

**CONCISE  
COLLEGE  
TEXTS**



**THE MAKING OF  
BUSINESS CONTRACTS**

**A. Harding Boulton**

*SECOND EDITION*

**SWEET  
&  
MAXWELL**

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THE MAKING  
OF  
BUSINESS CONTRACTS

BY  
A. HARDING BOULTON, LL.B., F.C.I.S.

SECOND EDITION

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## PREFACE TO FIRST EDITION

THIS book is an attempt to break new ground. It is concerned with the twilight borderland where the law and the practice of industry and commerce meet and sometimes overlap. The underlying motif of the greater part of the book could be indicated by suggesting as a sub-title "How to Read (and Write) the Small Type on the Back."

Certainly no apology is needed for offering a book on this subject. The vast majority of the contracts involved in industry and commerce other than those in the retail trade are governed by more or less stereotyped conditions which are not subjected to critical scrutiny as often as they might be. The purpose of this book is to help the business executive to see these documents in their right perspective and to read them with discernment. That it might have been a much more exhaustive study if the author had been able to devote more time to its compilation is certain. It is equally certain that it could have been a much better book if he had been gifted with greater ability. Such as it is, however, it is offered to the reader in the hope that it will be found of interest and some value.

The author acknowledges his indebtedness to the many anonymous draftsmen who have provided him with illustrations. Where these are used merely for the purposes of illustration, and especially where they are made the subject of critical comment, it has not been thought desirable to indicate their source. They are, however, all entirely authentic.

The book is necessarily selective, and is coloured by the author's experience in the engineering industry. If there is bias, it is probably towards sympathy for the manufacturer.

In the latter part of the book suggestions are made regarding the content of certain typical forms of agreement familiar in the conduct of business relations. In these chapters the intention has not been to offer any forms of precedents nor to criticise existing precedents, but to assist the business executive to clarify his thoughts before preparing his contract, or, in the alternative, instructing his lawyers regarding the points which are to be

covered. The matter they contain is the fruit of experience rather than of theory.

The author also gratefully acknowledges the permission given by the British Electrical and Allied Manufacturers Association, the Institution of Electrical Engineers, and the Purchasing Officers Association for the reproduction of standard sets of conditions of sale and purchase.

A. HARDING BOULTON

## PREFACE TO SECOND EDITION

IN offering a second edition of this book the opportunity has been taken to introduce a number of minor changes which, it is hoped, will enhance its value to the student of Management. Notice has been taken of statutes passed since the preparation of the first edition, including the Misrepresentation Act 1967 and the Trade Descriptions Act 1968. A section has been introduced dealing with the special features of hire purchase contracts, one with the special considerations applying to the international carriage of goods. A short chapter has been added dealing with price variations, and a longer one briefly reviewing the nature of the contract of insurance. Finally, because this work is aimed particularly at the student of business and management studies to whom the quotation of case reports tends to be a mystery, a brief note about legal case references follows the Preface.

A. HARDING BOULTON

## A NOTE ABOUT LEGAL CASE REFERENCES

It is customary, when quoting a legal case, to append a reference by which anyone wishing to follow out more critically the point it illustrates may find it. Although readers of this book are not, on the whole, likely to wish to do this, these references have been given. They follow a recognised pattern, thus—

Edwards v. Skyways Ltd. [1964] 1 W.L.R. 349

Williams v. Fitzmaurice (1858) 3 M. & N. 844

This means that in the first case the plaintiff was Edwards and the defendant Skyways Ltd., and in the second, the plaintiff Williams and the defendant Fitzmaurice. The years in which the cases were contested are shown in the bracket. The rest of the reference is an indication of the series of reports and the page number where it may be found.

