

30 October 2015

# 3HR Legal Weekly

## Commercial

### Commercial Contracts: (1) Introduction

Commercial law embraces many areas of law (both domestic and international) including sale of goods, marketing agreements, finance and credit arrangements, intellectual property and insurance, to name but a few. What links all of these together is the use of commercial contracts. A commercial lawyer will be regularly involved in the formation, negotiation and interpretation of these contracts.

#### Formation

Before the contract exists, one party will make an offer on certain terms, showing that they wish to be bound by those terms, and the other party must accept these terms unconditionally. This agreement must be supported by 'consideration' – value that is exchanged for the performance of the contract. There must also exist the intention to be legally bound by the terms of the contract. At this point, the contract is formed. Note, that although it is the norm to have a written document that is signed by the parties at this stage, a contract can come into existence without the need for a physical document if all the above conditions are satisfied. However, it is almost always safer to have a written contract.

#### Negotiation

In most contracts, barring the simplest commercial contracts, the entry into the contract will be preceded by a period of negotiation, either oral or written. The length and complexity of the negotiations depend on a number of factors e.g. is this the first time the parties have dealt with each other, is the subject matter of the contract complex, are standard terms and conditions being used?

Where several offers have been made and refused, or there exist a number of counter-offers, it can be difficult to know when the parties have moved from negotiations to conclusion of the contract and whether or not unwanted terms have been accidentally included in the contract. All documentation should be carefully monitored throughout the negotiation period to prevent this from happening.

#### Interpretation

In order to interpret a contract, you must identify the terms. This is not as simple as just looking at the document that the parties have signed. It will be necessary to see if any statements that were made before the contract was concluded have been included or if they have been misrepresented and therefore induced a party to enter into the contract. It will also be necessary to see if the contract is only in writing or if it is both written and oral. Incorporation of the terms is important; has the contract been signed? Sale of goods contracts may have terms implied by statute or by custom of that trade.

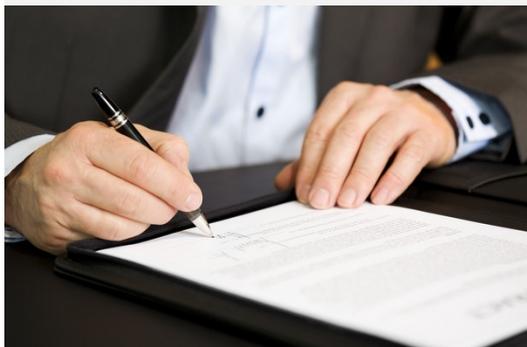
It should be noted that the courts have long since looked at the wider context and interpret contracts with "business common sense".

#### Discharge of contracts

A contract comes to an end when it has been discharged by:

- performance of the contract
- agreement by the parties
- 'frustration' – when the contract can no longer be performed as intended
- breach of the contract

Most commercial litigation centers on frustration and breach of the contract.



If you are in the negotiation or drafting stage of a commercial contract, please do not hesitate to contact 3HR Legal's Commercial department who are on hand to assist at all stages and represent your company, ensuring that you conclude contracts on the best terms that are available.

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