

# I

## Introduction

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## 1

## Main features of contract law

### 1. CHARACTERISTICS OF ENGLISH CONTRACT LAW

- 1.01 English contract law is organised into topics, as set out in the chapter headings of this work. These form the ‘general part’ of the subject.<sup>1</sup> The general principles and doctrinal structure of English contract law emerged during the nineteenth century, as many have noted,<sup>2</sup> as a result of both judicial and academic analysis. Hedley explains:<sup>3</sup>

the Victorians . . . were given a law of contracts, but turned it into a law of contract, with general principles applicable to all agreements. The responsibility for this development is largely that of Leake [1st edition, 1867], Pollock [1st edition, 1876] and Anson [1st edition, 1879], who each produced major textbooks expounding a law of contract and not merely collecting together rules on different types of contracts.

- 1.02 In modern times, Parliament<sup>4</sup> and judges<sup>5</sup> have consistently assumed the existence of a coherent body of general rules applicable to all types of contracts (in *Geys v. Société*

1 Cf Roman law, which comprises a system of particular contracts: B. Nicholas, *An Introduction to Roman Law* (Oxford, 1962), 165 ff.

2 P. S. Atiyah, *Essays on Contract* (Oxford, 1986), 16 ff: ‘[I]t was the nineteenth century which very largely saw the supersession of the importance of special kinds of contracts by the general principles of contract. It was, of course, an Age of Principles.’ P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), 681 ff, notes the importance of the textbooks by Leake (1867), Pollock (1876) and Anson (1879), especially the last two; Atiyah’s remarkable historical *magnum opus* surveys the entire intellectual and economic scene; S. Hedley, (1985) 5 OJLS 391, 402; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), chapters 5, 11, 12 and 13; M. Lobban, in W. Cornish, J. S. Anderson, R. Cocks, M. Lobban, P. Polden and K. Smith, *The Oxford History of the Laws of England*, vol. XII, 1820–1914: *Private Law* (Oxford, 2010), 295 ff; A. W. B. Simpson, (1975) 91 LQR 247, at 250–7, notes especially the influence of textbook writers; W. Swain, ‘The Classical Model of Contract: The Product of a Revolution in Legal Thought?’ (2010) 30 LS 513; S. Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge, 2011), chapter 1, notably at 17 ff.

3 S. Hedley, (1985) 5 OJLS 391, 402.

4 E.g., the Misrepresentation Act 1967 (9.20) applies to all contracts and to deeds; the Contracts (Rights of Third Parties) Act 1999 applies to all contracts and deeds, except five specific categories (7.23).

5 E.g., Roskill LJ’s judgment in *The Hansa Nord* [1976] QB 44, 71, CA (general concept of ‘innominate term’ applicable to sale of goods transactions). But sometimes statute precludes mechanical application of general Common Law principles, e.g., *Hurst v. Bryk* [2002] 1 AC 185, HL: dissolution of partnership; contractual termination following acceptance of a repudiation rested on a concession; Lord Millett doubted, *ibid.* at 196–8, whether a partnership can be terminated in this way because the Partnership Act 1890 does not refer to this mode of termination; those doubts have been vindicated in *Golstein v. Bishop* [2014] EWCA

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*Générale, London Branch* (2012) Lord Wilson said that all contracts are at anchor ‘within the harbour which the Common Law has solidly constructed for the entire fleet of contracts’.<sup>6</sup>

- 1.03 During the last twenty years, much collaborative energy has been spent identifying principles of contract acceptable to legal systems in general, whether Common Law, civilian or other. In fact, there are various ‘soft law’ codes (see 21.01 ff for details). None of these is binding, either in England and Wales or elsewhere. But, on many topics in this book, reference will be made to common features or differences between English law and these ‘soft law’ codes (for example, there are many references to UNIDROIT’s *Principles of International Commercial Contracts* (2010)<sup>7</sup> in these pages).
- 1.04 The ‘general part’<sup>8</sup> of English contract law is a combination of rules and principles. ‘Rules’ tend to be quite specific; ‘principles’ rather more general.<sup>9</sup> Principles (properly so-called) tend to be fundamental standards underpinning many rules. We will consider two such principles below: the principle of ‘freedom of contract’ (at 1.08) and ‘the objective principle’ (at 1.10).<sup>10</sup>
- 1.05 Rules can sometimes be subject to exceptions, and such exceptions can proliferate (for example, the cluster of exceptions to the rule in *Woodar’s* case, 17.19 ff). The fact that the courts have recognised a network of exceptions often reveals that the major rule is itself unsatisfactory.
- 1.06 English contract law is predominantly a case law subject.<sup>11</sup> And so the main source of law in this field is precedent, namely decisions on points of law given by:<sup>12</sup> (i) the High Court

