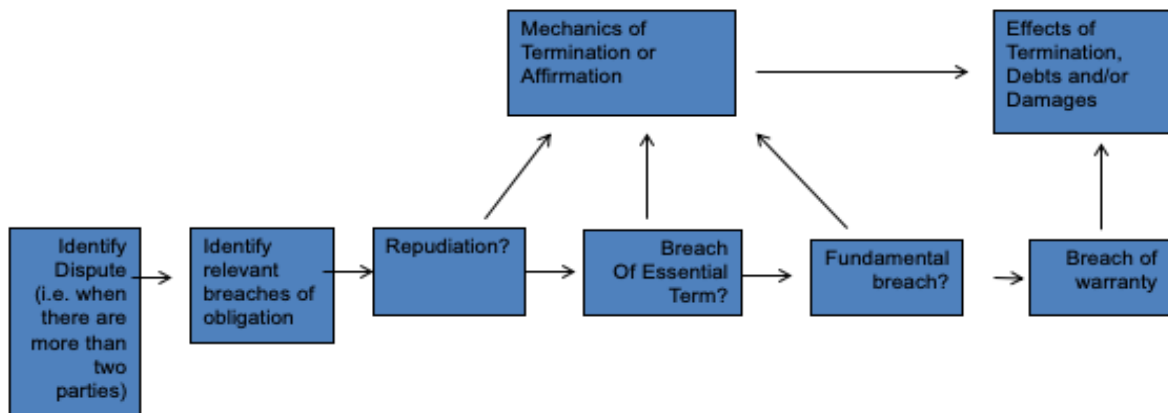


APPROACH TO ANSWERING MID-SEMESTER QUESTION

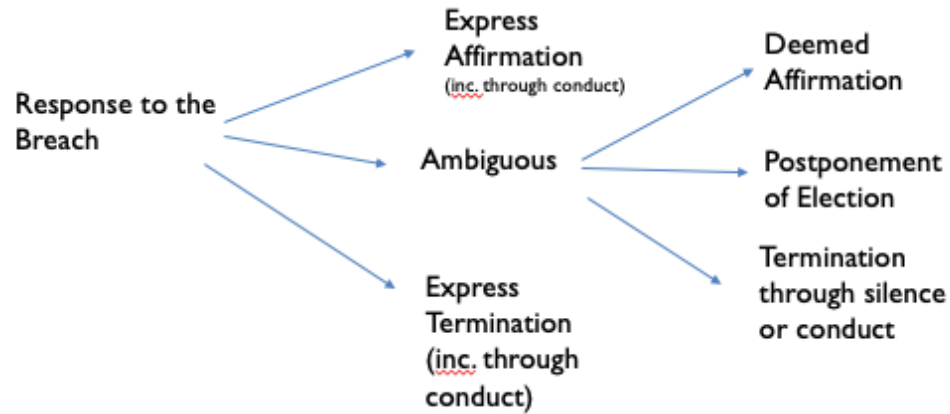
How to answer a question:

1. **Identify the issue**
 - Narrow question down
 - Two parties - then break question down into two topics
2. **For each party, identify relevant breaches of obligation**
3. **Repudiation**
 - Breach of essential term?
 - Fundamental breach? – time stipulations and intermediate terms
 - Breach of warranty?
4. **Mechanics of termination – how has the aggrieved party responded to the breach?**
 - Express affirmation? – conduct/express words
 - Ambiguous?
 - Deemed affirmation (i.e. accepting delivery or continuing to make payments when you know of the breach) – *Coastal Estates v Malavende*
 - Postponement of election (is it a reasonable time frame) – *Tropical Traders v Goonan*
 - Termination through silence or conduct – *Vitol v Norelf*
 - Express termination (incl. through conduct) – express words, or usually via letter
5. **Effects of termination, debts and or damages**
 - Identify relevant payments/performance - *McDonald v Dennings*
 - Substantial performance doctrine
 - Rights accrued unconditionally are unaffected (incl. damages)
 - Sums only conditionally accrued are subject to restitution where there is a total failure of consideration
 - Total failure of consideration – nothing given in return to what was paid
 - Remember the special role of deposits –
 1. Vendor has a right to keep the deposit if the purchaser defaults on the sale (finish sale?)
 2. If the vendor defaults, he doesn't get to keep the deposit



Mention: when an obligation has been breached, the aggrieved party has an automatic right to damages.

Mechanics of Termination



Effects of Termination

Identify Relevant Payments/Performance



Rights Accrued Unconditionally Are Not Affected (inc. damages)



Sums only conditionally accrued are subject to restitution where there is a **total failure of consideration**

NB. The special role of deposits.

