

# LPC BUDDY

Commercial Law  
2022 / 23



THE DEFINITIVE, DISTINCTION QUALITY STUDY GUIDE  
FOR THE LPC

CUT DOWN YOUR READING.  
EASE YOUR EXAM STRESS.  
GET THE GRADE YOU NEED.



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<b>Colour Coding Guide</b>	<ul style="list-style-type: none"> <li>❖ <b>Blue Text</b> – Reference to statutes and case law.</li> <li>❖ <b>Green Text</b> – Reference to textbook paragraphs and other notes in this guide.</li> <li>❖ <b>Purple Text</b> – Reference to Professional Conduct Rules or Principles.</li> </ul>
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**Formation of a Contract**

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

- ❖ A central focus of Commercial Law is dealing with contracts; e.g. international sale of goods agreements.
- ❖ Therefore, it is important to have a good understanding of the **basic principles of how a contract is formed in English law.**

<p><b><u>How is a Contract Formed?</u></b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 3.2.1</a></p>	<ul style="list-style-type: none"> <li>❖ <b><u>Offer</u></b> - one party (the offeror) must make an identifiable offer on certain terms, showing intention to be bound.</li> <li>❖ <b><u>Acceptance</u></b> - the other party (the offeree) must accept those terms unconditionally (conditional acceptance will be a counter-offer).</li> <li>❖ <b><u>Consideration</u></b> - one party must give or promise something in exchange for the other parties' performance or promise of performance.</li> <li>❖ <b><u>Intention to be Legally Bound</u></b></li> </ul>								
<p><b><u>Offer and Acceptance</u></b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 3.2.2</a></p>	<ul style="list-style-type: none"> <li>❖ The courts establish that an agreement has been reached is by looking for:                             <ul style="list-style-type: none"> <li>➢ An offer, and</li> <li>➢ Acceptance of that offer.</li> </ul> </li> <li>❖ Where a valid offer is made, it <b><u>requires only acceptance to turn it into a binding agreement.</u></b></li> <li>❖ <b><u>What constitutes an "offer"?</u></b></li> </ul> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="background-color: #e0e0e0; vertical-align: top;"> <p><b><u>It is distinct from an Invitation to Treat</u></b></p> </td> <td> <ul style="list-style-type: none"> <li>❖ Invitations to treat are non-specific, include non-promissory language. There is <b><u>no intention to be bound by acceptance.</u></b></li> <li>❖ An offer should be <b><u>sufficiently specific to be capable of acceptance,</u></b> include promissory language and there will be objective intention to be bound by acceptance.</li> </ul> </td> </tr> <tr> <td style="background-color: #e0e0e0; vertical-align: top;"> <p><b><u>Generally, the following will NOT be offers</u></b></p> </td> <td> <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> </ul> </td> </tr> <tr> <td style="background-color: #e0e0e0; vertical-align: top;"> <p><b><u>"Subject to Contract"</u></b></p> </td> <td> <ul style="list-style-type: none"> <li>❖ The words '<b><u>subject to contract</u></b>' generally indicate that the parties <b><u>do not intend to be bound by the document in question.</u></b></li> </ul> </td> </tr> <tr> <td style="background-color: #e0e0e0; vertical-align: top;"> <p><b><u>Ending an Offer</u></b></p> </td> <td> <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> </ul> </td> </tr> </table>	<p><b><u>It is distinct from an Invitation to Treat</u></b></p>	<ul style="list-style-type: none"> <li>❖ Invitations to treat are non-specific, include non-promissory language. There is <b><u>no intention to be bound by acceptance.</u></b></li> <li>❖ An offer should be <b><u>sufficiently specific to be capable of acceptance,</u></b> include promissory language and there will be objective intention to be bound by acceptance.</li> </ul>	<p><b><u>Generally, the following will NOT be offers</u></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> </ul>	<p><b><u>"Subject to Contract"</u></b></p>	<ul style="list-style-type: none"> <li>❖ The words '<b><u>subject to contract</u></b>' generally indicate that the parties <b><u>do not intend to be bound by the document in question.</u></b></li> </ul>	<p><b><u>Ending an Offer</u></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> </ul>
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<p><b>Battle of the Forms</b></p> <p><a href="#">Commercial and IP Law &amp; Practice, 3.2.2.3</a></p>	<ul style="list-style-type: none"> <li>❖ Where <b>both parties seek to impose their own standard terms on the other.</b></li> <li>❖ <b>In such circumstances it may not be clear whose terms apply:</b> <ul style="list-style-type: none"> <li>➤ E.g. 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 his 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 counteroffer.</li> <li>➤ If the contract is 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> </ul> </li> <li>❖ <b>The critical point is that the terms which were accepted first bind.</b> <ul style="list-style-type: none"> <li>➤ E.g. <a href="#">Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401</a>: the return of a signed acknowledgement slip amounted to acceptance of the buyer’s terms.</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 neither parties’ terms bind - <a href="#">Transformers &amp; Rectifiers Ltd v Needs Ltd [2015] EWHC 269 (TCC)</a><sup>1</sup>.</li> <li>❖ <b>This can be the case despite an extensive previous course of dealings.</b></li> </ul>				
<p><b>Consideration</b></p>	<ul style="list-style-type: none"> <li>❖ I.e. what one party gives or promises to give in exchange for the other parties’ performance or promise of performance.</li> <li>❖ Consideration is required when:</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 the gaskets supplied were not fit for purpose and that Needs had breached its contract. Needs asserted that its own terms and conditions applied, and that it could therefore rely on exclusion clauses to limit its liability. Transformers argued that its standard terms applied.

