

LEGAL EXAM

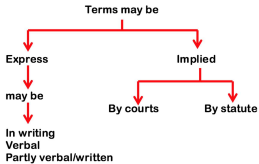
1. CONTRACT

Mainly **case law** (contract law is under common law and is fundamental of commercial law)

A. Is there a contract?

Exam: There will be a contract.

B. What are the terms of the contract?



i. Terms in the contract have contractual consequences.

ii. Express terms

1. Formality
 - a. Entirely oral
 - b. Entirely in writing
 - c. Partly oral and partly written

5.2.2 When the contract is verbal: In the absence of writing, there are two problems:

(1) **Firstly**, determining what was actually said;

There are obvious problems in proving oral terms that are not admitted by an opponent. But it is possible to do so by giving credible evidence of them, having witnesses present and so on.

<<<It is always better to have a written contract>>> **Buckenara v Hawthorn Football Club Ltd (1988)**

(2) **Secondly**, when it is determined what was said, it is necessary to determine which verbal statement was meant to be part of the contract. Establishing intention – factors court considers:

- 1) Time between making of the statement and finalization of the contract. Close to finalization, more likely to be a term
- 2) Did one party have special knowledge or skill on which the other was entitled to rely (Dick Bentley

Productions v Harold Smith (Motors); Oscar Chess v Williams?)

3) How important was the statement in the minds of the parties?

2. Requirements of terms (cumulative)

- a. For a statement to be a term of a contract, the statement must amount to a promise
- b. It is inferred that statements in a contract are **promissory** in nature unless the words that are used tend against the making of such an inference. (J.J. Savage) 'estimated speed', namely, if the speed is not reached, there is no breach of contract. -> this is not a contractual term.
- c. Example of promissory words: 'will'; compare 'may'.
 - Contract must have promise in it, BUT promise does not necessarily in the contract to be a promise.
 - If there is no promise, like if case, the plaintiff cannot sue under contract law, but can sue misleading or deceptive conduct.
- d. Timing: the promise must also be given **before the contract has been made**. (i.e. before acceptance of the relevant offer) (Boscaglia) 'The seller's promise was not binding. It was made after the sale had been completed.'
- e. If the promise is given after the contract has been made, it will become a non-contractual promise.
 - Once the contract is made, it cannot be changed. (General rule)

iii. Implied terms

1. Definition: terms that are part of the contract even though they may not have been mentioned by any party. (Wallis; Actual)
2. Examples
 - a. In any contract that involves the provision of services, it is implied that the services will be performed with **reasonable care and skill**. (Red Glass; Hawkins; Hungerfords)
 - 'Red Glass': The golden door was installed within a wood frame, which was easily broken. This indicated that the service was not performed professionally, and without reasonable care and skill.

→ If the service is not performed with reasonable care and skill, the plaintiff can argue the breach of contract, as well as negligence.

- b. In any contract for the sale of goods (under Goods Act, i.e. common law), it is implied that
 - i. 'Time is of the essence' (Tradax)
 - If the goods come late, you have the choice to reject the goods and not pay.
 - ii. The goods are of **merchantable quality** and are **fit for their purpose** (GA s 19(1), (3))
 - 'Merchantable quality': lunch with poisoned peanuts
 - 'Fit for purpose': lunch without peanuts (but buyer requires peanuts)
 - Difference: Goods without merchantable quality cannot be sold to anyone, but goods that does not fit for purpose can be sold to anyone else who don't have that requirement.

3. Can implied terms be expressly excluded by the parties to the contract?

- a. Under general rule, implied terms can be excluded, because of the freedom with contracts
- b. Exception: **Consumer contracts** cannot remove implied terms.

C. What do the terms (i.e. the obligations parties need to perform) mean?

- i. Approach to interpretation
 1. Focus on the text used (Beconwood; cf Integrated Computer Services)
 2. HOWEVER, 'no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements' (Barwick, Lippart Hunter)
- ii. Have the terms been followed? (i.e. Is there a breach of contract?)
 - i. An actual breach of contract involves: (obnoxious)
 1. not doing what has been promised (Moore); or
 2. doing what has been promised will not be done (Lumley; Curro; cf Network Ten) 'An European opera singer has made a contract with the company that she would only sing for that company, but she sang for other company. Thus, there is a breach of contract and she breaches the express term.'
 - ii. If relevantly challenged by the party (D) that is in breach, the party (P) that is seeking a remedy needs to prove on the **balance of probabilities** that it is actually willing and able to perform its contractual obligations. (Pacalpacabab) i.e. the plaintiff is able to perform his/her own obligations totally.

