When Commercial Contracts Fail: Breach, Termination And Remedies

Procurement and Supply Chain Management Made Simple.

Foreword

Commercial relationships rarely fail at a convenient moment. When a supplier's performance deteriorates, deliveries slip, or obligations are disputed, an organisation must decide whether to insist on performance, negotiate improvement, recover losses or end the relationship. Each choice carries legal and financial consequences. UK public bodies alone manage over £385 billion of contract spend annually, so even a small proportion of failing relationships represents billions of pounds of exposure.

Contract law matters most once expectation and reality diverge. Whether a failure is a minor breach or a repudiatory one determines whether damages are available, termination is permitted, or performance must continue. Terms agreed at the outset, conditions, warranties, liability caps, notice provisions and cure periods can substantially alter rights that would otherwise arise under English law. Precision at the drafting stage is cheaper than dispute resolution once relationships have already broken down.

For procurement and contract management teams, supplier failure rarely exists in isolation. A struggling contractor may still hold essential data, control critical assets or deliver a service that cannot be interrupted without serious operational harm. Termination may be legally available yet commercially unattractive. Conversely, tolerating repeated failure without protecting contractual rights weakens leverage and can leave an organisation exposed precisely when stronger commercial intervention becomes unavoidable.

Drafting quality often determines how much control an organisation retains once performance deteriorates. Measurable service levels, effective remedies, precise termination rights and workable exit arrangements create several routes to resolution. Weak drafting produces the opposite outcome, forcing parties into costly argument over whether breach occurred, whether notice was valid, or whether any remedy exists when decisive commercial action is already urgently required.

Damages and other remedies involve more than identifying financial loss. Causation, remoteness, mitigation, liquidated damages, penalties, exclusion clauses and liability caps can each affect what is ultimately recoverable. Equitable remedies, specific performance and injunctions, occasionally offer protection but remain exceptional in commercial disputes. The strength of a contract therefore depends not only on the obligations it creates, but on how enforceable its remedies prove when those obligations fail.

Strong contract management combines legal understanding with disciplined evidence, proportionate escalation and commercial judgement. Organisations that preserve records, follow notice procedures correctly and assess settlement options objectively protect value more reliably when disputes arise. The decisive question is rarely whether a supplier has failed, but what the contract and the law permit the innocent party to do next, and which option best serves organisational interests.

Introduction – When Commercial Relationships Break Down

Commercial relationships deteriorate for many reasons: persistent poor performance, late delivery, payment disputes, changing requirements or outright refusal to perform. Once that happens, the legal position becomes as important as the operational problem. The parties must establish whether a breach has occurred, whether it is serious enough to justify termination, and what remedies remain available without exposing either side to further financial or legal risk.

Not every failure gives the innocent party a right to end a contract. Some breaches justify damages while leaving the agreement in force; others amount to repudiatory breach and permit termination. The distinction turns on the contractual wording, the nature of the obligation, and the seriousness of the failure. Acting too quickly can convert a legitimate grievance into a separate, and potentially costly, wrongful termination by the party that intended to enforce its rights.

For procurement teams, the challenge is rarely purely legal. A supplier may miss key performance indicators, repeatedly deliver late, fail to remedy defects, or dispute a termination notice outright, yet the purchasing organisation must still protect continuity and value. There were 23,938 company insolvencies in England and Wales in 2025 alone, highlighting the overlap between supplier failure and insolvency risk and underscoring why decisions must balance legal rights, evidential strength and commercial leverage.

Clear contracts reduce uncertainty once relationships begin to fail. Well-drafted provisions define performance standards, breach triggers, cure periods, notice requirements, escalation routes, damages, liability limits and termination rights with precision, and distinguish contractual remedies from rights available at common law. Where drafting is vague, organisations often discover too late that the protection they expected does not exist, leaving fewer options when decisive action becomes commercially urgent.

How a Legally Binding Contract Is Formed

A legally binding commercial contract exists once the elements required by English law are present and sufficiently certain: a clear offer, an unqualified acceptance, consideration, an intention to create legal relations, and terms capable of enforcement. The parties must possess legal capacity and comply with any formal requirements applying to the transaction. Without these foundations, what looks like an agreement may carry no binding force at all.