Before 1865, when the Incorporated Council of Law Reporting was formed, the reports were private ventures, and, as such, patchy in extent and quality. As one goes back, they are increasingly brief and selective. Law reports are available in public libraries only in major cities. Such libraries as that of the Guildhall or the City of Westminster carry fairly complete sets, as do the Universities possessing faculties of law, and, for later years, the professional institutes serving the accountancy and secretarial professions. The Law Society and the Inns of Court naturally seek to be exhaustive, and, as a courtesy, will generally allow non-members to examine a book if approached. Otherwise, the British Museum Library remains as a last resource.

The following explains the abbreviations used. Dates, where given, indicate the periods which the series covers.

A.C.	Appeal Court
All E.R.	All England Reports
App. Cas.	Law Reports—Appeal Cases
C.P.D.	Law Reports, Common Pleas Division
E.R.	English Reports
Ex.	Exchequer Reports
	(Welsby, Murestone & Gordon)
H. & N.	Hurlstone and Norman's Reports

H.L. Cas.	Clark's Reports, House of Lords
K.B.	King's Bench
Lloyd's Rep.	Lloyd's List Law Reports
M. & W.	Meeson and Welsby's Reports 1836–1847
Q.B.	Queen's Bench
Q.B.D.	Queen's Bench Division
T.L.R.	<i>Times</i> Law Reports
W.L.R.	Weekly Law Reports



## CASES REFERRED TO IN THE TEXT

	PAGE
ALEXANDER v. Railway Executive [1951] 2 K.B. 882 .....	126
BENNETT and White (Calgary) v. Municipal District of Sugar City No. 5 [1951] A.C. 786 (P.C.) .....	81
CARR v. Lancashire and Yorkshire Railway Company (1852) 7 Ex. 707 .....	119
Cranleigh Precision Engineering v. Bryant [1965] 1 W.L.R. 1293 .....	170
DE Morgan Snell and Co. and Rio de Janeiro Flour Mills and Granaries Ltd., Re (1892) 8 T.L.R. 292 .....	66
Dunlop Ltd. v. New Garage Co. Ltd. [1915] A.C. 79 (H.L.) .....	100
EDWARDS v. Skyways Ltd. [1964] 1 W.L.R. 349 .....	150
GLYNN v. Margetson [1893] A.C. 351 .....	46, 126
HADLEY v. Baxendale (1854) 9 Ex. 341 .....	96, 101, 102
Hickman and Co. v. Roberts [1913] A.C. 229 (H.L.) .....	66, 109, 110
JONES and James v. Provincial (1929) 46 T.L.R. 71 .....	139
LEBEAUPIN v. Crispin [1920] 2 K.B. 714 .....	90
Lee (John) and Son (Grantham) Ltd. v. Railway Executive [1949] 2 All E.R. 581 .....	126
Lewis v. Great Western Ry. (1877) 3 Q.B.D. 195 .....	125
Lisi v. Alitalia-Linee Aeree Italiane S.p.A. U.S. Supreme Ct. [1968] 1 Lloyd's Rep. 505 .....	45
Lucena v. Craufurd (1808) 127 E.R. 858 (H.L.) .....	135
MACAURA v. Northern Assurance Co. [1925] A.C. 619 .....	140
MatSoukis v. Priestman & Co. [1915] 1 K.B. 681 .....	90
Moresk Cleaners v. Hicks [1966] 2 Lloyd's Rep. 338 .....	67
NIBLETT v. Confectioners Materials Co. [1921] 3 K.B. 387 .....	50
PANAMENA Europea Navigacion (Compania Ltda.) v. Leyland (Fred- erick) and Co. Ltd. (J. Russell and Co.) [1947] A.C. 428 (H.L.) .....	64
Parker v. South Eastern Ry. (1877) 2 C.P.D. 416 .....	45
Parkinson (Sir Lindsay) and Co. v. H.M. Commissioner of Works and Public Buildings [1949] 2 K.B. 632 .....	79
Peek v. North Staffordshire Ry. Co. (1863) 10 H.L. Cas. 473 .....	120
Priestley v. Fowler (1837) 3 M. & W. 1 .....	147
SUMNER Permain v. Webb [1922] 1 K.B. 55 (C.A.) .....	50
THORN v. Mayor and Commonalty of London (1876) 1 App. Cas. 120 .....	80
VICTORIA Laundry (Windsor) Ltd. v. Newman Industries Coulson & Co. (Third Parties) [1949] 2 K.B. 528 .....	23, 96
WELLS (Merstham) v. Buckland Sand and Silica Co. [1965] 2 Q.B. 170 .....	15
White and Carter (Councils) Ltd. v. McGregor [1962] A.C. 413 .....	36
Williams v. Fitzmaurice (1858) 3 H. & N. 844 .....	79
Workington Harbour and Dock Board v. Trade Indemnity Co. Ltd. (No. 2) [1938] 2 All E.R. 101 .....	106

