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Buying and selling goods and services

STARTER

Here are some sales managers having a consultation about contracts with the in-house lawyer. How would you answer their questions?

What happens if, after the parties have signed, we find that there's a mistake in a contract – say about VAT? Do we have to draw up a whole new contract?

A client agreed to buy some goods from us but needed them urgently. He didn't have time to wait for all the paperwork to be drawn up and signed. I sent him the goods and he paid – no problem. But was he actually legally bound by our verbal agreement?

I often see terms and conditions in our sales documentation. Aren't they just two words for the same thing?

Let's say there's a rail strike and we fail to deliver our goods to the client. I assume we're protected by the force majeure clause, aren't we?

We had a big order from a client and the client said it was OK to ask a third party to supply part of the order for us. But are we liable if the third party's goods are defective?

I keep coming across this word consideration in contracts. Does it mean that you have – sort of – thought carefully about the other party's offer before signing the contract?



1 Look at the beginning of a contract for the sale of goods and find the following information:

- 1 What is the product?
- 2 Which party manufactures the product?
- 3 Where is there detailed information about the product?
- 4 Who plans to buy the product?

Version 1

CONTRACT OF SALE

This agreement is made this 1st day of March 2... by and between Digital View plc (registered number 123456), with its principal place of business at 17, Hopkinson Way, Andover, SP10, ENGLAND, (hereinafter 'PURCHASER') and Pixeltechnik S.A., with its principal place of business at place Jourdain, 34, 1180 Uccle BELGIUM, (hereinafter 'SELLER') and its permitted sub-contractors and assignees.

Whereas:

- PURCHASER, a manufacturer of electrical goods, wishes to purchase the goods (hereinafter 'GOODS') specified in Annex 1 hereto and subject to the terms and conditions of this agreement:
- SELLER, a manufacturer of high-performance LCD screens, wishes to manufacture and supply the aforementioned GOODS.

IT IS AGREED:

DID YOU KNOW?

The language of contracts is changing in the U.K. and the U.S. as consumer and business groups campaign for more contemporary language so that the agreements are easier for people without a legal background to understand. Contracts between businesses have been slower to change, in contrast. The Contract of Sale above is an example of a *business-to-business* agreement, and has examples of the type of language that is becoming less common.

Whereas in this context is used to introduce the information about the transaction that the two parties want to enter into. *Where* can also be used with *by*.

Here and *there* can also be used with other words. *Here* is used in a legal document to mean the document itself, while *there* is used to mean other documents or things. *Hereinafter* means from this point in the document. *Hereby* means as a result of this document.

Aforementioned means that something has been discussed or referred to earlier.



2 Compare Version 1 of the Contract of Sale with Version 2, which uses more contemporary language. Make notes on how the phrases mentioned in the *Did you know?* box on page 27 have changed between the two versions.

Version 2

CONTRACT OF SALE

This agreement is made this 1st day of March 2... by and between Digital View plc (registered number 123456), with its principal place of business at 17, Hopkinson Way, Andover SP10, ENGLAND, (the 'PURCHASER') and Pixeltechnik S.A, with its principal place of business at place Jourdain, 34, 1180 Uccle, BELGIUM (the 'SELLER') and its permitted sub-contractors and assignees.

Recitals

- The PURCHASER, a manufacturer of electrical goods, wishes to purchase the the goods specified in Annex 1 to this agreement (the 'GOODS') subject to the terms and conditions of this agreement;
- The SELLER, a manufacturer of high-performance LCD screens, wishes to manufacture and supply the GOODS.

Now compare your notes with a partner.

3 Here are some clauses from the contract between Digital View plc and Pixeltechnik. Complete the contract on page 29, by inserting phrases 1–8 below into boxes a–h.

- 1 for a period of three years after delivery
- 2 are free from the rights of third parties
- 3 subject to the provisions for termination in 8.1 and 8.2 below
- 4 the number of items specified in Annex 2
- 5 any defective goods at no additional cost to PURCHASER
- 6 PURCHASER shall be entitled to terminate the agreement by giving 21 days' written notice to SELLER
- 7 The parties irrevocably submit to the exclusive jurisdiction of English courts for the determination of disputes arising under this contract.
- 8 PURCHASER may reduce the agreed price for the order by 1%

1 Delivery

- 1.4 Failure on the part of SELLER to meet the terms of delivery shall entitle PURCHASER to invoke the following penalty clause terms; for every week or part thereof by which the delivery date is exceeded, ☐ ^a. The rights of PURCHASER under 8.1 shall remain unaffected.

3 Minimum Orders

- 3.1 PURCHASER undertakes to purchase during the first 24 months following signature of this agreement ☐ ^b. The minimum amount ordered each calendar month shall be according to the details set out therein.

