

CONTRACT LAW FOR NON-LEGAL PROFESSIONALS



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ANALYSING THE STRUCTURE OF A COMMERCIAL CONTRACT

- Types of Contracts
 - ➔ Oral
 - ➔ Written
- Contents of a Contract
 - ➔ Parties
 - ➔ Preamble
 - ➔ Terms & Conditions
- Essential principles underlying contracts
 - ➔ formation
 - ➔ clarity
- Standard Terms in a commercial agreement
 - ➔ governing clause
 - ➔ jurisdiction
 - ➔ termination
 - ➔ mechanism to resort to if dispute arises

REVIEWING AND FORMATION OF CONTRACT

INTENTION TO CREATE LEGAL RELATIONS **(ITCLR)**

- Depends on inferences drawn by courts from language used by parties and circumstances in which they used it;
- General presumption is that there is no ITCLR
- *Phiong Khon v Chonh Chai Fah*- the onus of proof was on the plaintiff and where the terms are uncertain, there is unlikely to have been an ITCLR.

Offer

expression of willingness to contract on certain terms

intention to bind as soon as accepted by offeree

definite and unambiguous

communication of offer
(letter, fax, email,
newspaper)

can be withdrawn before acceptance

Acceptance

final and unqualified expression of assent to the terms of an offer

definite and unambiguous

unconditional

communicated to offeror

CONSIDERATION

- Section 2(d) Contracts Act 1950- when the desire of the promisor, the promisee/any other person has done/abstains from doing/does/promises to do something;
- Section 26 Contract Act 1950 – if there is no consideration, then the contract would be void unless it falls within the exceptions in s.26 itself (expressed in writing & registered, promise to compensate wholly/in part/promise made in writing & signed by the person to be charged therewith).

CONSIDERATION

- must be sufficient, need not be adequate;
- unilateral decision by one party is insufficient to support a contract;
- past consideration is good consideration as long as done at desire of promisor;
- specific performance will not be granted if the consideration is so grossly inadequate- hinting evidence of fraud or undue influence –s.27(a) CA 1950.

INTERPRETATION OF CONTRACTS

Intention of Parties

- Question of Fact

Nature of the Transaction

- Question of Fact

**Terengganu State
EDC v Nadevinco**

- A clause or word in an agreement has to be read in context of the whole agreement.
- Same words are to be given same meaning unless otherwise stated.

**Lim Yee Teck & Ors
v Shell Malaysian
Trading Sdn Bhd**

- Words used in any agreement must be consistent with spirit and letter of the agreement.

**Keng Huat Film Co
Sdn Bhd**

- Evidence of negotiations leading up to a contract ought to be excluded on the grounds that it is only the final agreement which records a consensus & such evidence of negotiations is unhelpful.
- Any individual purpose which either of them hopes to achieve by the agreement is irrelevant.
- Surrounding circumstances and factual background is admissible.

ASSESSING THE CRITICAL TERMS IN A CONTRACT

Boilerplate Clauses – Example of Common headings for boilerplates:-

- Amendment
- Assignment
- Arbitration
- Force Majeure
- Interpretation
- Law & Jurisdiction
- Warranties, liabilities, indemnity clauses
- Exclusion and Limitation Clauses (cap on liability, defining seller's duty, limiting the customer's remedy to repair or replace)

Sample Termination Clause

10. TERM AND TERMINATION

10.1 Term:

This Agreement will be valid for one (1) year from the Effective Date and shall continue in full force and effect, unless earlier terminated in accordance with the provisions contained in this Agreement. Thereafter, this Agreement will automatically renew on a year-to-year basis. Either party may terminate this Agreement at any time after one year from the Effective Date upon 90 days prior written notice.

10.2 Events of Termination:

This agreement shall be subject to termination upon the occurrence of the following events: If either party hereto defaults on any of its material obligations, representations or warranties under this Agreement, the non-defaulting party shall notify the other party in writing, specifying in sufficient details the nature and extent of such breach and, unless within thirty (30) calendar days after written notice of such default the defaulting party remedies the default, this Agreement will terminate, if (a) either party files a petition for bankruptcy or is adjudicated a bankrupt; (b) a petition in bankruptcy is filed against either party; (c) either party becomes insolvent or makes an assignment for the benefit of its creditors or an arrangement for its creditors pursuant to any bankruptcy law; (d) either party discontinues its business, then the other party shall have the right to terminate this Agreement immediately upon written notice.

IDENTIFYING AND MITIGATING CONTRACTUAL RISKS

- Handling a pre-contract risk – identification by means of common comparative analysis, consultation
- Understand commercial and tax risk within the contract
- Comparison of laws in different countries and evaluating the same

UNDERSTANDING AND DRAFTING
LETTERS OF INTENT,
MEMORANDUM OF
UNDERSTANDING, HEADS OF
AGREEMENTS AND NON-
DISCLOSURE AGREEMENTS

What is a Letter of Intent?

