

Checklist – Issuing a Termination Notice under English Law

Item	Required Action	Check
1. Assess the notice		
A	Formalities	
	Contractual procedure and requirements for issuing a notice of termination, as well as formal requirements for service of notices should be strictly complied with. ⁱ Determine (for example) whether the notice: (i) is required to be in writing; (ii) is addressed correctly; ⁱⁱ (iii) must be delivered by a particular method; and (iv) must be given in accordance with applicable time periods (including any grace or cure periods). ⁱⁱⁱ	
	The notice must communicate clearly ^{iv} and unequivocally ^v that the contract is being terminated. It is best practice for the notice to identify all of the grounds on which the contract is alleged to be terminated, in order to maximize your chances of termination being valid. ^{vi}	
B	Legalities	
	Determine whether the alleged termination right(s) arise under the express words of the contract or at common law (unless common law termination rights have expressly been excluded – which may be unlikely). ^{vii} A contractual right to terminate may be exercised even though the breach would not be a repudiation at common law. ^{viii}	
	Generally, there is no right to terminate for convenience at common law. The contract must expressly provide such a right.	
	If contractual termination rights are being relied upon, ensure that they have been satisfied and that this can be supported objectively (individuals too close to a project may not be in the best position to judge such matters objectively).	
	If common law termination rights are being relied upon, determine whether the alleged breach or repudiation relates to a condition, warranty or innominate term. A breach of a condition entitles the innocent party to terminate the contract, a breach of a warranty does not. Conditions are rare and most terms are now regarded as innominate. ^{ix}	

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	If the term is an innominate term, determine whether the breach is serious or trivial. A serious breach of an innominate term amounts to repudiation and permits termination, whereas a trivial breach does not. ^x	
	<i>Limitations on the right to terminate</i>	
	A party cannot rely on its own breach to terminate the contract. ^{xi} Make sure the circumstances giving rise to the right to terminate you rely upon do not arise from your own breach.	
	The contract may validly exclude a common law right of termination. ^{xii} Check whether your contract contains any such limitation.	
	A termination clause may be unenforceable under the Unfair Contract Terms Act 1977 (UK) if, for example, the clause (a) is in a standard form contract written by you, (b) would entitle you to terminate at will or for trivial reasons (despite rendering no performance), and (c) the clause is not reasonable. ^{xiii} Check whether this may be applicable to you.	
	The right to terminate may be lost where the innocent party (i) expressly or impliedly affirms the contract; ^{xiv} or (ii) indicates by words or conduct that it will continue with the contract. ^{xv} From a practical perspective, this can arise simply through the passage of time since the termination right arose. Be cautious about relying on a right to terminate which may have been lost.	
2. Assess the implications of termination		
	Determine whether any consequential arrangements are required as a result of termination, ^{xvi} and whether such arrangements are possible.	
	Determine the effect of termination on ownership and maintenance of any equipment, information and licenses provided during performance of the agreement.	
	Consider whether any specific rights or duties may arise on, or survive, termination. ^{xvii}	
	Make sure termination will be considered valid before issuing the notice of termination. If the alleged termination is invalid, it may amount to a repudiation which can be accepted by the other party. There may be significant prejudicial financial consequences if that occurs. ^{xviii}	

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3. Document the termination process		
	Communicate in writing wherever possible and keep notes of any oral conversation.	
	Gather and keep evidence of the grounds for termination.	
	Document any failure by the other party to rectify the breach(es) within any applicable cure/grace period.	
	Keep records of all communication (both internal and with the other party) about the termination, or grounds for it.	

If you have any questions about the issues addressed in this checklist, please do not hesitate to reach out to:

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ⁱ See for example *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19; *York v Casey* [1998] EWCA Civ 250; *Keepers and Governors of John Lyon Grammar School v Secchi* (2000) 32 HLR 820; *Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277; *Siemens Hearing Instruments Ltd v Friends Life Ltd* [2014] EWCA Civ 382.

ⁱⁱ *Lemmerbell Ltd and another v Britannia LAS Direct Ltd* [1998] EWCA Civ 1506; *Zayo Group International Ltd v Ainger and others* [2017] EWHC 2542 (Comm).

