms bind;</b> <a href="#">Transformers &amp; Rectifiers Ltd v Needs Ltd [2015] EWHC 269 (TCC)</a><sup>1</sup>.</p> <ul style="list-style-type: none"> <li>❖ This can be the case <b>despite</b> an extensive previous course of dealings.</li> <li>❖ To prevent a “battle of the forms” scenario from occurring: <ul style="list-style-type: none"> <li>➤ <b>Staff should be effectively trained.</b> <ul style="list-style-type: none"> <li>▪ In particular, they should be warned not to send anything to the other party which could be interpreted as acceptance without reference to more senior members of staff.</li> </ul> </li> <li>➤ <b>Certain clauses can be included in the parties' standard terms and conditions to try to mitigate the risk of this scenario occurring.</b> <ul style="list-style-type: none"> <li>▪ These are discussed in our note on <a href="#">Boiler-Plate Clauses</a>, though ultimately, the fact that a party has included these in their standard terms will be irrelevant if it is clear that the “other” party's terms have been accepted first on an “offer and acceptance” analysis.</li> </ul> </li> </ul> </li> </ul>
<p><b>Consideration</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 3.2.3.1</a></p>		<ul style="list-style-type: none"> <li>❖ “Consideration” is what one party gives, or promises to give, <b>in exchange for the other party's performance</b> (or promise of performance).</li> <li>❖ Consideration is required when: <ul style="list-style-type: none"> <li>➤ <b>Forming</b> a contract; and</li> <li>➤ <b>Changing the terms</b> of an already established contract (a “variation”).</li> </ul> </li> <li>❖ Consideration may be: <ul style="list-style-type: none"> <li>➤ <b>Something tangible</b> (for example, money or even chocolate bar wrappers (<a href="#">Chappell v Nestle [1960] AC 87</a>)).</li> </ul> </li> </ul>

<sup>1</sup> [Transformers & Rectifiers Ltd v Needs Ltd \[2015\] EWHC 269 \(TCC\)](#) is normally required reading for [Workshop 2. Summary](#): Needs and Transformers had had a commercial relationship for more than 20 years. Transformers placed regular orders to purchase components from Needs, including nitrile gaskets. Transformers alleged that gaskets supplied were not fit for purpose and that Needs had therefore breached its contract, made on Transformers' standard terms. Needs asserted, in response, that its own terms and conditions applied, and that it could therefore rely on exclusion clauses to limit its liability. Transformers placed its orders in an inconsistent way; by fax, email, and post. Its standard terms were (a) not included at all when orders were placed electronically, and (b) printed in small font on the reverse of purchase orders when orders were placed by post. Needs would respond to those orders with an acknowledgement, the footer of which stated that the prices and deliveries were “*subject to our normal Terms and Conditions of Sale (copies available on request)*”. No copy of Needs' terms was actually supplied. The Court found that neither party's terms were incorporated into the contract. Neither had done enough to draw the other's attention to its standard terms. Needs could not, therefore, rely on the exclusion clauses.



