

## **PERFORMANCE & BREACH**

### **TERMINATION**

Right to terminate:

- By Agreement/Contract
- Breach of a Condition – common law right to terminate
- Serious Breach of an Intermediate Term (SBIT) – common law right to terminate
- Repudiation – common law right to terminate
- Delay – common law right to terminate

Right to terminate:

- **CL right to terminate only** = can terminate with LOB damages
- **Contractual right to terminate only** = can terminate, but no LOB damages unless Anti *Shevill* – a clause in the contract which says this term isn't a condition, therefore breach of this will give you a common law right to terminate, however damages will be \_\_\_\_ - clause included (*Shevill*; approved in *Gumland*)
- **Neither** = damages for loss only (next week)
- **Both** = can terminate, with LOB damages
- Contractual right to terminate does not exclude Common Law right to terminate unless expressly stated to be excluded (*Tabali*)

### **TERMINATION BY AGREEMENT**

- Under the original contract
  - Contract in which agreement was made:
    - Has fixed term (e.g. contract will expire in 5 years from 1 January 2017)
    - Has express termination clause
      - E.g. can terminate on 1 month's' notice
      - E.g. can terminate if A breaches clause 2
    - If no express termination clause, may have implied right to terminate on reasonable notice
- By subsequent agreement
  - A later contract that expressly ends earlier contract
  - A later contract that impliedly ends earlier contract by covering similar ground
  - Abandonment inferred from parties' inactivity

### **TERMINATION FOR BREACH**

**Identify breach** (if anticipatory breach, go straight to repudiation)

- The breach is not fulfilling the contractual obligation
- Write what the contractual obligation and show how they have departed from that obligation

**State that client can claim damages, but only certain breaches would entitle them to terminate and get Loss of Bargain damages**

- Stating that you need a common law right to terminate

**Classify term into condition/intermediate term/warranty**

- You want the term to be classified as a condition (as any departure allows you a right to terminate)
- Check whether there is an implied condition – Statute (automatically the term is a condition if it fulfils section 18 or 19 of the *Goods Act*)
  - S 18: that goods will correspond to their description
  - S 19: that goods are of merchantable quality/fit for particular purpose known to seller
  - But these can be contracted out of (s 61)
- Consider whether the contract actually tries to classify the term (*Arcos* for example) (only relevant if the contract actually says it is a condition)
  - s 16(2) does not have any relevance, case law shows that terminology used by parties is not decisive
  - State terminology used by parties is only one factor, but not conclusive (*Shevill*)
  - Depends on the specific term, and the surrounding terms and circumstances
  - Whether it actually is a condition in a legal sense depends on the circumstances of the case
  - When a clause is easily breached, that points to the fact that the clause is not a condition in a legal sense, but a layman's sense
  - If the contract uses the word condition many times – it is too easy for one party to have the right to terminate (points towards the condition being used in a normal layman's sense)
- Is it a **condition** based on the **intention of the parties** (if no statutory or contractual classification)
  - Apply ***Tramways*** test: was the fulfilment of the clause of such importance to the promisee that he would not have entered into the K but for its strict compliance?
  - Any little breach the other party would not have entered into the contract
  - Consider these factors:
    - General nature of the contract, heavy subject matter (*Bancks, Ankar*)
    - Likely consequences of breach on other party
    - Language – strong, clear, obligatory language “we guarantee” “we promise” (*Tramways*)
    - Other terms of the contract: if another clause (clause 8 for example) says that clause 8 is a condition, it is unlikely that the clause in question (clause 7 for example) will be a condition – as the parties have turned their mind to the issue of conditions, and chose not to use the term in clause 7
    - If damages are an inadequate remedy (*Ankar*) – in certain cases about business or reputation, money is not adequate or applicable
    - Whether breach likely (*Schuler*)
  - State that courts are not so willing to construe clauses as conditions, and then consider if intermediate term
  - Do not go through this test if the parties say it is already a condition
- State that Australian courts now recognise intermediate terms (obiter in *Ankar*; *Kompahtoo* cf Kirby J)
  - An intermediate term = a term that can be breached in variety of ways
- If not intermediate terms or condition, it is a warranty

### Identify consequences of the classification

- If condition: even the slightest breach allows for termination (*Arcos v Ronaasen*)

- If intermediate term: is it a serious breach?
  - If breach deprives innocent party of substantially the whole benefit of the K (**Hong Kong Fir**)
  - Consider (weigh these elements up):
    - length of K (**Hong Kong Fir**) – how long the entire contract is, in *Hong Kong Fir* it wasn't a long breach in regards to the whole length of the contract
    - whether term breached contained their main obligation under the K (**Koompahtoo**) – *Koomphatoo*, one of the party's only obligation was to manage the accounts, and they didn't do that, so the court found it was a serious breach as they did not fulfil their one obligation
    - consequences of breach for the other party (**Koompahtoo**)
    - adequacy of damages
- If not one of these, it is a warranty: no right to terminate, only damages

#### TERMINATION FOR REPUDIATION

- Define: where a party demonstrates an unwillingness (words or conduct) or factual inability to perform K, either in the future (anticipatory) or currently
- **State high test**: repudiation is a serious matter and is not to be lightly found (*Shevill*)
- **Test**: has the party evinced an intention to no longer be bound by the K or that they intend to fulfil it *only* in a manner substantially inconsistent with their obligations under the K? (**Shevill per Gibbs CJ OR Carr v Berriman**)
  - Relate to the whole contract
  - Relate to a condition of a contract i.e. so fundamental as to deprive the innocent party substantially of the whole benefit of the contract (**Tabali v Progressive**)
  - OR can be inferred from combination or series of breaches of warranties (**Tabali**)
  - Compare what the party is willing/able to do with what they were required to do under the contract
- Consider if:
  - Instalment contract: look at the breach and the party's attitude in regards to the breach
    - If goods, cite s38(2)
    - 2 relevant factors (**Maple Flock**):
      - The quantitative ratio the breach bears to the whole K
      - How probable it is the breach will be repeated i.e. is it an isolated, unlikely occurrence
  - Erroneous interpretation of the K
    - **Willy nilly test (DTR v Mona)**: is the party persisting despite there being a clear enunciation of the correct interpretation?
      - Does the party actually believe that their interpretation is the right interpretation?
      - **cf Lord Salmon dissenting in Woodar** who believed genuine mistakes do not preclude finding of repudiation

#### TERMINATION FOR DELAY

- State alleged delay
- Is time of the essence?
  - If time is expressly stated to be essentialà yes
  - If time condition meets *Tramways* test à yes
- If yes, can terminate at any time after performance is due

- If no, can terminate if
  - A serious breach of an intermediate term
  - Repudiation
- Repudiation in cases of delay
  - Apply **general repudiation test** (above) **OR**
    - Attitude is important here
    - Can be satisfied by delay itself or delay in combination with other conduct (*Laurinda*)
  - A failure to perform after issuing a valid notice (*Laurinda*; *Louinder*) – analyse whether the notice is valid
    - Timing of notice:
      - If specific time stipulated: notice can be issued as soon as any delay occurs
      - If no specific time stipulated: unreasonable delay has to occur before notice is issued (*Louinder*)
  - Content of notice
    - Must specify **a time for performance** for a **particular obligation (both)**
    - Must be reasonable
    - Communicate the consequences of failure to comply with notice i.e. termination of K

State that in cases of uncertainty, party may obtain court declaration that right to terminate has been properly exercised (*Ankar*)

Consider if there is an express contractual right to terminate (but no Loss of Bargain damages)

Conclude: can the party terminate? With Loss of Bargain damages?

TERMINATION UNDER CISG AND UPICC