Civ 10; [2014] Ch 455 (affirming [2013] EWHC 881 (Ch); [2014] Ch 131, at [116] to [120] (Nugee QC), adopting *Neuberger J* in *Mullins v. Laughton* [2002] EWHC 2761 (Ch); [2003] Ch 250).

6 [2012] UKSC 63; [2013] 1 AC 523, at [97] (noted D. Cabrelli and R. Zahn, (2013) 76 MLR 1106–19).

7 3rd edition, 2010, text and comment, is available at: [www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf](http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf). M. J. Bonell has for many years been a leading force within the UNIDROIT organisation and has had a remarkable influence upon this influential work; see also M. J. Bonell, ‘Do We Need a Global Commercial Code?’ (2000–2003) vol. V, *Revue de droit uniforme (Uniform Law Review)* 469–81; M. J. Bonell (ed.), *The UNIDROIT Principles in Practice: Case Law and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (2nd edn, New York, 2006); S. Vogenauer and J. Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford, 2009) (antedating the third edition of the UNIDROIT principles, 2010). See also observations by M. Furmston, (2014) 31 JCL 61, 65–6.

8 On the ‘general part’, see S. A. Smith, ‘The Limits of Contract’, in J. W. Neyers, R. Bronaugh and S. G. A. Pitel (eds.), *Exploring Contract Law* (Oxford, 2009), 1–24; and, for a civilian perspective, see H. Dedek, ‘Border Control: Some Comparative Remarks on the Cartography of Obligations’, in J. W. Neyers, R. Bronaugh and S. G. A. Pitel (eds.), *Exploring Contract Law* (Oxford, 2009), 2 ff, especially at 36 ff.

9 For reflections on the nature of ‘rules’ and ‘principles’ in contract law, S. Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge, 2011), 17–21.

10 For a summary of deeper values within contract law, see M. Hesselink, ‘European Contract Law? A Matter of Consumer Protection, Citizenship, or Justice?’, in *Liber Amicorum Guido Alpa: National Private Law Systems* (London, 2007), 500, 516–20.

11 Even in the nineteenth century casebooks had emerged, e.g., *Finch’s Cases on Contract: A Selection of Cases on the English Law of Contract* (2nd edn, Cambridge, 1896) (R. T. Wright and W. W. Buckland, eds.).

12 For a convenient summary of the English precedent rules, J. Bell, in A. Burrows (ed.), *English Private Law* (3rd edn, Oxford, 2013), 1.61 to 1.100.

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(sitting in London or other parts of England and Wales), (ii) the Court of Appeal (sitting in London), and (iii) the (former) House of Lords (sitting in Westminster, London), now the Supreme Court of the United Kingdom (sitting in Westminster, London). Decisions of these courts are binding sources of English law. Decisions at level (iii) are binding on all courts below; decisions at level (ii) are binding on the Court of Appeal and on all courts below; decisions at level (i) are binding on courts inferior to the High Court, and will tend to be followed by other High Court decisions, unless demonstrably erroneous in law.