A document outlining an agreement between two or more parties before the agreement is finalised

The purposes of an LOI may be:
to clarify the key points of a complex transaction
for the convenience of the parties

to declare officially that the parties are currently
negotiating, as in a merger or joint venture
proposal

to provide safeguards in case a deal collapses
during negotiation

TURRIFF CONSTRUCTION LTD v. REGALIA KNITTING MILLS LTD *per Justice Kay :*

*“As I understand it such a letter is **no more than the expression in writing of a party's present intention to enter into a contract at a future date**. Save in exceptional circumstances **it can have no binding effect**.... A letter of intent would ordinarily have **two characteristics, one, that it will express an intention to enter into a contract in future and, two, it will itself create no liability in regard to that future contract.**”*

AYER HITAM TIN DREDGING v. YC CHIN ENTERPRISE [1994] 2 MLJ 754, SC held:

*“On its true construction, the letter did not constitute a contract binding in law but was only a record of terms which were agreed as a basis for the negotiations of a contract. It was a **Letter of Intent**, i.e an expression in writing of a party's present intention to enter into a contract at a future date.”*

What is a Memorandum of Understanding?

A memorandum of understanding (MOU or MoU) is a document describing a bilateral or multilateral agreement between parties. It expresses a convergence of will between the parties, indicating an intended common line of action. It is often used in cases where parties either do not imply a legal commitment or in situations where the parties cannot create a legally enforceable agreement. It is a more formal alternative to a gentleman's agreement.

KHEAMHUAT HLDGS v. THE INDIAN ASSOCIATION, PENANG [2006] 2 CLJ 1040, AC;

ABDUL RAHIM v. RAMAKRISHNAN KANDASAMY [1996] 3 CLJ 393, per Justice Visu Sinnadurai :

*“It must also be observed that the memorandum of understanding **contains no specific provision as to the effect of non-compliance** of it by the parties, nor does it provide that until the specified date, the vendor was under an obligation not to sell the property to a third party. Further, if the MOU had stated that, in consideration of the vendor promising not to do so, the money paid by the purchaser will be forfeited if the purchaser chooses not to go on with the sale, **no difficulties would have arisen.***

Time and again, the courts have stated that much of these problems may be avoided if only the consequences of either party not proceeding with the contract are expressly spelt out in the initial agreement itself. Despite these words of caution, such problems continue to arise.”

LOI vs. MoU

There is a specific difference between an LOI and MOU, whereby an LOI is the intent from one party to another and does not in this case have to be signed by both parties, whereas an MOU is an agreement between two or more parties, which should be signed by all parties to be valid.

What is a Non-Disclosure Agreement?

A non-disclosure agreement (NDA), also known as a confidentiality agreement, confidential disclosure agreement (CDA), proprietary information agreement (PIA), or secrecy agreement, is a legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to by third parties.

The legal meaning of “Confidential information”

ELECTRO CAD AUST PTY LTD v. MEJATI [1998] 3 CLJ Supp 196, per Justice RKNathan;

*“**Confidential information** is generally information which is the object of an obligation of confidence and is used to cover all information of a confidential character. This includes... **Trade secrets, Literary and Artistic secrets, Personal secrets and Public and government secrets..**”*

LANSING LINDE LTD v. KERR [1991] 1 AER 418, AC held on ‘trade secrets’:-

*“**Trade secrets**’ are not restricted to secret formulae for the manufacture of products but can include highly confidential information of a non-technical or non-scientific nature, **such as customer’s names, which if disclosed to a competitor, would cause real or significant harm to the owner and which the owner is entitled to have protected.**”*

FACCENDA CHICKEN LTD v. FOWLER [1985] FSR 105, 3 Classes of information which an employee may acquire during course of employment (per Justice Goulding);

The justification for Non-Disclosure :

TERRAPIN LTD v. BUILDERS SUPPLY CO [1960] RPC 128, per Justice Roxburgh :-

*“As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a **springboard for activities** detrimental to the person who made the confidential communication and **springboard it remains, even when all the features have been published or can be ascertained by actual inspection by any member of the public**”*

SVENSON HAIR CENTER v. IRENE C.Z.L per Justice Vincent Ng (now JCA) :-

*“**“**The injunction presently sought by the Plaintiff is to protect its Confidential Information pertaining to its **customer lists, names and details**, from continuing to be exploited by the Defendant. That this information belongs, in law, to the Plaintiff is beyond doubt, as is the fact that the Defendant has no right to avail herself of the same **without the Plaintiff’s consent.**”*

The efficacy of Non-Disclosure Clauses / Agreements :

