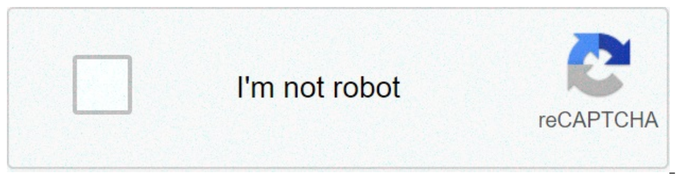

Continue

Legally binding contract forms

A contract is a legally binding agreement between at least two parties. The basic principles of formation of contract govern formation all contracts, whether you: buy or sell services sell a product sell a business buy intellectual property sell products to consumers give a guarantee. They're everywhere. And it's all controlled by contract law. Some contracts must be in writing to be enforceable. Most don't. Many businesses make the mistake that if there is no written contract, there cannot be a contract. The rules apply to oral contracts as well, and those formed by conduct of the parties. The rules apply across the board. Essential Elements of Contracts To make a legally binding contract, 5 elements must be satisfied: offer, acceptance, consideration, intention and capacity: Offer: One party makes an offer Acceptance: The other party accepts the offer Consideration: Each party provides consideration to the other. Consideration can be: a promise to pay money a promise to do something a promise not to do something, or promise to provide something else of value. That doesn't mean it needs to be valuable. £1.00 could be valuable consideration. And it doesn't have to be money. Intention to be legally bound: Both parties have an intention to be legally bound by the agreement (which is proposed by the offer, and then accepted) The parties have contractual capacity: The parties are legal entities recognised by law, such as companies, limited liability partnerships and individuals of at least 18 years of age. Once those elements exist, you have legally binding contract. But getting there can be tricky, particularly if it's a verbal contract. We run through each of the elements below. Also, there must be no vitiating factors (such as misrepresentation) which impair the validity of formation of the contract. Otherwise, what was a legally binding can reversed, and declared void ab initio at law: ie at law, it was never made. The remedy that makes that happen is rescission. How can a contract be made? The form of communication used to make the contract is irrelevant, other than where statutory requirements dictate that to be enforceable, it must satisfy the named prerequisites. Contracts therefore be made - and varied - in telephone calls, Skype calls, Skype IMs, face to face conversations, email, SMS (text) messages, WhatsApp messages, Telegram or Signal messages - you name it. In fact, words do not even need to be spoken to form a contract, provided each of the 5 elements are present. Forming a contract could be done with: a nod of your head Morse Code Flag semaphore. That's because they're all methods of communication. When statute law has requirements for a type of contract, they're usually that the agreement is recorded in written form, and signed by the one or both of the parties or their authorised agent. For example: assignments of intellectual property and exclusive licences must be signed by the owner/assignor of the intellectual property guarantees must be signed by the guarantor transfers of land must be in writing and signed by the parties Forming Legally Binding Contracts Principles of Contract law in Business If you don't mind me saying, to properly understand contract law, you need to appreciate the principle of freedom of contract. Freedom of Contract One of the first principles of contract law is autonomy. Businesses are free to contract on terms and on any terms they choose. They may allocate risks within their contracts as they wish. It is up to the parties to decide what risks they will accept and on what terms. Courts will respect their decisions and enforce the deals that they sign up to. Of course there are exceptions. But the principle of freedom of contract comes before all of the exceptions. That's basically how the law works: you can agree to whatever you like, unless the law takes it away. These areas of law include: It means parties choosing to contract with one another can do so on any terms. For so long as it satisfies the requirements of a contract, it's binding. Unless the law says it's not. Fairness But there are exceptions to these policies. The exceptions are limited. The exceptions revolve around unfair conduct. When a party does not deliver on their promises, it's a breach of contract. When a party acts without notice to their counterpart, legal consequences follow. Notice in this context means telling the counterpart before: imposing harsh or oppressive terms in a contract. The more unreasonable or extortionate a contract term is, the more effort needs to be taken to draw attention to it before the contract is finalised steps are taken which could affect a party's legal rights - where they have no legal entitlement to do so. Not giving notice can backfire - and badly Requiring a contract to use clear words to deprive a party of their usual fundamental legal rights When there is an imbalance between the bargaining power of negotiating parties and one takes advantage of the other. They're all principles of fair and open dealing. In all of these types of cases, legal remedies are available to take corrective action, as sanctioned by the law. Business Law and Courts There is a downside to freedom of contract too. Courts expect businesses to understand the legal effect of documents that they sign