Technically, decisions of the Privy Council (the Judicial Committee of the Privy Council) are not binding on the English courts, but the reality is that most of these decisions are treated as highly authoritative pronouncements of the Common Law and thus binding unless there is an unusual reason for not following the case.<sup>13</sup> Within contract law, the Privy Council has been highly influential, for example, decisions on formation,<sup>14</sup> trusts of promises,<sup>15</sup> third parties and exclusion clauses,<sup>16</sup> duress<sup>17</sup> and frustration.<sup>18</sup> It has been said that the Court of Appeal will follow Court of Appeal decisions even when there is a conflict with a Privy Council decision, unless it is a foregone conclusion that the Supreme Court of the United Kingdom would prefer the Privy Council decision and overturn the conflicting English Court of Appeal decision.<sup>19</sup>

There are few statutes governing the general part of contract law, although the topics of exclusion clauses and unfair terms in consumer contracts are now dominated by legislation.<sup>20</sup> The Law Reform (Frustrated Contracts) Act 1943; the Law Reform (Contributory Negligence) Act 1945; the Misrepresentation Act 1967; the Unfair Contract Terms Act 1977 (non-consumer contracts) (as amended by the Consumer Rights Bill, 'the Bill'); the Sale of Goods Act 1979 (as amended by the Bill); the Supply of Goods And Services Act 1982 (as amended by the Bill); the Contracts (Rights of Third Parties) Act 1999; the Bill<sup>21</sup> and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (2013).<sup>22</sup> There is also the Limitation Act 1980. the limitation periods applicable to contractual actions are: six years for ordinary ('simple')<sup>23</sup>

13 Cf *Lord Strathcona Steamship Co Ltd v. Dominion Coal Co Ltd* [1926] AC 108; 42 TLR 86, PC, which was not followed, and indeed declared wrong, by Diplock J in *Port Line v. Ben Line Steamers Ltd* [1958] 2 QB 146, 165–8.

14 *Pratt Contractors Ltd v. Transit New Zealand* [2003] UKPC 83; [2004] BLR 143; 100 Con LR 29 (tenders) 3.49; *Hart v. O'Connor* [1985] 2 All ER 880, PC (insanity not known to other party), 3.59; *Pao On v. Lau Yiu Long* [1980] AC 614, 629, PC (pre-existing contractual duty, consideration; and duress) 5.17 and 11.13.

15 *Vandepitte v. Preferred Accident Insurance Corporation of New York* [1933] AC 70, 80, PC (restrictive approach to trusts of promises) 7.12.

16 *New Zealand Shipping Co. Ltd v. AM Satterthwaite & Co. Ltd ('The Eurymedon')* [1975] AC 154, PC, 7.50; distinguished *'The Mahkutai'* [1996] AC 650, PC, 7.52.

17 *Barton v. Armstrong* [1976] AC 104, PC, 11.12.

18 *Maritime National Fish Ltd v. Ocean Trawlers Ltd* [1935] AC 524, PC, 16.18.

19 *Sinclair Investments (UK) Ltd v. Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2012] Ch 453, at [72] to [76], per Lord Neuberger MR.

20 Generally, A. Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 LQR 232–59.

21 The Explanatory Notes are helpful ([www.publications.parliament.uk/pa/bills/cbill/2013-2014/0161/en/14161en.htm](http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0161/en/14161en.htm)); see also the summary available within the following document: [www.parliament.uk/business/publications/research/briefing-papers/LLN-2014-023/consumer-rights-bill-hl-bill-29-of-201415](http://www.parliament.uk/business/publications/research/briefing-papers/LLN-2014-023/consumer-rights-bill-hl-bill-29-of-201415).

22 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013/3134.

23 Section 5 of the Limitation Act 1980.

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contracts and twelve years for deeds; for the latter, see 5.03.<sup>24</sup> The possibility of codification of contract law is discussed at 22.01.<sup>25</sup>

- 1.07 English contract law has a reputation for precision<sup>26</sup> and stability (although it has been fairly stated that finding this ‘precise’ statement often involves expensive legal advice, in order that decades or centuries of case law can be combed).<sup>27</sup> Foreign businesses often choose English law to govern their transactions by use of ‘choice of law’ clauses: 12.07. Such ‘cross-border’ transactions occur when one or both parties are resident or situated outside England.

## 2. FREEDOM OF CONTRACT

- 1.08 This principle,<sup>28</sup> recognised both in English law and in other legal traditions,<sup>29</sup> permits parties to conclude agreements on a wide range of matters, and on such terms as they wish. As noted by Christopher Clarke J in the *BNP Paribas* case (2009), English law places great emphasis on the need for the courts to respect contractual autonomy when it is exercised by commercial parties, especially when the relevant transaction has been relied upon in international commerce.<sup>30</sup> The classic statement (made in response to an unsuccessful plea that a contract was contrary to public policy) is by Sir George Jessel in *Printing & Numerical Registering Co v. Sampson* (1875):<sup>31</sup>

if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.