	<ul style="list-style-type: none"> <li>➤ The act of going <b>over and above an existing contractual duty</b> (<a href="#">Hartley v Ponsonby (1857) 7 EB 872</a>); or</li> <li>➤ Conferring a <b>practical benefit</b> on the promisor (<a href="#">Williams v Roffey Bros [1990] 1 All ER 512</a>).</li> </ul>								
<p><b>Intention to be Legally Bound</b></p>	<ul style="list-style-type: none"> <li>❖ In most instances, this will <b>not be controversial</b>.</li> <li>❖ An intention to create legal relations is <b>presumed in commercial situations</b>. If a party wishes to rebut this, it will have to produce clear evidence to that effect.</li> </ul>								
<p><b>Certainty of Terms</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 3.2.3.2 - 3.2.3.3</a></p>	<ul style="list-style-type: none"> <li>❖ A court will <b>not</b> enforce an agreement which is “<b>uncertain</b>”; that is where the agreement is:             <ul style="list-style-type: none"> <li>➤ <b>Incomplete</b>, because it is lacking in <b>some essential term</b>; or</li> <li>➤ Is otherwise uncertain, for example, because it is <b>vague or ambiguous</b>.</li> </ul> </li> <li>❖ The following are examples of agreements which will be void for lack of certainty:             <table border="1" data-bbox="324 793 1513 1955"> <tr> <td data-bbox="324 793 522 1354"> <p><b>An agreement which fails to address a key area.</b></p> </td> <td data-bbox="522 793 1513 1354"> <ul style="list-style-type: none"> <li>❖ <b>An agreement which fails to address a key area</b>, e.g., price, may be void for lack of certainty.</li> <li>❖ However, <b>such agreements may be saved by implied statutory provisions</b>. For example, <a href="#">s8 Sale of Goods Act 1979 (SGA 1979)</a> implies a term, where the parties have failed to agree on a price, that the price shall be a “reasonable” one.</li> <li>❖ Otherwise, the general approach is that <b>if the parties make their agreement incompetently, that is their problem</b>.</li> <li>❖ The courts may, however, fix a badly drafted contract if there is other evidence of the intent.</li> </ul> </td> </tr> <tr> <td data-bbox="324 1354 522 1528"> <p><b>Agreements to agree.</b></p> </td> <td data-bbox="522 1354 1513 1528"> <ul style="list-style-type: none"> <li>❖ The following will be void:                     <ul style="list-style-type: none"> <li>➤ An agreement to <b>enter into a contract at a later date</b>; or</li> <li>➤ An agreement that a certain provision will be agreed between the parties <b>after the commencement of the contract</b>.</li> </ul> </li> </ul> </td> </tr> <tr> <td data-bbox="324 1528 522 1873"> <p><b>Lock-In Agreements</b></p> </td> <td data-bbox="522 1528 1513 1873"> <ul style="list-style-type: none"> <li>❖ A lock-in agreement is where a person, <b>(A), is contractually obliged to negotiate with another person (B) and no one else</b>.</li> <li>❖ These are distinct from “lock-out agreements” where A is <i>not obliged</i> to negotiate with B, but <b>agrees not to negotiate with anyone else</b>.</li> <li>❖ Lock-out agreements <b>may be enforceable</b>, lock-in agreements <b>will not be</b> (<a href="#">Walford v Miles [1992] 1 All ER 453</a>).</li> </ul> </td> </tr> <tr> <td data-bbox="324 1873 522 1955"> <p><b>Cancellation Clauses</b></p> </td> <td data-bbox="522 1873 1513 1955"> <ul style="list-style-type: none"> <li>❖ If a cancellation clause in the contract (a clause allowing the parties to withdraw from the contract without liability in certain circumstances),</li> </ul> </td> </tr> </table> </li> </ul>	<p><b>An agreement which fails to address a key area.</b></p>	<ul style="list-style-type: none"> <li>❖ <b>An agreement which fails to address a key area</b>, e.g., price, may be void for lack of certainty.</li> <li>❖ However, <b>such agreements may be saved by implied statutory provisions</b>. For example, <a href="#">s8 Sale of Goods Act 1979 (SGA 1979)</a> implies a term, where the parties have failed to agree on a price, that the price shall be a “reasonable” one.</li> <li>❖ Otherwise, the general approach is that <b>if the parties make their agreement incompetently, that is their problem</b>.</li> <li>❖ The courts may, however, fix a badly drafted contract if there is other evidence of the intent.</li> </ul>	<p><b>Agreements to agree.</b></p>	<ul style="list-style-type: none"> <li>❖ The following will be void:                     <ul style="list-style-type: none"> <li>➤ An agreement to <b>enter into a contract at a later date</b>; or</li> <li>➤ An agreement that a certain provision will be agreed between the parties <b>after the commencement of the contract</b>.</li> </ul> </li> </ul>	<p><b>Lock-In Agreements</b></p>	<ul style="list-style-type: none"> <li>❖ A lock-in agreement is where a person, <b>(A), is contractually obliged to negotiate with another person (B) and no one else</b>.</li> <li>❖ These are distinct from “lock-out agreements” where A is <i>not obliged</i> to negotiate with B, but <b>agrees not to negotiate with anyone else</b>.</li> <li>❖ Lock-out agreements <b>may be enforceable</b>, lock-in agreements <b>will not be</b> (<a href="#">Walford v Miles [1992] 1 All ER 453</a>).</li> </ul>	<p><b>Cancellation Clauses</b></p>	<ul style="list-style-type: none"> <li>❖ If a cancellation clause in the contract (a clause allowing the parties to withdraw from the contract without liability in certain circumstances),</li> </ul>
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<p><b>Cancellation Clauses</b></p>	<ul style="list-style-type: none"> <li>❖ If a cancellation clause in the contract (a clause allowing the parties to withdraw from the contract without liability in certain circumstances),</li> </ul>								

