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Contract Law

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Structure

- Law and regulation of society
- Basics of contract law
 - Functions
 - Creation
 - Freedom of contract
 - Privity of contract
 - Contract terms
 - Rules of interpretation
- Remedies
- Competition law - example
- Sale of goods law - example
- Unfair contract terms - example

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Law and regulation

- Moral rules
 - You should not do X.
- Legal regulation / "The Law"
 - Rules sanctioned by an authoritative institution (e.g. a Parliament) pertaining to regulate behaviour or consequences thereof
 - e.g. rights and obligations, remedies and penalties*
 - Principles

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Why have a legal area that regulates how parties should agree on things?

- The law is not logical/coherent/consistent (conflict of laws, *lex specialis* etc.)
- Law and morality are not the same thing
- International law?

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Why have legal areas regulating business conduct?

- Promotion of economic growth / facilitate commerce
- Promote public welfare
- Protect different actors
⇒ e.g. workers/employees, consumers
- Guard against market abuse
⇒ Regulation of banking and finance => affects economy etc.

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Basics



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Functions of contracts

?

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Sources of Contract Law

- Legislation (incl. preparatory works)
- General principles of law
- Case Law
- Legal scholarship
- Customs
- Industry practice
- Contracts!

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Examples of contracts

- Sale of goods
- Provision of services
- Loans, investments
- Employment
- Licences
- Standard-form contracts
- Any kind of performance in return for something ← *consideration*

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Creation

- Offer
- Acceptance
- Consideration
- Legal capacity to enter into an agreement, obligation (normally part of offer/acceptance)

Meeting of the minds

binding contract

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[T]he battle is won by the man who fires the last shot. He (...) who puts forward the latest terms and conditions: and if they are not objected by the other party, he may be taken to have agreed to them

Butler Machine Tool Co. Ltd v Ex-Cell-O Corporation Ltd [1979] 1 All ER 965(CA) 968 per Denning MR

[A]n offer is only to be treated as lapsed when the offeror is led to assume that it has been rejected

Atiyah, P., An introduction to the law of contract ,Clarendon Press (1995), p.79

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Creation

- Written contract
- Oral contract?

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Freedom of contract

In general the parties are free to decide on whatever they desire and impose various obligations and rights.

- ⇒ any kind of performance in return for consideration
- ⇒ illegal performance?

"Everything is permitted except what is expressly forbidden, or everything is forbidden except what is expressly permitted?"

But is it the law that is completing a contract?
Or is it the contract that is completing the law?

What would be the consequences if the law said that one may only sell 1 apple to 1 customer?
Or that payment must always be made with a specific method, currency or within a specific time?

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Freedom of contract

- The law does not regulate everything, and laws are not always very specific -> risk of inflexibility
- Also not possible to imagine every conceivable set of circumstances. What then?
- Parties must be given the necessary flexibility because otherwise it would be the law that organises business, and not business organising business.
 - ⇒ not really efficient in capitalism
- Legal provisions can be contracted out (depends in every case)
- After all, the parties know best what they desire.
 - ⇒ the legislator is not in a better position to say what the parties want

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Freedom of contract

- B2B – **more flexibility** to agree on terms, including contracting out specific legal provisions, because parties are on an **equal standing** and can negotiate the terms, hire lawyers and other specialists (e.g. financial advisors in investment contracts) etc.
- B2C – **less flexibility** to **protect the weaker party** on whom terms can be **imposed** (the consumer) because of the stronger 'negotiation position' of the other party
 - ⇒ very important for standard-form contracts and unfair contract terms

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Privity of contract

- A contract is made between two or more parties.
- However, parties cannot regulate the performance of a 3rd party *← someone not party to the contract*
- In return, generally, a 3rd party may not invoke contract provisions against a party to the contract

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Contract terms

- Express terms *← what the parties agreed (note that a written term can be completed by an oral term)*
- Implied terms *← e.g. gap-filling = law, fact, custom and industry practice*
- Terms should be distinguished from statements made before the contract was entered into -> representation or promise? Both can really become part of the contract. Depends on the wording and circumstances

