

# LEGAL ENGLISH COURSE

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## *LESSON 1*



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# Negotiating an Agreement

In the contract formation process the parties negotiate the **terms and conditions** of the agreement. They must act in **good faith**, which means in compliance with reasonable commercial standards of fair dealing in a given trade or business.

The document subject to negotiation is commonly referred to as **draft** contract/agreement.

# Letter of Intent

A widely used document signed by the parties during contract negotiations is the **Letter of Intent** (also termed Memorandum of Understanding or Letter of Understanding).

It sets forth the **preliminary understanding** of the parties and should not be binding.

# Typical Contents of an LOI

A **Letter of Intent** generally sets forth:

- (a) the **premises** of the bargain
- (b) the **terms** for carrying out contract negotiations (such as good faith, confidentiality obligations, etc.)
- (c) the **objectives** of the contract
- (d) **break-up fees** (binding!)

# Sample Clause in an LOI

*“This Letter of Intent **summarises** the current intention of the Parties and **does not represent** a legally binding agreement; it is an expression of the individual and collective **effort** by the Parties to work jointly to attain a shared objective to the benefit of the Parties.”*



# Confidentiality Agreement

A **Confidentiality Agreement** generally sets forth:

- (a) the **obligation not to disclose** the Confidential Information (“C.I.”)
- (b) the **duty of care** by the Receiving Party
- (c) the right to disclose C.I. on a **need to know** basis
- (d) the **survival** of the confidentiality obligation

# Formation of Contract: rights and obligations

A **contract** is an agreement entered into between two or more parties who intend to create legal relations (or change or extinguish them). If the parties enter into a valid contract, they will be bound by its terms.

The contract creates legal **rights** and **obligations** and shall be **binding** upon the parties.

# Offer and Acceptance

Generally, to form a contract the **offer** has to be met by an **acceptance** relating to the offer, accepting its terms and conditions. Acceptance is usually effective on **receipt**; if there is an acceptance **by conduct**, the contract shall be deemed to be formed on the date the performance started.



# Rejection, Counter-Offer and Modified Acceptance

The offeree may reject the offer → **rejection**: (no contract is formed)

The offeree may amend the terms of the offer → **counter-offer** (no contract is formed)

Some legal systems consider a **modified acceptance** as an acceptance if changes do not materially alter the offer.

# General Terms and Conditions of Contract

General terms and conditions of contract are **contract templates** regulating the general aspects of a contract, such as warranty, confidentiality, force-majeure, governing law, jurisdiction, etc. They contain general **standard clauses** which can be adapted to suit different types of contracts.

# General Terms and Conditions of Contract

Generally, these conditions are **incorporated by reference into the contract**.

This means that they are deemed to be an **integral part** of the contract even if they have not been subject to any negotiations nor have they been attached to the contract: they've been simply **“referred to”**.

# Legal requirements for contracts

We must consider that each legal system sets forth **a number of legal requirements** for contracts.

Generally, in order to be valid a contract must be defined as to its **objects**, which must be **legal**, and the parties must have the **intention** to be bound by its provisions.

# Valid and enforceable contracts

A contract is **valid** if it meets the legal requirements provided by the applicable law.

A contract **comes into effect** on the **effective date**.

A contract is **enforceable** when it is capable of being made effective, because the law gives force and effect to its provisions.

# Void/null or voidable contracts

A **void** (or **null**) contract has no legal effects, while a **voidable** contract has legal effects until annulled.

Generally, illegal contracts are **void**, while **voidability** occurs when there is a lack of capacity of the party/ies or in case of duress, or misrepresentations inducing the other party to enter into the contract.

# Conditions in contracts

A **condition** is an event that is not certain to occur. A **condition precedent** must be fulfilled before a duty to perform comes into effect. A **condition subsequent** discharges a duty of performance. Commonly, conditions are expressly denoted by using conditional language such as “on condition that”, “subject to”, “provided that”, “if”, “unless”.

# Performance of contractual obligations

The **successful completion of contractual obligations** by the parties depends on such performance being in compliance with the terms and conditions of contract.

A defective performance usually shall result in a **breach of contract** and give rise to a **contractual liability** of the breaching party.



# Remedies to breach of contract

When a breach of contract occurs, the non-breaching party may be entitled to contractual remedies, such as **penalty, liquidated damages, contract termination.**

Besides these remedies, the non-breaching party may seek other **judicial remedies** in the form of legal action against the breaching party.

# Penalty/liquidated damages

- **Penalty/liquidated damages:** the ‘rule against penalties’ in common law countries
- **D.C.F.R. Chapter 4, 3:712 Stipulated payment for non-performance** - (i) *Where the terms regulating an obligation provide that a debtor who fails to perform the obligation is to pay a specified sum to the creditor for such non-performance, the creditor is entitled to that sum irrespective of the actual loss.*

# Penalty/liquidated damages

## **DCFR, Chapter 4, 3:712 Stipulated payment for non-performance**

(ii) *However, despite any provision to the contrary, the sum so specified in a contract or other juridical act may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.”*

# Penalty clause

*“In the event one party fails to perform any contractual obligations, the non-breaching party shall be entitled to payment of [•] by way of penalty, without prejudice to such non-breaching party’s rights to commence legal action claiming any further losses or damages suffered. The penalty shall be due and payable without any requirement of formal notice of default to the breaching party.”*

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