An offer is a promise to contract on stated terms if accepted. It must be distinguished from an invitation to treat, which merely invites negotiation or the submission of offers. Commercial quotations, tender documents and purchase enquiries may fall into either category depending on wording and context, and identifying precisely when an offer was made matters because acceptance must correspond exactly with it to create a binding agreement.

Formation also depends on sufficient certainty over the parties' obligations. Scope, price, duration, performance standards and other essential terms must be identifiable either from the document itself or an objective mechanism it sets out. Certain contracts, deeds, guarantees, and dealings in land must additionally satisfy statutory formalities. Procurement teams should confirm that approvals, signatures, contract documents and incorporated schedules together establish a genuinely enforceable agreement before performance begins.

Offer, Acceptance, Consideration and Intention

An offer is a clear, sufficiently certain expression of willingness to contract on defined terms, communicated with the intention that acceptance creates binding obligations. In commercial dealings, quotations, tender submissions, purchase orders, and proposals may each constitute an offer, depending on the wording and context. Procurement teams should avoid assuming that every commercial document automatically represents an offer capable of immediate, unilateral acceptance by the other party.

Acceptance occurs when the recipient agrees to the offer's terms without qualification; any variation may amount to a counteroffer, thereby closing the original offer to acceptance. Problems commonly arise where buyers and suppliers exchange documents each carrying different standard terms. This so-called battle of forms can determine which provisions ultimately govern liability, payment, *performance, warranties and termination if a dispute later develops between the parties.*

Consideration is the value exchanged between the contracting parties and is normally required for a simple contract to be binding. It may consist of payment, goods, services, promises or another recognised benefit or detriment; English law does not require consideration to be economically adequate, only legally sufficient. Procurement professionals should therefore separate the question of whether consideration exists from the distinct question of whether the bargain represents good commercial value.

The parties must also intend to create legal relations. In commercial transactions, courts presume intention unless the circumstances show otherwise, giving businesses confidence that ordinary commercial dealings will be enforceable. Wording such as "subject to contract" can signal that negotiations remain incomplete, so procurement teams should ensure that correspondence, approvals, and draft documents clearly mark the point at which negotiations end, and binding commitment begins.

Express and Implied Contractual Terms

Express terms are those specifically agreed by the parties, whether recorded in writing, incorporated by reference, or established orally. They typically cover price, scope, specifications, delivery obligations, service levels, payment, liability and termination. In procurement, clarity is essential: poorly drafted or inconsistent express terms create uncertainty regarding performance expectations, remedies, and risk allocation, particularly where purchase orders, schedules, and supplier conditions contain conflicting provisions.

Implied terms apply even though not expressly written into the contract. They arise through legislation, common law, established custom, or the particular circumstances of the agreement. They may concern quality, fitness for purpose, reasonable care and skill, or cooperation between the parties. Implication is not, however, a mechanism for improving a poor bargain or rewriting agreed commercial terms retrospectively once one party regrets the deal struck.

The relationship between express and implied terms becomes critical once performance deteriorates. Express wording generally takes priority where it clearly addresses the issue, although legislation, including the Unfair Contract Terms Act 1977, may restrict attempts to exclude statutory protection. Procurement teams should understand both what the contract states and what the law may separately imply, since effective drafting minimises reliance on implication by defining obligations precisely from the outset.

Conditions, Warranties and Innominate Terms

Contractual terms are not treated equally when breached. English law distinguishes between conditions, warranties and innominate terms, and classification affects the remedies available. A condition is a term regarded as sufficiently important that its breach normally entitles the innocent party to terminate and claim damages. The label the parties use may be relevant, but the legal effect ultimately depends on how the court construes the clause.

A warranty is a less fundamental term. Breach normally gives only a right to damages, not termination, and an organisation that treats a warranty breach as grounds for exit may itself act wrongfully and face a claim. Procurement teams should therefore avoid assuming that every contractual failure permits immediate termination, particularly where the agreement does not expressly classify the obligation or specify the consequences of non-compliance.