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Contract terms - examples

- What kind of performance
- Specific goods(services) / type of good / purpose / characteristics
- Delivery method /date/place
- Payment method /date/place
- Limitation of liability
- Exclusion of legal provisions
- Applicable law
- Applicable jurisdiction
- Entire agreement clause
- Termination / continuity / duration
- Breach of contract

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Contract terms - significance

- Conditions
- Warranties
- Innominate terms

Always depends on the circumstances of the case (e.g. during breach of contract), even though a contract may use headings "Conditions", "Warranties"

Hong Kong Fir Shipping v Kawasaki Kisen Kaisha [1962] 2 QB 26
[chartered ship, 'seaworthy', wrongful repudiation, 20 weeks out of 2 year contract]

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Rules of interpretation

In contracts (...) You look at what [the parties] said and did...

Storer v Manchester City Council [1974] 1 WLR 1403 (CA) 1408 per Lord Denning

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Rules of interpretation

- Language of the contract
 - ⇒ what the parties actually agreed on
- Courts generally prefer not to go outside the scope of the contract
- Teleological (purposive) interpretation
 - ⇒ what is the purpose of the contract?
 - ⇒ what would they have agreed on given the spirit of the contract?
- The law fills the gap left by the parties
 - ⇒ everything is permitted except for what is expressly forbidden?

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Remedies



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Remedies

- Damages (availability varies between jurisdictions)
 - ⇒ *Compensatory (actual damages)*
 - ⇒ *Punitive*
 - ⇒ *Incidental*
 - ⇒ *Reliance / Consequential damages*
 - ⇒ *Statutory*
- Equitable remedies (availability varies between jurisdictions)
 - ⇒ *Specific performance*
 - ⇒ *Injunctions (prohibitive / mandatory)*
 - ⇒ *Rescission*
 - ⇒ *Rectification*

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Competition law



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Art. 101 TFEU

1. The following shall be prohibited as **incompatible with the internal market**: all **agreements** between undertakings, decisions by associations of undertakings and concerted practices **which may affect trade** between Member States and **which have as their object or effect** the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be **automatically void**.

3. ...

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Art. 102 TFEU

Any abuse by **one or more undertakings** of a **dominant position** within the internal market or in a substantial part of it shall be prohibited as **incompatible** with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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Sale of goods law



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Sale of Goods Act 1979 (UK)

SOGA 1979 s. 1: Contracts to which Act applies
(1) *This Act applies to **contracts of sale of goods***

SOGA 1979 s.2(1) => a contract of sale of goods is a contract by which the **seller** transfers or agrees to transfer the **property in goods** to the **buyer** for a **money consideration** called the price.

SOGA 1979 s.4(1) => Formalities
a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties

SOGA 1979 s.5 => Subject matter of contract
(1) *The goods which form the subject of a contract of sale may be either **existing goods**, owned or possessed by the seller, or **goods to be manufactured or acquired by him after the making of the contract of sale**, in this Act called future goods.*

(3) *Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.*

SOGA 1979 s.61(1) => Interpretation.
"Goods" include: all personal chattels other than things in action and money... [Archaic phrase is also good: chose in action, refers to kind of intangibles => shares in company]... In particular it includes emblements, industrial growing crops, things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale

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Sale of Goods Act 1979

SOGA 1979, s. 27
*It is the **duty** of the seller to deliver the goods, and of the buyer to accept and pay for them, in **accordance with the terms of the contract of sale**.*

SOGA 1979, s.28
***Unless otherwise agreed**, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.*

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Sale of Goods Act 1979

SOGA 1979, s.29 Rules about delivery
(1) *Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question **depending in each case on the contract**, express or implied, between the parties.*
(2) ***Apart from any such contract, express or implied**, the place of delivery is the seller's place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.*
(3) ***Where under the contract of sale** the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.*

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SOGA 1979 – implied terms

SOGA 1979 s. 13 Implied term about description

*(1) Where there is a contract for the sale of goods **by description**, there is an **implied condition** that the goods will correspond with the description*

(1A) the term implied in ss.1 is a condition

(2) If the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description

(=if the sale is by sample as well as by description, the goods must comply with both the sample and their description)

e.g.: a sound horse vs 1kg of King Edward potatoes

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SOGA 1979 – implied terms

SOGA s.14 Implied terms about quality or fitness.

