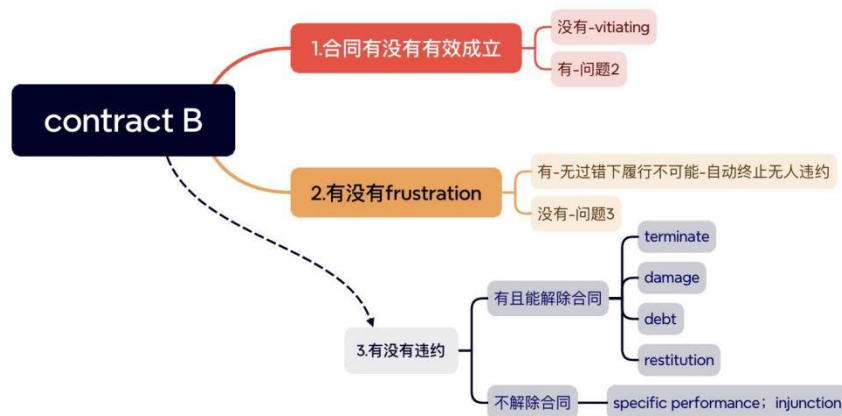


Contract B 考试笔记

<u>想要 terminate 合同</u> (注意: 很可能需要先分析 frustration, 不成再分析 termination, 两者互斥)	<u>终止原因</u>	Agreement, breach (三个类型), repudiation, delay
	Restrictions	Affirm, ready and willing, estoppel
	<u>Consequences</u>	Affirm, terminate
<u>合同违约的 remedy</u>	<u>Damages</u>	Measures, limitations
	<u>Equitable remedy</u>	Specific performance, injunction
<u>要求对方付款或者不想付款</u>	<u>Penalty</u>	
	<u>Debt 应付未付</u>	不能和 damage 重复
	<u>Restitution 不当得利</u>	不能和 damage 重复。返还已支付款项; 支付报酬 (付款权没有 accrued)
<u>发生意外想终结合同</u>	Frustration	突发情况对比案例, limitation, 后果
不公平的情况撤销合同 【沾边的最好都讨论】	Common law	<u>Duress</u> (压力+非法行为)
		<u>Undue influence</u> (支配地位+合法或非法行为)
		<u>Unconscionable dealing</u> (special disability) 【可以和 statute 非良心交易一起适用】
		<u>Third party impropriety</u>
	<u>Common law remedy: Rescission</u>	实质恢复, 部分撤销
	Statute	<u>Misleading or deceptive s 18</u>
		<u>Unconscionable dealing: 【可以和 common law 的非良心交易一起适用】</u> S 21 (商品/服务) S 20 (special disability)
	<u>Statute remedy</u>	236 (损失) 237 (其他)



一个人想要 terminate 终止合同

Issue: do they have the right to terminate?

1. 【终止原因；同一道题可能涉及好几个】 Were there grounds for termination?

【直接点出终止原因进入二级 issue】 Since there is no express termination clause, and 【违约】 [A] did [act], breaching clause [X] / 【预期违约】 [A] did [act], showing an unwillingness or inability to perform the contract / 【delay】 [A] delayed [act], the question is whether the contract can be terminated by [].

(1) 【约定终止】 Could the contract be terminated by agreement?

- Is there an express termination clause? (Shevill)
- If not, would a court imply a right to terminate?
- Have the parties entered a subsequent agreement agreeing to terminate the original contract?

(2) 【违约终止】 Could the contract be terminated for breach?

a. Condition :

Clause [X] may be a condition, in which case any breach entitles [B] to terminate (Arcos).

【不严格执行不会订合同】 Here, [facts+考虑的事实]. This suggests [B] would not have contracted without strict compliance, because [facts]. (tramways)

【argue: 条款可以被很轻或很重的违反】 [A] may argue it is an intermediate term because [facts] 。【按需修改 The clause might be breached trivially or seriously, and a construction requiring strict compliance would produce an unreasonable result where breach is likely (L Schuler).】

【结论】 However, [counter-facts], so the court would likely treat clause [X] as a condition, and [B] may terminate.