Transformers placed its orders in an inconsistent way; by fax, email and post. Its standard terms were not included when orders were placed electronically, and when placed by post, were printed in small font on the reverse of the purchase orders. Needs would respond to those orders with an acknowledgment, 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.

Commercial and IP  
Law & Practice,  
3.2.3.1

- Forming a contract and
  - Changing the terms of an already established contract.
- ❖ Consideration may be:
- Something tangible e.g. money or even chocolate bar wrappers ([Chappell v Nestle \[1960\] AC 87](#)).
  - Going over and above an existing contractual duty ([Hartley v Ponsonby \(1857\) 7 EB 872](#)).
  - Conferring a practical benefit on the promisor ([Williams v Roffey Bros \[1990\] 1 All ER 512](#)).

### Examples of Agreements Which are NOT Valid

Agreements Which  
are Void for Lack  
of Certainty

Commercial and IP  
Law & Practice,  
3.2.3.2 – 3.2.3.3

- ❖ **An agreement which fails to address a key area**, e.g. price, may be void for lack of certainty.
- However, **such agreements may be saved by implied statutory provisions**.
    - E.g. [s8 of the SGA 1979](#) implies a term, where the parties have failed to agree a price, that the price shall be a “reasonable” one.
  - Otherwise, the general approach is that **if the parties make their agreement incompetently, that is their problem**.
  - The courts may, however, fix a badly drafted contract if there is other evidence of the intent.
- ❖ **Agreements to agree:**
- An **agreement to enter into a contract at a later date**, or
  - An **agreement that a certain provision will be agreed between the parties after the commencement of the contract**
  - Will be void.
- ❖ **Lock-In Agreements:**
- A lock-in agreement is where **A is contractually obliged to negotiate with B and no-one else**.
  - These are distinct from “lock-out agreements” where A is not obliged to negotiate with B, but agrees not to negotiate with anyone else.
  - **Lock-out agreements may be enforceable, lock-in agreements will not be** [Walford v Miles \[1992\] 1 All ER 453](#).
- ❖ **Cancellation Clauses:**
- If a cancellation clause in the contract (i.e. a clause allowing the parties to withdraw from the contract without liability in certain circumstances), is **too wide, it may have the effect of invalidating the contract altogether**.
- ❖ **Mistake:**

- An erroneous belief, *at contracting*, that certain facts are true, may render the contract void.
- To have an effect on the contract, the mistake must have occurred before the contract was made.
- In practice, the **doctrine of mistake is narrow and very few mistakes will affect the validity of a contract**, but where they do, the effect is to render the contract void.