		<p>is <b>too wide, this may have the effect of invalidating the contract altogether.</b></p>
	<p><b><u>Agreements Which are Void for Mistake</u></b></p>	<ul style="list-style-type: none"> <li>❖ If a party is under an erroneous belief, <i>at contracting</i>, that certain facts are true, this may render the contract void.</li> <li>❖ To affect the contract, the mistake must have occurred before the contract was made.</li> <li>❖ In practice, the <b><u>doctrine of mistake is narrow and very few mistakes will affect the validity of a contract</u></b>, but where they do, the effect is to render the contract void.</li> </ul>



## Incorporation of Contractual Terms<sup>1</sup>

### ❖ [Commercial and IP Law & Practice, 8.5](#)

<p><b>Overview</b></p>	<ul style="list-style-type: none"> <li>❖ To be binding on the parties, terms must have been <b>effectively incorporated</b> into the parties' agreement.</li> <li>❖ Clauses may be incorporated into a contract in <b>three ways</b>:             <ul style="list-style-type: none"> <li>➤ By signature;</li> <li>➤ By notice;</li> <li>➤ By a previous course of dealing.</li> </ul> </li> </ul>
<p><b>Signature</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 8.5.1</a></p>	<ul style="list-style-type: none"> <li>❖ Where a buyer signs a commercial contract, they will be <b>bound by their signature, whether or not they have read or understood the document</b> (<a href="#">L'Estrange v Graucob [1934] 2 KB 394</a>).</li> </ul>
<p><b>Notice</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 8.5.2</a></p>	<ul style="list-style-type: none"> <li>❖ If a clause is in a <b>separate, unsigned document</b>, it will only be incorporated if reasonable steps are taken to give the customer "notice" of the clause, i.e., to <b>bring it to the customer's attention</b> before the contract is made.</li> <li>❖ Clauses should not be "hidden away" in the body of an agreement.</li> <li>❖ The <b>more onerous or burdensome</b> the clause, the greater the need to draw it to the buyer's attention; the so-called "red hand rule":             <ul style="list-style-type: none"> <li>➤ <a href="#">Spurling v Bradshaw [1956] 1 WLR 461</a>;</li> <li>➤ <a href="#">Thornton v Shoe Lane Parking Ltd [1970] EWCA Civ 2</a>.</li> </ul> </li> <li>❖ Consider the background:             <ul style="list-style-type: none"> <li>➤ Has the buyer <b>negotiated</b> the contents of the clauses? If so, it will be <b>difficult to deny knowledge</b>.</li> <li>➤</li> <li>➤ Is there a <b>delay</b> between drawing the buyer's attention to a clause, and the contract being made?</li> </ul> </li> </ul>
<p><b>By a Previous Course of Dealing</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 8.5.3</a></p>	<ul style="list-style-type: none"> <li>❖ If the parties have dealt with each other before, the term may be <b>incorporated through these dealings</b> even where the term was not brought to the attention of the other party on this occasion.</li> <li>❖ Consider:             <ul style="list-style-type: none"> <li>➤ Does the client do a <b>lot of business with regular customers</b>?</li> <li>➤ Do the parties always <b>contract on the same terms</b>?</li> <li>➤ Has there been a <b>sufficient number of transactions</b>?</li> </ul> </li> </ul>

<sup>1</sup> [Workshop 1, Task 2, Question 1](#)

