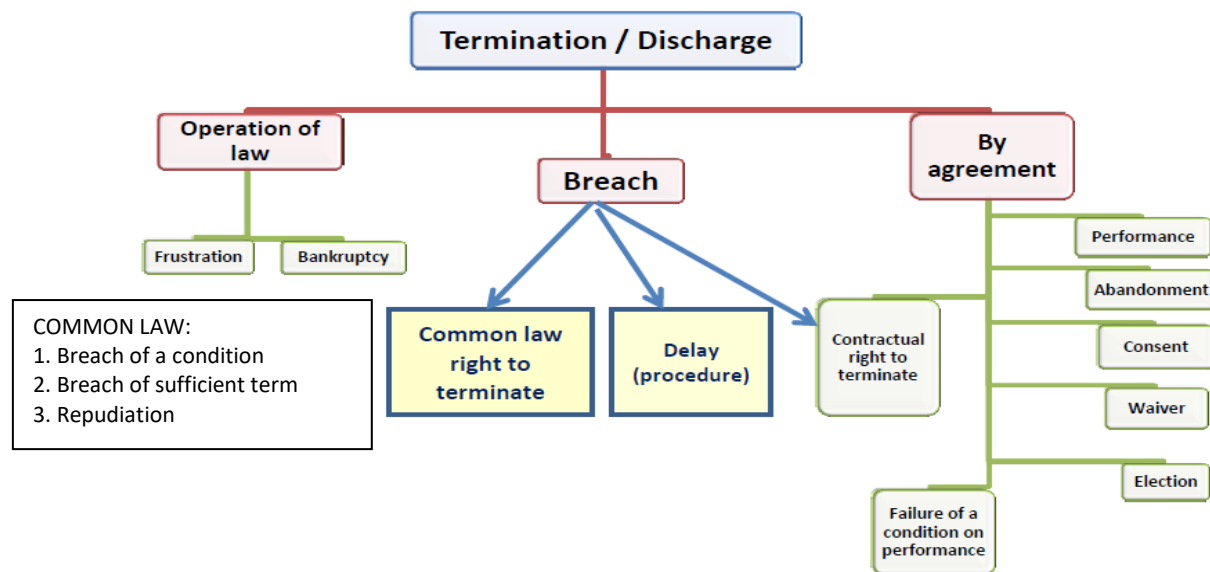


Termination of a contract = no future obligations



#### 1. Termination by agreement

- parties have performed all of their obligations
- if obligations occurred prior to termination = work already completed remains enforceable
- parties abandon the contract
- 
- there is an express contractual right to terminate
- failure of a contingent condition

Issues:

- express contractual provision in the contract itself
- contingent condition stated in the contract
- effect of a new agreement to vary, novate, settle or abandon the contract

#### 2. Consent

- Eg. accord and satisfaction, substituted agreement

Variation does not necessarily involve termination. Inconsistent new terms = old contract is not in use.

#### 3. Right to terminate

- Must notify other party of their decision if there is no express contractual right that specifies the termination

#### 4. Terminating parties should:

- Be careful not to 'affirm' the contract – by electing to keep the contract on foot, or acting inconsistently with the right to terminate, they lose their right to terminate
- Estoppel: contracting parties whose conduct induces the other party to believe that the contract between them has been varied may be estopped from denying this on the basis of post-formational conduct

### PRELIMINARY AGREEMENTS

Anticipates the execution of a further more formal contract

#### Purpose:

1. Parties finalized the main details – committed - want solicitors to look over the contract and express it in full form
2. Afraid that they have left something out – insert additional terms (Godecke)
3. Continue to negotiate
5. Parties want to commit pending a formal agreement
7. Commit only if they are satisfied with the condition
8. Show intention to create legal creations

#### Variation

A contract can be varied or terminated by a further contract

A definite agreement must be established or inferred from conduct

Obligation to perform continues to exist

Variation must be clearly demonstrated through reference to the rules of formation

Both parties must have the right to vary the terms or the contract is void

A written contract can be varied or terminated by an oral contract (including a contract under seal)

If a contract is under statute or fraud legislation states an original contract is required to be in writing, then a variation must also be in writing. If parties wish to terminate then it does not have to be in writing.

### **What are the main issues that arise when parties attempt to enter into a preliminary agreement?**

### **When do the parties intend to be legally bound? At this point or when a more formal contract is signed?**

This determines what will happen if one of the parties refuse to execute the formal contract.

If there is no intention to create a legally binding contract at this point = no contract and the recalcitrant party cannot be forced to do anything

If there is intention to create a legally binding contract at this point = there is a contract when the formal contract is formed

This will govern the parties' relationship until such time as the formal contract is executed.

At that stage, the preliminary agreement will be discharged by consent

In a commercial environment, there is a strong belief that parties do intend any agreement to be immediately binding

### **Is a preliminary agreement enforceable?**

**What material can the court take into account to establish whether the parties intended to create legal relations?**

- factual matrix
- subject matter
- language
- detailed nature of the terms
- surrounding circumstances
- parties objective intention

A contentious question is whether the court can take into account the parties' actual subjective intentions. This matter is still to be settled.

### **Is a contingent condition created?**

If the contract is intended to be immediately binding, are some or all of the parties' obligations postponed pending the execution of the formal contract?

This question asks whether the performance of the parties' obligations is conditional upon the execution of the formal contract

### **Classification of preliminary agreements**

1. Immediately bound, formal agreement to follow
2. Immediately bound, performance dependent on formal contract
3. No contract
4. Immediately bound, substituted contract to follow

### **Relevance to classify preliminary agreements**

#### **1. Language**

Whether it evidences the parties' intention to be bound "offers"

"agrees to purchase"

"this shall be a legally binding contract until such time as a formal contract is drawn up" (*GR Securities*).

Also look for language that cuts the other way.

"subject to contract" (*Masters v Cameron*), or language with an air of futurity such as "proposed agreement", or "the purchaser intends to acquire".

#### **2. Detail**

The more detailed = more likely intended to be bound

eg. Godecke: parties had drawn up 11 special conditions and also sought to incorporate terms by reference

The less detailed = less likely parties did not intend to be bound

#### **3. Nature and magnitude of the transaction**

If parties are involved in a large, complex transaction = easier to infer that they did not intend to be bound until the formal contract was executed.

Clear language of intention can displace a negative inference that might otherwise be drawn from the nature and complexity of the subject matter

#### **4. Circumstances surrounding the execution of contract**

Traditional approach to intention = one infers intention from the terms of the contract itself.

But in the *Air Great Lakes* case, the NSW Court of Appeal held that evidence of surrounding circumstances can be used to support inferences that the parties intended to be bound. McHugh JA for example was prepared to receive evidence that the purchaser was pressing for completion of a contract and was happy to proceed without lawyers.