

5

Contract law 2

■ Lead-in

Discuss these questions with a partner.

- 1 What is a breach of contract?
- 2 What types of breach are there?
- 3 What can the injured party do when there is a breach of contract?

Reading 1

1 Read the extract below to check your ideas in the Lead-in.

2 Read the extract again and answer these questions.

- 1 What two examples of a breach are given?
- 2 What is the difference between a fundamental and anticipatory breach?
- 3 What two choices for the innocent party are given in the extract?

Breach of contract

There is a breach of contract when a party to a contract fails to perform his obligations under the contract. Examples of such breach are the failure to supply goods or perform a service as agreed. There are varying degrees of breach, depending on the terms of the contract and the importance of the terms to the core of the contract. A breach of contract does not automatically serve to discharge the contract. Each situation depends on the nature of the breach, but a breach of contract does give the innocent party a number of options to terminate the contract.

The breaches that give rise to such options are **express** or **implied repudiation**, where one party can repudiate the contract as a result of the party in breach failing to perform some terms of the contract. Repudiation before performance is due is known as **anticipatory breach**, where the contract is repudiated before performance is due. **Fundamental breach** is where the party in breach has committed a serious breach of a fundamental term or totally fails to perform the contract. The effect of a repudiatory breach is not always the ending of the contractual relationship. The innocent party does have a couple of choices: he may treat the contract as **discharged by frustration** and bring an action for damages for breach, or he may elect to treat the contract as valid, complete his side of the bargain and then sue for damages from the other party.

3 Use words from the extract to complete these case excerpts.

- 1 If A has contracted to sell a house to B, and A subsequently sells the same house to C, then this is a(n) _____ of A's obligation to B.
- 2 If A contracts to sell a house to B, and A subsequently contracts to sell the same house to C and communicates to B that he will not convey the house to B as per the agreement, then A has _____ the agreement with B.
- 3 If A hires B to start work on 1st June, and A repudiates the contract on 11th May, B is permitted legally to sue on 23rd May, even before the due date of performance of 1st June, as he can sue because of _____.
- 4 If A breaches a term of a contract that is so important that it goes to the root of the contract, then the injured party B may terminate the contract and sue for damages for _____.
- 5 If A charters a ship to load a cargo for B, and the ship is unfit to sail before the cargo is loaded, so the charterparty cannot be performed, then the contract is discharged by _____.

4 Work in pairs. Write another case excerpt for each of the different types of breach. Exchange with another pair and guess the types of breach.

Language work

5 Find words or phrases in the extract and excerpts in Exercise 3 that mean the same as the following.

- | | | | |
|-------------|---------------|---------------|---------------|
| 1 result in | 4 injured | 7 consider | 10 after this |
| 2 end | 5 fulfil | 8 basic | 11 sell |
| 3 choose | 6 allow/cause | 9 still legal | 12 employs |

6 Complete the table. Which two words remain the same?

verb	noun
perform	(1) _____
supply	(2) _____
discharge	(3) _____
terminate	(4) _____
repudiate	(5) _____
treat	(6) _____
fail	(7) _____
imply	(8) _____

7 Use words from the table in Exercise 6 to complete these sentences.

- 1 We went ahead because of the _____ that the offer might be withdrawn.
- 2 His _____ to win support from his colleagues resulted in the company dropping the case.
- 3 The _____ of all information must be completely confidential.
- 4 The delay in the _____ of oil caused serious problems.
- 5 The other party was making outrageous demands, and the _____ of negotiations was the only alternative.

Reading 2

1 Discuss these questions with a partner.

- 1 Have you ever dealt with an e-contract?
- 2 List what you think are the main problems with e-contracts.

2 a Work in pairs. Read through these questions about e-contracts. How many can you answer?

- 1 Why is it very important to read the terms and conditions of a contractual transaction online very carefully before clicking 'I agree'?
- 2 What are the different types of e-contracts?
- 3 What specific problems can businesses have concerning e-contracts?
- 4 What global standard is there to harmonize regulations concerning e-commerce contracts?
- 5 Why is e-commerce important for developing countries?
- 6 What do courts consider in disputes over validity of e-contracts?
- 7 What other developments are happening in the field of e-commerce control?

b Read this extract and find the answers to the questions.

Online contractual transactions are becoming increasingly common, and it is essential that those entering such transactions examine the terms and conditions carefully before clicking on 'I agree' to indicate acceptance, as courts are inclined to uphold agreements accepted in this way.