## Variation of Contractual Terms

### ❖ [Commercial and IP Law & Practice, 3.2.4.1](#)

<b>Overview</b>	❖ A “variation” of a contract occurs where the parties agree to do something differently to what they originally agreed. To be valid, variations must adhere to certain pre-requisites:		
<b>Consideration</b>	<ul style="list-style-type: none"><li>❖ For a variation to be valid, the party that agrees to the variation must generally <b>provide consideration</b> for the other party’s varied performance.</li><li>❖ E.g.:<ul style="list-style-type: none"><li>➤ By providing <b>something over and above an existing contractual duty</b> (<a href="#">Hartley v Ponsonby (1857) 7 EB 872</a>).</li><li>➤ By <b>conferring a practical benefit</b> on the promisor (<a href="#">Williams v Roffey Bros [1990] 1 All ER 51</a>).</li></ul></li><li>❖ However, promises can sometimes be enforceable even though <b>no consideration</b> has been provided:</li></ul> <table border="1" data-bbox="337 898 1511 1898"><tr><td data-bbox="337 898 521 1898"><b>Doctrine of Waiver</b></td><td data-bbox="521 898 1511 1898"><ul style="list-style-type: none"><li>❖ A party may “waive” i.e., <b>give up</b>, its rights to enforce a contract in equity.</li><li>❖ This occurs where a party acts in such a way that it is deemed fair to treat it as having made a <b>deliberate choice</b> to give up its rights (whether or not it has).</li><li>❖ This doctrine thus operates to enable certain promises <b>not</b> to enforce obligations under a contract to be given limited effect.</li><li>❖ For instance, a buyer may <b>accept late delivery of goods</b>, and may thus be taken to have <b>waived their right to terminate the contract</b> for late delivery (<a href="#">Charles Rickards Ltd v Oppenheim [1950] 1 KB 616 (CA)</a>).</li><li>❖ This can occur through <b>conduct</b>, for instance:<ul style="list-style-type: none"><li>➤ If the buyer <b>continues with performance</b> of the contract; or</li><li>➤ Otherwise, <b>does not behave in a way which suggests that they object</b> to the late delivery.</li></ul></li><li>❖ If a buyer agrees to accept late delivery of goods, they have a right to <b>reinstate the original terms “by reasonable notice”</b> before delivery is actually made. So, the buyer, in the period after the original delivery date, but before the goods are actually delivered, is entitled to require the seller to deliver within that “reasonable notice” period.</li></ul></td></tr></table>	<b>Doctrine of Waiver</b>	<ul style="list-style-type: none"><li>❖ A party may “waive” i.e., <b>give up</b>, its rights to enforce a contract in equity.</li><li>❖ This occurs where a party acts in such a way that it is deemed fair to treat it as having made a <b>deliberate choice</b> to give up its rights (whether or not it has).</li><li>❖ This doctrine thus operates to enable certain promises <b>not</b> to enforce obligations under a contract to be given limited effect.</li><li>❖ For instance, a buyer may <b>accept late delivery of goods</b>, and may thus be taken to have <b>waived their right to terminate the contract</b> for late delivery (<a href="#">Charles Rickards Ltd v Oppenheim [1950] 1 KB 616 (CA)</a>).</li><li>❖ This can occur through <b>conduct</b>, for instance:<ul style="list-style-type: none"><li>➤ If the buyer <b>continues with performance</b> of the contract; or</li><li>➤ Otherwise, <b>does not behave in a way which suggests that they object</b> to the late delivery.</li></ul></li><li>❖ If a buyer agrees to accept late delivery of goods, they have a right to <b>reinstate the original terms “by reasonable notice”</b> before delivery is actually made. So, the buyer, in the period after the original delivery date, but before the goods are actually delivered, is entitled to require the seller to deliver within that “reasonable notice” period.</li></ul>
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	<p><b>Promissory Estoppel</b></p>	<ul style="list-style-type: none"> <li>❖ In limited circumstances, a party may be <b>estopped</b> (“prevented”) from <b>reneging</b> (“going back on”) on a promise.</li> <li>❖ Estoppel will only normally apply where there are <b>continuing obligations</b> (for example, payments of rent).</li> <li>❖ In a sale of goods context, this means that: <ul style="list-style-type: none"> <li>➤ If a seller agrees on a contract with a buyer with a purchase price of £10,000, but subsequently agrees to accept £8,000 for the goods;</li> <li>➤ The seller would be entitled to <b>renege on that promise</b>, and <b>would not be estopped from changing their mind</b>, and demanding the extra £2,000 from the buyer. This is because a <b>fixed payment is not a continuing obligation</b>.</li> </ul> </li> </ul>
<p><b>No Authority Clauses</b></p>	<p><b>Are these effective?</b></p>	<ul style="list-style-type: none"> <li>❖ One of the main problems in practice regarding contractual variations is that due to the relative lack of formality required to vary a contract, business contracts can be varied either <b>unintentionally</b>, or <b>informally</b> by staff members who lack sufficient seniority to do so.</li> <li>❖ One potential solution to this is to include a “no authority clause” in the contract.</li> <li>❖ This is a clause which intends to prevent unauthorised variations by <b>limiting who is able to agree to a valid variation</b>.</li> <li>❖ For instance, they may purport to: <ul style="list-style-type: none"> <li>➤ Restrict the grant of variations or waivers to <b>certain members of staff</b>, e.g., senior staff only; or</li> <li>➤ <b>Prevent oral variations</b> (known as a <i>no-oral-modification</i> (“NOM”) clause).</li> </ul> </li> <li>❖ Alternatively, a clause may provide that any <b>variation or waiver does not affect the seller’s rights</b> under the contract.</li> </ul> <ul style="list-style-type: none"> <li>❖ Clauses to prevent <b>oral variations</b> (a no-oral-modification clause) <b>are effective</b>.</li> <li>❖ <a href="#">MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] UKSC 24</a>: the Supreme Court held that a NOM clause is legally effective, but the parties <b>must comply with the formalities set out in the clause</b> if they wish to vary the contract.</li> </ul>