4 Price

- 4.1 The price charged for the goods shall be in accordance with the price list set out in Annex 2. The stated price shall be binding on both the seller and the purchaser for the duration of this agreement.

5 Duration

- 5.1 This agreement shall be for a period of two years from the date of signature ☐ ^c.
 5.2 The agreement shall be renewed automatically for a further period of one calendar year unless either SELLER or PURCHASER terminates in accordance with the provisions contained in 8.2 below.

8 Termination

- 8.1 Should SELLER: (i) fail to provide satisfactory performance of this agreement or (ii) fail to fulfil any of its obligations hereunder or (iii) become bankrupt or have a winding up petition made against it or have a liquidator or administrator appointed, ☐ ^d.
 8.2 In all other cases, notice to terminate must be made in writing by either SELLER or PURCHASER no later than 90 days in advance of the expiry date as defined in 5.1 above.

10 Warranties

- 10.1 SELLER warrants that the goods will comply with the specifications as set out in Annex 1 and will be free of defects (other than those caused by incorrect usage or operation by PURCHASER) ☐ ^e.
 10.2 Pursuant to the above warranty SELLER guarantees that after receipt of written notice from PURCHASER it will promptly repair or replace at PURCHASER's option and to PURCHASER's entire satisfaction ☐ ^f.

11 Warranty of title

- 11.1 SELLER warrants that the GOODS ☐ ^g SELLER shall indemnify PURCHASER on demand against any claims made by third parties in this regard.

12 Applicable law and jurisdiction

- 12.1 This agreement shall be governed by the laws of England and Wales.
 12.2 ☐ ^h.

DID YOU KNOW?

Warranty has two meanings in contract law.

- 1 It can be the statement that a manufacturer makes to the purchaser in which the repair or replacement of defective goods within a certain period of time is guaranteed.
- 2 It is the word used for a **term** in a contract that is not a condition. A **condition** is an essential element of a contract. If it is breached, then the other party has the right to terminate the whole contract. A **warranty** is not an essential part of a contract. If a **warranty** is breached, the contract as a whole remains in force for both parties.

Expiry date is the end of a period for which something is valid. It is often called **expiration date** in American English (AE).

The heading **Duration** in a contract can also be **Term**, especially in AE. This use of the word **term** has nothing to do with the meaning of term above. Here it means a period of time.

Force majeure is sometimes referred to as **act of God**. This clause covers all of the things that can happen which might make performance impossible, but over which the parties have no control, e.g. storms, natural disasters, unannounced strike action.

4 Read the dictionary definitions below and choose the correct term among the words underlined in the contract on page 29, which fit the definition.

1 _____ person appointed by the court to manage the affairs of a bankrupt company

6 _____ a guarantee issued to the purchaser of an article promising repair or replacement in case of defects

2 _____ to be in accordance with

7 _____ to hold a person safe or secure against a risk

3 _____ conditions (in an agreement)

8 _____ to go beyond a set limit (quantity or time)

4 _____ to make use of or apply a clause in a contract

9 _____ imposing an obligation which one must fulfil

5 _____ formal request to have a company closed down

10 _____ to state or describe something in writing



5 You are the in-house lawyers at Digital View plc. At a meeting with the purchasing department you are asked the following questions about the agreement with Pixeltechnik S.A. Listen to each question and note your answers below. Then share your views with the class.

- 1 _____
- 2 _____
- 3 _____
- 4 _____
- 5 _____
- 6 _____
- 7 _____
- 8 _____

STYLE TIPS FOR LEGAL TEXTS

Legal English often uses **past participles** to make sentences more compact. Instead of:
The price which is charged for the goods shall be ... or ... the number of items which is specified in Annex 2

the contract says:
*The price **charged** for the goods shall be ... or ... the number of items **specified** in Annex 2*

Present participles are also used to make sentences more compact. So instead of:
The agreement which exists between the parties is due to expire at the end of this year.

we can say:
*The agreement **existing** between the parties is due to expire at the end of this year.*

6 Put the verbs into the sentences below. Decide if you need a present participle or a past participle. Be careful! There are two verbs which you don't need.

arise • claim • dispatch • entitle • fail • find • impose • lead • list • reach

- 1 Any goods _____ to be defective must be replaced within 48 hours to the full satisfaction of the purchaser.
- 2 Any decision _____ by the arbitrator is binding on both parties.
- 3 The prices _____ in Annex 1 fail to take account of possible quantity discounts.
- 4 The purchaser is indemnified against any loss or injury to a third party _____ out of any product defect as defined in 6.4 above.
- 5 The 1,000 euro charge _____ on the supplier by my client is completely in accordance with the penalty clause in the agreement.
- 6 A transport strike _____ to delays in delivery is only covered by the *force majeure* clause to a limited extent.
- 7 Any products _____ to meet the agreed specifications will be returned to the supplier at the supplier's expense.
- 8 The compensation _____ by the purchaser is, in our view, unreasonable.