There are two main types of e-contracts: B2C contracts between businesses and consumers, and B2B contracts, which are between businesses and businesses. Obviously, there are jurisdictional issues that arise because of the global scope of the Internet, and agreements affect the jurisdiction and specify laws that will govern the transactions. Technology also brings with it other risks for companies. Data protection and privacy issues must be dealt with by companies to limit their exposure to liability.

The need to regulate requirements concerning e-commerce contracts led to the setting up of UNCITRAL Model Law on Electronic Commerce in 1996 to set general conditions. It confirms that clicking 'I agree' on a website

constitutes a valid form of consent and allows an offer to be made and accepted in electronic form. UNCITRAL Model Laws have been enacted nationally worldwide and are also important for developing countries, as e-commerce greatly facilitates and protects new businesses in accessing new markets.

However, as with paper-based contracts, electronic contracts are not automatically valid, and in disputes, courts consider whether the parties involved were fully aware of the terms. This sometimes involves deciding how clear the terms were in relation to the size of text or location on a website.

Developments in the law governing e-commerce are continuing. Recently, we have seen a Model Law on Electronic Signatures, which has already been adopted by the national law of certain countries. Other developments currently being considered include an international treaty on Jurisdiction and the Enforcement of Judgements and a global agreement on e-commerce taxation regulations.

3 Discuss this question in small groups.

What legal steps do you think will be taken in the future regarding e-contracts? Why?

Reading 3

1 Discuss these questions with a partner.

- 1 What does CISG stand for?
- 2 When might a contract be avoided?
- 3 What is *foreseeability*?
- 4 Why might the guidance about what constitutes a fundamental breach be vague under CISG?

2 Read these comments that three student lawyers made following a lecture on aspects of contractual breach. Match the speakers (1–3) with the statements (a–g).

2

Yes. It's all about foreseeability, isn't it? We have to look into the future and work out what might be the most likely result, then work backwards. It appears that foreseeability of a loss affects both fundamental breach and non-fundamental breach. If the loss or damage to the affected party – or, as our lecturer put it, detriment – was not foreseeable and it can be proved, then lack of foreseeability is a ground for excuse. However, the burden of proving foreseeability rests with the breaching party. So, in a nutshell, if what happened couldn't've been predicted, and the breaching party can prove this, then there is no fundamental breach, right?

1

The lecture was a bit complicated but ... but I think I got the main idea. Where there is a breach of contract, there are a lot of different sorts of remedies available to the innocent party. The types of remedies may vary, depending on the type of breach and also the applicable law. For instance, the CISG – you know, the UN Convention on Contracts for the International Sale of Goods – says that if there is a fundamental breach, then the contract may be avoided. In other words, the breach is so serious that the other party can't get what he expected under the contract. What's important is that if the party in breach or a reasonable person of the same kind and in the same circumstances could've foreseen the damage to the other party, then the breach is fundamental.

3

I think so. I can understand that the type of breach seems to determine the damages that can be looked for. But it's difficult to get clear guidance on what actually constitutes a fundamental breach – which is really pretty fundamental, wouldn't you say?! The lecturer suggested that the vagueness in Article 25 of the CISG is because of the differences which exist across all the definitions of fundamental breach in the various legal systems. This seems to be the reason why the drafters couldn't agree on the type of breach that leads to avoidance of the contract. All the convention does really is provide interpretative guidelines, which surely leaves lawyers a bit in the dark, don't you think?

- a Lawyers often have to use prediction in their work.
- b It's up to the breaching party to show that no damage was foreseeable.
- c A breach is fundamental if a reasonable person could have predicted the damage.
- d Lawyers have to weigh up what might constitute a fundamental breach.
- e The CISG isn't clear about this point because different legal systems interpret fundamental breach differently.
- f Loss foreseeability does not only affect fundamental breach.
- g Remedy options depend on the type of breach.

Language work

3 Match the expressions in *italics* (1–6) to their more formal meanings (a–f).

- | | |
|--|------------------------------------|
| 1 I think I got <i>the main idea</i> . | a not knowing what is happening |
| 2 <i>In other words</i> , ... | b most important point |
| 3 <i>It's all about</i> ... | c to summarize |
| 4 So, <i>in a nutshell</i> , ... | d to express it in a different way |
| 5 It's really pretty fundamental, <i>wouldn't you say?</i> | e I'm sure you agree |
| 6 It surely leaves lawyers a bit <i>in the dark</i> , don't you think? | f it mainly concerns |

Listening

1 a How many different types of damages can you name?

b  **19** 5.1 Look at the table and read the definitions. Listen and complete the left-hand column.