## STATUTES REFERRED TO IN TEXT

1623 Statute of Monopolies (21 Jac. 1, c. 3) ...	158	1950 Arbitration Act (14 Geo. 6, c. 27) .....	33
1830 Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68)	115, 116	1953 Transport Act (1 & 2 Eliz. 2, c. 13) .....	117
1854 Railway and Canal Traffic Act (178 18 Vict. c. 31) .....	119	1954 Hire-Purchase Act (2 & 3 Eliz. 2, c. 51) ...	54
1893 Sale of Goods Act (56 & 57 Vict. c. 71) ...	7, 10, 14-40, 49, 60	1956 Restrictive Trade Prac- tices Act (4 & 5 Eliz. 2, c. 68) ...	41, 113
1906 Marine Insurance Act (6 Edw. 7, c. 41)	138	1961 Carriage by Air Act (9 & 10 Eliz. 2, c. 27)	130
1924 Carriage of Goods by Sea Act (14 & 15 Geo. 5, c. 22) .....	129	1962 Carriage by Air (Sup- plementary Provi- sions) Act (10 & 11 Eliz. 2, c. 43) .....	130
1932 Carriage by Air Act (22 & 23 Geo. 5, c. 36)	130	Transport Act (10 & 11 Eliz. 2, c. 46) .....	120
1938 Hire-Purchase Act (1 & 2 Geo. 6, c. 53) ...	7, 53, 54	1963 Contracts of Employ- ment Act (c. 49) ...	147, 149
1938 Architects Registration Act (1 & 2 Geo. 6, c. 54) .....	65	1964 Hire-Purchase Act (c. 53) .....	54
1947 Transport Act (10 & 11 Geo. 6, c. 49) ...	117	Resale Prices Act (c. 58) .....	179
1948 Companies Act (11 & 12 Geo. 6, c. 38) ...	155	1965 Redundancy Payments Act (c. 62) .....	153
Law Reform (Personal Injuries) Act (11 & 12 Geo. 6, c. 41)	147	1967 Misrepresentation Act (c. 7) .....	7, 19, 138
1949 Patents Act (12, 13 & 14 Geo. 6, c. 87)	159, 161, 167	1968 Trade Descriptions Act (c. 29) .....	7, 18
		1969 Employers Liability (Com- pulsory Insurance) Act (c. 57) .....	141

## CONTENTS

<i>Preface to First Edition</i> . . . . .	v
<i>Preface to Second Edition</i> . . . . .	vii
<i>A Note About Legal Case References</i> . . . . .	ix
<i>Cases referred to in the Text</i> . . . . .	xiii
<i>Statutes referred to in the Text</i> . . . . .	xiv