7 The contract runs well for 15 months. Then Pixeltechnik S.A. is forced to send the following letter to Digital View plc. Read the letter and answer the following questions:

What is the problem?

How quickly can Pixeltechnik solve the problem?

Pixeltechnik S.A.

place Jourdain 34
1180 Uccle

Tel: +32 511 648 31 50
Email: pixel.technik@t-mobile.be

September 23rd 2...

Mr. Gary Thorne
Head of Purchasing Department
Digital View plc
17 Hopkinson Way
Portway Industrial Estate
Andover
SP10
England

Dear Mr. Thorne

Recall of all batches from TZ64/0 to TZ64/9

I regret to inform you that we have to recall the above ten batches of LCD screens for use in digital cameras. Unfortunately, it has come to our attention that a chemical processing error has caused minor inconsistencies in the candlepower of the screens. They failed to pass all of our quality controls and must therefore be regarded as defective.

I appreciate that, in recalling a total of 5,000 screens, I am causing considerable inconvenience to your company. I apologise for this and will endeavour to dispatch to you 1,000 screens within the next ten days and the remaining 4,000 within 21 days at the latest.

Please accept once again my sincere apologies for this error. If you have any questions or would like to discuss this matter further, do not hesitate to contact me.

Yours sincerely

Jean-Marie Hérault

Jean-Marie Hérault
Managing Director

What is your overall opinion of the letter? Is the tone appropriate? Is the information sufficient? Give some examples.

8 You are a lawyer in the legal department of Digital View. Decide how your company should respond to this problem. Consider the following options and give reasons for your choices:

- accept Pixeltechnik's apology
- accept the apology but take steps to obtain compensation or to impose penalties
- suggest another alternative

9 Now listen to a consultation between Jean-Marie Hérault, Managing Director of Pixeltechnik S.A., and Mr. Evans, an English contract lawyer, working for an international law firm.



Part 1: The problem

Are the following statements true or false?

- 1 Digital View replied to Pixeltechnik's original letter of September 23rd. ☐
- 2 The Production Manager first realized there was a problem when he noticed a chemical processing error. ☐
- 3 M. Hérault is sure that the screens still conformed to the product specifications agreed in the contract. ☐
- 4 The technicians only carried out tests on the product once every ten days. ☐
- 5 Some defective LCD screens had already been delivered to Digital View. ☐



Part 2: The dispute

Answer the following questions.

- 1 Name three reasons why M. Hérault thought he had avoided a dispute with Digital View.

- 2 What does Digital View now intend to do?

- 3 On what legal grounds is it trying to do this?

- 4 Why is it important to Pixeltechnik that the contract runs at least two years?

10 You are solicitors advising M Hérault. Discuss the following questions with a partner.

- 1 To what extent are the following points significant?
 - a In his letter of September 23rd, M. Hérault described the 5,000 LCD screens as *defective*.
 - b Pixeltechnik already seemed to have reached a compromise with Digital View.
- 2 To what extent can it be argued that Digital View is not justified in invoking 8.1 (i)?
- 3 How important is the concept of *reasonableness* here?
- 4 If Digital View wants to terminate the contract, what are its rights and obligations?
- 5 Is the absence of a dispute resolution clause significant?

Now decide what advice to give your client.

11 Contracts and legal correspondence often contain words with negative prefixes e.g. *invalid*, *insolvent*. Look at the list of adjectives below and match them with the correct negative prefix.

IR • UN • IN • IM • DIS

- | | |
|---------------------|----------------------|
| 1 <u>in</u> valid | 8 ____ foreseeable |
| 2 ____ lawful | 9 ____ partial |
| 3 ____ enforceable | 10 ____ confirmed |
| 4 ____ satisfied | 11 ____ correct |
| 5 ____ reconcilable | 12 ____ complete |
| 6 ____ affected | 13 ____ reasonable |
| 7 ____ effective | 14 ____ satisfactory |

USEFUL LANGUAGE

The words *valid*, *enforceable*, and *effective* sometimes cause confusion.

A work permit or residence permit can be **valid**, i.e. it has the correct stamps on it or hasn't expired.

A contract of employment can be **effective**, i.e. it is in use and has legal relevance.

As an employee, I might have certain rights or claims with respect to an employer that are **enforceable**, i.e. I can go to court and ask the court to ensure that my rights are respected or my claims met.