E. Is there an exclusion or limitation clause?

- i. Exclusion Clauses
 1. A clause that effectively excludes liability for breach of a term brings about the same outcome as the exclusion of the term itself from the contract
 2. Exception: Terms that purport to exclude liability for breach of contract are ineffective in the case of **consumer contracts with non-business consumers** (CCA sch 2 ss 64, 276; Australian Consumer Law and Fair Trading Act s 9)
 - a. Is the exclusion clause a term of the contract?
 - b. Does the exclusion clause cover the loss or damage that has happened?
- ii. Limitation Clauses

1. What is the difference (if any) between a term that excludes liability for breach of contract and one that limits liability for breach?
 - Limitation clause only limit defendant's liability to a certain amount, but cannot totally exclude liability for breach of a term. (Darlington Futures; Suisse Atlantique)

F. Validity & Effectiveness of terms that purport to limit or exclude liability for breach of contract

- i. Step 1: Analysis under common law
 1. Timing rule of exclusion/limitation clause
 - a. Has the contract in question already been made (i.e. has the relevant offer already been accepted) at the time that the exclusion/limitation clause is presented? (Olliver; Thornton; Baltic Shipping; J Spurling; compare Bradshaw)
 - 'Olliver': The exclusion/limitation clause is shown on the back of the door in the hotel room, which is after the contract has been made. It is only effective when given at reception desk, especially for the guests who stay in this hotel for the first time.
 - 'J Spurling': the exclusion clause was effective because it was part of the contract and made before the contract was formed.
 - The exclusion/limitation clause can only be part of the contract if it is made before the formation of the contract.
 2. Timing rule of the interpretation of the exclusion/limitation clause (only if there is an interpretation)
 - The **oral** interpretation of the limitation clause can only be considered whether or not to be incorporated into the contract (if it is given before the contract is formed). In addition, the formality of the contract that contains the limitation clause is also important to determine the effectiveness of the limitation clause. If the limitation clause is in an **entirely oral contract**, the interpretation of the limitation clause can be treated as an amendment to the limitation clause, which suggests that the previous limitation clause is not effective. It becomes a contractual promise and can be incorporated into the contract as an express term. If the limitation clause is in an **entirely written contract**, other common law rules should be applied and are discussed below.
 3. Parol evidence rule
 - i. In general:
 - a. A written document is presumed to be complete (i.e. contain all terms in the contract).
 - ii. Evidence or material outside that document may not be used to contradict or change (eg add to or subtract from) the words of the document. (Gleeson, McHugh, Kirby, Hayne, Callinan, Gaudes)
 - iii. Purpose: To respect what is in the document, otherwise there is no use to have the document.
 1. If you want to change the terms in the contract, you can make a new contract. BUT problems are: the other party may not agree, then you can only follow what's already in the contract (a drawback of this rule).
 - iv. Rationale
 1. See, eg, B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd [1994] 35 NSWLR 227, 234 (Kirby P) 'It is to add to certainty by adherence to the effect of the clearly expressed written word. See also Prens v Simmonds [1971] 3 All ER 237, 240-1 (Lord Wilberforce)

→ 'Causar': Unsigned docket -> The docket was not a document containing contractual terms including an exclusion clause even though it was on the docket. P. 454

→ 'L'Estrange': P was bound by the document he signed, whether or not she had read them (in small print).

- b. If not signed, Has **Reasonable Notice** (not actual notice) Been Given of the Term? Has the party that is seeking to rely on the term attempted to bring the term to the attention of the other party? (Balmain; Parker; Thompson; compare Interfoto)
 - Unsigned documents are non-contractual. The responsibility is on the person who wants to rely on an exclusion clause (D) to show that the terms of the contract have been brought to the notice of the plaintiff that **the term was contractual in nature**. p. 449

→ 'Parker': see back (ticket). There is a reasonable notice. P. 450

→ 'Balmain': rule of reasonable notice does not apply, because the plaintiff had previous dealings with the defendant and this shows that he has known and accepted the terms of paying an extra fee for the wharf. P. 454

→ 'Thompson': P was illiterate and could not see the exclusion clause. P was injured when she fell from the train, but she failed against the railway company. The court held that **P could not rely on being illiterate, which was a burden not a privilege**. Moreover, she had received constructive notice of the exclusion clause. P. 451

→ 'Interfoto': In the delivery note, there was a condition which said that the hirer would have to pay a holding fee of 5 pounds per day plus tax (if the transparencies were not returned on time. This condition was not effective as **it was not discussed**, it was not brought to the attention of the customer and it was not part of the contract. p. 452

e.g. a post size is too small or the light is dim, the notice is not reasonable.

→ If the reasonable notice has been given of the exclusion/limitation clause, regardless whether you read it or not, they are still part of the contract.

- c. Exceptions: where there was fraud or misrepresentation about the clause; the document was presented in a way that suggested it had another purpose; or **non est factum** applies (a plea that a written agreement is invalid because the defendant was mistaken about its character when signing it).

5. Misrepresentation rule

- a. Misrepresentation is an exemption to
- b. Has the party that is seeking to rely on a term of the contract misrepresented the term to the party against whom the term is being used without the latter being aware of the misrepresentation? (Curtis; compare Mendelssohn; Evans; Couchman)
 - 'Curtis': one party told the wrong thing about the clause to the other, and the other party was not aware because he/she did not read this clause. Thus, under this situation, the other party should rely on what is being told rather than the actual clause in the contract.

If the other party was aware of the misrepresentation, then he/she should follow the exclusion/limitation clause.

→ 'Mendelssohn': there was no discussion between the plaintiff and defendant about whether the exclusion clause formed part of the contract and no interpretation of the exclusion clause.

6. Contra Proferentem Rule (based on the clause is part of the contract)