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Identifying express terms

**Express terms:** explicitly agreed between the parties.

- Usually recorded in a formal, written contractual document then signed by both parties
- May be found in parties’ communications (may be partly oral /partly written), negotiations, docs

> Courts use **objective approach** to asses + give effect to parties’ intentions (a reasonable man in parties’ position).

**Standard form (adhesion) contracts**

- Pre-prepared business contracts for repeated use in similar situations (eg: car hire, travel, loans).
- Almost always non-negotiable. SEE *Australian Consumer Law, s27*.
- Issues: (although they have been tested in court + remove cost +time of negotiations),

  Standard form contracts exploit customers: they are rarely read; hide terms in difficult language, small print; negotiation is impossible (competitors are all the same), social pressure to sign, exploit gap in customer knowledge. Courts are likely to give effect to the contract (except for offensive terms).

1. Written terms + legal effect of a signature

Traditional rule in *L'Estrange v Graucob*: parties will be bound by terms in a contractual doc that they have signed (regardless of whether they have read/understood the terms).

> Signature seen in law as willingness to be bound to the terms contained in the doc (but must consider the situation) *(Toll v Alphapharm)*: confirmed *L'Estrange*.

**Criticisms** of rule: consumers often sign contracts without reading them or appreciating the risks:
- difficult to read as complex legal language > difficult to access/read. + too onerous.

**Exceptions: where the binding effect of a signature may be avoided**

Rule in *L'Estrange* does **NOT** apply:

  1 – *Non est factum*: where the signature was induced by misrepresentation /fraud (vitiating factors)
  2 – Where the doc signed is **not reasonable to be considered a contractual doc** (eg: a receipt) *(Curtis)*
  3 – When the conditions are **unusual/onerous** (SEE: incorporation of terms) + no **reasonable notice**. *(Thornton)*

*(Curtis v Chemical)*: > Misrepresentation (fraud or innocent misrepresentation) is sufficient to disentitle a party to the benefit of an exclusion clause.

> A document will not be considered a contract if it has a different function (eg, a receipt) and does NOT contain legally binding terms.

**Remedy:** party not bound by the contract, + contract is **void** ab initio.
2. Terms incorporated by notice

For parties to be bound:

1. **Timing**: terms must be available before the contract was formed \( (Oceanic) \) &

2. **Knowledge**: Reasonable steps must be taken to bring the terms to notice \( (Thornton) \)

**Timing**

For displayed terms to form part of a contract they must be made available (to the party to be bound by those terms) at a time BEFORE the contract is made.

- If an unknown clause is inserted after contract is made, (eg: incorporated in a ticket issued) it is NOT part of contract.
- Cannot rely on clauses incarnated later unless carrier had done all reasonably necessary to bring to the party’s notice.

\( (Oceanic Sun v Fay) \): conditions printed on a ticket issued after contract made ≠ effective to alter contract

**Knowledge or Notice**

If the timing requirement is satisfied (ie, notice is given before the contract was made), then a party will be bound by those terms if they have either knowledge or reasonable notice of the terms.

**Knowledge**: if a party signed a document knowing that the document contained certain terms, even if they didn’t read the document. \( (Thornton) \)

- Must know that the doc delivered or displayed contains contractual terms (doesn’t have to have read)

**Reasonable notice**: Offeror must provide reasonable notice (depends on situation and type of contract/terms).

**Unusual / Onerous terms**

\( (Baltic Shipping Co v Dillon) \): requirement of special notice (that which will fairly + reasonably bring terms to peoples’ attention).

- Responsibility to bring unusual conditions to the notice of other party before they are bound by them.
- Reasonable opportunity to see + agree to terms/conditions is necessary before the contract is made (ie, not delivered later).
3. Terms incorporated by a course of dealings

Where parties have history of dealings, contractual terms from earlier contracts may be incorporated into a subsequent contract.

- Actual knowledge of terms can be inferred where reasonable notice + reasonable conditions
  
  *(Balmain New Ferry v Robertson)*: mere continuance of the services = party is bound (they are presumed to be aware of the terms/conditions).

- The course of dealings must have been regular + uniform for a term to be incorporated. *(Kendall v Lillico)*

- Documents relied on in previous transactions must be reasonably considered to be contractual in nature.
  
  *(Rinaldi v Precision Mouldings)*: the doc must be more than a mere receipt, otherwise no knowledge of the terms/conditions can be inferred.

What they SHOULD HAVE done: make everything clear! Say ‘terms + conditions’ instead of ‘cart note’. Emphasis on exclusion from liability (say ‘read before signing’), (but too much emphasis might lose business).

4. Statements made during negotiations

If false statements are made during negotiations = promissory (contractual term) > remedy for breach of contract.

If the statement is merely representative, (not part of contract) > there is relief under misrepresentation /misleading conduct as causes of action. (compensation thru rescission /ACL remedies)

Is the statement part of the contract?

1- Is evidence of the purported term admissible?

  (Entire agreement clause + parol evidence rule (see p 8) > limits the use of extrinsic evidence that ‘adds to or varies’ a contract).

2- Whether the parties would have intended the statement to be binding (judged objectively).

  (consider: language used, relevant expertise, importance of the statement, timing, and form of the written contract).