

Contracts
LAWS1075

Terms of a contract may be:

Express

- Incorporated by signature;
- Incorporated by notice;
- Incorporated by course of dealings; or
- Written or oral statements made in negotiations (but consider parol evidence rule)

Implied

- In fact
- In law

A term of the contract – forms part of the contract, imposes an obligation and is enforceable.

The terms indicate what the parties have agreed to do, or refrain from doing, by way of performance of the contract.

Week 1: Express Terms

Class 1A - Express Terms (I)

- **Incorporation by Signature**
- **Incorporation by Notice**

Reading: Contract Casebook

Terms and The Communications of the Parties

The terms of a contract determine what the parties have agreed to by way of performance of their contract.

In identifying the terms of a contract, courts favour an objective approach, considering 'the intention which reasonable persons would have if placed in the situation of the parties' - *Reardon Smith Line v Hansen-Tangen* [1976]

INCORPORATION BY SIGNATURE

Case:	<i>L'Estrange v Graucob Ltd</i> [1934] 2 KB 394
Facts:	- The plaintiff decided to purchase from the defendant a cigarette vending machine. - She signed a form on brown paper which was headed 'Sales Agreement' - When the machine was delivered, it did not work satisfactorily.
Key takeaways:	A signature is widely recognized even by the general public as being a formal device, and its value would be greatly reduced if it could not be treated as a conclusive ground of contractual liability at least in all ordinary circumstances. A party will be bound by the terms in a contractual document which they signed, whether or not they read the document.

Case:	<i>Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52</i>
Facts:	- EB - Australian distributor of a UK influenza vaccine & Alphapharm - sub-distributor. - Richard Thomson, an Australian subsidiary of EB, agreed with Alphapharm to manage vaccine collection, storage, and regulatory approval. - Richard Thomson engaged Toll to transport and store the vaccine, which needed constant refrigeration. - Dispute over liability for vaccine spoilage during storage and transport.
Issue/s:	Whether Richard Thomson, acting on Alphapharm's behalf, had the authority to agree to Toll's standard conditions.
Judgement:	The High Court found that Richard Thomson was authorised to contract with Toll on behalf of Alphapharm.
Key takeaways:	Objective Approach: What a reasonable person would understand from what was written in the contract. Signing a document intended to affect legal relations conveys to a reasonable person that the signatory has read and approved the contents or is willing to be bound by them, regardless of whether they read the document.

Circumstances in which the effect of signature may be avoided

Exceptions to the rule in *L'Estrange v Graucob*:

1. Misrepresentation
2. Fraud
3. Non-contractual document
4. Mistake/non est factum - very narrow- e.g. if blind or cannot read English

The signature rule will not apply where the signature was induced by misrepresentation or fraud, or in some cases of mistake.

The rule will also not apply where the document cannot reasonably be considered a contractual document, for example, because it appears to have another function, such as being a receipt.

Case:	<i>Curtis v Chemical Cleaning & Dyeing [1951] 1 KB 805</i>
Facts:	- Curtis took a white satin wedding dress for cleaning to the defendants business. - Curtis was handed a paper headed 'receipt', which she was asked to sign. - When the dress was returned to Curtis, there was a stain.
Judgement:	The effect of signature was avoided.
Key takeaways:	Any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption.

	If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption.
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INCORPORATION BY NOTICE

Incorporation of Terms by Notice

It is not uncommon for one party to allege that the contract contains terms which have been displayed or delivered before or at the time of the transaction. Whether or not the other party will be bound depends upon whether:

1. The terms were available to the party to be bound by those terms before the contract was made; and
2. Reasonable steps were taken to bring the terms to the notice of the party to be bound.

Timing

For delivered or displayed terms to form part of a contract, they must be available to the party to be bound before the contract is made.

E.g. A contract is made when you book a hotel. The terms written on the door in the hotel room saying that the hotel is not liable for valuable items going missing are therefore terms presented after the formation of the contract.

Case:	<i>Oceanic Sun Line Special Shipping Company v Fay (1988) 165 CLR 197</i>
Facts:	- Dr Fay, the <i>plaintiff</i>, made a booking in New South Wales for a cruise of the Greek islands on a vessel owned by a Greek company, Oceanic Sun Line, the <i>defendant</i>. - Upon payment of the fare, the plaintiff was handed an 'exchange order' which stated that it would be exchanged for a ticket when he boarded the vessel. - In Athens, the plaintiff obtained his ticket, upon which was printed a condition that the courts of Greece should have jurisdiction in any action against the owner. - The plaintiff received serious injuries while taking part in trap shooting on board the ship. The plaintiff sued the defendant for negligence.
Issue/s:	Whether the exchange order counted as a contract.
Judgement:	The High Court decided the contract was formed when the exchange order was issued in NSW. Because Dr Fay was not adequately informed of the exclusive jurisdiction clause, the court held that it was not incorporated into the contract.
Key takeaways:	The terms and conditions on a ticket issued after a contract has already been made are not automatically incorporated into the contract. Terms introduced after contract formation cannot bind a party.

Knowledge or Notice

If the timing requirement is satisfied, a party will be bound by delivered or displayed terms if he or she has either knowledge or reasonable notice of the terms.

If a party knows that the relevant document contains contractual terms, he or she will be bound by those terms regardless of whether he or she has read them.

In the absence of knowledge, a party will be bound by delivered or displayed terms if he or she had reasonable notice of the terms.