考虑因素:

- 合同的类型和目的— General nature and subject matter of contract
- Tramways 测试
- 用词—tramways 用了 we guarantee (指向 condition); L Schuler 用了 condition 不影响判断

the parties said "[wording]". Words like "we guarantee" point towards a condition (Tramways), but labelling a term a "condition" is not conclusive, and the court looks to the parties' objective intention from the terms and subject matter (L Schuler).

- 双方的 condition 应该对等—Associated Newspapers
[主张解除的人]'s corresponding obligations are/are not treated as conditions; terms of equal weight should be classified consistently (Associated Newspapers).
- 条款被违反的可能性—L Schuler
【如果条款违反的结果很荒谬, 如很容易违反则通常那个推断没有 intention】 where a particular construction leads to a very unreasonable result, it is unlikely that strict compliance is required.
- 违反的后果— Hong Kong Fir
breach here would deprive [B] of [substantially the whole benefit]
- Damage 是否足够— Ankar

damages would be inadequate because [facts], supporting a right to terminate for any breach

b. Serious breach of an intermediate term

Clause [X] may be an intermediate term, as it can be breached from the trivial to the serious (Hong Kong Fir). [B] may terminate only if the breach deprives it of substantially the whole benefit of the contract. Considering the nature of the contract, the term, the kind and degree of breach, its consequences for [B], and the adequacy of damages (Koompahtoo), [facts], so the breach [does / does not] reach that threshold.

考虑因素:

- 从轻到重违反 it is capable of being breached in a wide range of ways, from the trivial to the very serious (Hong Kong Fir)
- Koompahtoo:

the nature of the contract and the relationship it creates

the nature of the term

the kind and degree of breach

the consequences of the breach for the other party

the adequacy of damages

c. Warranty

Clause [X] is likely a warranty, as no breach of it could deprive [B] of substantially the whole benefit. [B] therefore cannot terminate and is limited to damages. (Hongkong Fir)

(3) 【预期违约】 Could the contract be terminated for repudiation?

a. 【不能/不愿/anticipatory】 Has a party demonstrated they are unwilling or are unable to perform? 【不愿意关注是否有 intention】

By [words/conduct], a reasonable person would conclude [A] does not intend, or is unable, to perform (*Carr*). The test is objective intention, not [A]'s stated subjective intention (*Laurinda*).

Shevill: 合同约定超过 14 天不付房租就 terminate, 租客长时间不付房租, 不构成因为租客有意愿履行。

Laurinda: 看客观意图, 不看为表达出来的主观意图

b. 【分期合同】 If it is an instalment contract, will the breach amount to repudiation?

【如果对方明确表示不能不愿就无需评估分期合同, 仅适用于对方某一期/几期合同违约评估是否涉及 repudiation】

Maple: Because the contract [], it is an instalment contract, and the time is []; [] breached at [], which is only a proportion of []. Further, because [], the likelihood of future breach is low.. 【违约比例和未来违约的可能性】

c. 【错误解释合同】 Has a party erroneously interpreted the contract?

DTR: 在对方已经明确清楚解释后仍然坚持错误解释构成 repudiation, 否则不构成。By persisting in its interpretation after [B] clearly explained the correct one, [A] repudiated (*DTR*). [Or:] [A]'s interpretation was made in good faith and is arguable, so it does not amount to repudiation.

(4) 【延迟】 Does a party's delay in performing constitute a breach of a condition (was time of the essence?) or repudiation, justifying termination?

a. 时间是 condition

- 普通 condition 就用 tramways 测试—任何违反 (包括 delay) 都可以解除
- Goods Act 1958 (Vic) s 15: 付款时间一般不是关键条款
- 法院通常认为商事合同中的时间条款如交货时间比较关键

b. 时间不是 condition 但 repudiation

- 时间是 intermediate term 没有定论— The law is unsettled as to whether a time stipulation can be an intermediate term (*Ankar*)
- 延迟表明 repudiation: the delay in itself or in combination with other conduct (*Laurinda*)

c. 时间不是 condition 也没有 repudiation

- 违约后可以发通知：明确时间就时间到了后发；没有明确时间就 after an unreasonable delay has occurred (Laurinda)
- 通知要求：明确履行时间 specify a time for performance+时间合理 the time allowed must be reasonable+时间是关键或者如果不遵守就终止[B] may make time of the essence by serving a notice after unreasonable delay (Laurinda), specifying a reasonable time for performance and making clear that non-compliance ends the contract. Reasonable time depends on all the circumstances and what remains to be done (Laurinda). 【不遵守构成 repudiation】
- 什么是 reasonable time: (Laurinda) All the circumstances of the case ; What remains to be done under the contract by the party in delay; The subject matter; The behaviour of the parties
- Laurinda: 履行时间会超过通知时间。Performance would extend beyond the notice period.

