**10 key facts about English contract law**

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**In this article James Normington of** [**New Park Court Chambers**](http://www.newparkcourt.co.uk/) **explains some of the key points of English contract law. Every businessman and women should be familiar with these concepts.**

Contracts occur in every business. It might be as simple as the agreement with the milkman to deliver the milk and your obligation to pay for it, or it might be an order you made with a major supplier. There is one thing which you can be certain of, which is that you don’t want to find out there is a problem with your contract when you are walking through the door of a courthouse with a disgruntled person on the other side.

This contract focuses on English contract law, which shares many common features with other common law jurisdictions such as Australia, New Zealand, Canada and the United States, although individuals from those countries should always seek appropriate legal advice.

**1) Privity of Contract**

It is important to remember only the parties to the contract may enforce the terms of the agreement. So for example if Mrs Smith promises to deliver a chair to Mr Jones’ office for £100, which will be paid on delivery, Mrs Smith must deliver the chair on the agreed terms. Mr Johnson, Mr Jones’ employee, who is to sit on the chair cannot sue Mrs Smith if she fails to deliver. Only Mr Jones could sue Mrs Smith for not delivering the chair.

**2) Consideration**

Contracts must contain mutual promises, or obligations, between the parties making the agreement. For example in return for Mrs Smith delivering the chair Mr Jones agrees to pay £100 on delivery. The obligation is the delivery of the chair and the consideration is the £100. If there is no mutual obligation then there is no contract. For example if Mr Jones takes his wife to dinner dance, and at the end of the evening the cloakroom attendants return their jackets; Mr Jones tips the cloakroom attendant £10 that is not a contract. There was never any consideration. Mr Jones has simply given the cloakroom attendant £10 by way of a gift or a gratuity. The cloakroom attendant has not performed any pre-agreed service for the £10.

Consideration should current in time and one cannot rely on “past consideration”. An example of past consideration would be if Mrs Smith gives her neighbour £100 for a birthday. The day after the birthday, Mrs Smith asks the neighbour to help her paint the fence. The £100 is not consideration for any agreement to paint the fence, that was a voluntary act, and helping paint the fence came after that voluntary act.

Consideration must have an economic value in order for it to be valid in a contractual context.

**3) Exceptions to the rule on Past Consideration**

There are two exceptions to the issue of past consideration. The first relates to an antecedent debt. The Bills of Exchange Act 1882, means that a pre-existing debt or obligation can be good consideration for a bill of exchange. For example, if a landscaping company mow the lawn at Mr Johnson’s house and then a week later he sends them a cheque for £25 in the post that is “valuable consideration”, even thought the landscaping company’s mowing occurred in the past.

There is a more common exemption which all businesses should be aware which comes from a case called Lampleigh v Braithwait. This exemption means that if a business asks a party to perform an obligation there is an understanding that the performing party will be remunerated in some way. For example if the Directors of ACME Limited ask Mr Smith, a patent agent, to obtain patents for their machines, and there was a discussion as to dividing the profits of the patents with Mr Smith. Mr Smith upon obtaining the patents would be entitled to a division of the profits, even though the act for which he is to be remunerated occurred in the past.

**4) Formalities**

There are very few formalities that are required by law. There is no longer a requirement for all contracts to be signed as deeds, and the requirements for signing, sealing and delivery of deeds has also been abolished.

While it is good practice for all business contracts to be in writing it is not essential. The contract may be formed orally, by parties agreeing the terms on the telephone. There is an obvious disadvantage to an “oral agreed contract”, which is that the orally agreed terms may be misunderstood, or misremembered by the respective parties. That in itself can lead to problems. In the event that an agreement is reached on the telephone or in person it is always best practice to condense the agreed terms into writing. For example a letter summarising the terms sent by email or fax, should be sent to the other side with a request that they confirm and acknowledge the written terms reflect the agreement will suffice for most routine agreements.

**5) Contracts which must be writing**

There are several types of contracts that must be in written form. For example, contracts containing a guarantee must be in writing. A guarantee is an agreement where one party agrees to pay the debt of another individual or company in the event that the third party defaults on the debt. Contracts relating to the sale, transfer, option or lease of land should always be in writing. Another common situation where writing is required is for contracts for the assignment or exclusive licensing of certain intellectual property rights.

**6) Authorised Signatures and Authorised Persons**

One of the mistakes made by many small businesses is in obtaining the signature of the correct person on a contractual agreement. Legally, to bind a company to a contract, it must be signed by a person who has the authority to do so. This would normally be a director of the company, its solicitor, or a manager. Far too often in my experience small businesses enter into transactions sending a written contract for a signature and they failed to ask the questions to confirm that the individual whom they are dealing with is legally representing the company. It can be as easy as obtaining confirmation in the form of an email or fax stating that “Joe Bloggs” is Director of X Ltd and authorised to sign on behalf of the company.