A contract that has no legal basis – because, for example, one of the contracting parties acted under duress or because the object of the clause is unlawful – is **void**.

12 Work with a partner. Use the information in the Partner Files to find the legal vocabulary.

PARTNER FILES

Partner A File 05, p. 71
Partner B File 05, p. 76

INTERACTING WITH A CLIENT

Lawyers need to get information from their clients and summarize what the client has said, to direct the consultation and to express their own point of view. The following questions and expressions can be useful.

Getting information

Could I start by asking you when / why / how the problem began?

And what happened then?

What did you do then?

How did the other party react to this?

Could you explain why ...?

Getting the client to refocus

Let me take you back to ...

Checking and clarifying

Are you suggesting that ...?

So, if I understand you correctly ...

Could you explain what you mean by ...?

Expressing an opinion

As I see it ...

Our best option would be to ...

13 A client and a lawyer discuss contract issues. What advice did your lawyer give you?

VOCABULARY ASSISTANT

comply with *to obey a rule or contractual promise*
 invoice *a bill; a list of goods sold or work done showing what the customer must pay*
 offer *the act of saying you are willing to do something, for example, make a contract*
 reject *refuse to accept*
 tiles *coverings for a roof, wall, or floor*

PARTNER FILES

Partner A File 06, p. 72

Partner B File 06, p. 76–77

14 Fill in the gaps with words from the unit. Be careful! There are two words which you don't need.

binding • bound • comply • defective • expire • invoke • specifications •
 terminate • terms • warranty

- Any _____ items must be replaced within five working days to the full satisfaction of the purchaser.
- The insolvency of the supplier entitles the purchaser to _____ this agreement with immediate effect.
- The prices hereby agreed shall be _____ on both parties for a period of 24 months.
- The goods must be manufactured according to the _____ set out in Annex 2.
- The _____ of delivery state that the supplier remains liable for the goods until they have been unloaded at the specified delivery point and signed for by the purchaser.
- Your failure to _____ with this completion date entitles my client to impose the following financial penalties:
- To _____ the termination clause because some of the goods delivered were not of the required standard would be seen as unreasonable.
- The agreement will _____ exactly twelve months following its date of signature.

OUTPUT

Read the article about a famous case in contract law.

Flour power and contract law

By Franklin G. Snyder



Legal scholars from around the world are celebrating a momentous event: a broken steam engine shaft at a flour mill in Gloucester. That shaft gave rise to the most widely known case in the history of common law: the 1854 decision of *Hadley v Baxendale*.

Great cases sometimes have trivial causes. In an era engrossed by news of impending war with Russia, few cared about that broken shaft. Two people who did were Joseph and Jonah Hadley, the mill owners. They needed that shaft and as it could be repaired only in Greenwich, they hired Pickfords, the removal company, to take it from Gloucester by the next day. For some unexplained reason, the shaft took several days to arrive. During the delay, the mill lay idle.

The Hadleys sued for the delay. The question before the court was whether Pickfords was liable for the money that the Hadleys had lost while the mill was without its shaft. The court's answer was no. Since Pickfords did not necessarily know that the mill would be idle until the shaft could be returned – there might have been a spare – the court found that the company could not be charged with those damages. Its opinion announced what came to be known as the “foreseeability” test for contract breaches: you cannot be held liable for losses that you could not reasonably have anticipated.

How did this rather mundane dispute become a fixed star in the legal firmament? There are

two reasons. The first was the growth of contract law. Before the 19th century, many commercial relationships were regulated by custom, not by individual agreements. There was, in fact, no body of law called “contracts”. Secondly, the world of 1854, like that of today, was one of revolutions in transport, communications, economics, politics and society. It was the first era of “globalisation”.

An era of rapid change needs contract rules that are predictable, but also flexible. And *Hadley* is the embodiment of the common law's success at dealing with change. Its “foreseeability” rule encourages people to engage in transactions by protecting them from damages that could not be anticipated. But by avoiding a fixed rule – say, that the carrier is never liable for such lost profits – it allows for flexibility when things change. Next time, the carrier might be aware that there is only one shaft and that it had better take precautions or charge more in exchange for the greater exposure.

The Hadleys' old mill is, coincidentally, being restored. For me, a law professor who studied *Hadley* 20 years ago as a student, it is fitting that the mill is being adapted to face a new century, just as *Hadley's* rule has allowed us to adapt to futures about which we could only guess.

(abridged)

OVER TO YOU

- How does the law deal with the concept of foreseeability in your jurisdiction?
- Do you share the author's enthusiasm for this case as an example of clarity and flexibility?
- What, in your opinion, works better in contract law? Case law (the Anglo-Saxon tradition) or codified law (the tradition in continental Europe)?