Term/abbreviation	Meaning	Page number
Intermediate (or innominate) term	A term that cannot be characterised as a **condition** or **warranty** when the **contract** is made. Whether breach of such a term will allow the innocent party to discharge the contract depends upon how serious the breach is in the circumstances of the particular case.	284–288
Invitation to deal (or treat)	A communication from one person inviting another to initiate negotiations for a possible **contract**; a request that they make an offer to enter into a contract.	37–45
Joint promisees	Two or more persons to whom an **offer** is made.	129–130
Misleading conduct	Conduct that leads into error those to whom it was directed. It is prohibited by s 18 of the ***ACL*** and in practice is the principal ground relied upon by the victims of objectionable pre-contractual conduct when seeking to have the **contract** set aside.	313–352
Misrepresentation	A false statement of fact. If it induces the representee to enter into a **contract** with the representor, the former can elect to rescind the contract from the beginning: ***ab initio***. It may be 'innocent' (where the representor was unaware of the falsity) or 'fraudulent' (where the representor was aware of the falsity or reckless about the truth).	353–357
Mutual mistake	Both parties are mistaken, but about different things.	378–380
Non est factum	'Not my deed'; a plea that a person should not be bound by a document they have signed because, as a result of suffering from some disability, they were mistaken about its very nature.	389–392
Offer	A **promise** by one person (the '**offeror**') to do something, or not to do something, if the person to whom it is addressed (the '**offeree**') responds in a stipulated manner.	35
Offeree	The person to whom an **offer** is made.	35
Offeror	A person who makes an **offer**.	35
Parol (or extrinsic) evidence	Oral evidence; evidence that is given verbally.	275
Parol (or extrinsic) evidence rule	The rule that, where the parties have recorded their agreement in writing, **parol evidence** (verbal evidence of matters extrinsic to the document) cannot be given to subtract from, or add to, or vary the written document.	375–380
Part performance, doctrine of	The **equitable remedy** allowing a **contract** to be enforced, even though the parties have not complied with the formalities required, where the party wishing to enforce the contract has acted in accordance with its terms.	203–207
Postal acceptance rule	The rule that an **offer** is **accepted** when and where a letter of acceptance is posted, rather than when and where it is received by the **offeror**. It applies only if communication of acceptance by post was contemplated by the offeror.	69–72
Privity of contract, doctrine of	The doctrine that a person who is not party to a **contract** (in other words, is 'a third party') cannot enforce the contract, or have the contract enforced against them.	211–235
Promise	An undertaking to do something if the person to whom it is addressed does something, or **promises** to do so, in return.	32
Promisee	The person to whom a **promise** has been made.	118
Promisor	A person who has made a **promise**.	118

(*continued*)

Term/abbreviation	Meaning	Page number
Quantum meruit	A claim for the value of work carried out for the benefit of another person, where the latter requested or accepted the work in circumstances making it clear that it was to be paid for.	201–202
Quid pro quo	Something given in exchange for a **promise** or something else; in effect, **consideration**.	119
Rectification	The correction of a document to make it comply with the terms of the **agreement** reached between the parties; in effect, it allows the correction of typographical errors.	376–377
Restitutio in integrum	Restoration of the parties to their original position—the position they were in before the **contract** was made.	309
Sanctity of contract, doctrine of	Once a **contract** is made, it is 'sacred' and should, therefore, be enforced according to its terms. In particular, it should not be rewritten by a court merely because it proves to be improvident for one of the parties.	9
Severable (or divisible) contracts	**Contracts** in which each party must perform their obligations regardless of whether the other party has done so; in other words, A has to perform even if B has not; cf **entire contracts**.	566–567
Severance	The excising of the objectionable parts of a **contract** from the rest, where the latter is capable of operating alone.	105; 551
Standard form contracts	A **contract**, the precise terms of which are not negotiated between the parties. Rather, one party, in effect, requires the other to agree to its prepared standard terms if they wish to enter into a contract.	492–493
Statutory implied term	Terms implied into a **contract** by a statute. Examples include the terms implied into contracts of sale by the Sale of Goods Acts. As far as consumers are concerned, the most important ones have been superseded by the consumer guarantees created by the ***ACL***.	266
Substantial performance, doctrine of	The doctrine allowing a party who is in breach of **contract** to recover what they were due under the contract, less compensation for the cost of remedying the breach.	564–566
TPA	The *Trade Practices Act 1974* (Cth). This Act deals with competition and consumer matters and was renamed the *Competition and Consumer Act* in 2010 (Cth).	7
Unconscionable conduct	Conduct against good conscience. It occurs when one party takes advantage of a special disability suffered by the other to secure the latter's participation in a transaction that is unfair to them. It will make the transaction voidable in **equity**; it is also prohibited by ss 20 and 21 of the ***ACL***.	436–487
Unfair contract terms	For the purposes of the **ACL**, an unfair **contract** term is one that would unnecessarily cause a significant imbalance in the rights and obligations of the parties to the detriment of the party disadvantaged by the term: see s 24. They are **void** if contained in a **standard form consumer contract**: see s 23.	488–512
Unilateral contract	A **contract** in which only one of the parties makes a **promise**; cf **bilateral contract**.	18; 82–86
Unilateral mistake	Where one party is mistaken about an aspect of the **contract**, but the other is not. The unmistaken party may or may not be aware of the other's mistake.	380–387
Void	A void **contract** is one that is completely ineffective. At no stage is it operative and therefore cannot create contractual rights or impose obligations; cf **voidable**.	311