and commit to. Courts say that the parties to a contract are the best judge of the commercial fairness of a proposed contract. Businesses are also the best judge to decide whether the terms of an agreement are reasonable - before committing them. Courts do not readily accept in business law cases that a company will commit itself to an agreement which it thinks is unfair, or contains unreasonable terms. Unless one party has taken unfair advantage of the other, or a term is so unreasonable that it cannot properly have been understood or considered, courts are unlikely to interfere with the contractual relationship. Courts know just like everyone else that that insurance is available to mitigate against risk presented by any particular contract. Individuals and Courts Likewise, individuals are treated in the fashion. One of the leading statements of the approach taken by the common law was recorded in 1875 by Jessell MR in Printing and Numerical Registering Co v Sampson: If there is one thing that more than another public policy required, it is that [people] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. That's still the position at common law. It's this harsh approach that ultimately led to the introduction of the Unfair Contract Terms Act in 1978, and other consumer protection legislation after that. To be clear - consumer protection legislation is there to protect those buying goods and services as consumers, not as businesses: ie business to consumer contracts. These days, the Unfair Contract Terms Act applies to business to business contracts. The overriding principle is that it's a legally being contract unless some law or legal principle says that it's not. Here are the elements that make a contract, a contract. The Elements of a Contract: The Law 1. Offers in Contract Law An offer is a promise to do, or not to do something that is capable of acceptance by another person. An offer is made by an “offeror” to an “offeree”. What constitutes an Offer? An offer must be “capable of acceptance”. This is a reference to legal certainty of what exactly is being offered. More on that below. Whether it is an offer capable of acceptance will depend on the answer to this question: Would a reasonable person to whom the offer was made, acting reasonably, understand that the offeror was making a proposal to which the offeror intended to be bound in the event of an unequivocal acceptance? The offer must: be able to be accepted without further ado. convey to a reasonable person that the maker of the proposal (ie the offeror) intended to be immediately bound by the proposal if the offeror accepted it. Otherwise, it’s not an offer. Subjective intention irrelevant: If a reasonable person would believe by the words or conduct that the offeror intended to be legally bound by their offer, they will be bound. For legal purposes, the subjective intention of the offeror by making the offer is irrelevant. It's not a factor taken into consideration. Consequently, if the offeror offers to sell specific pencil for £10.00 (deliberately pricey), and the offer is accepted, the offeror cannot then go back and say they do not wish to sell it. The reason is this: if all of the essential elements of the contract have been agreed by the offer and acceptance, then Then, contract = formed. An offer may be made to a specific legal person, a class of persons or to anyone in the world. An offer can only be accepted by someone who knows the offer exists. An offer can only be accepted by a person to whom it was made, whether that's one person or a class of persons. When an offer is made, what happens next? One of the following may happen: The offer is accepted by the offeree. That consummates the “agreement” for the purposes of a legally binding contract. The offer lapses: with the passage of time if the offer is not accepted, or because conditions attached to the offer are not satisfied The offer is rejected outright by the offeree The offer is expressly revoked or withdrawn (they're the same thing) by the offeror prior to acceptance, or A counteroffer may be made, which automatically rejects the offer preceding it. Each of these possible responses to an offer are fundamentally important. That’s because a legally binding contract will - or won’t - be formed, depending on what happens next. To reach agreement on what has been agreed and to form a contract, the parties must agree: to the same subject matter, on the same terms. It’s that simple - in principle. In the real world, it can get quite messy. That's because: an acceptance could be equivocal a lapse of an offer may be uncertain. The amount of time that passes between the offer being made and lapse of the offer must be a reasonable time. What is a reasonable time in the circumstances of the case? a rejection of the offer could have been followed by a commencement of work. What are the terms of the contract upon which work commenced? 