### PART ONE

#### STANDARD FORM CONTRACTS

1. INTRODUCTION—THE LEGAL FUNCTION IN BUSINESS . . . . .	1
2. THE SALE AND PURCHASE OF GOODS . . . . .	7
1. The Function of Conditions of Sale . . . . .	7
2. Deviations from the Sale of Goods Act . . . . .	14
(i) Definition of the contract . . . . .	15
(ii) Suitability for a purpose . . . . .	18
(iii) Performance . . . . .	21
(iv) Time for delivery . . . . .	23
(v) Defects and maintenance guarantees . . . . .	34
(vi) The right of cancellation . . . . .	36
(vii) Miscellaneous matters . . . . .	39
3. The Application of Conditions of Sale . . . . .	40
4. Patents and the Sale of Goods . . . . .	49
5. Hire-Purchase Contracts . . . . .	52
3. CONTRACTS FOR BUILDING, ENGINEERING WORKS AND THE ERECTION OF MACHINERY . . . . .	58
1. The Standard Forms . . . . .	58
2. Architects and Engineers . . . . .	63
3. Assignment and Sub-letting . . . . .	69
4. Sub-contractors and the Terms of Sub-contracts . . . . .	71
5. Variations . . . . .	76
6. Vesting of Plant . . . . .	80
7. Liability for Loss or Damage and Insurance . . . . .	81

8. Extension of Time for Completion . . . . .	87
9. Liquidated Damages . . . . .	95
10. Sureties and Guarantees . . . . .	104
11. Certificates for Payment . . . . .	109
4. PRICE VARIATION IN CONTRACTS . . . . .	112
5. THE CARRIAGE OF GOODS . . . . .	115
1. In Home Trade . . . . .	115
2. In International Trade . . . . .	129

## PART TWO

### OTHER COMMERCIAL CONTRACTS

6. INSURANCE . . . . .	135
1. The Proposal and the Policy . . . . .	137
2. Law and Practice . . . . .	139
3. Insurable Interest . . . . .	140
4. Liability Insurance . . . . .	141
5. Marine Insurance . . . . .	142
6. Export Credit Guarantees . . . . .	143
7. THE CONTRACT OF EMPLOYMENT . . . . .	145
8. PATENT LICENCES AND "KNOW-HOW" AGREEMENTS . . . . .	158
1. The Basic Facts . . . . .	162
2. The Interest of the Licensor . . . . .	163
3. The Interest of the Licensee . . . . .	165
9. "AGENCIES" AND DISTRIBUTOR AGREEMENTS . . . . .	172
10. WRITING THE COMMERCIAL AGREEMENT . . . . .	183

#### APPENDIX 1

Conditions of Sale (A) for Machinery and Equipment (Exclusive of Erection) United Kingdom (1967 Edition, British Electrical and Allied Manufacturers Association)	190
---	-----

#### APPENDIX 2

Purchasing Officers Association, Term and Conditions of Contract, 1960 Edition . . . . .	196
---	-----

#### APPENDIX 3

Model Form of General Conditions of Contract (C), 1956 Edition . . . . .	208
---	-----

<i>Index</i> . . . . .	217
------------------------	-----

## CHAPTER 1

### INTRODUCTION—THE LEGAL FUNCTION IN BUSINESS

THERE are many books on the law of contract. They differ widely in sophistication and usefulness, ranging from great classics used by the practitioner, written, rewritten, and annotated by successive editors and revisers long after their original and illustrious authors are dead, to the elementary textbooks designed to do little more than to assist the young student over his first hurdles when preparing for the intermediate examination for a commercial qualification. Into this wide field this book is not designed to trespass; its purpose may be defined as being to provide practical assistance to those who, not being lawyers, are yet responsible for exercising the legal function in business.

