

CONTRACTS

SESSION 1 Terminology, sources, party autonomy

I Terminology and English law

Definition of a contract given by sir William Anson : a legally binding agreement made between 2 or more parties, by which rights are acquired by one or more to acts or forbearances on the part of the other.

1 Elements of a contract

1.1 Capacity

The exceptions

- . infants
- . person drunk or mentally disordered
- . corporations (legally entity created by a process of law) and companies

1.2 intention to create legal relationships

No contract in case of lack of intent even if there is an agreement and a consideration

Presumption of intent for commercial agreements

Presumption of lack of intent for family and social agreements

1.3 agreement (offer and acceptance)

1.3.1 Offer

An offer is a promise that the person making the offer (the offeror) is prepared to be legally bound upon special terms

It is susceptible to acceptance at any time, unless it is revoked

There is no offer in case of

- invitation to treat
- supply of information on products is not an offer
- declaration of intent

The offer has to be

- . oral , in writing, implied by the conduct
- . clear (note vague and uncertain)
- . specific (made to a particular individual) so that it can only be accepted by this person or general (addressed to the world at large)
- . communicated to the offeree

Termination of the offer

- . by revocation at any time before the acceptance and the revocation has to be communicated
- . by rejection of the offer or counter-offer
- . by lapse of time : the time may be foreseen , if it is not after a reasonable time !
- . by failure of a condition under which the offer was made
- . by death of the offeror

1.3.2 Acceptance

- assent to all the terms of the offer, if not it is a counter-offer

- acceptance may be oral, in writing, by implied conduct, usually on the same manner than the offer
- cases where there is no acceptance
 - . acceptance is subject to contract : no intent to create legal relationships and the acceptance does not fit the offer
 - . the terms of the alleged contract are too vague
- acceptance has to be communicated by an external act
- acceptance is complete upon posting, (the rule is in favour of the offeree)
- silence is not acceptance but the offeror may waive the need to communicate acceptance

1.4 valuable consideration

Concept of consideration means that there is no bargain without exchange : there is no legal effect to a gratuitous promise (there would be legal effect to the promise if there is a formal deed)

Definition of consideration : anything of value : supply of goods, performance of a service, exercising forbearance from the performance of an act, promising to act

Conditions related to the consideration :

- . it has to be real and of some value even if non adequate value
- . forbearance to sue is a valuable consideration
- . existing obligations cannot be consideration (to perform a public duty as to attend an audience as a witness, part payment of a debt)

2circumstances affecting the validity of a contract

Principle : a valid offer which is validly accepted and with a valuable consideration is legally binding unless certain circumstances :

2.1 Duress or undue influence

- duress is actual or threatened violence to a contracting party so that the consent has not been freely given: the contract is voidable at the option of the concerned party

It is a common law remedy, very restrictively used only in case of treat to the person

- undue influence : equitable remedy developed to be used when duress is no possible, namely when the contract is entered into under compulsion, from physical or moral pressure ; it covers all cases when contract is made under compulsion, from physical or moral pressure

the contract is void up to the concerned party

2.2 Mistake

Common law : mistake is limited as in case of operative mistake,

the contract is void ab initio ;

the alternative is for the party to use misrepresentation or a remedy in equity

- mistake on the fact only and not mistake on the law

- 3 types of mistake :

2.2.1 common mistake : both parties made the same mistake,

- there is an agreement on a mistake

- there has been an innocent or negligent misrepresentation, so that it might be damages for the tort of negligence

- remedy in common law :

- remedy in equity :

2.2.2 mutual mistake : the parties are at cross-purposes ;
there is normally no agreement

- common law : Contract is void if a third party could not conclude that A or B was right
- equity remedy : specific performance may be a remedy

2.2.3 unilateral mistake : only one party is mistaken and the other knows of its mistake;
there is no agreement

there is a fraudulent misrepresentation, so that it might be damages for the tort of deceit
object of mistake :

- . mistaken identity by the fraudulent misrepresentation by a party as to its identity (w bad person claims to have the identity of a honest one in order to get credit)
- . mistaken about documents mistakenly signed : a party induces another to sign a document different in class or in content to that the other contemplated different
- . mistake in equity : slip of the pen has to be corrected