2. Acceptance in Contract Law Acceptance of an offer forms the "agreement" - not the contract - between the parties. (Forming a contract - rather than merely reaching agreement - in the strict sense of the word requires the presence of the other 3 elements listed above: (1) consideration, (2) with the intention to create a legally binding contract, and (3) contractual capacity) Acceptance in contract law must: accept an offer which remains open Acceptance must take place while the offer is open for acceptance. An offer made today is not likely to remain open for acceptance months from now. It would have lapsed with time and no longer remain available for acceptance. be on the same terms as the offer Where there is a variance between what has been offered and the “acceptance”, the “acceptance” is treated as a counteroffer. (A mismatch between the offer and the acceptance is one of the things the law of mistake is about) For example, if I offer to work for you on Saturdays and Sundays and you say, “OK, I’ll accept you working on Fridays and Saturdays” – you have made a counteroffer. You have not accepted my offer on the terms it was offered. be unequivocal There must be no doubt that the offer has been accepted. Usually, it’s not acceptance to: acknowledge receipt of an offer or an order express an intention to accept an order request an invoice or express an intention to place an order. Acceptance doesn't need to be complicated or formal. Suppose a shopkeeper that makes an offer to sell you a specified pair of shoes for £10. You respond with, “Yes”, “OK”, “No problem”, "I accept" or a nod of your head. That’s unequivocal. be unconditional The acceptance cannot be subject to a further condition being satisfied. Taking the example above, if you were to say, “No problem, I’ll take the shoes when I return in 10 minutes, after I go to the bank”. The acceptance in this case is not unconditional. You need to return to the shop to accept the offer. You have not accepted the offer there and then. Remember the card game named Snap? You have a moment to snap. That's acceptance. Once the next card falls, it's too late to accept. (Yeah, you're probably wondering. I once did a trial involving foreign contract law. The judge said (in terms), "So in the law of [country], you can't go snap?". The judge was referring to the requirement to accept there and then. And our experience is not an isolated instance. other High Court judges have used the analogy too). must be communicated to the offeror Acceptance is usually communicated either orally or in writing. It might also be drawn from the conduct of the parties. The offeror is entitled to know whether the contract has been concluded. It is not open for the offeror to say that the offer will be treated as accepted by the offeree unless they hear differently. Silence and inaction are by their nature are equivocal. There can be more than one reason for the silence and inactivity. It won't be assumed to be acceptance unless combined with conduct indicating acceptance - but that's not silence of itself. Rare is the case where silence will amount to acceptance, however it can happen. Communications - voice, letter, email, SMS message or text message - are equally effective to accept an offer. But the acceptance must be received by the offeror. comply with any conditions of acceptance in the offer An offer may be accepted any mode or means of communication, unless the offeror says differently in the offer. However, if the offer specifies the means by which it must be accepted, then only that method will suffice to accept the offer. An offeror might specify that the offer must be accepted by responding in writing on blue paper. If acceptance to be effective, the acceptance must be sent on blue paper – probably by snail mail. Acceptance made by letter may be effective when the letter was posted, rather than when it was received by the offeror. That's the “postal acceptance rule”. For example, the other day I received an email which said: If you would like to take the [offer], I simply need you to reply to this email with your confirmation by stating ‘Agreed’ or ‘Confirmed’. All I needed to do is reply with the words ‘Agreed’ or ‘Confirmed’, and I would have been legally bound. See what I mean by Snap? Once these elements of acceptance are satisfied, the agreement is finalised. Examples: Simple offer and acceptance Acceptance may take place by the behaviour of the offeree, that is, by their conduct. For example, the possible outcomes are: an offer to buy goods may be accepted by delivering the goods an offer to sell goods may be made by sending the goods, and acceptance by the receiver using them. (This is the case in the general law, but laws on inertia selling displaces the rule) an offer in a request for services, can be accepted by starting to supply of the services. 3. Consideration in Contracts To be legally binding, a contract must be “supported by consideration”. Some value must pass from each party to the other for the agreement to become a legally binding agreement. Consideration: is a promise, an act, or a promise not to act. It represents the value in the contract. The requirement of consideration effectively avoids situations where persons can be legally bound for promises which have no value. Many systems of law don't enforce gratuities. They’re not supported by consideration. must move from the person making the promisee. The person that makes a promise is commonly referred to as the promisor. The promisee is the person on the other side of the negotiation. Consideration must move - ie be given in exchange for the promise given by the promisor - from the promisee. This means that consideration must be given by the person receiving a promise. Otherwise, the agreement is a gratuity and unsupported by consideration. The