Type of damages	When applicable
(1) _____	When the amount of damages is fixed
(2) _____	
(3) _____	When damages have to be vouched
(4) _____	When compensation is given because of loss experienced through relying on the contract
(5) _____	When damages relate to the type of breach and do not have to be vouched like special damages
(6) _____	When the court orders a party to complete the contract

2  **19** 5.1 Listen again. Who says the following: Pavla (P) or Stefan (S)?

- | | |
|------------------------------------|---------------------------|
| 1 Could you go through it with me? | 7 No problem. |
| 2 I get you. | 8 Sounds a bit confusing. |
| 3 You bet! | 9 OK so far? |
| 4 Got that. | 10 Nearly there. |
| 5 It's quite straightforward. | 11 You've lost me. |
| 6 Is that it? | 12 And equity is ...? |

Speaking

1 Work in pairs. Look at the transcript for audio 5.1 on page 100. Practise reading the dialogue. Take the different parts in turn.

2 Work in pairs.

Student A: Imagine you have missed a lesson or lecture about one of the themes from this unit – types of breach, aspects of breach, e-contracts or remedies (or one of the previous units in the book).

Student B: You attended the lesson and have your notes. Role-play the conversation, using expressions from Listening, Exercise 2.

Writing

1 a You're going to read a memo asking for advice about a case. Check you understand the meanings of these words.

conformity defective handy loss rubber selling point waterproof

b Read the memo on the opposite page and complete the gaps using the words in the box above.

Hi Harry,

Conrad tells me that you recently went to an international conference on 'The Economic (1) _____ Approach to the Connection between (2) _____ Goods and Fundamental Breach'. I hope it was good; I'm really sorry that I missed it, as it would have come in (3) _____ right now.

I have a situation and I think you may be able to help me out. I have a client who contracted to buy 100,000 (4) _____ boots made from natural (5) _____, sourced in Vietnam. Apparently, the big (6) _____ was that the rubber came from Vietnam, and Vietnamese rubber is apparently the best! However, he's found out that although the boots were made in Vietnam, they used rubber sourced in China. He is now left with 100,000 pairs of boots that he says he can't sell because the certificate of (7) _____ is inaccurate and he's refusing to pay. The boot manufacturer is threatening to sue my client.

Did you come across any cases at the conference that might cover this situation? I'm wondering if this is a fundamental breach. What do you think? Can my client avoid the contract and not pay for the boots?

I'd be really grateful if you could get back to me as soon as possible. Cheers.
George

2 Read the details of a similar case that Harry has found. What are the similarities? Are there any differences? What do you think was the result of the case?

A Dutch seller and a German buyer entered into a contract for the sale of a product with special technical qualities. The buyer declared the contract avoided because the product delivered was of a lower quality than what was agreed in the contract. Also, the product was produced in South Africa and not in the UK, as had been

stated in the contract. The seller had also given the buyer certificates of origin and quality that did not match Dutch regulations. The buyer exercised his right to avoid the contract. The seller did not accept the avoidance. The seller sued to recover the purchase price from the buyer.

3 a Read the ruling on the case in Exercise 2.

The German Supreme Court held:

- The buyer had not validly avoided the contract.
- The seller was entitled to be awarded the full price.
- They did not accept the buyer's argument that he was entitled to avoid the contract under Art. 49(1)(b) CISG

b Use the case details to write a memo from Harry to George, giving his opinion on what George's client should do.

USEFUL LANGUAGE

Comparing

In both cases, ...
There are several similarities.
Whereas ...
Although ...
On one hand, we have ...;
On the other, ...
Nevertheless, ...
There's a marked difference/
similarity between ...

Conceding

While it might be said/argued
that ...
Granted ...
Admittedly, ...
We have to consider ...
Naturally, ...

Summarizing

In conclusion, ...
All in all, ...
To conclude, ...
To sum up, ...
In short, ...
Consequently, ...

Reading: Part 3

TIP

Read the gapped sentences carefully to decide if you need a noun, verb, adjective, etc. If in doubt, think about some common endings for this type of word and make a guess. Read through the sentences or phrases afterwards in your head to see if they sound right.

- 1 CONTRACT
- 2 CONSIDER
- 3 HEAD
- 4 BASE
- 5 RESTRICT
- 6 SOLE
- 7 IMPROVE
- 8 EXPEND
- 9 EXPECT
- 10 PROFIT

Read this website extract about restitution. Use the words on the left to make one word that fits the numbered gap in the text.