2.3 Illegal contract

- when the promise, the consideration or the object is unlawful, it has to be void by illegality
- when the contract is prohibited by statutes or contrary to public policy, it has to be void by illegality
- pb of terminology as some authors write that there is no difference between void and illegal contracts, but for other an illegal contract renders unenforceable any contract depending upon it
- contracts illegal at common law :
 - . contract whose object is the commission of crime or a civil wrong
 - . contract to defraud the revenue or other public authority
 - . contract depending for their performance upon sexually immoral acts : a prostitute does not have to pay the carriage maker who built a special car for the attraction of male customers
 - . other contracts against public policy
 - . contracts in restraint of trade by "clause in restraint of trade" in favour of an employer, of a buyer of a business these clauses are OK if they are fair and reasonable
- illegality declared by statutes
 - . gaming and wagering
 - . loans to infants
 - . restrictive practices under the restrictive trade practices act and the resale prices act

3 The content of the contract : the Terms of the contract

3.1 Distinction term/representation

- the term is part of the contract
- the representation is not part of the contract , it is a statement which induces the making of the contract, it induces the remedies of misrepresentation
- test to make the distinction

3.2 Form of the contract

It may be oral, written or partly written

3.3 Express terms : conditions and warranties

- An express term is a clear stipulation in the contract which the parties intend should be binding upon them
- Conditions and warranties are 2 kinds of expressed terms
- Conditions
 - . they are the terms which go to the root of the contract
 - . in case of breach the remedies are repudiation or rescission and damages
- warranties are minor terms of the contract, collateral to the main purpose of the contract
 - . the only remedy in case of breach is damages
- there is now an incentive to look at the consequences of the breach whether it is serious or not rather than to make a distinction between condition and warranty
- other matters
 - . in case of sale of goods no remedy in case of breach if the buyer accepted the goods
 - . a representation may also become a warranty so that it may be damages for the warranty but also rescission of the contract for the misrepresentation

3.4 Implied terms

Terms not expressly stated by the parties by words or conduct, but which are, by law, deemed to be part of the contract

Terms may be implied

by custom,

by statute (sale of goods, unfair contract terms act...)

by the courts (under the doctrine of implied terms to give business efficacy to the contract)

3.5 Excluding and limiting terms

- contractual clauses designed to exonerate a party wholly or partly from liability for breaches of express or implied terms

for torts

- clauses imposed by means of notices, receipts, tickets or in standard forms contracts

- the unfair contract terms act remedied to that but only for business activities

- solutions

. the writing has to be a contractual document

. reasonable steps must be taken to bring the existence of the terms to the notice of the other party

. if it is in a document signed by the parties, no way to escape the exoneration

. doctrine of fundamental breach : a party cannot rely on an exemption clause if he has failed to carry out the basic purpose of the contract ; however it might be an excluding liability clause even for a fundamental breach

4 Misrepresentation

4.1 Definition :

- representations are statements made in order to induce a party to enter into a contract ;

they differ from conditions and warranties as they are not part of the contract

they differ from mere puffs which are not intended to be taken seriously

- a misrep is a false statement made in the course of negotiations leading to a contract which was intended to induce and induced the other party to enter into the contract

4.2 Elements of misrep

. a positive statement and not silence but there are some exceptions (silence distorts a positive representation

. statement may be made by conduct

. the misrep must at least partly induce the contract

4.3 Types of misrep

- . innocent misrep when the party is honest and had reasonable grounds to believe it is the truth
- . negligent misrep : statement made honestly but without any reasonable grounds for belief in its truth ;
in fact insufficient care has been taken to check the statement ;
the remedy is an action in tort
- . a fraudulent misrep is a false statement and the party knows it is false
- . duty to disclose some information for some contracts : example contract of insurance where the insured must disclose all the relevant facts

4.4 Remedies for misrep

- Three possibilities for the plaintiff :
 - . repudiation of contract if it has not been performed
 - . rescission of contract if it has been performed : the situation has to be replaced as it was before
 - . damages
- Test to make the choice :
 - exclusion of liability for misrep : this clause has no effect under the misrep act unless the judge or arbitrator finds it fair and reasonable
 - limitation of the remedy of rescission for any kind of misrep
 - . “restitution in integrum” impossible
 - . discretionary remedy
 - . plaintiff is guilty of unreasonable delay

5 The discharge of contract

The rights and obligations persist for only as long as the contract is in existence : when it comes to an end they are said to have been discharged.