promisee would receive nothing. That's not good consideration to form a legally binding contract - there isn't any. need not be adequate, but must be sufficient. There is no requirement in law that the value of the consideration between the parties must be equal or near equal. Once the contract has been formed, there are different types of consideration: executory consideration is a promise that will be performed in the future executed consideration is a promise that has been performed thus giving rise to the obligation on the offeror to perform their promise past consideration is where a promise is performed before the formation of the contract and as such cannot be used to bind the other party to the contract. Past consideration is not sufficient to form a binding contract. (Consideration in contract law is simple in theory, but can get difficult in practice.) Examples: Consideration Contract Law Business to business relationship: say in a software as a service contract: one business promises to supply a product or a service (the consideration of one party), and the other business promises to pay money in exchange for the service (the other party's consideration). Open Source software licences: Under the GPL Public Licence, the open source licensor makes available software. The licensee promises to do certain things: include licence terms in reproductions of the source code of the software licensed, if they use the software in a particular way Pre-employment Context: An potential employer (the promisor) says to a prospective employee, "Come to the interview, and we'll pay for your flights to get here". The employee (the promisee) says "OK". The prospective employee's consideration is the promise to attend the interview. There's consideration provided by both the employer and employer. There's no reason in principle why that could not be a legally binding contract. 4. Capacity to Contract To form a contract, a party must have the legal capacity to do so. The categories of legal person (which includes natural persons) which don’t have legal capacity are: bankrupts minors (subject to the Minors' Contracts Act 1987) individuals operating under a mental disability (at common law) companies which have not yet been formed, and companies which have been dissolved There's also the related point that some individuals may not have power to legally bind a company or other incorporated legal entity, such as a director of a company which has appointed a liquidator (it's a point related to actual or ostensible authority). In business transactions, legal capacity will usually be one of the more straightforward elements of a contract to satisfy. 5. Intention to create Legal Relations This is the last element to create a legally binding contract. The parties must intend that the offer and acceptance is legally binding upon them: that known as "contractual intention". In commercial negotiations, it's presumed that the parties intend to create a legal relationship. When there is a dispute about whether a contract was formed or not, it's for the party alleging that there was no intention to create a legal relationship to prove it: ie they bear the burden of proof. And they must prove it on the balance of probabilities. In the context of commercial contracts, that can be a tough ask. Subjective Intentions Lord Clarke said in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14: Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. The assessment of the intention to be legally bound is usually assessed on the basis of an objective test: where a reasonable bystander would think that the parties had the relevant intention, the parties are bound. Exception to the General Rule However, there's a significant exception to the operation of this default rule. Where one of the parties actually knows that the other party does not actually have an intention to be bound, that party will not be permitted to rely on the objective test to get the better of the other contracting party. In HLB Kidsons (A Firm) v Lloyd's Underwriters [2008] EWCA Civ 1206 it was said: … a person who does not intend to contract will be bound by the objective appearances of contract, but may not himself be entitled to invoke the objective test so as to hold another party to an alleged contract. So the test is primarily objective, but falls back to a subject test when there is evidence that the other person knew that their counterpart did not have any subjective intention to make a contract. 6. Vitiating Factors: When contracts can be set aside Above are the elements which give rise to a legally binding contract. In the lead up to creation of the contract, statements can be made, misunderstandings can arise which undermine the legally binding nature of the contract. And then one of the parties might mislead their counterpart (knowingly or not) in respect to some fact, state of affairs or term of the contract. The most common causes of action which can interfere with creation of a business contract or permit it to be made void include: Misrepresentation taints the otherwise lawful formation of a contract. When a statement by one party to the other before the contract is formed is untrue, it will be a misrepresentation. An actionable misrepresentation renders the contract voidable, that is, valid until voided by the party relying on the misrepresentation when