24 Section 8 of the Limitation Act 1980 refers to actions on ‘specialties’, for example, a deed.

25 Noting especially M. Arden, ‘Time for an English Commercial Code?’ [1997] CLJ 516; R. Goode, ‘Removing the Obstacles to Commercial Law Reform’ (2007) 123 LQR 602–17.

26 But on the problem of open-ended rules, which are subject to imprecisely formulated exceptions, R. Ahdar, ‘Contract Doctrine, Predictability and the Nebulous Exception’ [2014] CLJ 39–60.

27 R. Goode, ‘Removing the Obstacles to Commercial Law Reform’ (2007) 123 LQR 602–17.

28 *Chitty on Contracts* (31st edn, London, 2012), 1–028 ff; P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979); Atiyah’s *Introduction to the Law of Contract* (6th edn, Oxford, 2006); R. Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, Oxford, 2006), chapter 2; H. G. Collins, *The Law of Contract* (4th edn, Cambridge, 2003); C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA, 1981); J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991); D. Kimel, *From Promise to Contract* (Oxford, 2005), chapter 5; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), chapters 7, 11, 12 and 13; A. Ogus and W. H. van Boom (eds.), *Juxtaposing Autonomy and Paternalism in Private Law* (Oxford, 2011); S. A. Smith, *Contract Theory* (Oxford, 2004); and M. J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA, 1997).

29 M. J. Bonell (ed.), *The UNIDROIT Principles in Practice: Case Law and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (2nd edn, New York, 2006), 69; S. Vogenauer and J. Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford, 2009), 118.

30 *BNP Paribas v. Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm), at [24], [42], *per* Christopher Clarke J, referring to ‘a carefully drawn standard form intended for widespread commercial use’ and quoting other judicial discussion.

31 (1875) LR 19 Eq 462, 465 (heard at first instance).

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The principle of freedom of contract embraces the following liberties. First, parties have a general freedom to enter into transactions which are intended (explicitly or otherwise) to create legal obligations.<sup>32</sup> This freedom includes the power to formulate individual terms within such a transaction, or to acquiesce in 'default' terms 'implied' by statute or Common Law. Secondly, parties to a transaction can stipulate that it will not be legally binding, 6.05 ff. Thirdly, freedom to contract includes the liberty to compromise a legal dispute, or to waive legal liability. But a contract of compromise must be very clearly worded if it is to extend one party's prospective liability towards the other, that is, liability which has not yet arisen but which might arise in the future if there were to be a change in the law.<sup>33</sup>

- 1.09 Exercise of these interrelated freedoms is subject to the overarching limitations of (1) public policy (Chapter 20) (including the problem of sham transactions<sup>34</sup> and protection against use of the law as a punitive mechanism, 19.23); (2) the parties' inability to exclude liability for fraud at Common Law (15.04); (3) statutory regulation of adhesion clauses (15.07, 15.08, 15.28); and (4) personal capacity. As regards personal capacity, for persons under eighteen (so-called 'minors'), for reasons of space the law on this topic can only be sketched in this note;<sup>35</sup> as for mental capacity, it should be noted that if a party's insanity is not known to the other party, the Privy Council in *Hart v. O'Connor* (1985) held that a contract will arise (see 3.59);<sup>36</sup> as for 'legal persons', the company or other legal entity (such as a local authority)<sup>37</sup> must have capacity to enter into the relevant transaction.<sup>38</sup>

32 E.g. contractual estoppel, including estoppel by deed, enables the parties to establish agreed facts, even though they know them to be untrue, if this is not inconsistent with public policy: *Prime Sight Ltd v. Lavarello* [2013] UKPC 22; [2014] AC 436, at [47], *per* Lord Toulson (noted A. Trukhtanov, (2014) 130 LQR 3–8).

