

Part One – Introduction

Contract: A Defined Covenant

The concept of contract is that of a defined covenant, a word used in colloquial and official circumstances to indicate the presence of a pact, or agreement, between two parties who have decided to accept a **binding** commitment. Binding means capable of imposing an obligation upon those who **enter into** a legal agreement. In English Common Law a contract can be either written or oral.

The purpose of a written contract is to provide certainty as to what has been agreed and the process of writing and negotiating the contract can be invaluable in drawing out each party's motivations and requirements. This manual focuses on written contracts, although verbal contracts, with some exceptions, can be just as valid under UK law.

This agreement is entered into **voluntarily**, that is to say that the parties to a contract have wilfully accepted to abide by the **provisions** contained in it and are therefore aware of the specific duties and obligations stemming from the stipulation of such accord.

The duty of a solicitor when **drafting** a contract for a client is, among many other, to ascertain that his or her client has fully understood the concept of "binding agreement". In English and American Common Law, as in all other juridical systems, there are specific rules that must be followed in order to **draft** or **draw up** a proper, effective and **enforceable** document and we will look at which parameters a solicitor must fall within in this specific circumstance.

In UK law a contract is **formed** once it is verified that it contains essential elements, without which the document would not have any validity and is therefore considered to be **void** or **null**. There exist of course other reasons which may cause a contract to be void and we shall look at them further into this manual.

UK Legal System

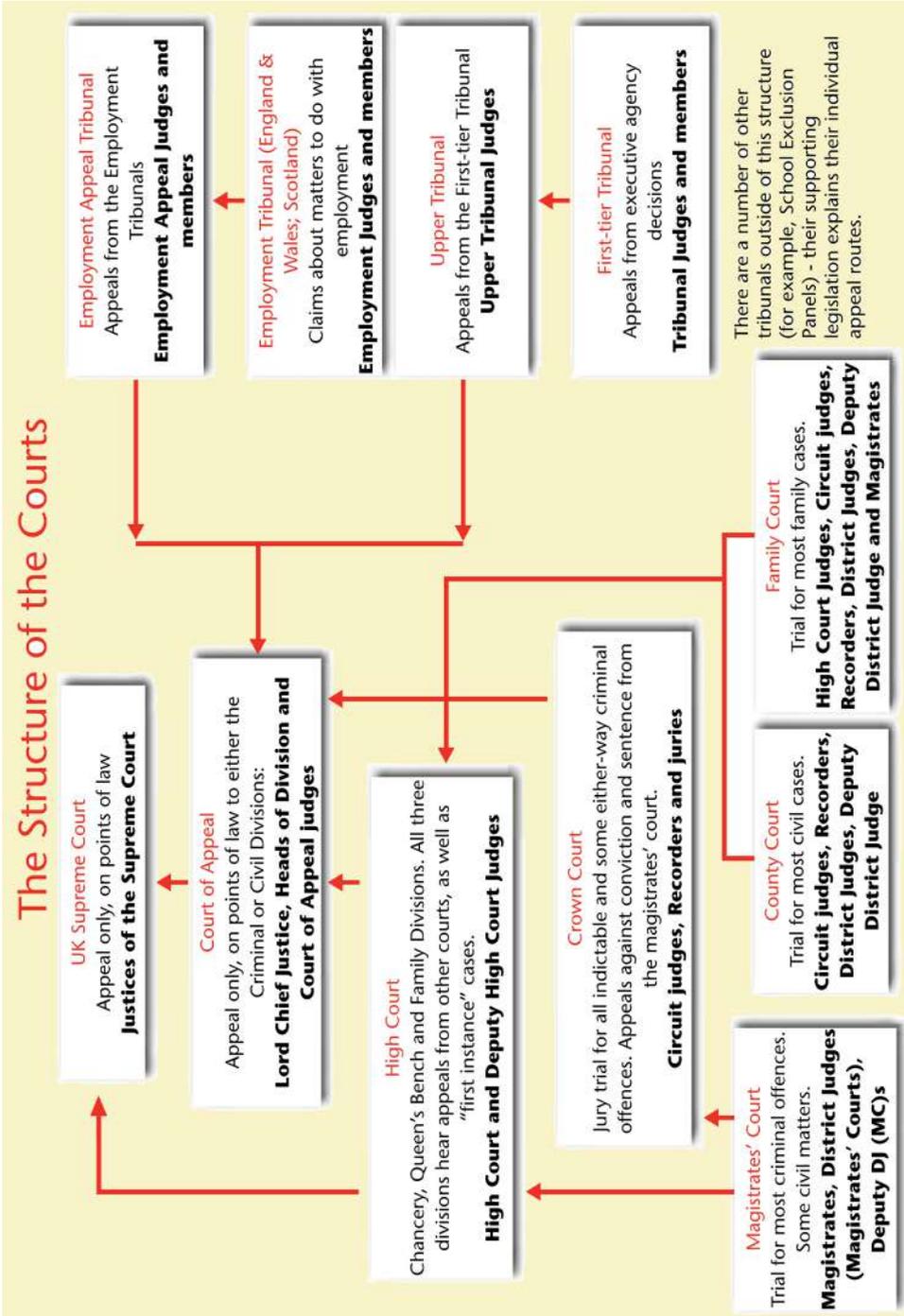
There is no Civil Code in England and, therefore, contract law is not codified. **Statutes (Statutory Law)** and **Case Law** (also called “**Common Law**” or **Judge-made Law**), are the main sources of law in the United Kingdom. Another name for statute is “**Act of Parliament**”, a law which is first proposed as a **bill** by a single **MP** (Member of Parliament) or a government agency before it gets approved. In order to be approved a bill must go through the House of Commons, the first chamber in UK’s Parliament, which will in turn pass the proposed law to the House of Lords, the second chamber, which does not have law-making powers but is in charge of reviewing the proposed law and suggest possible corrections, or **amendments**. The final stage is the approval by the monarch, called **Royal Assent**. The Queen is only presented with a very succinct version of the proposed statute and does not see the entire bill. Parliament has supreme law-making powers, as it can make or repeal laws as it sees fit.