entering into the contract. The remedy for misrepresentation is rescission. Law of Mistake The law of mistake is about correcting - one way or another - fundamental misunderstandings which underlies a contract which has been made. Cases of mistake include where: both of the parties operate under a fundamental misapprehension of the facts forming the background to the contract (I buy land from you. We both think that the land is good for growing wheat. It's not suited for that purpose) one or both parties are mistaken about the terms of the contract (I thought the contract included a term that payments would be made at the end of a contract. It didn't), or one or both of the parties are mistaken about the identity of the other party. In mistake cases, the contract might be: declared void for mistake - the innocent party may rescind the contract. In these cases, it's clearer to say that the contract never existed, rather than say it's void. However, we can't say that because the law treats the contract as formed - and legally binding - under it is agreed to be void by the parties, or a court says it's void. rectified to make it say what the parties actually agreed (and not what was recorded in writing) Non est Factum Non est Factum applies when a person signs a contract is mistaken as to the fundamental character or effect to what they believed. The different must be "radical" or "very substantial" when contrasted to the actual legal effect of the document signed. The rule also may have effect to render a contract void when a contract is signed when it was blank, and filled in by another person at a later date. The Latin translation for the term is “Not my document”. Economic duress When unfair - and extreme - commercial pressure is applied to a party to enter a contract or vary an existing contract in a business context, it may be declared void. An indicator of economic duress is a demand for performance which is well in excess of the rights of the person making the demands. Illegality The law which applies to statutory illegality and common law illegality may operate render a contract void or unenforceable. Illegal consideration can play a part in a contract falling over, because the consideration can't be taken into account for the purposes of forming the contract There is an important distinction to be made between contracts which are void and claims for breach of contract. The first 4 causes of action above - if successful - may mean that the law finds that the contract is deemed to have never come into force: for legal purposes, it never existed in the first place. It's declared void. Claims for breach of contract are fundamentally different. A claim for breach of contract requires a contract to be in existence. So that means that the remedies of rescission and damages for breach of contract are inconsistent with one another: you can't have both at the same time. What isn’t a Contract? There are business dealings which give the impression that legally binding agreement has come into place. However, where the criterion to form a contract have not been satisfied there can be no contract. These include: 1. Invitation to Treat v Offer An invitation to treat is an express or implied request to someone to make an offer. They form part of preliminary discussions which lead up to an offer being made. As they are not offers, they are not able to be accepted. A definite offer capable of acceptance has not been made. Invitations to treat usually precede offers in lines or chains of communications: commonly email threads. The communication after an invitation to treat has been made is likely to be read as an offer. It follows that when something is referred to as an offer doesn’t necessarily make it an offer for the purposes of offer an acceptance. When is it an Invitation to Treat? Whether a statement or presentation of a product or service is an invitation to treat depends on: the context in which the statement was made, including: precise words used and conduct of each of the parties the seriousness of the offer whether a reasonable person could have believed that the statement was an offer the background circumstances to the statements made a court deciding that no reasonable person could have believed that the advertisement actually offered what it said: There's the US case where Pepsi was said to offer drinkers a fighter plane if they had "Pepsi Points". The lack of certainty (or otherwise) in respect of the terms of the contract whether agreement has been sought in the statement whether a definite promise to be bound was made or it was preparatory discussions concerning a possible agreement If there is no evidence one way or the other, you're left to looking at the intentions of the parties and objectively construe contractual statements to determine their legal effect. Offer or Invitation to Treat? Price quotations are not usually offers, They're no more than a simple statement of a price at which property or services might be supplied Advertisements are intended to lead in due course to binding contracts of sale after enquiries and further bargaining and negotiations, and determining the customer’s capability to pay. They include advertisements (on billboards, in newspapers), catalogues and flyers. There is an element of public policy at play here at well. Advertisements cannot be easily retracted. It