Innominate terms occupy the middle ground: their consequences depend on the seriousness and effect of the breach rather than a fixed label. The leading authority, Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26, established that a sufficiently serious breach of an innominate term entitles termination, while a less serious breach produces only damages. The test asks whether the breach substantially deprives the innocent party of the whole benefit it was intended to receive.

For procurement professionals, classification matters most when a supplier misses service levels, delivery dates, or repeatedly breaches performance obligations. A contract that expressly designates obligations as conditions, or links specified failures to termination rights, provides far greater certainty *than one that does not. Where drafting is silent, the purchasing organisation must carefully assess the seriousness and consequences of the breach before assuming that termination is legally available.*

What Constitutes a Breach of Contract?

A breach of contract occurs when one party fails, without lawful excuse, to perform an obligation required by the agreement. The failure may involve non-performance, defective performance, late performance or conduct inconsistent with contractual duties, and can arise from a single event or an accumulation of failures over time. The precise wording, surrounding circumstances and seriousness of the obligation determine whether a breach has actually occurred.

Some breaches are straightforward, failing to deliver goods by an expressly agreed deadline, or refusing a contracted service outright. Others are less obvious, particularly where standards are subjective, obligations depend on cooperation, or performance is measured against service levels. Procurement teams should distinguish dissatisfaction with a supplier from an actual breach, ensuring any alleged failure traces to a specific, enforceable contractual obligation rather than a vague expectation.

Evidence is essential when establishing breach. Contract managers should retain accurate records of missed milestones, defective deliveries, correspondence, complaints, service reports, and opportunities to remedy failures. They should follow any formal notice, escalation, or cure procedure required by the contract. A well-documented breach strengthens an organisation's position in negotiation or litigation, while weak records undermine otherwise valid contractual rights and make enforcement considerably harder later.

Minor, Material and Repudiatory Breach

A minor breach is a limited failure that does not substantially undermine the contract or deprive the innocent party of its expected benefit. It may justify damages or another contractual remedy but will not normally permit termination. Examples include an isolated late report or a temporary service failure quickly corrected. Procurement teams should respond proportionately, avoiding unnecessary contractual disputes over failures that carry little real commercial significance.

A material breach is more serious and refers to a failure that significantly affects performance. However, the expression carries no single fixed meaning under English law and depends heavily on the contract's own wording. Agreements frequently define particular events as material breaches and permit termination if they occur or remain unremedied. Procurement professionals should therefore examine the contractual definition carefully before relying on the label alone.

A repudiatory breach is sufficiently serious to entitle the innocent party, at common law, to accept the breach, terminate the contract, and claim damages. It may arise where a party refuses to perform, breaches a condition, or commits a sufficiently grave breach of an innominate term. The innocent party must then choose whether to terminate or affirm, and an incorrect decision can itself create substantial legal exposure.

Persistent failures can become repudiatory even where individual incidents appear minor in isolation. Repeated missed deadlines, recurring service failures, or continued non-compliance after warnings may demonstrate that a supplier no longer intends, or is unable, to perform properly. Termination should never be assumed automatically; however, procurement teams should assess the contractual terms, cumulative effect, correspondence, and evidence before concluding that repeated breaches justify ending the relationship.

Anticipatory Breach and Refusal to Perform

An anticipatory breach occurs when, before performance is due, one party clearly indicates that it will not perform its obligations. The refusal may be express, stating outright that delivery will not occur, or inferred from conduct showing that performance has become impossible or will not be provided. The innocent party must assess whether the indication is clear and serious before treating the contract as repudiated.

Where anticipatory breach is established, the innocent party may accept the repudiation and terminate immediately, claim damages, or affirm the contract and require continued performance.

Affirmation can preserve the relationship where replacement supply is difficult, but it may expose the organisation to further operational or financial risk if the supplier still fails to perform. The decision should weigh contractual rights, replacement options, and the practical consequences of continuing.

