A Thorogood Special Briefing

Chapter 1
Formation of a contract – introduction

- A contract can be made orally or in writing
- Laws of different countries
- Groups of legal systems
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Formation of a contract – introduction

A contract can be made orally or in writing

In the business world, a contract sets out how the relationships between the parties conducting business with each other will be governed. Common issues are, what happens if: goods are delivered late; or a building is not completed on time; or parts of the obligations accepted by one of the parties are not undertaken; when a party does not pay; or if information is not provided by the time stipulated in the contract? It also sets out how and when the contract may be terminated and if this occurs, the steps that should be taken by the party. It may look at how products are to be stored or manufactured. It may set out the level of skill or expertise to be undertaken by a party in a contract for services, or stipulate who the actual people that are going to provide the services should be and what happens if those particular named persons are not able to perform the contract. Ideally, the contract will set out what happens if there is a dispute in relation to the contract and the business relationship that it governs.

The contract will be read and interpreted according to the laws of the country that govern the contract, either because this has been set out in the contract or the law of a particular country has been imputed to the contract.

Laws of different countries

Essentially, this book is written with the laws of England and Wales in mind. It is one of three jurisdictions that make up the United Kingdom. The others are Northern Ireland and Scotland. Each of the jurisdictions has its own separate system of law, even though there may be similarities. Those systems of law deal with commercial matters and crime, land, employment, tax and tort.

All systems of law will have local law that governs:

- Contract and commercial law
- Regulatory law such as consents and permits

- Law attributing liability to accidents and damage such as health and safety law
- Company law
- Environmental law
- Criminal law
- Intellectual property law, such as patents and copyrights

There are other areas of law such as transport, shipping, payments, such as letters of payment and bills of exchange, which have similar laws in similar countries and also international conventions that countries may have signed to join.

Groups of legal systems

Legal systems in the world have developed historically and their origins may be due to the laws of ancient Rome, laws of England or religious laws such as Sharia law or, indeed, the Russian law family.

'Common Law' is a system of law that derives from English law (this includes England and Wales, Northern Ireland, the USA (except for Louisiana), India, Australia, the Caribbean and other countries of the British Commonwealth).

'Civil Law' systems originate from Roman law and these countries include Scotland, most countries in Western Europe, Japan and the former colonies of the countries of Western Europe (save for Great Britain).

The 'Russian Law' family includes Russia, the countries of Eastern Europe and China and it is a combination of common law and civil law concepts.

There is the 'Sharia Law' system in Muslim countries, including the Middle East, Pakistan, and Malaysia. Sharia includes concepts of common law or civil law in areas of commercial law.

The key difference between common and civil law is the source of the actual law. In civil law systems, the law is set out in codes (the commercial code, and the criminal code). In the common law system of law, it has developed as a result of decisions made by courts in actual disputes that have occurred over the years. In addition, there is some legislation that Parliament has passed that reflects or overrides the decisions of judges. When looking at matters of business and

contract law under common law systems such as England, one would have to look at decisions made by the judges and also sometimes at the legislation that may impact on the business or contractual point.

In civil law, it is thought that there is more certainty, whilst in common law systems, as it is based on decisions of the courts, the common law system reflects and is better at adapting to different commercial matters and relationships and the development of commerce. In this respect, this is the reason why a lot of international contracts are often governed by English Law, as there are many decisions in the English courts specific to international commercial contracts.

European law

The law between organisations and between people and organisations

Certain legislation has been enacted in order to protect the individual; such as the Employment Protection (consolidation) Act 1978, the Employment Rights Act 1996, the Unfair Contract Terms Act 1977 and the Consumer Protection Act. These laws essentially work to protect employees or the employee as an individual and the individual consumer.

When looking at contracts between two businesses as opposed to an individual and a business, the law believes that, generally, the two parties will have equal bargaining power, they will understand the law, and they will have the legal, contractual and technical experience to enter into the contract. Under English law there is a view that people should have freedom to contract, or the freedom to enter into whatever bargain they wish to, as long as it is legal. If that bargain is a bad bargain, then that is the risk that the parties took. Essentially, if two business organisations enter into a contract, the law expects them to know what they are doing. However, sometimes the courts will look at unequal bargaining power between two business organisations and seek to protect the smaller or medium sized enterprise against a large multi-national organisation. This can be seen in some decisions, but not all, as courts become more pragmatic. This is why it is important for businesses to fully appreciate and understand the law that will govern their commercial arrangement.