The phrase "the legal function in business" as used here calls for some explanation, and in the course of the explanation the scope and purpose of the book will become clearer. It is an evident fact that commercial life consists of the making and fulfilling of contracts, using the word "contract" in its true sense as meaning any agreement designed to create obligations enforceable at law. Almost every act in business life creates legal rights and duties; the right to receive benefits, the duty to pay for them, the duty to supply goods or services, the right to be paid. As business goes on in its accustomed way, the fact that it consists of this web of legal rights and duties may not occupy the forefront of our minds. Indeed, it is good that it should not, for it would be intolerable to live our business lives always thinking of the precise legal obligations which press upon us at every moment of the day, and perhaps worse to be engrossed always in the definition and exaction of our precisely determined rights. It is good that the necessarily rigid and narrow concepts of legal rights and duties should be hidden from immediate view by the zest for activity, the stimulus of the rough and tumble of competition, and by the equivalent, in this machine age, of the joy a craftsman feels in achievement. But the fact of rights and duties is never very far away in the background. It is desirable, indeed imperative, that legal rights and duties should be always recognised as underlying

the daily activity, underpinning and giving strength to the structure of business. Because this is so, it is important that they should indeed be what they are imagined to be, that they should possess the strength and precision they are assumed to have. The first requirement for the prevention of disputes is that each party should know what the rights and obligations of both parties to a contract are, and that they should never proceed on the basis of merely vague ideas of what is required, each thinking differently from the other and acting accordingly. From time to time, when things go awry, when goods are defective or due payments are not made, when the good fellowship evaporates from the daily give and take of commercial relationship, the legal rights will be invoked and the strength of the structure that lies behind the façade of business enthusiasm and bonhomie will come to the test.

The businessman tends to adopt an ambivalent view towards the law and lawyers. He is desperately anxious to be able to insist upon his legal rights if he has need so to do, while hating to be thought to adopt a "legalistic" attitude. He views lawyers with some degree of awe, touched with affection when it is his own lawyer who is the subject, and with dislike and suspicion when other people's lawyers are concerned. His own lawyer is the man to whom he repairs readily enough when trouble is upon him, when litigation threatens, when debtors are neglectful or creditors unyielding. But at other times he feels that the lawyer is somewhat remote from the facts of life as indeed, in one sense, he is and knows himself to be. Sometimes when he discusses with other businessmen arrangements which he seeks to enter into with them, especially in the early stages of negotiations, he is very ready to suggest "let's keep the lawyers out of this." He feels, not always without some justification, that the presence of the lawyer in business discussion can operate as a brake or create inhibitions or suspicions. He refers to the language which lawyers use in their documents as legal "jargon" or "verbiage" and is rather contemptuous of it, and may be heard to refer in general and disparaging terms to the "small type on the back" of some printed document by which he will bind or be bound.

The reason for this is very easy to understand. It is that the law involves not only a certain body of knowledge, but a way of thinking, and that way of thinking is not one easy to enter into

in the occasional enthusiasms and the frequent dull routines of business life. It is the habit of the lawyer to ask for precision. There is a stage of negotiation when the time is not right for precision, and at that stage the lawyer's presence may be unwelcome. His habit of analysis causes him to be suspect when the attention of those who have business in hand is engrossed with imaginative forward thinking. When the businessman is in trouble, however, he goes to his lawyer, and if he is wise he will go readily when the first lineaments of trouble are discerned. He consults the lawyer readily enough, too, when the problems he faces are of particular magnitude or of an unfamiliar quality.

Passing down the scale of business transactions from the negotiation of major contracts and the facing of crises, there are a number of transactions at the other end which occur so frequently and are of such a routine nature that nothing at all appears in writing in connection with them and the facts that they create legal rights and duties is hardly remembered. The greater part of the retail trade comes within this category. Without any specific contract in writing and perhaps no contract in spoken words (as in a self-service store) these contracts are such that the need to define any legal rights and duties does not arise in one case in a thousand and when it does can well be left to the common law.

Between the two extremes represented, on the one hand, by the contract sufficiently important or complex for the lawyers to be consulted, and on the other, those which are so frequent or of such a routine nature as to be treated casually with hardly any recognition that they involve a contractual operation at all, lie innumerable intermediate contracts which make up a large part of daily business life. They can involve important questions and, indeed, can give rise to consequences that can break or make a business, but in their formation the lawyer is not normally consulted. The ordering of goods, the acceptance of orders for goods, the carriage of goods, agreements for agencies, building and structural engineering contracts, the employment of staff—all these are for the most part contracts which are not taken to the lawyers for negotiation, and it will usually be found that within the business itself some person (or persons) may exercise the "legal function" in respect of these arrangements.