A supplier's refusal to perform may stem from pricing disputes, resource shortages, disagreements over scope, or an assertion that the purchaser has itself breached the contract. Procurement teams should avoid treating every reservation or threat as repudiation; conditional statements, requests to renegotiate, or temporary difficulties may fall short of a clear refusal. Correspondence, contractual obligations and supplier conduct should be examined objectively before termination rights are exercised.

Timing can be critical, because the innocent party's response affects the remedies available. If repudiation is accepted, the contract ends as to future performance, though accrued rights remain enforceable; if affirmed, both parties remain bound, and later events may alter the position. Procurement professionals should document the refusal, preserve evidence and seek advice before taking irreversible action that could expose the organisation to a wrongful termination claim.

Persistent Poor Performance and Repeated Breaches

Persistent poor performance does not always stem from a single dramatic failure. It may develop through repeated late deliveries, recurring defects, missed milestones, incomplete reporting, service interruptions or a failure to implement corrective action. Individually, each incident may seem minor, yet collectively they can undermine the contract's commercial purpose. Procurement and contract management teams should therefore monitor patterns rather than assessing every failure entirely in isolation.

Whether repeated breaches justify termination depends on the contractual wording, seriousness of the failures and their cumulative impact. Some agreements contain persistent breach provisions, permitting termination after a stated number of failures, repeated service credits, or unsuccessful remediation plans. Where such wording is absent, the organisation may need to establish that the pattern has become sufficiently serious to amount to repudiatory breach before common-law termination is considered.

Effective contract management strengthens the purchaser's position by creating a clear record of underperformance and the opportunities given for improvement. Performance notices, meeting minutes, corrective action plans, correspondence and escalation records demonstrate both the supplier's failures and the organisation's proportionate response. Allowing repeated breaches to continue unchallenged can weaken commercial leverage and, in some circumstances, raise arguments of waiver or affirmation against the purchasing organisation.

When KPI and Service-Level Failures Become Contractual Breaches

Key performance indicators and service levels provide measurable standards for assessing supplier performance, but missing a target does not automatically create a right to terminate. The legal consequences depend on how the measures are incorporated into the contract and what remedies attach to failure. Some agreements treat missed targets as breaches; others provide service credits, improvement procedures or escalation mechanisms as the primary response to underperformance.

Drafting should distinguish aspirational performance measures from legally binding obligations. A KPI described merely as a target may carry different consequences from a minimum service level stated as mandatory. Contracts should explain whether service credits operate as the exclusive remedy or alongside damages and termination rights. Subject to specified exceptions, the Procurement Act 2023 generally requires contracting authorities to set and publish at least three KPIs for public contracts valued above £5 million, reinforcing the need for precise performance drafting.

Repeated KPI failures become more serious where they demonstrate systemic underperformance or undermine the contract's essential purpose. Commercial agreements may set thresholds, consecutive failures, cumulative service credit levels, or repeated missed service levels within a defined period, thereby converting performance data into contractual triggers. Procurement teams should ensure measurement methodologies, reporting periods, exclusions and calculation rules are precise enough to withstand challenge if termination follows.

The practical response should remain proportionate to the breach. Isolated underperformance may warrant monitoring or remediation, while sustained failure may require formal breach notices, improvement plans and escalation toward termination. Procurement teams should avoid relying solely on dashboard results without connecting them to contractual provisions; strong contract management combines performance evidence with disciplined notice, cure and escalation, ensuring termination rests on a defensible legal foundation.

The Innocent Party's Choices Following Breach

Once a breach occurs, the innocent party must decide how to respond rather than assume termination is automatically available. Options include requiring performance, seeking damages, invoking contractual remedies, allowing time to cure, suspending obligations where permitted, negotiating a settlement or, in sufficiently serious cases, terminating. The correct response depends on the nature of the breach, the contractual wording, operational priorities and the consequences each remedy carries.

The innocent party should first establish what rights have actually arisen. A contract may prescribe procedures, a breach notice, a cure period, service credits, or escalation before termination becomes available. Common-law rights may coexist with contractual remedies, but their interaction requires careful analysis. Procurement teams should avoid bypassing agreed mechanisms unless the contract, or the seriousness of the breach, clearly permits a different response.