would not be desirable for advertisers to be bound to deliver when an order is placed for an advertised product. Even Amazon runs out of products stocked. Products reach end of life (and in some cases can't be sold due to illegality), and advertisements might be place don some websites that cannot be easily removed by the wholesaler or retailer Over the Counter sales and displays of goods in shop windows or in the store itself. Items offered for sale at listed prices are invitations to treat. It is the customer that makes an offer to purchase when the customer hands the product or requests the product over the counter Common Law Auctions: When the auctioneer calls for bids, they are invitations to treat. Bidders make offers to the auctioneer. It is open to the auctioneer to accept or reject any offer made by a bidder. The price is finalised when the auctioneer’s hammer concludes the sale. That's acceptance of the offer. Up until that time, the auctioneer is free to reject any bid Online Auctions, Online Marketplaces, eCommerce Markets The way online marketplaces and auctions operate are quite different to common law auctions. They're set up by contracts between the business running the auction site, the seller/vendor and potential customers/buyers. The obvious example is eBay, but the there's OnBuy, Allegro and Bol.com. There are usually two contracts for the auction process, followed by a third: the first is between the potential seller wanting to sell on the website and the business running the website (a website does not have legal personality, and therefore can't be party to a contract) the second is between potential buyers and the business running the website the third is between the vendor business and the buyer (which might be a consumer) that have agreed to purchase: a contract between them, to which the eCommerce market is not necessarily a party. The agreements are usually set up so that the business running the online auction website merely introduce sellers to potential buyers. The business responsible for the website doesn't make any commitment to: the customer or buyer that the seller will sell to the customer, or the seller or vendor that the customer will buy from the vendor or seller, even when they agree a price between one another. That would expose the business to claims for breach of contract from consumers and businesses alike. All of this means that the exact contractual relationships will change form marketplace to marketplace and from one eCommerce provider to another. Tenders to sell goods are generally considered to be offers to sell to the highest bidder. Conditions may attach to the tender to alter that convention. Initial Public Offerings for allotments of new shares are usually invitations to treat. The company usually retains (or should retain) the power to select from applicants and allot shares to applicants as they see fit. Rewards for the return of lost or stolen property are presumed to be offers. Examples: Invitations to treat When a potential purchaser makes preliminary enquiries for more details in respect of goods or services, such as: product specifications other key information terms of shipping and associated costs Where a person is invited to make an offer, the communication is an invitation to treat When someone makes a query relating to price of goods or services: “I am willing to make a sale for £[amount]” “I may be prepared to sell” "The lowest price I would accept is £[amount]" “I am prepared to offer you my [property] for £[amount]” "I agree to pay you £[amount] in principle for your [object]" From a legal perspective, none of these statements suggest or imply that a contract would follow as a result of the response. The response to these questions would probably be an offer. To do so, it would need to satisfy the criterion to constitute an offer, listed above. 2. Heads of Terms and Letters of Intent The purpose of heads of terms and letters of intent is to distil down to the basic points, the essential terms of a contract which will be entered in the future. You could call this reaching “commercial agreement”. It's not intended to be legally binding. They're communications which are part of the negotiations. The “legally binding” contract is to come later. Heads of terms and letters of intent usually contain: The title: "Heads of Terms" or "Letter of Intent" The names of the parties Description of any property that will be part of the contract Description of the services which are to be provided the amount of money to be paid for products or services It's not mandatory that it contains the words "subject to contract". When it is headed “subject to contract”, it affirms that the parties don’t intend the heads of terms to be legally binding. Whether they remain non-legally binding is another question. A further step – such as drawing up of a formal contract – is intended to take place before a contract is formed. It’s when parties actually start working together the heads of terms may become a legally binding contract, whether that is the intended consequence or not. So are heads of terms or a letter of intent a contract, and legally binding? It depends on how they have: communicated with one another since the heads of terms were agreed how they have interacted with one another since the heads of terms were agreed. 