The other party must take reasonable steps to bring the terms to the notice of the party bound.

Reasonable notice = in a form that is likely to come to the attention of the party to be bound before the contract is formed (*Thornton v Shoe Lane Parking*).

Case:	<i>Thornton v Shoe Lane Parking Ltd</i> [1971] 2 QB 163
Facts:	- Mr. Thornton parked his car in a multi-storey automatic car park. - Upon entry, he received a ticket from an automatic machine, which stated that parking was subject to conditions displayed on the premises. - One of these conditions purported to exempt the company from liability for personal injury. Mr. Thornton did not read the conditions. He later suffered serious injuries due to the defendant's negligence.
Issue/s:	Was the exemption clause incorporated into the contract?
Arguments:	Defendant's Argument: The ticket was a contractual document, and the exemption clause on the premises formed part of the contract. Plaintiff's Argument: The contract was already formed when Mr. Thornton accepted entry by taking the ticket, and any terms on the ticket came too late to be incorporated.
Judgement:	The contract was formed when Mr. Thornton entered the car park and took the ticket. Any conditions on the ticket were introduced after the contract had been concluded and were therefore not part of the agreement. The exemption clause was not brought to Mr. Thornton's attention in a sufficiently clear manner and did not bind him.
Key takeaways:	In cases of automatic ticket machines, the contract is formed at the moment the customer takes the ticket, not when they later read any conditions. Terms must be clearly communicated before contract formation to be incorporated. Exemption clauses must be explicitly and reasonably brought to the customer's attention to be enforceable.

Unusual Terms

Case:	<i>Baltic Shipping Co v Dillon (The Mikhail Lermontov) (1991) 22 NSWLR 1</i>
Facts:	- The respondent booked a cruise with the appellant through a travel agent. - She received a booking acknowledgment and later a booking form stating that a contract of carriage was only formed when the ticket was issued. - The respondent received the ticket two weeks before departure. The ticket contained terms limiting the appellant's liability. - The ship sank on the 10th day of the cruise, causing the respondent physical injury.
Issue/s:	Whether the terms and conditions on the ticket, particularly the limitation of liability, were incorporated into the contract of carriage.
Judgement:	The limitation clauses did not form part of the contract.
Key takeaways:	Terms and conditions, especially those limiting liability, must be brought to the passenger's attention before contract formation. New terms cannot be unilaterally imposed after the contract is made. If there are unusual or unexpected terms, the party seeking to incorporate must take extra efforts to give notice such as will fairly and reasonably bring to the attention of the other party.

The party is bound by terms if:

- They know the notice displayed or delivered contains the contractual terms, whether or not they read the terms.
- A reasonable person would expect the notice displayed or delivered to contain the contractual terms, whether or not they read the terms.
- The other party takes reasonable steps to bring terms to notice of the party to be bound, if contained in a 'non-contractual' document.
- Reasonable notice = doing what is reasonably sufficient to give the other party notice of the term: *Thornton v Shoe Lane Parking Ltd*
- If the terms are unusual for this type of contract, the party seeking to incorporate them must take extra measures to bring those terms to the attention of the other party: *Baltic Shipping Co v Dillon*

Online Module - Express Terms (II)

- **Incorporation by Course of Dealing**

INCORPORATION BY COURSE OF DEALING

If the parties have a history of dealings together, and they have contracted on certain terms in the past, those terms may be incorporated in a later contract on the basis of a course of dealings, even if the terms have not been expressly mentioned or pointed out on this occasion.

Requirements for incorporation of terms on the basis of a course of dealings:

- **Uniform (consistent) course of conduct** – *McCutcheon v David MacBrayne*; and
- **Regular course of conduct** – used often enough that parties must have intended (objectively) to contract on that basis – *Balmain New Ferry Co Ltd v Robertson*; and
- **Contractual document from previous transactions** – not a mere invoice or receipt, for example – *Rinaldi & Patroni v Precision Mouldings*; *D J Hill v Walter H Wright*; *La Rosa v Nudrill Pty Ltd* [2013] WASCA 18.

Case:	<i>Balmain New Ferry Co Ltd v Robertson</i> [1906] HCA 83
Facts:	- Mr Robertson was a barrister who was about to catch a ferry to Balmain one night. - He had already paid a penny and gone through the turnstiles at the wharf when he realised that he had just missed the 7:45 ferry. - Mr Robertson decided he'd like to leave the wharf and catch a ferry owned by a different company. - The problem was the Balmain New Ferry company's employees wouldn't let him leave the wharf, not without paying another penny to get back through the turnstiles. - Mr Robertson refused. He even tried to get out by squeezing past the turnstiles, but the employees pushed him back onto the wharf. - There was a standoff, and eventually, Mr Robertson escaped from the wharf, and he later brought an action for assault and false imprisonment. - There was a notice at the wharf that said that a fair of one penny must be paid by all persons entering or leaving the wharf, whether they had travelled by the company's boats or not.
Judgement:	The High Court said that Robertson had travelled back and forth by the company's boats on many occasions and was aware of this term that required payment of a penny whether he had caught a boat or not. But because of his earlier trips, the High Court held that if he wished to leave the turnstile, he could only do so by complying with the usual conditions from all those earlier trips, that is, by paying a penny.
Key takeaways:	Where there is uniform course of conduct, regular course of conduct, and a contractual document from previous transactions, there will be incorporation by course of dealing.