Term/abbreviation	Meaning	Page number
Voidable	A voidable **contract** is one that is operative unless and until it is set aside. Being of this nature, it can create contractual rights and obligations until that time; cf **void**.	309–310
Warranty	This term is used in several different senses. It may mean any term in a **contract**; or it may mean a particular type of term, namely a term of secondary importance—the breach of which will not allow the innocent party to terminate the contract; cf **condition** and **intermediate term**.	284

INTERNATIONAL PERSPECTIVES

Because of its English origins, some international perspective is inherently part of Australian contract law. In addition, as English influences on our law have waned, those of other countries—especially those sharing our common law heritage, such as the United States, New Zealand and Canada—have increased. As a result, Australian contract law has not developed in splendid isolation and this is reflected in the materials we have selected in the following chapters. In addition, we have included specific international perspectives from India and China. There are two reasons for choosing these jurisdictions. In the first place, they are countries that are becoming increasingly important to Australia. China is now Australia's largest trading partner and our commercial links with India are destined to expand rapidly. Consequently, it will be advantageous for Australian lawyers to have some familiarity with the commercial law of those countries. Second, India and China present valuable perspectives from which to evaluate Australian law. The *Indian Contract Act, 1872* put into statutory form much of the common law of contract that India had adopted from England. Consequently, comparing and contrasting its provisions with current Australian law will deepen and enrich our understanding of the latter. This is also the case with the *Contract Law of the People's Republic of China*, adopted and promulgated in 1999. This was formulated after an extensive review of contract law regimes around the world, including Australia's, and although many of its provisions are directed towards uniquely Chinese situations it nevertheless represents one important view of what an ideal contract law would look like.

a. Background to the *Indian Contract Act, 1872*

Ancient Indian law did not recognise a separate law of contract.[25] As a result, during the period of English colonial rule, especially in the eighteenth and early nineteenth centuries, the English common law was introduced into India. However, its relationship with local law—which did regulate particular forms of commercial activity—was ambiguous; so much so that the Second and Third Law Commissions in India suggested codification of contract law. This resulted in the passage of the *Indian Contract Act, 1872*. Sections 1–75 of this Act contain general provisions that apply to all agreements. Subsequent parts then deal with indemnities and guarantees, bailment and agency. Originally, the Act also dealt with the sale of goods and partnership; these matters have since been made the subject of separate statutes.[26] The *Indian Contract Act* is not a code; that is, it does not purport to deal with all aspects of contract law, and s 1 specifically preserves 'any usage or custom of trade, [or] any incident of a contract, not inconsistent with the provisions of this Act'.[27] As a result, the common law as interpreted by Indian courts continues to apply where the Act is silent.