It may be exercised only very loosely, but generally the responsibility of reading the documents by which such contracts

are entered into, or of settling their form when they originate within the business itself, will be found to rest upon some executive or to be dispersed amongst a limited number of people. Not infrequently the company secretary carries the responsibility, or it may be a manager or managing director or contract manager or, within their own functional operations, the buyer or sales manager. Almost certainly the function will be exercised in a way that merges it with other duties, and for this reason it may be done very imperfectly. It may never be clearly visualised as the important function it is. If, however, in a business of any magnitude there is no competent person available to look at the transactions of the undertaking from a legal point of view, it is easy for trouble to lurk unseen. It may be found, for example, that when it is desired to sue another undertaking for breach of contract, scrutiny of the facts and the papers by lawyers may disclose that there never was a contract to break, or perhaps, even more exasperating, the contract was unwittingly entered into in words originating from the other side which completely erode the case on which it is desired to initiate action.

If, however, this function is performed properly many dangers will be avoided. It should be envisaged clearly and allotted to an executive with adequate intelligence and training. It is becoming increasingly common for the larger company to take a solicitor or barrister into its staff, and often indeed, to create a separate legal department which operates almost as a professional firm. The degree to which such a department is consulted varies, as does its effective authority. But smaller businesses cannot afford this luxury: only a really large undertaking can justify the expense, or provide the steady load of worthwhile work without which a professionally qualified person will not be satisfied even though he be adequately paid. For this reason it is right that in the training afforded to those who aspire to office as business executives some instruction in the general principles of law is normally included. The qualifying examinations of the professional associations issuing qualifications in accountancy, secretaryship, and other business skills normally include papers on those branches of the law which seem most relevant to the respective avocations.

Knowledge gained in order to pass a necessarily elementary examination is not always to the point, however. Business transactions are tending to be increasingly integrated into routine



procedures, achieved through the use of printed forms, standard conditions and the like. The classical cases which still properly find their places in the elementary textbooks, cases about horses that kick, the painting of coach doors, and the inevitable snail in the bottle are remote from the present world, though the principles they illustrate remain valid. There is need to supplement the basic knowledge imparted by the elementary textbook of contract law by some illustrations of the way in which some typical contracts are entered into in practice, of the place and purpose of common form contracts. In brief there is need for guidance as to what to look for in the "small type on the back." In the last resort nothing can take the place of experience, but the value of experience can be enhanced by guidance. There is no quality so valuable in business nor perhaps any so rare as the ability to be prompt, reliable and firm in judgment, and any help towards the development of this quality is well given and received. All of us know how valuable is the rare quality possessed by just a few men and women, the ability to take a swift grasp of essentials and to detect, almost at a glance, the nub of a problem, bringing simplicity out of confusion. Such a quality is, indeed, a natural gift, but this is not to say that it can never be cultivated.

The scope of this book is, then, to help those who, not being lawyers, are in day-to-day contact with the texture of business and have to exercise the legal function in relation to the daily flux of affairs. In the exercise of this function they need to show common sense and qualities of sound judgment. The book will not deal with the common law aspects of the kind of transaction that is not evidenced by writing, nor, on the other hand, with the kind of contract in connection with which solicitors are customarily consulted at the time when it is made. It is concerned with a group of typical contracts which lie between the two. It is a broad terrain very fruitful in disputes and misunderstandings and as such is one which can and does provide much raw material for litigation.

No attempt has been made to be exhaustive, for to cover the whole field of commercial contracts would not only require many volumes but would also call for a team of experts. The contracts concerned are those relating to the buying and selling of goods, the construction of buildings, civil engineering works and erection of machinery, the carriage of goods, agencies and distributorships,