33 *BCCI v. Ali* [2001] UKHL 8; [2002] 1 AC 251, at [19], [21], [35] and [86]; cf the dissent at [73] by Lord Hoffmann; N. Andrews, *English Civil Procedure* (Oxford, 2003), 23.65 to 23.77; see also *Satyam Computer Services Ltd v. Upaid Systems Ltd* [2008] EWCA Civ 487; [2008] 2 All ER (Comm) 465, at [84].

34 E.g. the cases noted by K. R. Handley, (2011) 127 LQR 171–3.

35 *Chitty on Contracts* (31st edn, London, 2012), 8–002 ff (see also S. Hedley, [2004] CLJ 435, 440–2); (1) a minor is liable for 'necessaries' purchased: section 3 of the Sale of Goods Act 1979; *Nash v. Inman* [1908] 2 KB 1, CA; 'necessaries' can include certain services (*Chitty on Contracts* (31st edn, London, 2012), 8–013); (2) a minor is bound by a contract of employment or apprenticeship as long as it is on the whole beneficial to him; but this does not extend to a contract to promote the prospects of a talented footballer: *Proform Sports Management Ltd v. Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch); [2007] 1 All ER 542 (the 'Wayne Rooney' case); (3) contracts for the sale or purchase of land, or the grant or acquisition of a lease, or for the onerous acquisition of shares, can be repudiated by a minor or, after he reaches eighteen, repudiated within a reasonable time (on the problematic grant of a lease to a minor, see *Hammersmith and Fulham London Borough Council v. Alexander-David* [2009] EWCA Civ 259; [2009] 3 All ER 1098); (4) all other types of contract (e.g. a contract of insurance or a trading contract, or a contract for a luxury item not within the scope of 'necessaries') are not binding on the minor unless he ratifies the transaction after reaching eighteen: *Chitty on Contracts* (31st edn, London, 2012), 8–043 ff); (5) section 3 of the Minors' Contracts Act 1987 permits the court to order restitution of 'any property acquired by the [minor] under the contract, or any property representing it', even if the minor had not lied about his age, and this provision applies to all contracts other than those at (1) and (2).

36 *Hart v. O'Connor* [1985] 2 All ER 880, PC (the 'rule in *Imperial Loan Co v. Stone* [1892] 1 QB 599', see *Blankley v. Central Manchester and Manchester Children's University Hospitals NHS Trust* [2014] EWHC 168; [2014] 1 WLR 2683, at [30], *per* Phillips J); however, where the incapax's property is subject to the control of the court, under sections 15 ff of the Mental Capacity Act 2005, transactions which would be inconsistent with the court's control of those assets will be void as against that party; *Chitty on Contracts* (31st edn, London, 2012), 8–074, and *Treitel* (13th edn, London, 2011), 12–056, 12–057.

37 *Hazell v. Hammersmith & Fulham LBC* [1992] 2 AC 1, HL, and the flood of 'swaps' litigation resulting from this decision (on which, conveniently, see *Haugesund Kommune v. Depfa ACS Bank (No. 1)* [2010] EWCA Civ 579; [2011] 1 All ER 190; [2010] 1 CLC 770).

38 *Haugesund* case, preceding note, decided in the context of restitution of a void loan, and with discussion of the difference between English and foreign notions of corporate incapacity.



### 3. THE OBJECTIVE PRINCIPLE

- 1.10 This principle is a fundamental and pervasive aspect of *contract law* (for further detail, 3.55 ff). A person's words or conduct must be interpreted in the manner in which the other party (or alleged party) might objectively and reasonably understand them.<sup>39</sup> As Lord Reid said in *McCutcheon v. David MacBrayne Ltd* (1964):<sup>40</sup> 'the judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.' Thus the objective principle concerns the following matters: is there an offer (3.02); has there been acceptance of that offer; if so on what terms (on these last two questions, see the 'snapping up' cases, examined at 3.63); how should the terms of a written contract be interpreted (14.02 ff); has the contract been varied or terminated by consensus; has a party repudiated the agreement (see discussion of '*The Pro Victor*' (2009)<sup>41</sup> at 17.07); has the other party accepted that repudiation (17.37 ff); has a voidable contract been 'affirmed' by a party (11.14); is there an intent to create legal relations (*per* Aikens LJ in *Barbudev v. Eurocom Cable Management Bulgaria Eood* (2012)<sup>42</sup> and *Attrill v. Dresdner Kleinwort Ltd* (2013) (6.04)).<sup>43</sup>