Commercial considerations matter as much as legal entitlement. Termination may protect against continued underperformance but can create replacement costs, service disruption, mobilisation risk and urgent procurement needs. Continuing with a failing supplier may preserve continuity while increasing financial exposure or weakening leverage. The innocent party should compare legal remedies against practical alternatives and select the course most likely to protect value, service and organisational objectives.

The innocent party must act consistently once a course is chosen. Delay or continued acceptance of performance may affect whether termination rights can still be exercised. Clear communications, reserved rights and accurate records are essential throughout. Procurement and contract management teams should coordinate decisions so that day-to-day actions do not unintentionally undermine the legal position the organisation ultimately intends to preserve after a breach.

Affirming the Contract or Accepting Repudiation

Where a repudiatory breach occurs, the innocent party faces a choice between accepting the repudiation and terminating the contract, or affirming the contract and keeping it alive. The contract does not automatically end simply because repudiatory conduct has occurred; acceptance normally requires clear communication or conduct showing the innocent party treats the contract as terminated. Until that happens, the relationship may continue despite the serious breach already committed.

Affirmation means continuing with the contract despite knowing of the repudiatory breach. In White & Carter (Councils) Ltd v McGregor [1962] AC 413, the House of Lords confirmed that an innocent party may, in some circumstances, elect to continue performance and claim the contract price rather than terminate, though this can reduce flexibility later. Procurement teams should understand that accepting deliveries or requesting further work may itself evidence affirmation.

Accepting repudiation ends future performance while preserving accrued rights and clauses intended to survive termination. The decision should be communicated promptly and clearly, particularly where the contract contains formal notice provisions. If the breach was not, in fact, repudiatory, attempted termination may itself amount to a repudiatory breach. Organisations should assess the seriousness, evidence, wording, and operational consequences before making a decision that may prove difficult to reverse.

Contractual Termination Rights

Contractual termination rights are express provisions that allow one or both parties to terminate upon specified events. They may cover material breach, persistent breach, insolvency, corruption, regulatory failure, repeated service-level failures, or prolonged force majeure. These rights offer *greater certainty than relying solely on common law, because the contract identifies the trigger and sets out the procedure to be followed before termination takes effect.*

The availability of a contractual termination right depends on the conditions being satisfied. A clause may require written notice, identification of the breach, a specified remedy period, or escalation through governance before termination. Failure to comply can invalidate the attempt even where the underlying failure is serious. Procurement teams should treat termination clauses as procedural mechanisms, not simply as permission to end an unsatisfactory relationship.

Contracts frequently distinguish immediate termination from termination following an opportunity to remedy. Serious illegality, insolvency events, or conduct incapable of correction may permit immediate action, while other failures require a cure period during which the defaulting party can restore compliance. Clear drafting should identify which breaches are remediable, how long any remedy period lasts, and what happens if corrective action remains incomplete once that period expires.

Termination clauses should address persistent or repeated breaches that individually may not justify immediate termination. The contract can specify thresholds, service failures within a period, recurring breaches after remediation, or cumulative service credits exceeding an agreed-upon level, providing procurement teams with clear triggers for intervention. Without them, an organisation may struggle to demonstrate that a pattern of underperformance has become serious enough to justify termination.

Well-drafted termination provisions should work alongside, rather than obscure, other contractual and common-law remedies. The agreement should state whether remedies are cumulative, exclusive, or subject to liability limitations, and identify which obligations survive termination. Procurement professionals should distinguish termination for breach from termination for convenience, expiry and rescission, ensuring the organisation uses the correct legal route and does not surrender rights through procedural error.

Common-Law Termination Rights

Common-law termination rights arise independently of any express contractual termination clause. They generally become available where the other party commits a repudiatory breach, refusing to perform, breaching a condition, or committing a sufficiently serious breach of an innominate term. These rights matter where the contract is silent or incomplete, but require careful legal assessment because not every contractual failure is serious enough to justify termination.

