



what you need to know to start and grow your business

contracts

When is a contract formed?

A binding contractual agreement can take many forms and cover many different arrangements. To be legally binding, it does not need to be signed or even in writing and can be affirmed simply by your conduct, but you must have the four elements described below. If you do sign, electronic signatures are valid. It's still best to go for a written, signed contract before you start work under it, for clarity in case disputes arise later.

OFFER FROM ONE OR MORE PARTIES	ACCEPTANCE OF OFFER BY THE OTHER(S)	INTENTION TO CREATE LEGAL RELATIONS
CONSIDERATION One or more promises from each party to do something (such as provide goods/services or pay) or not to do something. NOT needed if you enter into a 'deed' (a special written contract executed in a particular way).		

What are the key terms of a contract?

SCOPE	PAYMENT	WARRANTIES/INDEMNITIES	LIMITATION OF LIABILITY
<ul style="list-style-type: none">What will each party do/not do?When?How?Where?	<ul style="list-style-type: none">What will the party receiving goods/services pay?When?Interest on late payments?	<ul style="list-style-type: none">Assurance of circumstances other party relies on when entering into contract/commitment to compensate if defined events occur	<ul style="list-style-type: none">What things will each party be/not be responsible for if things go wrong?Up to what amount?
TERM & TERMINATION	CONFIDENTIALITY	IP RIGHTS	EXCLUSIVITY
<ul style="list-style-type: none">How long will the contract last?In what circumstances can it be ended earlier?What happens when it ends?	<ul style="list-style-type: none">Does any information need to be shared under secrecy/restricted use conditions?What information?For how long?What can you do with it?	<ul style="list-style-type: none">Ownership/use rights re. any intellectual property rights (copyright, patents, design rights, trade marks etc.) contributed or created	<ul style="list-style-type: none">Commitment not to work with/supply to/buy from anyone else?For how long?
DISPUTE RESOLUTION	OWNERSHIP/RISK	AMENDMENT/VARIATION	SUB-CONTRACTORS
<ul style="list-style-type: none">Escalation to senior management first?MediationCourt or arbitration? (Which country/system?)Which country's laws will apply?	<ul style="list-style-type: none">For goods being shipped/delivered: when does legal ownership transfer to buyer?Who accepts risk (and pays for insurance) during transit?	<ul style="list-style-type: none">How will variation to scope be agreed?What about amendments to the contract terms?Usually in writing by authorised person from each party	<ul style="list-style-type: none">Can the supplier get someone else to do the work/supply?Head contractor remains responsible to buyerDoes a buyer need to approve choice of sub-contractor?

Are any contract terms automatically included?

UK common law allows parties very broad commercial freedom to agree whatever they like. However, in certain circumstances particular provisions are included ('implied') in the contract, even if not discussed/agreed. These include:

- Sale of goods: goods are of satisfactory quality and reasonably fit for purpose; and seller promises it has the right to transfer ownership of the goods (In the case of consumer contracts, this expressly applies to digital content as well as tangible goods)
- Supply of services: must be carried out with reasonable skill and care

Can I limit my liability to the other party?

- You can never exclude your liability for damage suffered by the other party resulting from fraud, or death or personal injury arising from your negligence or because you are not able to transfer ownership of the goods.
- In business-to-business contracts (NOT consumer contracts), you can exclude or limit liability for other types of damage caused to the other party to the extent it is reasonable to do so. (What is reasonable? Amongst other things this may depend on the respective size/bargaining power of each party)

This could include placing a cap on the amount of money you would need to pay for damage the other party suffered. (For example no more than the value of the contract.)

You may also see an exclusion of liability for 'indirect' or 'consequential' loss - so that a party is only required to compensate for losses that flow directly from its breach of contract. If you want to exclude liability for the other party's loss of profits, you should say so expressly.

How to handle breach of contract claims

WHERE TO BRING A CLAIM	WHAT TO THINK ABOUT
<p>MONEY CLAIMS</p> <ul style="list-style-type: none">Online for <£100k or County CourtMediationFile a 'statutory demand': can force individual into bankruptcy/get company wound up if they don't payIf person/company already in process of bankruptcy/liquidation: register your claim <p>OTHER CLAIMS</p> <ul style="list-style-type: none">MediationCourts: County/High/Appeal/SupremeArbitration <p>BUT FIRST: Check contract dispute resolution clause and do what this requires (eg escalation to senior management)</p>	<ul style="list-style-type: none">Don't panicConsider instructing a lawyer for larger claimsCan claimant show all aspects of claim?Any defences available?Sufficient evidence?Possible counterclaim(s)?What do you want to achieve? (Avoid/receive payment? Avoid reputational damage?)Do you have time/energy/resources to fight all the way? <p>When to bring a claim</p> <p>Within 6 years of date of breach UNLESS the contract is a deed, when this 'limitation period' is 12 years.</p>

What Remedies are available?

- Damages to put defaulting party in position it would have been in if the contract was performed as agreed.
- Specific performance to require defaulting party to comply with its relevant obligation in the contract, or other court order (injunction).
- 'Terminate' (end) the contract - depending on what term has been breached.

How do I negotiate a contract?

- Mark draft contracts 'draft' and 'subject to contract' until you are ready to sign, to avoid being contractually bound to the wrong terms.
 - Instruct a lawyer to prepare and negotiate the contract.
- Work through your strategy, anticipating the other party's position, and stick to it:

PREFERRED POSITION Start with what you want (within reason)	FALL-BACK Identify upfront what you could concede	WALK AWAY Be clear on your 'red lines': if crossed, walk away
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Battle of the forms

- Each party claims their standard terms apply
- Usually the last set of terms provided before acceptance or performance of contract will apply (often supplier who says it will only supply if its standard terms apply)
- Consider a clause stating which terms prevail
- Usual course of dealing may be evidence of which terms are being used

Also think about

- Dispute resolution: in advance, decide how you will deal with disputes
- Specific activities - may require specific terms. For example: Selling Online, commercial agents, construction, etc.
 - Employees & Other Staff
- Trade Secrets & Confidentiality • Intellectual Property Rights

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