### 4. OVERVIEW OF CONTRACTUAL DOCTRINES

- 1.11 Contracts are legally enforceable agreements involving two or more parties. The agreement can involve one party assuming an obligation only if the other does something (or refrains from something): a so-called 'unilateral contract'. An example is an offer of reward payable only if the other party supplies desired information. But most contracts involve reciprocal obligations: a so-called 'bilateral contract'; for example, to sell and buy, to insure and pay the premium, to hire out and to pay the hire charge, to work and to pay a salary, etc.
- 1.12 Many contractual obligations are promises to do something, or to pay money, or to transfer property. Occasionally, a party might undertake to refrain from doing something, such as not to work for a rival employer for a specified period. In short, most promises are forward-looking commitments to do, pay, transfer or abstain. But there are two main variations.

39 McLauchlan has lucidly distinguished (although this distinction has a long lineage) (1) the 'promisee'-based form of objectivity from (2) the 'detached observer' or 'fly-on-the-wall' form of objectivity. The preferred form is (1). The passage from McLauchlan, too long to quote here, merits close attention: D. McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, at 88–90. See also: D. Friedmann, (2003) 119 LQR 68; J. R. Spencer, [1974] CLJ 104; W. Howarth, (1984) 100 LQR 265; J. Vorster, (1987) 103 LQR 274; M. Chen-Wishart, in J. W. Neyers, R. Bronaugh and S. G. A. Pitel (eds.), *Exploring Contract Law* (Oxford, 2009), 341; T. Endicott, 'Objectivity, Subjectivity and Incomplete Agreements' in J. Horder (ed.), *Oxford Essays in Jurisprudence* (Fourth Series, Oxford, 2000), 159; see also, from an American perspective, L. DiMatteo, Q. Zhou, S. Saintier, K. Rowley (eds.), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge, 2014), chapter 3 (by T. Joo).

40 [1964] 1 WLR 125, HL; see also *Shogun Finance Co. Ltd v. Hudson* [2003] UKHL 62; [2004] 1 AC 919, HL, at [183].

41 *SK Shipping (S) PTE Ltd v. Petroexport Ltd ('The Pro Victor')* [2009] EWHC 2974, Flaux J at at [89] to [98].

42 [2012] EWCA Civ 548; [2012] 2 All ER (Comm) 963, at [30]: 'On the issue of whether the parties intended to create legal relations . . . [the] court has to consider the objective conduct of the parties as a whole.'

43 [2013] EWCA Civ 394; [2013] 3 All ER 807 at [61], [62], [86], [87] *per* Elias LJ.



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A contractual assurance need not involve a promise of *future* conduct (or abstention). Thus, a ‘warranty’ is an assurance that something is the case, or has been the case. Another variation is that a promise need not concern the promisor’s own primary conduct. Thus, a guarantee (5.06) is a surety’s undertaking (normally) to indemnify a creditor if a debtor fails to satisfy a debt owed, or becoming due, to that creditor.