There are 4 ways in which a contract may be discharged

5.1 Discharge of contract by performance

- Normally a contract is discharged when both parties perform their obligation
- If only one party performs it is the only one to be discharged and is entitled to sue the other ; its performance however has to be “precise and exact” but there are exceptions where this party is allowed to sue the other even if its performance was not precise and exact
 - . divisible contract
 - . the party is prevented to complete its performance by the action of the other
 - . doctrine of substantial performance : a party can claim if its performance was substantial

5.2 Discharge of contract by express agreement

“Which has been created by agreement can be extinguished by agreement”

- bilateral discharge if both parties have rights to surrender
they may **rescind** the contract, this is the **termination**
they may rescind and create a **new contract** (it is different from novation which is when 2 contracts are replaced by a single contract)
- they may decide for the **variation** of the contract

- unilateral discharge where only one party has rights to surrender as he has already performed his obligation

5.3 Discharge of contract by frustration

- In common law a contract is discharged if something occurs which is not the fault of the parties and was not contemplated by them and prevents the performance

- conditions
 - . event not foreseen
 - . none of the parties is responsible for the event
 - . if performed under the new model, the contract would be different
- effects of frustration : the contract ends but only for the future

5.4 Discharge of contract by breach

The breach of a term is not really a discharge : this is the action made by the other party which will discharge the contract

The breach of a condition only will discharge the contract , but even in this case the party may prefer with damages

There are 2 breaches of contract

- . anticipatory breach : the breach occurs before the date specified : the party notices to the other that he will not perform the obligation
- . actual breach : in case of non performance, defective performance, untruth

5.5 Assignment of contract

Contracts may be assigned in 4 ways :

- novation : the old contract is discharged and a new contract is entered into between one party and a new contractor replacing the first one
- legal assignment : for debts and things in action
- equitable assignment
- other assignments : death, bankruptcy

6 How the law enforces contractual obligations

Law of contract provides remedies made to compensate, not to punish

6.1 Remedies in common law

- **repudiation** of contract, namely it is treated as ended, **termination**
- damages
 - . direct damages and remoteness of damages : losses have to reasonably arise from the breach
 - . quantification of damages as per the market rule
 - . mitigation of damages : it is the duty to the plaintiff to take all the steps to mitigate his loss , the evidence of failure of mitigation has to be brought by defendant
- quantum meruit : the plaintiff claims for what he has done under the contract rather than for damages

6.2 Remedies in equity

- specific performance : as it obliges the court to get involved within the relationships between the parties , there are many limitations
 - . damages is an adequate remedy
 - . it is at the court's discretion
 - . the contract will be difficult to enforce

- injunctions either mandatory or prohibitory : decree compelling a party to do or not to do something

6.3 Discharge of actions

through a contract (settlement, “transaction” in French)

through a judgement

through lapse of time (“prescription” in French)

7 Contract for sale of goods

7.1 definition :

contract by which the seller transfers and agrees to transfer the property in goods to the buyer, for a money consideration, called price

- it is implicit that the seller is the owner or an agent acting for him
- the sale is different of the agreement to sell which is on condition or on a lapse of time
- no specific form
- the goods subject of the contract are existing goods or future goods to be manufactured

7.2 conditions and warranties

7.3 effect of the contract :

- transfer of ownership
- transfer of title

7.4 Duties of the seller

7.5 Exclusionary clauses

7.5 Duties of the buyer

7.6 Remedies for the buyer and the seller

II Sources

2.1 International sources

- conventions
- référence norms

2.2 EU sources

- treaties
- other instruments

2.3 Domestic law

- for international situation
- for internal situations and international
- necessity of choice of law rules or mandatory rules

III Party autonomy and mandatory rules

1 Field of autonomy

- choice of law
 - party autonomy as a connecting factor
 - party autonomy as a way to select a law in case of litigation by a specific agreement
- choice of a reference norm (see new regulation Rome 1)
- choice of a convention (for example Vienna convention)
- choice of jurisdiction, as a way to select the law
- choice of arbitration as a way to select the law or to avoid the law
- division of a contract into parts relevant to various laws
- importance of party autonomy in EEC law see *Alsthom case*

2 Limits to autonomy

- Duties of the judge
- Mandatory rules
 - Supermandatory rules
- . definition
- . national supermandatory rules in EEC
- see *Arblade case*
- . European supermandatory rules
- see *Ingmar case*
- see *directive on unfair terms in consumer contracts 1993*
- fraud ?
- see *Alsthom case*

SESSION 2 Methods for international contracts

1 Uniform material law

- see Vienna convention
- see Unidroit principles
- see ICC incoterms

2 Determination of the law

-Conflict of law rules

See Rome convention

See Proposition of Rome I regulation

See Regulation 1/2003

- Internal market method

see eCommerce directive

- law containing the limits of its territorial application

see directive on unfair terms in consumer contracts 1993

see Ingmar case

3 Choice of jurisdiction rules and arbitration in relation to contracts

See Brussels I regulation(reg 44)

See Regulation 1/2003