FISCAL TECHNOLOGY v. JOHNSON [1991] 23 I.P.R 555, NZ High Court

LIM LEAN HENG v. WAKO MERCHANT BANK (S'PORE) [2004] 3 CLJ 9, AC
per Justice Sri Ram , JCA :-

*“Without going into any detail, suffice if we say that **equity imposes an obligation on the recipient of confidential information not to disclose it. A threat to do so will be restrained by injunction.** A breach of confidentiality is remediable in damages. See Douglas & Ors v. Hello Ltd [2001] 2 All ER 289.*

*But such a breach cannot in our view found an application for cross-examination. It stumbles at the very first step of relevancy. For it can hardly be relevant in an application for a post-judgment Mareva injunction prayed in aid of execution that illegally obtained evidence is sought to be admitted. **If there is a complaint that confidence was breached, the appellants have appropriate remedies available to them.** However, cross-examination is not one of those remedies.”*

RESOLVING DISPUTES IN COMMERCIAL CONTRACTS

Identifying dispute resolution mechanism:-

Recognising potential problems
Dealing with issues as they arise
Legal rights and commercial outcomes distinguished
Negotiation structures for internal dispute resolution
Types of external dispute resolution
 Litigation
 Arbitration
 Adjudication
 Expert Determination
 Mediation
 Enforcement of awards
 Management of disputes
Common governing law and jurisdiction issues

Significance of Alternative Dispute Resolution Mechanisms

Alternative dispute resolution (ADR) is a term that refers to several different (but philosophically linked) methods of resolving business-related disputes outside traditional legal and administrative forums



ARBITRATION



MEDIATION

MANAGING BREACH OF CONTRACT

SECTION 40 CONTRACTS ACT 1950

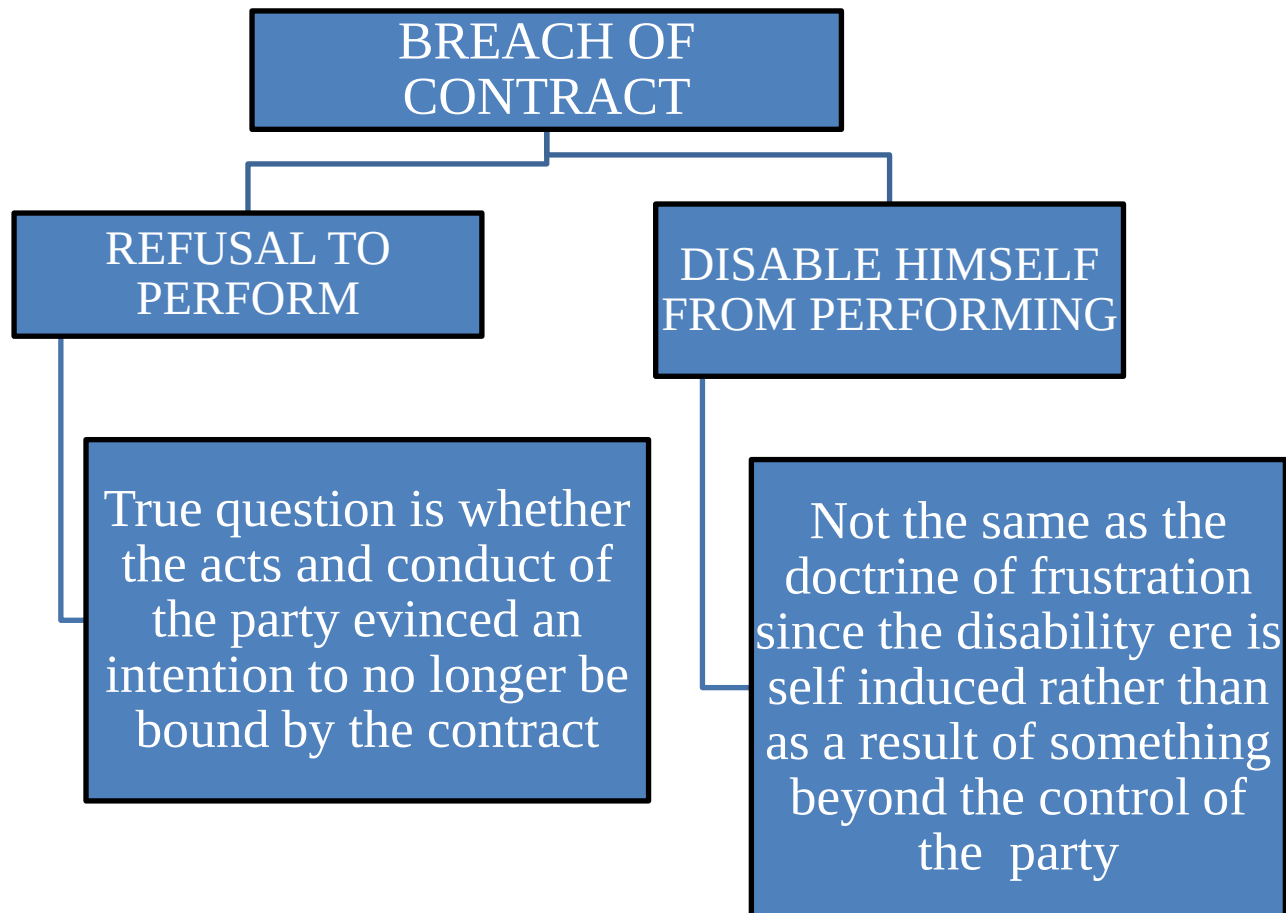
When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance



refusal to perform



disable himself from performing



EFFECT OF BREACH

Lee Contractors
(M) Sdn Bhd v
Castle Inn Sdn Bhd

- Promisee may put an end to the contract
- This does not make the contract *void ab initio*

Chin Kim v Loh
Boom Siew

- Upon breach, the party should make his position clear as to whether he accepts the breach or refuses to do so.
- If the party delays in bringing a cause of action to enforce the contract, the proper inference to be drawn is that he accepts the breach

Sim Chio Huat v
Wong ted Fui

- If an innocent party intends to terminate the contract for breach, he must clearly communicate this intention to the other party in breach ASAP.

Rescission

- *Johnson v Agnew*- Rescission here is not *void ab initio*. Where the repudiatory breach is accepted, the contract is valid but has been put to an end/discharged as a result of the breach. Hence, appropriate to say contract is terminated.

Restitution

- S. 65 Contracts Act- innocent party may restore any benefit received.
- *Yong Mok Hin v UMSSI*- when contract is rescinded under S.40 CA1950, innocent part must restore any benefit received (S.56) and one party has the option of annulling the contract- the contract is voidable and when he makes use of the option the agreement becomes void (s.66).

Damages

- S.76 CA 1950- a person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.

DAMAGES

- Damages include pecuniary, non-pecuniary, liquidated, unliquidated, special, nominal & exemplary damages;
- Damages are rewarded once and for all;
- Damages are compensatory in nature;
- Only a party to the contract/his estate is entitled to claim compensation for breach of contract;

Pecuniary Loss

Expectation Loss: the aim is to put the party into a position as if the contract was performed

Party also entitled to recover additional pecuniary loss such as loss of user profit i.e. cost of replacing & adapting goods, damage to or destruction of party's profit, compensation paid to sub-buyer and cost incurred in defending a sub-buyer's claim

Reliance loss: wasted expenditure. The aim is to put the party into a position as if the contract was not entered into.

Non-Pecuniary Loss

Physical inconvenience & discomfort- can recover if within contemplation of parties.

Pain & Suffering, Loss of Amenities & Loss of Expectation of Life- claim may be allowed even when there is no concurrent liability under tort.

Loss of Reputation- No damages would be awarded for loss of reputation as the proper cause of action in such cases is in defamation- *Addis v Gramophone*

Loss Arising out of Loss of Reputation- recoverable : *Ariel Advertising Co v Bachelors Peas Ltd*

Mental Distress- General rule: No damages awarded unless enjoyment contracts, service related to weddings, if not too remote, consequent on physical inconvenience.

SPECIFIC PERFORMANCE



Specific performance is an equitable remedy and is only available on certain conditions :-

- i. Party must not delay/sit on his right
- ii. Party must come to court with clean hands
- iii. Party must make full & frank disclosure



Section 21(1) SRA 1950-Specific Performance is a discretionary remedy, the Court are not bound to grant it merely because it is lawful, but the Court's discretion is not arbitrary and is guided by sound and reasonable judicial principles.



only available in certain situations provided for under the Specific Relief Act 1950

INJUNCTIONS

- ➡ A judicial remedy by which a person is ordered to refrain from doing (prohibitory)/ordered to do a particular act/thing (mandatory).
- ➡ injunction can be interlocutory or perpetual.
- ➡ temporary/interim/interlocutory injunction – only granted in rare and exceptional circumstances.
- ➡ mareva injunction : special order made against a person to prevent him from disposing of his assets before the conclusion of the suit.
- ➡ injunction to enforce a negative covenant : may be enforced even if the positive covenant cannot be specifically enforced.
- ➡ injunctions will not be granted in instances to stay judicial proceedings unless necessary to prevent multiplicity of proceedings, stay proceedings in a higher court – S. 54 SRA 1950

- Types of Termination – Unilateral, Bilateral
- Effective drafting of termination clauses – clarity, certainty, defined.

~THANK YOU~



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