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## Incorporation of Contractual Terms

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

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

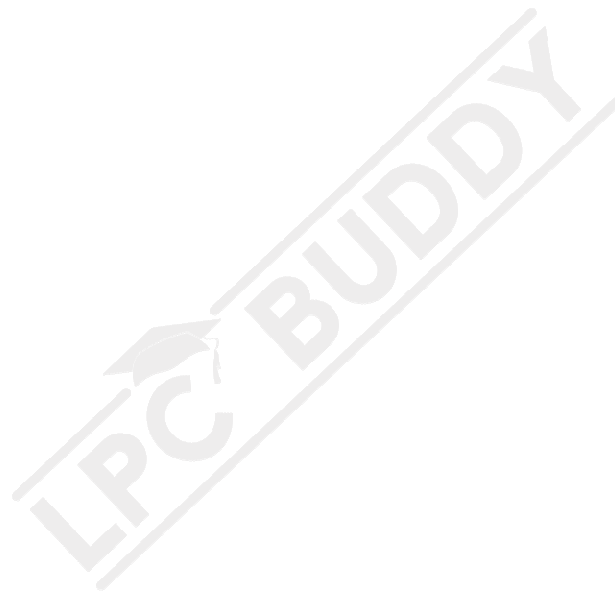
**Variation of Contractual Terms**

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

❖ A contract variation occurs when the parties agree to do something differently to what they originally agreed; however, in order to be valid, variations must adhere to certain pre-requisites:

<p><b>Consideration</b></p>	<ul style="list-style-type: none"> <li>❖ To be valid, the party that agrees to the variation must generally <b>provide consideration for the other party's varied performance.</b></li> <li>❖ E.g.:             <ul style="list-style-type: none"> <li>➢ Providing <b>something over and above an existing contractual duty.</b> <ul style="list-style-type: none"> <li>▪ (<a href="#">Hartley v Ponsonby (1857) 7 EB 872</a>).</li> </ul> </li> <li>➢ <b>Conferring a practical benefit</b> on the promisor.                 <ul style="list-style-type: none"> <li>▪ (<a href="#">Williams v Roffey Bros [1990] 1 All ER 51</a>).</li> </ul> </li> </ul> </li> <li>❖ However, promises <b>can sometimes be enforceable even though no consideration has been provided:</b></li> </ul> <table border="1" data-bbox="321 762 1511 1501"> <tr> <td data-bbox="321 762 508 1115"> <p><b>Doctrine of Waiver</b></p> </td> <td data-bbox="508 762 1511 1115"> <ul style="list-style-type: none"> <li>❖ A promise <b>not</b> to enforce the other party's obligations under the contract may be <b>given limited effect in equity.</b> <ul style="list-style-type: none"> <li>➢ E.g. a buyer who accepts late delivery of goods could be taken to waive his right to terminate the contract for late delivery.</li> <li>➢ This can occur through conduct; for instance if the buyer continues with performance of the contract, or does not behave in a way which suggests that they object to the late delivery. They may be taken to have waived their right to terminate the contract.</li> </ul> </li> </ul> </td> </tr> <tr> <td data-bbox="321 1115 508 1501"> <p><b>Promissory Estoppel</b></p> </td> <td data-bbox="508 1115 1511 1501"> <ul style="list-style-type: none"> <li>❖ In <b>limited circumstances a party may be estopped from renegeing ("going back on")</b> on a promise.</li> <li>❖ Generally, this only applies where there are <b>continuing obligations.</b></li> <li>❖ So, for example:             <ul style="list-style-type: none"> <li>➢ A seller who agrees a sale of goods contract with a buyer with a purchase price of £10,000.</li> <li>➢ Who then subsequently agrees to accept £8,000 for the goods.</li> <li>➢ Could renege on that promise, change their mind, and demand an extra £2,000 from the buyer as payment is not a continuing obligation.</li> </ul> </li> </ul> </td> </tr> </table>	<p><b>Doctrine of Waiver</b></p>	<ul style="list-style-type: none"> <li>❖ A promise <b>not</b> to enforce the other party's obligations under the contract may be <b>given limited effect in equity.</b> <ul style="list-style-type: none"> <li>➢ E.g. a buyer who accepts late delivery of goods could be taken to waive his right to terminate the contract for late delivery.</li> <li>➢ This can occur through conduct; for instance if the buyer continues with performance of the contract, or does not behave in a way which suggests that they object to the late delivery. They may be taken to have waived their right to terminate the contract.</li> </ul> </li> </ul>	<p><b>Promissory Estoppel</b></p>	<ul style="list-style-type: none"> <li>❖ In <b>limited circumstances a party may be estopped from renegeing ("going back on")</b> on a promise.</li> <li>❖ Generally, this only applies where there are <b>continuing obligations.</b></li> <li>❖ So, for example:             <ul style="list-style-type: none"> <li>➢ A seller who agrees a sale of goods contract with a buyer with a purchase price of £10,000.</li> <li>➢ Who then subsequently agrees to accept £8,000 for the goods.</li> <li>➢ Could renege on that promise, change their mind, and demand an extra £2,000 from the buyer as payment is not a continuing obligation.</li> </ul> </li> </ul>
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<p><b>Drafting to Prevent Unauthorised Variation</b></p>	<ul style="list-style-type: none"> <li>❖ <b>No-Authority Clauses:</b> <ul style="list-style-type: none"> <li>➢ No Authority Clauses are intended to prevent unauthorised variations to contracts by limiting who within a business is able to agree to a valid variation.</li> <li>➢ These may purport to:             <ul style="list-style-type: none"> <li>▪ <b>Restrict the grant of variations or waivers to certain members of staff</b>, e.g. senior staff only, or</li> <li>▪ <b>Prevent oral variations</b> (known as a <b>no-oral-modification ("NOM") clause</b>).</li> </ul> </li> <li>➢ Alternatively, they may provide that any <b>variation or waiver does not affect the seller's rights</b> under the contract.</li> </ul> </li> <li>❖ <b>Are these Effective?</b></li> </ul>				