2. 【终止限制】 Are there any restrictions on the right to terminate?

(1) 【确认合同后不能解除除非有新的违约 (Carr) 或持续违约】 affirmed the contract

- a. 要件一：knowledge— of at least the facts that give rise to the right to terminate — law unsettled as to whether also need knowledge that have legal right to terminate
- b. 要件二：Unequivocal conduct 明确无歧义的行为 (Immer)

给宽限期不构成 affirm— Extension of time unlikely to be an affirmation (Tropical Traders)

Affirm 的选择需要在合理时间内，但不要求立即[B] need not elect immediately and may keep the question open, provided it does not affirm or cause unreasonable prejudice to [A] through delay.

(2) 【解除方自己没有 ready and willing to perform】

- a. 如果有明示解除条款则无需满足
- b. Actual breach 实际违约：【对方已经实际违约】【无论什么情况请求 loss of bargain 都需要证明 readiness】

■ 受损方自己也有违约：

- ◆ 观点一：受损方在对方违约时 ready and willing。Wronged party must show they were ready, willing and able to perform their essential and fundamental obligations at the time of the breach.

如果受损方违约严重则丧失解除资格 those breaches that would have given the other party the right to terminate will disqualify a party from terminating

受损方轻微违约不构成解除障碍 Non-essential breaches— (Sharjade)

◆ 观点二【更有力】：受损方违约不影响解除，只影响 damage (Sharjade)

- 双方义务是同时且互相的 concurrent and interdependent obligations。they must have tendered performance.

Goods Act 1958 (Vic) s 35: 交货与付款为 同时履行义务 (concurrent conditions) 时，任何一方要主张对方违约，须先证明自己已 tender (实际提出履行)

- 【一般原则】对方已实际违约 actual breach 时，受损方须证明在违约当时自己 ready and willing。Foran

c. 对方 Repudiation: (anticipatory breach) 无论什么情况请求 loss of bargain 都需要证明 readiness】

- 受损方接受了 repudiation (立即解除)

◆ 观点一：【证明在 repudiation 发生时没有实质丧失履约能力即可】(Foran)

At time of repudiation wronged party needs to show that at the time of repudiation they were not substantially disabled or incapacitated from performing (low standard).

◆ 观点二：【不要求 ready 和 willing，除非请求 damages】(Sharjade) No requirement of readiness and willingness when terminating for anticipatory breach unless seeking damages.

- 受损方没接受 repudiation (affirm 合同) (Foran)

原本应该继续履行，但如果因 repudiation 导致受损方的履行变得无意义，且受损方基于该 repudiation 产生了不利依赖，受损方可以依据 estoppel 免于实际履行 if the repudiation makes it futile or pointless for the wronged party to attempt to perform their obligations and there was detrimental reliance (on basis of estoppel)

(3) estoppel 违约方主张

受损方使得违约方产生信赖合同不会被解除并作出行为，违约方主张 estoppel。Estoppel can restrict a right to terminate where there is detrimental reliance on an assumption induced by the other party that the right to terminate would not be exercised

- i. Assumption: must have assumed that P would not terminate (**Waltons Stores**);
- ii. Inducement: must be a “clear”, “unequivocal” and “unambiguous” representation that induces P to adopt the assumption (**Legione**: “I think that” “ll be all right” was not a clear and unequivocal representation);
- iii. Detrimental reliance: established where P relies on the representation, and as a result, will suffer detriment.
 - a. Their reliance must mean that they have altered their position (**Walton Stores: wasted expenditure**)
- iv. Knowledge of reliance / intention: party who makes representation must be intentionally induced / encouraged, or otherwise, must have knowledge (**Waltons Stores**);
- v. Departure or threatened departure: representing party has departed, or threatened to depart, from the initial representation – i.e., failed to fulfil the assumption / expectation (**Waltons Stores**);
- vi. Reasonableness of reliance: two elements – what the representation objectively could be taken to have meant (not what the promisor thought) (**Waltons Stores**);
 - a. The adoption of the assumption must be reasonable; and
 - b. The reliance on that assumption must be reasonable – whether it was reasonable to act (and rely) in the way in which he/she did.
- vii. Unconscionability: “something more” than simply breaking a promise is required (**Waltons Stores, per Mason CJ and Wilson J**)
 - a. e.g., greater consequential detriment suffered
 - b. e.g., more reliance placed on the promisor not changing his/her mind.