		❖ However, if an innocent party accepts the breach without protest, the courts are likely to hold that it has <b>affirmed</b> the contract ( <a href="#">Tele2 International and Others v Post Office Ltd [2009] EWCA Civ 9</a> ).
<b><u>Economic Duress</u></b>		<ul style="list-style-type: none"> <li>❖ A contractual variation <b>will not be valid</b> if it is <b>brought about by economic duress</b> i.e., where one party threatens to break its side of the contract unless the other side promises to pay more than originally agreed.</li> <li>❖ A party to a contract cannot hold the other party to ransom. The variation of the contract will be <b>voidable and the only remedy is rescission</b>.</li> </ul>



## Discharging (Ending) Contracts

### ❖ [Commercial Law & Practice, 3.2.6](#)

<p><b>Overview</b></p>	<ul style="list-style-type: none"> <li>❖ A contract may come to an end when it is discharged by:             <ul style="list-style-type: none"> <li>➤ <b>Performance of the contract;</b></li> <li>➤ <b>Agreement;</b></li> <li>➤ <b>Frustration;</b> or</li> <li>➤ <b>Breach of the contract’s terms.</b></li> </ul> </li> </ul>		
<p><b>Performance</b></p>	<ul style="list-style-type: none"> <li>❖ A contract will be discharged when <b>both parties fully perform</b> their contractual obligations.</li> </ul>		
<p><b>Agreement</b></p>	<ul style="list-style-type: none"> <li>❖ The contracting parties can <b>agree to end a contract early</b>.</li> <li>❖ If there is no express clause permitting the parties to terminate by agreement, they will need to <b>vary the contract so as to bring it to an end</b>.</li> <li>❖ Such agreement should therefore either (a) be by <b>deed</b> (as this does not require consideration), or (b) be <b>supported by consideration</b>.</li> </ul>		
<p><b>Frustration</b></p> <p><a href="#">Commercial Law &amp; Practice, 3.2.6.1</a></p>	<ul style="list-style-type: none"> <li>❖ A contract is “frustrated” where:             <ul style="list-style-type: none"> <li>➤ <b>After the contract is made</b> (but before performance has been completed);</li> <li>➤ There is <b>some unforeseen event</b> that is not the fault of either of the parties (a “supervening event”);</li> <li>➤ Which makes the contract <b>impossible or radically different to perform</b>.</li> </ul> </li> </ul>		
	<table border="1" style="width: 100%;"> <tr> <td data-bbox="284 1239 535 1921"> <p><b>Consequences</b></p> </td> <td data-bbox="535 1239 1529 1921"> <ul style="list-style-type: none"> <li>❖ Where a contract is frustrated, the consequences are as follows:                     <p style="margin-left: 20px;">The contract <b>automatically comes to an end</b> and <b>both parties are relieved</b> of their obligations.</p> <ul style="list-style-type: none"> <li>➤ The provisions of the <a href="#">Law Reform (Frustrated Contracts) Act 1943 (LR(FCA)A 1943)</a> will come into operation, which provide that:                             <ul style="list-style-type: none"> <li>▪ The buyer may <b>recover any payments made</b> before frustration (<a href="#">s1(2)</a>); and</li> <li>▪ Any sums which <b>have yet to be paid</b>, but which are due before the frustration date, <b>will cease to be payable</b>.</li> </ul> </li> </ul> </li> </ul> </td> </tr> </table>	<p><b>Consequences</b></p>	<ul style="list-style-type: none"> <li>❖ Where a contract is frustrated, the consequences are as follows:                     <p style="margin-left: 20px;">The contract <b>automatically comes to an end</b> and <b>both parties are relieved</b> of their obligations.