The innocent party must decide whether to accept the repudiatory breach and terminate the contract, or affirm the contract and continue performance. Termination at common law is not automatic, and acceptance should be communicated clearly. Delay, or conduct indicating the contract remains in force, may amount to affirmation. Procurement teams should avoid acting inconsistently while internal discussions continue, particularly where operational staff remain engaged with the supplier day-to-day.

Common-law rights may coexist with express contractual termination provisions, but their interaction depends on the wording of the agreement. Some contracts preserve common-law remedies; others regulate precisely how termination rights must be exercised. A purchasing organisation should consider both the contractual mechanism and the underlying legal position, since relying on one route without examining the other may create unnecessary procedural risk or overlook a valuable remedy.

Wrongful termination at common law can itself amount to repudiatory breach, exposing the terminating party to damages. This risk is particularly acute where the seriousness of the supplier's breach is arguable, or evidence remains incomplete. Before relying on common-law termination, procurement teams should establish the obligation breached, assess the consequences, preserve supporting evidence, and seek advice, since a commercial grievance alone does not constitute a legal ground for termination.

Termination for Convenience

Termination for convenience allows a party, usually the customer, to end a contract without proving the other party's breach or fault. The right exists only where the contract expressly provides for it. It *can offer valuable flexibility when requirements change, funding disappears, services are reorganised, or the organisation wishes to procure differently. However, exercising the right typically triggers notice obligations and compensation payable to the affected supplier.*

A convenience clause should specify who may exercise the right, the required notice period, and the financial consequences of termination. It may allow payment for work properly completed, committed costs and demobilisation expenses, while excluding lost profit. Poor drafting can create disputes over recoverable costs and whether the clause was intended to provide an unrestricted exit. Clear allocation of termination costs supports both flexibility and commercial certainty.

Procurement teams should consider the commercial impact of including a unilateral convenience right within the procurement process itself. Suppliers may price the risk of early termination into their bids, particularly where mobilisation costs are substantial, or investment must be recovered over several years. A broad termination right can therefore increase tendered prices even if never exercised, so flexibility should be weighed against the resulting cost premium.

Exercising termination for convenience must comply with the contractual procedure and any duties arising from the procurement context, including the requirements of the Procurement Act 2023 regarding the fair treatment of suppliers. Notice should be served in the required form, through the correct channel, within the stated timescale. The organisation should also manage the transition, asset return, information transfer, and outstanding payments carefully, since a convenient exit does not eliminate surviving obligations.

Termination for convenience should not be used casually where another ground more accurately reflects the supplier's actual failure. Using convenience rights avoids disputing breach but can affect compensation, contractual remedies and the organisation's ability to recover losses. Procurement teams should assess whether termination for cause, common-law termination, negotiated exit or remediation produces the better outcome, aligned with the organisation's commercial objectives and evidential position.

Termination for Cause

Termination for cause permits a party to end the contract because a specified default or event has occurred. Typical grounds include material breach, persistent breach, insolvency, corruption, regulatory failure, service-level failures, or failure to remedy a notified breach. Unlike termination for convenience, the right depends on establishing the cause and complying with the contractual mechanism, so grounds should be defined precisely enough to minimise uncertainty when enforcement becomes necessary.

Evidence is important where termination for cause relies on persistent or cumulative failures rather than a single serious event. Contract managers should retain performance reports, breach notices, meeting records, corrective action plans and correspondence showing that opportunities to improve were genuinely provided. The termination notice should identify the contractual basis relied upon with sufficient clarity, since vague references to poor performance can make an organisation's position harder to defend.

Cause-based termination should be assessed against the practical consequences of ending the relationship. The organisation may need replacement supply, transition assistance, access to records, or transfer of assets and services during an exit period. The contract should address these requirements before problems arise, so procurement drafting combines clear termination triggers with workable exit provisions, ensuring a legally valid termination can proceed without unnecessary operational disruption or value loss.