	<ul style="list-style-type: none"> <li>➤ <b>NOM clauses are effective:</b> <ul style="list-style-type: none"> <li>▪ <a href="#">MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] UKSC 24</a></li> <li>▪ The Supreme Court held that a NOM clause is legally effective.</li> <li>▪ Where the contract includes a NOM clause, <b>parties must comply with the formalities set out in the clause if they wish to vary the contract.</b></li> </ul> </li> <li>➤ 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>).</li> </ul>
<p><b><u>Economic Duress</u></b></p>	<ul style="list-style-type: none"> <li>❖ A contractual variation <b>will not be valid if it is brought about by economic duress.</b> <ul style="list-style-type: none"> <li>➤ i.e. <b>where one party threatens to break its side of the contract unless the other side promises to pay more than originally agreed.</b></li> <li>➤ A party to a contract cannot hold the other party to ransom. The variation of the contract will be voidable and the only remedy is rescission.</li> </ul> </li> </ul>



**Discharging i.e. Ending Contracts**

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

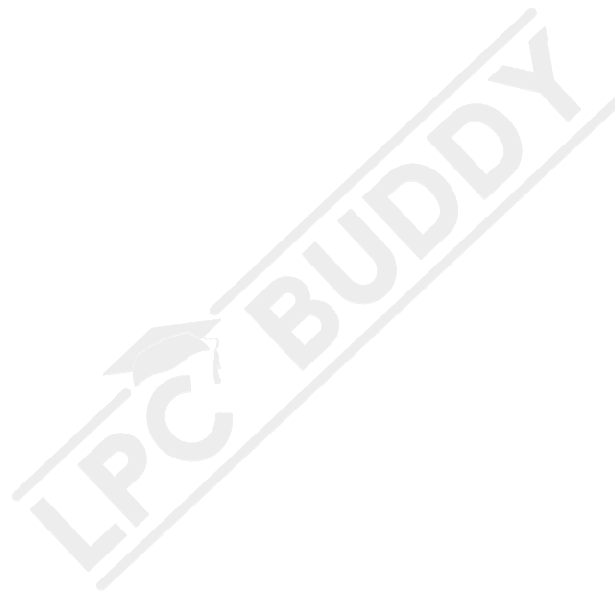
<p><b>Overview</b></p>	<p>A contract comes to an end when it is discharged by:</p> <ul style="list-style-type: none"> <li>(a) <b>Performance</b> of the contract</li> <li>(b) <b>Agreement</b></li> <li>(c) <b>Frustration</b> <ul style="list-style-type: none"> <li>➤ i.e. if the contract can no longer be performed in the manner intended by the parties (see below).</li> </ul> </li> <li>(d) <b>Breach:</b> <ul style="list-style-type: none"> <li>➤ i.e. Where there is:                             <ul style="list-style-type: none"> <li>i. A breach of a <b>condition</b> (not of a warranty);</li> <li>ii. I.e. a <b>repudiatory breach</b>, and</li> <li>iii. That repudiation is <b>accepted</b> by the innocent party.</li> </ul> </li> </ul> </li> </ul>	
<p><b>Frustration</b></p> <p><a href="#">Commercial Law &amp; Practice, 3.2.6.1</a></p>	<p><b>What is it?</b></p>	<ul style="list-style-type: none"> <li>❖ A contract is frustrated where:                     <ul style="list-style-type: none"> <li>➤ The contract becomes <b>impossible or radically different to perform</b> i.e.</li> <li>➤ There is a “supervening event”.</li> </ul> </li> </ul>
	<p><b>Consequences</b></p>	<ul style="list-style-type: none"> <li>❖ The contract <b>automatically comes to an end</b> and <b>both parties are relieved of their obligations.</b></li> <li>❖ The <a href="#">Provisions of the Law Reform (Frustrated Contracts) Act 1943</a> will come into operation.                     <ul style="list-style-type: none"> <li>➤ <i>Prima facie</i>, the buyer can:                             <ul style="list-style-type: none"> <li>▪ <b>Recover payments</b> made <b>before frustration (s1(2))</b>, and</li> <li>▪ Any sums which have yet to be paid, but which are due before the frustration date <b>will cease to be payable.</b></li> <li>▪ The court, however, has <b>discretion</b> to allow the seller to <b>keep all or some of any advance payment if it considers that this will be just.</b></li> </ul> </li> </ul> </li> <li>❖ <a href="#">The Sale of Goods Act 1979:</a> <ul style="list-style-type: none"> <li>➤ Where there is a contract for the sale of specific goods, and</li> <li>➤ The goods <b>perish before risk has passed to the buyer,</b></li> <li>➤ <b>The contract is avoided (s7).</b></li> </ul> </li> </ul>

