



Miles and Dowler, *A Guide to Business Law 21st edition*

Study Aid – Chapter summaries

Chapter summary – ch 8 – introduction to the law of contracts

1. A contract is an agreement made between two or more persons that creates legal rights and obligations that are enforceable by the courts.
2. The law of contracts comprises common law, equitable principles and statute law.
3. All contracts are agreements but not all agreements are contracts.
4. There are six elements that are legally recognised for the creation of a valid contract:
 - (a) intention by the parties to be legally bound by their promises;
 - (b) agreement by the parties on the basic terms of the contract (offer and acceptance);
 - (c) consideration from both sides (especially in simple contracts);
 - (d) the contracting parties must have the capacity to make a contract;
 - (e) real or genuine consent by the parties to the contract; and
 - (f) purpose and objects that are legal.
5. Some contracts are legally required to be fully written down (Power of Attorney); others must
 - have some evidence in writing (sale/purchase of real estate) but the majority of contracts are
 - not legally required to be written.
6. If any agreement was required to be proven in court by way of physical evidence then a written agreement is easier to prove than a verbal/oral one.
7. Where a contract is fully in writing the parol evidence rule applies. The law presumes that what the parties have agreed to is contained within the four corners of the document and oral/verbal evidence is usually not allowed where it contradicts the writing. There are a number of exceptions to this rule including the claim that the written agreement is only part of the bargain struck between the parties.
8. A person who signs a written agreement is usually bound by it even if they failed to read it.



9. There are exceptions to this rule and a party might escape from a contract they signed if they could prove:
- misrepresentation (see *Curtis v Chemical Cleaning & Dyeing*);
 - non est factum;
 - unconscionable conduct/contracts; or
 - a breach of the *Trade Practices Act* (s 52 prohibits misleading/deceptive conduct in trade or commerce) or similar State Fair Trading Laws. Note the changes under the new national consumer laws in Chapter 19.

10. Contracts can be classified in a variety of ways including the type, validity, method of formation and performance.

11. Formal and simple contracts

Two basic categories of contract can be distinguished as:

1. formal – in some special form like a deed, where rules of consideration are not relevant; and
2. simple contracts – all contracts that are not formal must be simple. Simple contracts generally require consideration.

12. Validity

We can also distinguish between contracts that are:

- **valid**, creating legal rights and obligations;
- **void ab initio**, where there never was a contract, and there are no legal rights or obligations;
- **voidable**, valid until a party with the right to do so voids the contract; it creates legal rights and obligations until voided;
- **unenforceable**, contracts that courts will not enforce because of some defect; they can operate as valid contracts if the parties so wish; or
- **illegal**, which have an element of illegality because of public policy or statute; their validity depends upon the circumstances.

13. Formation of contracts can occur in various ways including:

- express words or language;
- implied from conduct of parties; or



- imposed by law (quasi-contract), eg quantum meruit. Quasi-contracts are legal obligations imposed on parties regardless of any agreement between them.

14. Performance

- **executory**, where both parties have yet to perform their promises;
- **executed**, where both parties have performed their promises; and
- **partly executed**, where only one party has performed his or her promises.

15. Unilateral or bilateral contracts

- **bilateral**, an exchange of promises, eg *Boots Chemists case*; and
- **unilateral**, a promise in exchange for an act, eg *Carlill v Carbolic Smoke Ball Co.*

16. The principle of privity of contract means that only the parties to a contract can acquire rights or liabilities under the contract. There are some exceptions to this doctrine of privity of contract including agency, insurance and cheques.

17. Terms are what are contained in a contract.

18. Puffs or exaggerated advertising gimmicks are not usually part of a contract and are not actionable under contract law if they are inaccurate or untrue.

19. Representations that are simply statements during negotiations but do not form part of a later contract are also unlikely to be actionable under contract law if they prove to be untrue (see *Oscar Chess Ltd v Williams*).

20. Any statements or promises that are contained in a contract and are recognised as part of the contract may give rise to legal rights and remedies if shown to be untrue/false/inaccurate (see *Dick Bentley Productions v Harold Smith Ltd*).

21. Terms in a contract can be identified as:

- a **condition**: an important promise in a contract that may allow termination and or damages, if broken;
- a **warranty**: a less important promise that allows damages, if broken; or
- an **intermediate term**: a term somewhere between a condition and a warranty. If broken, the remedies may depend upon the nature and extent of the breach.

22. Terms in a contract can be expressly agreed between the parties or implied by the courts under the common law or implied by statute law such as the *Sale of Goods Act 1923 (NSW)*, *Trade Practices Act 1974 (Cth)* or the guarantees



under the new *Competition and Consumer Act 2010* (Cth).

23. At common law, the courts will usually imply terms into a contract when it appears necessary to give effect to what the parties intended. Terms have been implied at common law:
- based upon previous dealings between the parties;
 - based upon trade use or custom; and
 - to give business meaning to the agreement.
24. Statute law implies certain terms into contracts. For example, the State and Territory Sale of Goods Acts imply certain “conditions” and “warranties” (promises) from the seller that:
- the goods comply with the description under which they are sold;
 - the goods are fit for the purposes for which they are sold; and
 - the goods are of merchantable quality.

These conditions cannot be excluded in a consumer sale.

25. Until 2010 the *Trade Practices Act 1974* (Cth) implied similar but not identical conditions and warranties in relation to the sale of goods and services. Note that some of the implied conditions and warranties have been replaced by guarantees under the new *Competition and Consumer Act 2010* (Cth) that was fully introduced in 2011. See Chapter 19.
26. Matters that may adversely affect a contract include:
- lack of an essential element;
 - lack of writing or other formalities;
 - mistakes;
 - misrepresentations;
 - duress/undue influence/unconscionable conduct; and
 - illegal objectives.
27. Discharge of a contract refers to the situation where the parties are released from any further obligations under the contract. There are a variety of reasons for a contract to be discharged including:
- performance;
 - breach;



- a subsequent contract; and
- frustration.

28. A breach of contract generally occurs when either party fails to perform their obligations. Remedies are available under the common law, in equity and from various State and commonwealth statutes such as the Contracts Review Act.

29. In certain circumstances parties may be able to assign (transfer) a contract to another party. Assignment may be possible under common law, equity or statute law.