(4) Does the contract expressly restrict a party's RTT?

是否构成 ACL 下的 unconscionable termination

合同中有明确的 restriction

违反 implied duty of good faith

3. 【终止结果】 What are the consequences of a party having the right to terminate?

(1) 【有权终止】 If there was a right to terminate:

a. 【受损方 aggrieved party 有选择权】

[A] may elect to affirm or terminate following [B]'s breach, but [A] must have knowledge of the facts giving rise to the right to terminate and must clearly manifest its election by words or conduct. (**Immer**)

b. 【合同被确认】 Consequences of affirmation :

- 不能再终止合同 the right to terminate for that breach is lost (**Foran**)
- 新违约新选择 A new right to make an election occurs upon further breaches (新的违约或者持续违约都会产生新选择 continuing breach)
- Damages: get damages for loss caused by the breach. 但 anticipatory breach 要等 actual breach 才能获得 damage 【预期违约可以立刻解除，也可以先确认等 actual breach 再解除并请求 damage】
- 继续履行义务：

一般双方继续履行合同否则违约方也可以主张受损方违约，除非违约方的行为导致受损方认为可以不履行，构成 estoppel (**Foran**)，但如果受损方本来也没准备好履行则不适用 estoppel

受损方完成履行可以申请 debt 【前提是可以不依赖对方独立履行完成】（debt 和 damage 不能重复）（White and Carter）

后续受损方违约，违约方可以获得解除权（Bowes）

给予延期通常不算 affirm（Tropical Traders）

c. **【合同被终止】** Consequences of termination

- 无需履行未来义务 further obligations cease: both parties are relieved from further performance.

- 结束前的权利仍存在 past obligations remain on foot.

但是如果对价完全落空 total failure of consideration（比如支付了部分价款但没拿到东西）可以要求 restitution（McDonald）

Bot: 【买方违约，卖方保留定金】即便解除也可以追讨解除前没有支付完的 deposit；定金的对价不是“取得标的”，而是“对方进入合同/买方认真交易的担保，因此无需满足 restitution 的要求”

Foran: 【卖方违约，买方要回定金】基于 restitution

区分定金（10%以下）和预付款，如果是预付款不论卖家还是买卖违约均需满足 restitution 的要求：Because [] is [], higher than the usual 10% deposit, and the parties agreed it would be applied towards the price, it is likely a part payment.

Property Law Act 1958 (Vic) s 49: 土地转让合同，法院酌情命令返还定金

- Restitution: 已提供的货物或服务获得救济（Mann）

- Loss of bargain damages: 合同价（若履行本应获得的）－ 替代交易可得的金额 = 赔偿额[B] may claim loss of bargain damages, measured as the difference between the contract price [A] was to pay and the amount [B] could reasonably have obtained under a substitute contract at the time of termination.

【loss of bargain 以 readiness 和合同解除为前提，且仅包括“如果合同被履行原本应该获得的利益，或者收回的利益”的损失，如果该损失仅是违约造成的，比如因违约另外请人干活多花的钱，这种不是 loss of bargain，不以 readiness 和合同解除为前提】

- 解除时无需说对理由。事后发现当时另有有效的解除理由（即便当时并不知情），仍可援引以支持该次解除 the aggrieved party can rely on any valid ground for termination, even if they did not have awareness at the time of termination.

(2) **【无权终止】** If there was no right to terminate: **【一定要提一句】**

If [B] had no right to terminate, its purported termination is itself a wrongful repudiation

一个人因为另一个人 breach 合同寻找 remedy

1. 【损害赔偿; repudiation 只有 actual breach 后才可赔偿】 Will they be able to obtain substantial damages at common law?