**Remedies for Breach of Contract**❖ [Commercial Law & Practice, 3.2.6.2](#)

<b>Is there a Breach of Condition or Breach of Warranty?</b>	❖ The remedies that are available for a breach of contract <b>depend on the type of term that has been breached:</b>		
	<b>Type of Term</b>	<b>What is it?</b>	<b>Consequences of Breach</b>
	<b>Condition</b>	<ul style="list-style-type: none"> <li>❖ Terms which are of such vital importance that they <b>go to the root of the contract.</b></li> <li>❖ This is defined by the clause's <b>substance and not its form.</b> Simply labelling a clause as a "condition" is <b>not conclusive.</b></li> </ul>	<ul style="list-style-type: none"> <li>❖ The Innocent party gains the right to <b>elect</b> to: <ul style="list-style-type: none"> <li>➢ <b>Terminate the contract</b> i.e. the innocent party is: <ul style="list-style-type: none"> <li>▪ <b>Discharged from all future obligations.</b></li> <li>▪ <b>Can recover any property already transferred</b> under the contract (including the price paid for any goods or services)</li> </ul> </li> <li>➢ <b>Affirm the contract:</b> i.e. to continue with performance.</li> </ul> </li> <li>❖ In either case, the innocent party has the right to claim <b>damages.</b></li> </ul>
<b>Warranty</b>	<ul style="list-style-type: none"> <li>❖ A warranty is a "minor" term in the contract i.e. it is not a condition.</li> </ul>	<ul style="list-style-type: none"> <li>❖ The innocent party has the right to claim damages.</li> <li>❖ Does <b>not</b> have the option to terminate the contract.</li> </ul>	

<b>Damages</b>  <a href="#">Commercial Law &amp; Practice, 3.2.6.3</a>	❖ Damages for breach of contract are intended to put the <b>innocent party in the position they would have been in HAD THE CONTRACT BEEN PERFORMED.</b>
	<ul style="list-style-type: none"> <li>❖ <b>Remoteness:</b> <ul style="list-style-type: none"> <li>➢ Damages <b>cannot be claimed for losses that are too remote.</b></li> <li>➢ Not all loss which the Claimant suffers will arise as a <b>direct result</b> of the breach</li> <li>➢ E.g. a fire may cause a business to cease operations, which may in turn cause the business to suffer a loss of profits.</li> <li>➢ <a href="#">Hadley v Baxendale (1854) 9 Exch 341</a>: Damages can only be claimed for losses that: <ul style="list-style-type: none"> <li>▪ (a) <b>Flow "naturally from the breach"</b> (ordinary loss of profit can come within this limb) or</li> <li>▪ (b) Were <b>reasonably in the contemplation of the parties</b> at the time they made the contract. <ul style="list-style-type: none"> <li>• This goes to what was explained during negotiations. Did the parties know that the contract was to be for a particular purpose, or that a party had a specific requirement?</li> </ul> </li> </ul> </li> </ul> </li> </ul>