*(1) Except as provided by this section and section 15 below and subject to any other enactment, **there is no implied about the quality or fitness** for any particular purpose of goods supplied under a contract of sale.*

*(2) Where the seller sells goods in the **course of a business**, there is an implied term that the goods supplied under the contract are of satisfactory quality.*

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

- a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
- b) appearance and finish,
- c) freedom from minor defects,
- d) safety, and
- e) durability.

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Consumer Sales Act - Konsumentköplag (1990:932)

1 § This law applies to the purchase of **tangible things** which a trader sells to a consumer.

...

consumer: a physical person who purchases mainly for purposes falling outside business activity

trader: a physical or legal person who trades for purposes in connection with their business activity

3 § **Contract terms** which are **to a purchaser's detriment** are **void**, if nothing else is stipulated in the law.

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Consumer Sales Act (SWE)

Delivery of goods

4 § Unless otherwise agreed in the contract, the goods shall be available for collection where the seller had their place of business during the sale

5 § If it is not provided in the contract when the goods shall be delivered, they shall be delivered without unnecessary delay and not later than 30 days after the contract was entered into.
(applies from 2014-06-13 00:00:00)

...

7 § Unless otherwise provided in the contract, the seller shall be responsible for the costs of transportation and other costs associated with the goods which arise before the delivery, and which do not depend on a delay caused by the purchaser.

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Consumer Sales Act (SWE)

16 § The goods shall **correspond** to the **terms of the contract** regarding type, quantity, quality, and other characteristics and packaging. They shall be accompanied by instructions regarding installation, assembly, use, storage and maintenance

..

Unless otherwise provided in the contract, the goods shall

1. fit the purposes for which goods of similar type are generally used,
2. fit the specific purpose for which the purchaser intended to use the goods, if the seller should have realized this specific purpose,
3. correspond with the description that the seller has provided and have such characteristics which the seller referred to by presenting a sample or model, and
4. be packed in an ordinary or otherwise secure way, if packaging is required to preserve or protect the goods

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Unfair contract terms



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Unfair Contract Terms Act 1977

Section 2 Negligence liability

(1)A person **cannot** by reference to any **contract term** or to a notice given to persons generally or to particular persons **exclude or restrict his liability** for death or personal injury resulting from negligence.

(2)In the case of **other loss or damage**, a person cannot so exclude or restrict his liability for negligence **except** in so far as the term or notice satisfies the requirement of **reasonableness**.

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UCTA 1977

Section 6 Sale and hire purchase.

(1)Liability for breach of the obligations arising from—

- a) section 12 of the Sale of Goods Act 1979(seller's implied undertakings as to title, etc.);
- b) section 8 of the M3 Supply of Goods (Implied Terms) Act 1973 (the corresponding thing in relation to hire-purchase).

cannot be excluded or restricted by reference to any contract term.

(2)As against a person **dealing as consumer**, liability for breach of the obligations arising from—

- a) [section 13, 14, or 15 of the 1979 Ac.](seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);
- b) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire-purchase).

cannot be excluded or restricted by reference to any contract term.

(3)As against a person dealing **otherwise than as consumer**, the **liability** specified in subsection (2) above **can be excluded or restricted** by reference to a **contract term**, but only in so far as the term satisfies the requirement of reasonableness.

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Law on consumer contract terms

Lag (1994:1512) om avtalsvillkor i konsumentförhållanden

1 § This law **applies to contract terms** which traders use when they offer goods, services, or other items of utility, to consumers

This law also **applies to contract terms** which traders use when they convey such offers on behalf of a trader or another

...

3 § If a **contract term** in **1 §** with regard to the price and other circumstances is **unfair** with regards to the consumer, the Market Court **may prohibit the trader from using similar or significantly similar term** in the future, if the prohibition is desired from a public interest perspective, or is otherwise in the interest of consumers or competitors

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Directive 93/13/EEC on unfair contract terms

ANNEX (clauses that may be considered unfair)

Terms which have the object or effect of:

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b)
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
- (d)
- (e) **requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;**
- (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) **enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice** except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

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Directive 2011/83/EU on consumer rights

Article 5 - Information requirements for contracts other than distance or off-premises contracts

Article 6 - Information requirements for distance and off-premises contracts

Articles 7-8 – formal requirements for off-premises and distance contracts (respectively)

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