ⁱⁱⁱ An early notice may be ineffective *Eminence Property Developments Ltd. v Heaney* [2010] EWCA Civ 1168. If the notice which must be given is "reasonable" notice, there may be scope to argue the notice which has been given is not reasonable. The determination of what is "reasonable" is a question of fact in all the circumstances at the time the notice is given (*Martin-Baker Aircraft Co v Canadian Flight Equipment* [1955] 2 QB 556).

^{iv} *Jet2.com Ltd v SC Compania Nationala De Transporturi Aeriene Romane Tarom SA* [2012] EWHC 622.

^v A party must "... either affirm the whole contract or rescind the whole contract: you cannot approbate and reprobate by affirming part of it and disaffirming the rest ..." (*Suisse Atlantique Societe d'Armement Maritime v NV Rotterdamschke Kolen Centrale* [1967] 1 AC 361, 398).

^{vi} However, this may not be essential in every case. A refusal to perform may later be justified if there were facts, at the time of the refusal to perform, which would have provided a good reason, even if the refusing party was unaware of them at the time (*Ridgway v Hungerford Market Co* (1835) 3 Ad. & El. 171, 177, 178, 180; *Baillie v Kell* (1838) 4 Bing. NC 638). This general rule is subject to exceptions and may depend on the specific facts.

^{vii} Common law rights to terminate are generally less clear, and more susceptible to argument.

^{viii} See, for example, *Financings Ltd v Baldock* [1963] 2 QB 104.

^{ix} Professor Andrew Burrows, *Commentary in A Restatement of the English Law of Contract*, paragraph 19(9), referred to with approval by the court in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd; The Spar Capella, The Spar Vega, The Spar Draco* [2017] 4 All ER 124 [20]. In contracts for the sale of goods, time is not of the essence for payment unless the contract shows otherwise (see: *Sale of Goods Act 1979* (UK) s 10(1)).

^x Instead, if the breach is trivial, the remedy is damages (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1961] EWCA Civ 7). Trivial breaches of punctual payment conditions are unlikely to entitle a party to terminate (see for example *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd; The Spar Capella, The Spar Vega, The Spar Draco* [2017] 4 All ER 124) However persistent late payment may be a repudiation (*Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982). The seriousness of a breach is often fertile ground for argument.

^{xi} *Total Transport Corp v Amoco Trading Co* [1985] 1 Lloyd's Rep 423, 426; *Alghussein v Eton College* [1988] 1 WLR 587; *Richco International Ltd v Alfred C Toepfer International GmbH* [1991] 1 Lloyd's Rep 136; *Cheall v APEX* [1983] 2 AC 180, 188-189.

^{xii} While clear words are needed, it is legally possible (*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 717-718). The more valuable the right, the clearer the exclusory words will need to be (*Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75 [23]).

^{xiii} *Unfair Contract Terms Act 1977* (UK) s 3(1)&(2)(b)(ii).

^{xiv} *Stocznia Gdanska SA v Latvian Shipping Co (No.2)* [2002] EWCA Civ 889 [87].

^{xv} Depending on the circumstances, the words or conduct may constitute a waiver by election or a waiver by estoppel (see for example *Kammins Ballroom & Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850; *Hughes v Metropolitan Ry Co* (1877) 2 App. Cas. 439; *Chitty on Contracts*, 33rd ed. [24-007]).

^{xvi} For example, terminating a subcontractor when the main contract has been terminated.

^{xvii} For example, there may be a duty to destroy or return confidential information or personal data. Other obligations may survive termination, such as certain indemnities and restrictive covenants. Check whether (1) either party has accrued rights or obligations which, by their nature, survive termination; and (2) the contract expressly states, or necessarily implies, that particular rights or obligations survive termination. See: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476-477; *Johnson v Agnew* [1980] AC 367, 396; *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 WLR 435, 450.

^{xviii} If the repudiation is accepted as discharging the contract, the repudiating party will become liable to put the innocent party in the position it would have been had the contract been performed. Such damages can be substantial.