</p> <ul style="list-style-type: none"> <li>➤ The provisions of the <a href="#">Law Reform (Frustrated Contracts) Act 1943 (LR(FCA)A 1943)</a> will come into operation, which provide that:                             <ul style="list-style-type: none"> <li>▪ The buyer may <b>recover any payments made</b> before frustration (<a href="#">s1(2)</a>); and</li> <li>▪ Any sums which <b>have yet to be paid</b>, but which are due before the frustration date, <b>will cease to be payable</b>.</li> </ul> </li> </ul> </li> </ul>
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	<ul style="list-style-type: none"> <li>▪ However, the court has the <b>discretion</b> to allow the seller to keep all or some of any advance payment if it considers it just, having regard to any expenses which the seller may have incurred in preparing to perform the contract.</li> <li>➤ If one party has conferred a valuable benefit on the other, the court may <b>allow the first party to claim a just sum in respect of that benefit (1(3))</b>.</li> <li>❖ If the contract is for the <b>sale of specific goods</b>, the <a href="#">Sale of Goods Act 1979 (SGA 1979)</a> provides that: <ul style="list-style-type: none"> <li>➤ If the goods <b>perish before risk has passed</b> to the buyer;</li> <li>➤ The contract is <b>avoided (s7)</b>; and</li> <li>➤ The provisions of the <a href="#">LR(FCA)A 1943</a> will not apply.</li> </ul> </li> </ul>
<b>Breach</b>	<ul style="list-style-type: none"> <li>❖ A breach occurs whenever a party fails to perform a contractual duty as required by its terms. <b>Some</b> breaches will give the aggrieved party a <b>right to terminate</b> the contract (see notes on <a href="#">Remedies for Breach of Contract</a>).</li> <li>❖ In overview, a right to terminate will arise where: <ul style="list-style-type: none"> <li>➤ A breach falls within the <b>scope of an express contractual right</b> to terminate; or</li> <li>➤ The breach is such that there is a <b>right to terminate at common law</b>. This will be the case where: <ul style="list-style-type: none"> <li>▪ <b><u>There is a “repudiatory” breach of contract.</u></b> <ul style="list-style-type: none"> <li>• That is, a fundamental breach of the contract’s terms.</li> <li>• The most likely reason this will occur is due to a breach of a <b>“condition”</b> by one of the parties (and not of a “warranty”).</li> <li>• What terms amount to conditions depends on the contract; but broadly these are clauses which are of such vital importance that they <b>go to the root of the contract</b>.</li> </ul> </li> <li>▪ <b><u>And that repudiation is accepted by the innocent party.</u></b> <ul style="list-style-type: none"> <li>• A repudiatory breach <b>does not end the contract automatically</b>.</li> </ul> </li> </ul> </li> </ul> </li> </ul>



	<ul style="list-style-type: none"><li>• The aggrieved party is entitled to <b>terminate or affirm</b> the contract (and, in either case, claim damages).</li><li>• “Accepting the repudiation” means that the aggrieved party has <b>exercised their right to terminate</b>.</li><li>• Unless modified by an express clause in the contract (e.g., a requirement for notice in writing), the innocent party must only <b>communicate that they are ending the contract to the other party</b>. As soon as communication takes place, the contract is at an end.</li></ul>
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