(1) Identify the breach

(2) Identify the potential losses

For substantial damages, 【受损方】 must prove that they have suffered loss as a result of the breach on the balance of probabilities, otherwise damages will be nominal

Here, the loss includes []

(3) Measures and restrictions

damages aim to place 【受损方】 in the position she would have occupied had the contract been performed (Robinson)

Loss 1: 【题目中的 loss】 —— 【damage 种类】

1) The measure of damages 【以下择一且可以去掉小标题】

a. Expectation damages 【注意 damage 的计算以违约时的市场价格为准】

客户毁约服务合同: 【原本应该挣得钱】 lost profit

卖方毁约货物合同: 【找替代品多花的钱】 additional cost to get replacement goods

服务提供方毁约: additional cost of substitute services.

货物存在瑕疵: the difference in market value between goods supplied and goods promised

Amann: 【受损方】的 expectation of a certain outcome had a likelihood of attainment rather than being mere expectation. 【期待利益具有实现可能性】

b. Breach of an obligation to build or repair

◆ Diminution of value:

Because [], [aggrieved party] may claim the cost of cure from [party in breach], but it must be necessary and reasonable (Bellgrove). Here, although [], the difference does not affect market value, and the cost of cure of [] is out of all proportion to the benefit gained. Damages should therefore be assessed as diminution in value, namely [] (Ruxley).

Ruxley: 泳池尺寸微小差别

◆ Cost of cure:

Because [], [aggrieved party] may claim the cost of cure from [party in breach], but it must be necessary and reasonable (Bellgrove). Here, although [], [Aggrieved party] has a particular preference for / aesthetic interest in / eccentric attachment to [], so damages should not be limited to restoring the same financial position, the cost of cure is the more appropriate

measure (*Tabcorp*).

Tabcorp: 租户擅自拆掉 foyer 重新装修。利益可能是经济上的, 审美上的, 甚至是个人偏好或特殊执念。

c. Reliance damages 【expectation 无法计算; 违约加重了不确定性; 基于合同会被履行而产生的成本】

Where [B] cannot prove its expectation loss because [the subject matter did not exist / the outcome cannot be assessed], it may claim wasted expenditure incurred in reliance on performance — here, [\$X] (*McRae*). It is presumed [B] would have recouped this (*Amann*). Although [party in breach] may argue [aggrieved party] would not have recouped its costs even had the contract been performed, that uncertainty was caused by [party in breach], so the court will lean towards presuming [aggrieved party] could have recouped the wasted expenditure (*Cessnock*).

McRae: 邮轮, 标的物不存在无法计算损失。Although the subject matter did not exist, [aggrieved party] can recover the [] it spent, unless [party in breach] proves this money could not have been recouped even had the contract been performed (*McRae*).

Amann: test。Can't be put in a superior position than they would have been in had the contract been performed. 对于亏损合同 (loss making contracts), 原告不能因为违约而被置于比合同正常履行时更优越的地位。 However there is a presumption that the plaintiff would recoup its expenses. 不过, 法律上存在一个推定: 即原告原本能够收回其支出的费用。 The onus is on the defendant to prove that expenses would not be recouped. 由被告承担举证责任, 证明原告原本无法收回这些费用。

Cessnock: 即便履行也不一定挣钱。The more difficult the defendant's breach has made it for the plaintiff to prove its position had the contract been performed, the stronger the assumption or inference will be that the plaintiff would have recovered its wasted expenditure. 被告的违约行为越是使原告难以证明“合同若被履行时其本应处于的状态”, 法院就越倾向于作出更强的推定或推论, 认为原告本来能够收回其浪费性支出 (wasted expenditure)

d. Loss of chance

Because [B] lost a real chance of [], it may recover even though the chance was uncertain and below 50% (*Chaplin*). The court will value that chance, however difficult (*Howe*) — here, approximately [\$X].

Chaplin: Fact that the benefit depended on a contingency and prospects were less than 50% no bar to damages. 即使该利益取决于不确定因素 (contingency), 且成功概率低于 50%, 也不妨碍赔偿的成立。

Howe: Once it has been established that a chance has been lost, some quantification of its