An equally important point to note is that the name of the company is written correctly both in the agreement and on any invoices that are submitted. It may seem a small thing but a small businessman discovered to his credit that missing off “Limited” from his company name meant that he was personally liable for the debts he incurred. A court found that he was doing business in his own right as ABC Fashions rather than as ABC Fashions Limited. Such errors may seem little but they can be very costly.

When dealing with local authorities, it may be necessary to obtain the “seal” of the corporation to the contract. The seal of a local authority binds the relevant local authority, in the same way that having the signatures of the board of directors would in the case of Limited Company.

**7) Capacity**

This goes hand in hand with the issue of authorised signatures, and authorised persons. In English law a minor, that is an individual under the age of 18 does not have capacity to enter into a contractual agreement. Contracts signed by drunks, the mentally ill, the certifiably insane can all be declared void by a court of law. Interestingly, minors, drunks, the mentally ill, and the certifiably insane can be legally obliged to pay for “necessary items”, such as food, clothes and water. It is however best practice to avoid dealing with such individuals as it will provide lawyers with all kinds of interesting issues, and cause an unnecessary and costly legal dilemma, for your business!

**8) Battle of the Forms**

In cases where businesses are dealing with “standard terms” it is important to remember which “standard terms” apply to an agreement. In this example A Ltd contacts B Ltd requesting the supply of 1000 widgets. As part of the request it sends an email enclosing A Ltd’s standard terms and conditions for the procurement of widgets. B Ltd accepts the order of 1000 widgets from A Ltd and sends an email back saying

“Thank you for your order of 1000 widgets. We have accepted the order pursuant to our standard terms and conditions, and will make deliver to your premise by the 31st of this month.”

A Ltd simply replies enclosing payment at the agreed price.

In law this type of scenario is referred to as a “battle of the forms”. The issue is whose standard terms apply to the transaction. Under the “battle of the forms” rules it is party who fired the last shot that has its standard terms and condition incorporated into the agreement, not the company that sends them in first.

**9) Exclusion Clauses**

It is common to see in many contracts clauses which limit or exclude liability in the event of breach. The difficulty with such clauses is that the courts construct them on a very narrow basis. The courts have determined that clauses that seek to limit liability in the event of a fundamental breach are largely unenforceable. The reason for this is that in the event that one party breaches there must be a remedy open to the other side. It is quite unreasonable for one party to seriously breach a contract and for the non-breaching party to have no or little legal remedy.

Exclusions clauses in standard term agreements are also likely to fall foul of the Unfair Contract Terms Act (“the Act”). This is particularly relevant when doing business with the public. The Act seeks to put the parties on an even footing, giving a court the power to remove clauses that would be unfair, or offer the party drafting them too much of an advantage. One common exclusion clause which is frequently dismissed as unfair is any term which seeks to remove liability for death or injury. Such terms are almost always struck down, and should not be relied upon.

**10) Breach**

Where one party does not perform their obligations as per the contract they commit a breach of contract. A breach of contract is technically a failure to perform the contract in accordance with the strict terms. For example if one party requests and pays for one tonne of coal to be delivered to his home address on the 21st of January, and only 800kg are delivered then he is entitled to seek cash reimbursement for 200kg of coal that was not delivered. There is however a defence open to the delivery company if they can show that the difference is so small that it de minimis. Such arguments are always based upon the particular facts. In this case 200kg of coal is highly unlikely to be declared de minimis. If there had been delivery 999kg of coal then there may be a stronger argument.

The non-breaching party should place the breaching party on written notice of any breach of contract before issuing court proceedings. The attitude of the courts in recent years has been to push parties towards mediation of contractual disputes in order to resolve differences. It is good practice for the non-breaching party to outline a conciliatory basis upon which the breach can be remedied. For example in the case of 200kg, it might be for the remaining 200kg to be delivered as soon as possible or for the delivery company to repay the difference in price as soon as possible.

It is open to a non-breaching party to repudiate a contract in the event of a very serious breach of a contract. Repudiation means giving up the agreement and considering the contract to be at an end due to the breach committed by the other side. In these circumstances the non-breaching party would be able to claim financial compensation from the breaching party to compensate the non-breaching party for the breaching party’s failure to perform the contract. The non-breaching party would also be able to do so without completing its obligations under the contract. Effectively the non-breaching party would be declaring to the other side that the contract is at an end due to the serious nature of the breach.