Restitution

Restitution is where the claimant has conferred a benefit on the defendant in performing their (1) _____ duties and wants to claim that benefit back. An example of this is where the claimant has paid in advance for goods which have not been delivered.

The loss is measured with regard to the value of the actual benefit as opposed to the claimant's loss, but will only be permitted if there is a serious breach and a total failure of (2) _____.

The purpose of a claim under this (3) _____ is to put both parties into the position they would have been in had the contract never been entered into, although in some situations the claimant may be placed in a better position.

The claimant is entitled to choose the (4) _____ upon which to make their claim, but there are certain (5) _____. Where the claimant has made a 'bad bargain', they will not be able to claim damages by relying (6) _____ on the loss if it puts them in a better position than they would have been in had the contract been performed. In any event, it is for the defendant to prove that the claimant has made a bad bargain. In the case of *C.&P. Haulage v. Middleton (1983)*, the claimant had hired a garage for six months, and it was agreed that any (7) _____ would be the property of the defendant. When the defendant breached the contract, the claimant sued for the cost of these. The court held that even if the contract had not been breached, the (8) _____ would have been wasted.

In some situations, it may also be possible to recover twice for the same loss under the various bases as outlined above, as long as the loss itself is not duplicated.

In general, though, the claimant will seek damages assessed on the (9) _____ basis, as this usually proves to be more (10) _____.

Listening: Part 2

TIP

The words you need to complete each sentence will all be from the listening. However, the rest of each sentence may be phrased in a different way from the original. Read the sentences carefully before you listen and predict the type of information you are going to be listening for.



20

5.2 You will hear a speaker giving a welcome and overview of a one-day conference on Contract and Commercial Law. Listen and complete the sentences.

Conference on Contract and Commercial Law

Being aware of latest developments in this field will help reduce (1) _____ for law firms and their clients.

The course has been designed to be intensive to assist those who have limited (2) _____.

The course is aimed at both (3) _____ and private-practice lawyers. Participants will receive advice on dealing with (4) _____ contracts in particular.

One speaker today is well known because of his involvement in a case that turned on (5) _____.

'How to avoid expensive (6) _____' will be the focus of another session.

A very important concern for contract and commercial lawyers is drafting (7) _____ indemnities.

Participants will benefit from the (8) _____ and techniques of experts throughout the day.

Mr Frans Viedriect is the (9) _____ speaker of the day

Writing: Part 1

TIP

Make sure you divide your letter into clear paragraphs so that the reader can follow your thoughts easily. Do not use language that is too colloquial.

You are a lawyer, and one of your clients, Milton Football Club, has been able to buy a player from Barford Football Club because of a special escape clause in the player's contract. Barford FC is unhappy about the situation. Read the letter from Mr Trafford, from Barford FC, on which you have already made some handwritten notes. Then, using all the information in your handwritten notes, write a letter to Mr Trafford on behalf of your client, Milton FC.

Regarding the transfer of Player X from Barford FC to your club, it is clear that you breached the rules by contacting Player X directly.

He contacted us - explain

The rules state that you should have contacted us first. It is also clear that Player X leaked confidential information about the escape clause in his contract to you. This information that Barford FC was obliged to accept an offer of a minimum of 5.5 million pounds for Player X allowed you to buy him for at least 2 million pounds below his value.

Your wording - suggest more careful in future!

No - value exaggerated - indicate more realistic value

We are confident that if Player X had stayed with us, the club profits would have increased by 2 million pounds because of increased spectator numbers and television coverage. We are therefore claiming a further 2 million pounds from you in compensation.

Disagree - request proof of expected loss

If you fail to agree to this, we shall take legal action.

Yours faithfully

Thomas Trafford

No legal responsibility, but suggest compromise - say what and why

Write a letter of between 120 and 180 words in an appropriate style. Do not write any postal addresses.

Speaking: Part 2

TIP

If you have a problem thinking of enough to say about the topic, give some examples from your own experience or what happens in your country.

Look at these two topics. Select one of them and give a short talk on it for about a minute. There are some ideas to help you. You have a minute to prepare your talk. After you have finished your talk, your partner will ask you a brief question about it.

TASK 1

Breach of contract (1)

- Different types of breach
- Difficulty in proving a fundamental breach
- Importance of 'forseeability'

TASK 2

Breach of contract (2)

- Action that can be taken when breach suspected
- Remedies available
- Appropriateness of different types of damages