<p><b>Restitution and Restitutionary Damages</b></p> <p><a href="#"><i>Commercial Law &amp; Practice, 3.2.6.3</i></a></p>	<ul style="list-style-type: none"><li>❖ <b><u>In certain circumstances, an aggrieved party may also seek “restitution”:</u></b><ul style="list-style-type: none"><li>➤ This seeks to reverse <b><u>unjust enrichment of a Defendant</u></b></li><li>➤ E.g. where an advance payment is made and yet no benefit at all is provided to the paying party.</li><li>➤ Restitution seeks to <b><u>restore the Defendant’s benefit or enrichment to the Claimant.</u></b></li><li>➤ It is awarded rarely, and <b><u>never where contractual remedies would produce a satisfactory result.</u></b></li></ul></li></ul>
<p><b>Mitigation</b></p>	<ul style="list-style-type: none"><li>❖ A Claimant that seeks damages must make a reasonable attempt to mitigate their loss.</li><li>❖ If the Defendant can show that the Claimant failed to mitigate their loss, the Claimant will be unable to recover the extent of their losses which could have otherwise been avoided.</li></ul>



**Introduction to Commercial Contracts**

❖ [Commercial and IP Law & Practice, Chapter 1](#)

❖ Chapter 1 of *Commercial and IP Law & Practice* provides an introduction to the basics of commercial contracts. The essential points that this chapter covers, in summary, are:

- Overview of the Supply Chain.
- Pros and Cons of the use of Standard Terms as opposed to an individually negotiated contract.
- Overview of the basic structure of a Commercial Contract

**The Supply Chain**

❖ [Commercial and IP Law & Practice, 1.3](#)

❖ Supply Chain Procurement:

- This is the term given to the **sourcing of raw materials, goods, services and utilities necessary to produce goods**, and enable the business to function effectively.
- There are three primary routes through which raw materials are ultimately procured and become goods. Consider the following alongside **Figure 1.1** at [Commercial and IP Law & Practice, 1.3](#):

Agreement	What happens?		Explanation	
<b>1. Direct Sale Agreement</b>	<b>Manufacturer Sells...</b>	<b>...to a Retailer.</b>	<ul style="list-style-type: none"> <li>❖ The Supplier of Raw Materials sells these to a Manufacturer.</li> <li>❖ The <b>Manufacturer uses the raw materials to create a good which is sold to a Retailer.</b></li> <li>❖ The <b>Retailer then sells the good to the End User (Customer).</b></li> </ul>	
<b>2. Distribution Agreement</b>	<b>Manufacturer Sells...</b>	<b>...to a Distributer who Sells...</b>	<b>...to a Retailer.</b>	<p><b>A Distribution Agreement:</b></p> <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 which in order to re-sell.</b></li> <li>❖ Unlike an Agency agreement (see below) the Distributor owns the goods. There is no direct contractual relationship between the Supplier and the Distributor’s customers (Retailers).</li> <li>❖ The <b>Retailer then sells this to the End User (Customer).</b></li> <li>❖ The pros and cons of this method of procurement are set out in folder <a href="#">6. Agency &amp; Distribution Agreements.</a></li> </ul>
<b>3. Agency Agreement</b>	<b>Manufacturer Sells</b>	<b>...to an Agent who Sells...</b>	<b>...to a Retailer.</b>	<p><b>An Agency Agreement:</b></p> <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> </ul>

				<ul style="list-style-type: none"> <li>❖ The Manufacturer appoints an Agent who acts on the manufacturers behalf to negotiate and conclude sales.</li> <li>❖ The <b>Retailer buys the goods from the Agent (acting on the manufacturer’s behalf) and sells this to the End User</b> (Customer).</li> <li>❖ Again, the pros and cons of this method of procurement are set out in folder <a href="#">6. Agency &amp; Distribution Agreements.</a></li> </ul>
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Upstream and Downstream Contracts

<b><u>Upstream Contracts</u></b>	<ul style="list-style-type: none"> <li>❖ Upstream Contracts provide the <b>client with the resources needed in order to carry on business.</b></li> <li>❖ i.e. they are contracts which <b>require some sort of financial outlay</b> e.g.:             <ul style="list-style-type: none"> <li>➢ 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, security.</b></li> </ul> </li> <li>❖ E.g. BP’s Upstream Contracts include oil and natural gas exploration, as well as “midstream” services such as transportation, storage and processing.</li> </ul>
<b><u>Downstream Contracts</u></b>	<ul style="list-style-type: none"> <li>❖ Those under which the <b>client passes on and exploits the fruits of his labour.</b></li> <li>❖ E.g. contracts for the <b>supply of goods and services by the business.</b></li> <li>❖ <b>Generate income</b> for the business.</li> <li>❖ E.g. for BP – these include fuel refineries and marketing; convenience retail businesses; lubricant sales; manufacture, sale and distribution of petrochemicals for use in consumer products.</li> </ul>