- 1.13 Some elements of basic contract law will now be explained. Formation of contract requires analysis in terms of offer and acceptance (Chapter 3); certainty (Chapter 4); intent to create legal relations (Chapter 6); absence of a vitiating factor rendering the contract either void (Common Law mistake, Chapter 10) or voidable (misrepresentation, duress, undue influence or unconscionability, Chapter 11).
- 1.14 An agreement must either be supported by consideration (Chapter 5) or contained in a ‘deed’: a deed is a formal written contract, which is normally gratuitous (see also 5.03 ff). The requirements for a valid deed are:<sup>44</sup> (1) the statement must be in writing; (2) this document must be declared to be a deed; (3) the document must be signed by the promisor (the ‘covenantor’); (4) the document must be witnessed by another; and (5) the document must be ‘delivered’ (this word is misleading because the covenantor need not physically transfer the deed to the covenantee: it is enough that there is conduct indicating that the covenantor intends to be bound by it).<sup>45</sup>
- 1.15 In general, contracts do not need to be in writing or comply with special formality (thus, an agreement for the purchase of a £10m ship or a £20m – inevitably over-priced – English footballer can be made without writing). The main exceptions, where a contract must be in writing or formalised, are agreements for the creation or transfer of interests in land (see also 5.07) and guarantees (5.06). Many contractual obligations are express, whether oral or written (for an overview, see 12.06). But implied terms (Chapter 13) are readily found as a result of statute or Common Law doctrine.
- 1.16 An agreement might be expressly ‘subject to contract’ (6.06), so that it does not create any legally binding duties. Or an agreement might be subject to so-called ‘conditions precedent’ (12.06). For example, the contract might be contingent upon a third party, such as a government minister or planning authority, giving permission which is vital to the relevant transaction. Sometimes one party might agree to exercise best or reasonable endeavours to apply for such permission (2.11).
- 1.17 A contracting party’s unexcused failure to perform, or his defective performance, constitutes a breach (Chapter 17). The other party has a range of possible remedies in respect of breach (18.01 for an overview): orders to compel agreed performance (a claim in

44 Section 1(2) and (3) of the Law of Property (Miscellaneous Provisions) Act 1989; as amended by Article 7(3) of the Regulatory Reform (Execution of Deeds and Documents) Order 2005 (SI 2005 No. 1906); *Treitel* (13th edn, London, 2011), 3–170 ff; *Bolton Metropolitan Borough Council v. Torkington* [2004] Ch 66, CA; *Chitty on Contracts* (31st edn, London, 2012), 1–107.

45 *Treitel* (13th edn, London, 2011), 3–172.

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debt, 18.02; or, exceptionally, recourse to equitable and coercive relief by injunction, 18.36; or specific performance, 18.33); claims for damages at Common Law (18.07); restitutionary claims in respect of the guilty party's unjust enrichment (18.26); declarations that the guilty party is in breach (18.32) (or the award of merely nominal damages, 18.07 at (1), that is, a token amount designed to register that there has been a breach of contract or commission of a tort); self-help measures (forfeiture of a deposit, 19.27); or a stipulated right to liquidated damages (19.02); or a possible right to repossess property (10.32) or to withhold reciprocal performance (17.46 ff).

- 1.18 A party's non-performance or defective performance might be excused by an exclusion clause (Chapter 15) or under the Common Law doctrine of frustration (Chapter 16). Frustration applies if the contractual situation has been drastically affected by a change of circumstances subsequent to the agreement's formation. It will not be enough that one party has experienced unforeseen price increases, even if they are very large. Nor is it enough that other changes have occurred which severely hamper his performance, or which render the transaction highly unattractive to him.
- 1.19 The agreement at Common Law does not confer rights of enforcement on a third party (for a summary, see 7.02). Nor does it impose obligations on a third party (for a summary, see 7.55). The main qualifications upon these fundamental propositions of 'privity of contract' are: a third party might acquire rights, including a right to require performance, by a trust of a promise (7.09); and the Contracts (Rights of Third Parties) Act 1999 (7.22) might enable the third party to take the benefit of the contract and sue the promisor for nonperformance, or the third party might be permitted under the same Act to take the benefit of an exclusion clause. Alternatively, the benefit of the contract might be assigned. If so, the assignee acquires a direct right of action against the promisor (Chapter 8).
- 1.20 An agreement can be reconstituted or varied in various ways:
  - (1) by waiver (5.37) or estoppel, at Common Law or in Equity (5.38), suspending or modifying the agreement;
  - (2) by a variation supported by consideration;
  - (3) by a variation formalised by deed;
  - (4) by the substitution of a new agreement between the same parties in one of two ways:
    - (a) either by 'transaction' novation, in which the first contract is replaced by a second contract between the same parties; or
    - (b) by 'new party' novation, in which one of the parties to the original contract is substituted by a new third party; thus a contract between A and B is replaced by a contract between A or B and C, a new party (8.12 at (1)).

On these two forms of novation, see the remarks in *Scarf v. Jardine* (1882) by Lord Selborne LC.<sup>46</sup>

46 (1882) LR 7 App Cas 345, 351, HL, *per* Lord Selborne LC.