CONTRACTUAL LIABILITY

PERFORMANCE – what parties need to do to comply with the terms of contract

DISCHARGE – when parties will cease to have obligations under the contract

RIGHTS AND REMEDIES IN THE EVENT OF A BREACH – what can be done in the event of the other parties' failure to perform

VITIATING FACTORS – whether there are any grounds for avoiding obligations under the contract

COURTS CAN ENFORCE A CONTRACT THROUGH PROVISION OF REMEDIES:

- i. Compelling performance through the **coercive enforcement**, such as an order of *specific performance* or *an injunction*.
- ii. An award for **damages**. This is the most common remedy. It aims to put the *p* in the position the would have been, had they benefited from performance. Breach of contract *implies an automatic right to damages* for the innocent party. These claims are *unliquidated*.
- iii. An action in **debt** for a **liquidated sum**. This is an action arising from seeking relief for a detention of a sum of money that is subject to *p*'s contractual right. Liquidated damages provisions

DEBTS AND DAMAGES

Debt	Damages
A liquidated sum (exact/fixed by formula/operation of law)	Unliquidated
Quantum is fixed by contract	Quantum must be proved by plaintiff
Not subject to duty to mitigate	Subject to duty to mitigate (failure to mitigate = damages reduced)
Not strictly related to breach of contract	Arise through breach of contract

ACTION FOR DEBT

- ... is an action for a **liquidated** (fixed) **sum** which is a primary obligation under the contract (e.g. purchase price); OR
- ... is an action for **"liquidated damages"** – a sum agreed upon by the parties in the event of a breach.

ACTION FOR DAMAGES

An **unliquidated amount** that provides the monetary equivalent of performance upon breach.

- Damages are subject to various restraints, including the **duty to mitigate**; which must be proven by the claimant
 - Damages arise on breach and they can often approximate an interest
 - No agreed sum to refer to
 - Duty to mitigate – hard to prove
- **Liquidated damages** – action in debt
- **No loss = nominal damages**

DISCHARGE

A contract is discharged when it is brought to an end. Discharge can occur:

By **MUTUAL PERFORMANCE** – when both parties have fulfilled their primary obligations.

- When both parties fulfil all their primary obligations that was agreed under the contract.
 - Primary obligation – anything that was promised to be done under the contract (i.e. time, performance, price)
- Secondary obligations, which regulate parties' conduct following a breach will survive the discharge of primary obligations.
 - Secondary obligation – obligations that are conditional on the performance of the primary obligation (i.e. if you are 10 minutes late, I will pay you \$10 less.)
- Exact and literal performance – *Luna Park NSW LTD v Tramways*
- Recovering the contract price
 - Entire obligations – *Cutter v Powell, Sumpter v Hedges*
 - Divisible obligations – *Government of Newfoundland v Newfoundland Railway Company*
 - Substantial performance doctrine – *Hoening v Isaacs, Bolton v Mahadeva*

By **CONSENT** – through mutual abandonment and consent.

- By subsequent agreement: extinguishing a contract through a contract – *McDermott v Black*
 - Consideration required. Accord and satisfaction required.
- By mutual abandonment: both parties treat the contract as at an end – *DTR Nominees v Mona Homes*
 - Clear intention to abandon the contract

By **NON-FULFILLMENT OF A CONTINGENT CONDITION** – contracts may terminate as a result of a non-fulfillment of a contingent condition – *Perri v Coolangatta*

- Where contingency within one/both party's control, courts will prefer a construction which *precludes* automatic termination
- Where contingency is out of the parties' control (i.e. weather, interest rates), non-fulfillment that is expressed to be self-executing will automatically terminate the contract.

By **ELECTION TO TERMINATE FOR SERIOUS BREACH OR REPUDIATION**

- Repudiation – an unwillingness or inability to perform the contract. A party can repudiate either before performance has commenced or during performance and can do so through words or by conduct.
 - Repudiation is *not* termination, it gives the aggrieved party the right to terminate the contract.
 - Test for repudiation – *Koompahtoo Aboriginal Land Council v Sanpine*
 - Repudiation through conduct – *Luna Park v Tramways, Progressive Mailing House v Tabali*
 - Erroneous interpretation of contract – *DTR Nominees v Mona Homes*
 - Wrongful termination – *Starlight Ent v Lapco Ent*
 - Repudiation of instalment contract: court looks to the ratio of the breach to the contract as a whole and the probability of the breach being repeated – *Maple Flock v Universal Furniture Products, Hammer and Barrow v Coca Cola*
 - Repudiation and anticipatory breach – *Foran v Wight*
- Breach of essential term – a right to terminate arises at common law for any breach of an essential term. Essentiality can either be expressed or implied. – *Luna Park v Tramways, Associated Newspapers v Banks*
 - Test for essentiality – *Koompahtoo v Sanpine, Tramways Advertising v Luna Park*
- Breach of an intermediate term – a right arises at common law for a fundamental breach of an intermediate term.
 - Testing whether a term is intermediate – *Hong Kong Fir v Kawasaki, Koompahtoo v Sanpine*
- Delay – time stipulation of a contract may be essential through express words (*Foran v Wight*) or implication (*Bunge Corporation v Tradax*). Otherwise, time stipulation is a mere warranty.
 - Notices to complete: must be served after breach, require strict compliance, advised failure to comply as a basis for termination – *Laurinda v Capalaba Park, Louinder v Leis*

By **OPERATION OF LAW DUE TO A FRUSTRATING EVENT**