Use of Standard Terms

❖ [Commercial and IP Law & Practice, 1.4](#)

<b>Advantages</b>	<b>Disadvantages</b>
❖ 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> – 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 s3 of <b>UCTA 1977</b> which subjects the clause to the test of reasonableness.



## Basic Structure of a Commercial Agreement

❖ [Commercial and IP Law & Practice, 1.5](#)

❖ See: <https://uk.practicallaw.thomsonreuters.com/0-107-4877>

(a) <b><u>Commencement and date.</u></b>	<ul style="list-style-type: none"> <li>❖ The <b>“introduction” to the contract.</b></li> <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>	
(b) <b><u>The parties</u></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>	
(c) <b><u>The recitals, if any;</u></b>	<ul style="list-style-type: none"> <li>❖ The <b>“Background”</b>.</li> <li>❖ Explains the <b>previous relationship</b> between the parties and the <b>reason for entering into a contract.</b></li> </ul>	
(d) <b><u>Definitions and interpretation;</u></b>	<ul style="list-style-type: none"> <li>❖ Explains the meaning of defined terms which appear in the body of the agreement.</li> <li>❖ Listed alphabetically.</li> <li>❖ Defined terms are normally denoted by capital letters.</li> </ul>	
(e) <b><u>Conditions precedent, if any;</u></b>	<ul style="list-style-type: none"> <li>❖ Provides certain conditions that have to be satisfied <b>BEFORE the agreement / parts of the agreement comes into effect.</b></li> <li>❖ E.g. the supply of goods is conditional on the buyer obtaining a letter of credit.</li> </ul>	<b>Known as the “Operative Part”</b>
(f) <b><u>Agreements;</u></b>	<ul style="list-style-type: none"> <li>❖ Defines the <b>rights and obligations</b> of the parties.</li> <li>❖ E.g. Sale of Goods Contract: <ul style="list-style-type: none"> <li>➤ Seller is obliged to sell and deliver goods of a certain description and quality.</li> <li>➤ Buyer is obliged to pay the price.</li> </ul> </li> </ul>	
(g) <b><u>Representations and warranties;</u></b>	<p><b>Conditions:</b></p> <ul style="list-style-type: none"> <li>❖ Fundamental terms of the contract, breach of which will entitle a party to terminate.</li> </ul> <p><b>Warranties:</b></p> <ul style="list-style-type: none"> <li>❖ Less important terms.</li> <li>❖ Normally breach gives rise to damages only, though the agreement may provide for something different to this.</li> </ul>	
(h) <b><u>Indemnities;</u></b>	<ul style="list-style-type: none"> <li>❖ Where one party promises to make good another’s loss on the happening of a particular event.</li> </ul>	
(i) <b><u>Limitations and exclusions</u></b>	<ul style="list-style-type: none"> <li>❖ The contract may seek to limit or exclude a parties’ liability for a particular event,</li> <li>❖ Will be <b>subject to reasonableness</b> under <a href="#">UCTA 1977</a>.</li> <li>❖ See notes on <a href="#">Exclusion Clauses</a>.</li> </ul>	
(j) <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 <b>address the mechanics of an agreement and common legal points which are relevant to most transactions.</b></li> <li>❖ See notes on <a href="#">Boiler-Plate Clauses</a> for a full list of examples.</li> </ul>	

	<ul style="list-style-type: none"> <li>❖ E.g. an <u>Entire Agreement Clause</u> (which provides that all of the obligations of the parties are recorded in one document).</li> </ul>	
(k) <u>Execution clause and signature; and</u>	<ul style="list-style-type: none"> <li>❖ The end of the contract will normally provide for the signatures of the parties.</li> <li>❖ The formalities required for execution <b><u>depend on the identity of the parties and the type of contract.</u></b></li> </ul>	
(l) <u>Schedules</u>	<ul style="list-style-type: none"> <li>❖ <b><u>Used to include detail from the body of the agreement</u></b> to make it readable.</li> <li>❖ Can be used to annex other documents.</li> </ul>	