3. Declarations of intention, proposals, letters of comfort When it comes to deciding whether any spoken words or written communication form a legally binding contract, there needs to be at least two communications: the offer and the acceptance. Where the requisite contractual intention exists, and consideration exists, a contract is formed. So: Agreement in principle: is not an offer ready for acceptance, because the statement communicates that there is no intention to be legally bound. It’s only an agreement “in concept” Declaration of intention to enter a contract by itself is an invitation to treat to negotiate further Proposal will be an offer where it is capable of acceptance. The law looks at the substance over form. The title of the document is a factor, but not even a strong factor. When a proposal is capable of acceptance, it will form a contract if it is met by an acceptance. Letters of comfort are intended to provide reassurance on a state of affairs, not amount to an offer. In summary though any of these descriptions of documents are legally binding is highly fact specific. A small change in the facts can lead to a different conclusion of its legal effect. 4. Contracts to enter into a Contract / Agreements to Agree The law does not recognise a contract - or agreement - to enter into a contract in the future. It has no binding force, because the offer and acceptance do not exist. To put it another way, what are the terms of the offer? One or more of the offer, acceptance or consideration remain too uncertain. It might be different if the parties agree to enter into a specific form of contract - which contains agreement of all the specific terms required to form a contract in the future. Declarations of a contract which is void for uncertainty is a distant last resort. 5. Contracts to Negotiate When there is a fundamental term remaining to be agreed between parties and subject to negotiation, there is no contract. Contracts to negotiate are is too uncertain to have any binding force. Courts are not able to estimate the damages for a theoretical breach. There is no causation or reasonable foreseeability of loss. No one can tell whether the negotiations would be successful or fall through: or if successful, what the result would be. 6. Agreements lacking definite meaning When the language used by parties to reach an agreement is so vague and indeterminate so as prevent a reliable interpretation of the contractual intentions, in all likelihood, there will be no contract. Broad statements of intention, sentiment or policy which do not show any definite meaning on which courts can safely act cannot have legal effect. Courts will do their best when there is an ascertainable and determinate intention to contract to give effect to the intentions of the parties. Preference is given to substance over the form. Difficulties of interpretation do not prevent formation of a contract: it is when the intentions are so ambiguous that no definite meaning can be extracted which prevents it from being a contract. Types of Contracts One you have a legally binding contract, the law applies to it whether it is: an oral / verbal agreement, which is an express contract a written agreement , which is also an express contract an agreement which is partly oral and partly in writing, or an implied contract. In other words, however the contract might be formed. Consequences of a legally binding contract Forming a legally binding contract does not need to be a deliberate act. It can happen although you had no intention of forming a contract. Once the fundamental elements of offer, acceptance, consideration, intention to be legally bound and capacity exists, a series of legal consequences arise as part of the contractual relationship. Those rules apply, subject to agreement to the contrary. They include: privity of contract: only the parties to the contract can enforce its terms, subject to limited exceptions assignment of duties to perform the contract can't be transferred to someone else, without the permission of the other contracting party subcontracting of services doesn't relieve the contracting party from performing its obligations agreed implied terms may add to the express terms agreed, to give what is known as "business efficacy" to the contract. That can have the effect of including terms in the contract which aren't expressly agreed... which can come as a surprise to the uninitiated. non-compliance with terms and conditions will be a breach of contract. Rights arise for breach of contract, which usually include right to damages and power to terminate the contract if it's a really serious breach Business Law: Contract Law Solicitors We're a UK based small business law firm in London: ie business law solicitors. We advise businesses of all shapes and sizes on business law, contract law, and have particular expertise assisting businesses with IT related business disputes. We advise SMEs on: Have a business law problem and can't see the way to the end of it? Need advice on a business to contract, or a contract checked over for defects and pitfalls? To speak with a business contract solicitor, call +44 20 7036 9282 or email us at contact@hallellis.co.uk. Facebook Twitter LinkedIn More what forms a legally binding contract. what is required to form a legally binding contract. how to create a legally binding contract. how to make a legally binding contract