Under Case Law instead, the rule is called **Precedent**, which is a decision **handed down** by a judge on a point of law never explored in the past, making this a statement of law, which is binding upon future cases. When handing down a decision, a judge provides the legal reasoning, or **Ratio Decidendi**, related to his or her judgment, and the ratio must be in line with the invoked precedent. In some cases, a precedent may not be considered applicable, making the case at hand **distinguishable**.

A binding precedent is usually created in a higher court, as **courts of first instance** do not usually have such power. When a court decides that a precedent should no longer constitute controlling law, said precedent is said to have been overruled. The Supreme Court, which is the highest authority in the UK, can **overrule** previous decisions.

Today over 40 countries are based on the common law system, however some of them have some internal exceptions. As an example, the state of Louisiana in the United States is based on French and Spanish civil law. Canada’s Quebec province is administered under French civil law while Indian internal states like Goa, Daman and others are based on the Portuguese civil law system. Some provisions of Islamic law apply in countries like Bangladesh and Singapore for family law matters.

UK Court System Structure



The Queen's Bench Division

The Queen's Bench Division (QBD), a derivation of the King's Court (*Curia Regis*) originally founded in 1215 by means of the Magna Charta signed by King John of England in Runnymede, was created by the Supreme Court of Judicature Act 1873 and it is, along with the Chancery and Family, the biggest of the three High Court divisions. It is here that breach of contract and/or unpaid goods and/or services cases, among many others, are heard and decided. The Division is made of 71 judges and has jurisdiction over many cases among which, as a mere example, libel, tort, damage at sea (Admiralty), banking (Commercial), application for Judicial Review (Administrative). The Heads of Division are appointed by the Queen based on the recommendation of a selection committee. It is seated at The Royal Courts of Justice on the Strand, in London and the current president is Dame Victoria Sharp. (source www.judiciary.uk)



The Royal Courts of Justice Building on The Strand, London (photo by David Castror)

Brief History of Common Law

When the Normans conquered England in 1066 (The Battle of Hastings, which saw Duke William of Normandy victor against the Anglo-Saxon King Harold Godwinson), there existed no single set of laws but rather several types of rules, different from one another depending on the region. As opposed to the continental legal systems, Common Law is not based on codes, and before the time in which it was institutionalised by King Henry II, the year 1154, it had different types of courts, among which the King’s Court (*Curia Regis*) and lower courts, or “manorial” courts, which were the lower feudal courts, which had limited jurisdiction with regards to what disputes they could hear and where they could be heard. Clerics, the members of the ecclesiastical nucleus, were part of the monarch’s cortège. The first statute in English Common Law is the Statute of Gloucester (1278) which, among its provisions, established that cases valued at less than 40 schillings could not be heard by the Royal Court but rather by local tribunals. Today 80 countries are based on the Common Law system, some with influence from religious law or codified systems.



The Battle of Hastings (Bayeux Tapestry, Detail ca. 11th century)

Revision A – Multiple Choice

Answer to each question by selecting the correct term

1. Once a contract is entered into, it is said to be:
 - a. Forcing
 - b. Limiting
 - c. Binding
 - d. Obligatory

2. If a contract is in writing it is said to be:
 - a. Drafted
 - b. Written
 - c. Typed
 - d. Etched

3. If made of all necessary elements, a contract is:
 - a. Perfect
 - b. Formed
 - c. Complete
 - d. Finished

4. Under UK law a proposed law is called a:
 - a. Bill
 - b. Act
 - c. Motion
 - d. Proposal

5. In Case Law, the binding element for a judgment is called:
 - a. Sentence
 - b. Judgment
 - c. Decision
 - d. Precedent

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6. If a precedent cannot be used in court because of discrepancies, it is said to be:
 - a. Different
 - b. Distinguishable
 - c. Separate
 - d. Avoidable

 7. If the UK Supreme Court or the EU Court decide that a precedent is no longer valid, the precedent is:
 - a. Cancelled
 - b. Erased
 - c. Overruled
 - d. Overwritten

 8. The High Court Divisions are:
 - a. 4
 - b. 3
 - c. 2
 - d. 5

 9. The Heads of Division are appointed by:
 - a. The Prime Minister
 - b. The Parliament
 - c. The Queen
 - d. The House of Lords

 10. The Queen's Bench Division is one of the three divisions of the:
 - a. Supreme Court
 - b. Chancery Court
 - c. High Court
 - d. Court of First Instance