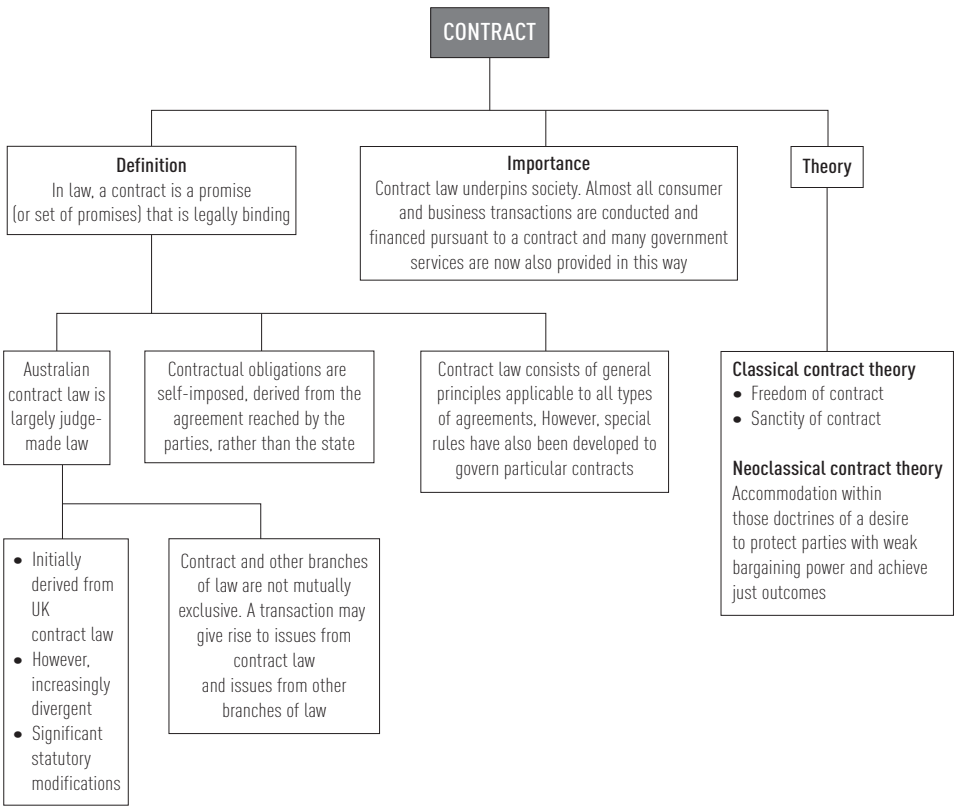
b. Background to the *Contract Law of the People's Republic of China, 1999*

The first meaningful attempt to develop contract law in China was in 1911 during the Qing Dynasty. This Draft Civil Code was largely modelled on the Japanese Civil Code and disappeared together with the last Chinese emperor when the Republic of China was established in 1912. >>

25 See generally, HK Saharay, *Dutt on Contract*, 10th edn, Eastern Law House, Kolkata, 2006.
26 See *Sale of Goods Act 1930* and *Indian Partnership Act 1932.*
27 See also the comments to s 1 of the *Indian Contract Act, 1872*.

In 1929 the Republic of China promulgated a new Civil Code, the development of which was influenced by European and Japanese codifications of contract law. However, after the establishment of the People's Republic of China (PRC) in 1949, this Code was abolished and contract law remained undeveloped during the formative years of the new regime. This situation became untenable with the rapid expansion of the Chinese economy following the reform programs and open-door policies introduced after 1978. These saw business activity grow in scale and complexity, both domestically and internationally, and necessitated significant reform. Three statutes were enacted in response—the *Economic Contract Law* (the *ECL*) in 1981, the *Foreign Economic Contract Law* (the *FECL*) in 1985 and the *Technology Contract Law* (the *TCL*) in 1987. Unfortunately, each of these statutes was drafted to deal with a particular type of economic activity and none was applicable to all commercial transactions, with the result that gaps remained in some areas and overlap and inconsistency occurred in others. This led to calls for the development of a unified contract law to accommodate China's business and social needs. After Chinese legislators had spent six years examining the contract laws of civil and common law countries and various international models, the result was the promulgation on 1 October 1999 of the *Contract Law of the People's Republic of China* and the repeal of the *ECL, FECL* and *TCL*.[28]

8 Summary



28 For a detailed account of the development of Chinese contract law, see B Ling, *Contract Law in China*, Sweet & Maxwell, Hong Kong, 2002 and Mo Zhang, *Chinese Contract Law: Theory and Practice*, Koninklijke Brill NV, Leiden, The Netherlands, 2006.

9 Questions

1 Why is contract law so important in countries with market economies? Could they operate without a law of contract? When considering this question, reflect on what contracts you have made in the past few days and whether you could have avoided making them.

2 In each of the contracts you have made, who was the promisor and who was the promisee, and what were you and they asked to do or promise?

3 What promises have you made recently that were not contracts? In each case, why were they not contracts?

4 What does it mean to say that a promise is 'legally binding'?

5 What are the doctrines of 'freedom of contract' and 'sanctity of contract'? How relevant are they today in influencing the content and nature of contractual relations?

6 What are the principal sources of Australian contract law? How are the sources of contract law different in India and China? Do these jurisdictions present any lessons for Australia? In particular, should Australian contract law be codified in some way?

7 What are the principal kinds of transactions entered into by businesses? Are any of these *not* contracts? Explain your answer.

8 What are the principal kinds of transactions entered into by consumers? Are any of these *not* contracts? Explain your answer.

9 What is a bilateral contract? What is a unilateral contract?

10 What is a formal contract? What is an informal or simple contract?

11 What does it mean to say that a contract is void? How is this different from a contract that is merely voidable?

12 What is a consumer contract as distinct from a business contract?