Notice Requirements and Why They Matter

Contractual notice provisions determine how important communications, including termination notices, must be given: the permitted method of service, recipient, address, timing and required content. These are not mere administrative formalities. Where a party relies on a contractual right to terminate, compliance with the agreed notice procedure can determine whether termination is effective and whether the terminating party remains protected from a wrongful termination claim afterwards.

Notice periods also provide fairness and certainty. They may give the defaulting party time to remedy a breach, prepare for termination, or arrange an orderly transition. Procurement teams should identify whether notice runs from dispatch, receipt or another defined event, particularly where deadlines are strict. Miscalculating the period by even a few days can result in premature termination and expose the purchasing organisation to challenge later.

The content of a notice can be decisive. Contracts often require the terminating party to identify the breach, state the contractual provision relied upon, explain any required remedy and confirm when termination takes effect. A vague letter expressing dissatisfaction rarely satisfies these requirements. Procurement teams should distinguish formal notices from routine correspondence and ensure they accurately reflect the legal basis on which the organisation intends to act.

Service requirements should be checked before any critical notice is issued. A contract may require delivery by post, hand, email or another specified method, and may restrict service to named individuals or registered offices. Sending a notice to the operational contact who manages the account daily may seem sensible but may prove legally ineffective. Strong contract management includes keeping notice details up to date and precisely following the contractual mechanism when termination is considered.

Invalid and Defective Termination Notices

A termination notice may be defective if it fails to comply with contractual requirements or does not clearly communicate the exercise of the right to terminate. Common errors include using the wrong address, serving the wrong recipient, giving insufficient notice, failing to identify the relevant breach, or omitting a required cure period. Such defects can prevent termination from taking effect even where the underlying supplier failure would otherwise justify ending the contract.

Courts may distinguish minor technical defects from failures that materially depart from contractual procedure, but procurement teams should not assume an error will be overlooked. Much depends on the wording of the notice clause, the seriousness of the defect, and whether the recipient genuinely understood what was intended. Where strict compliance is required, procedural mistakes can undermine an otherwise strong case and create significant financial exposure.

A defective notice can have consequences beyond delaying termination. If the terminating party stops performance or excludes the supplier without a valid right, that conduct may itself amount to repudiatory breach, allowing the supplier to accept the breach and claim damages in turn. Procurement teams should therefore treat the validity of termination notices as a substantive legal issue rather than an administrative step tacked on after the decision is made.

Problems arise where multiple grounds for termination exist, but the notice relies on only one. Depending on the circumstances, the terminating party may later face restrictions on reliance on alternative grounds known but not stated at the time. Notices should be prepared carefully, using precise contractual language and preserving relevant rights; overstatement should be avoided, since unsupported allegations weaken credibility if the supplier challenges the termination.

Waiver, Election and Estoppel

Waiver occurs when a party voluntarily gives up, or is treated as having given up, a contractual right through words or conduct. Repeatedly accepting late performance without objection, for example, may make immediate reliance on a strict delivery requirement more difficult later. Contracts often contain no-waiver clauses, but these do not always eliminate the risk. Procurement teams should reserve rights expressly when tolerating temporary non-compliance or allowing extra time.

An election arises when a party, faced with inconsistent rights, must choose between them: accept a repudiatory breach and terminate the contract, or affirm the contract. Once a choice is made with knowledge of the relevant facts, it can become difficult or impossible to reverse, and continued performance may itself carry legal significance. Procurement teams should coordinate operational and legal responses so routine actions do not contradict the intended remedy.

Estoppel may prevent a party from enforcing a legal right where its words or conduct led the other party reasonably to rely on a different position, and it would be unfair to permit reversal. In contract management, informal assurances, repeated tolerance or agreed departures from procedure can *create real risk. Procurement teams should document temporary concessions, clearly define their duration, and, wherever possible, confirm that future contractual rights remain reserved.*

What Happens After Termination?

Termination generally ends the parties' obligations to perform under the contract, but it does not erase everything that occurred before it. Rights and liabilities already accrued usually remain enforceable; unpaid invoices, damages claims, and obligations arising from earlier breaches may be included; and certain provisions may be drafted to survive termination entirely. Procurement teams should distinguish between ending future performance and extinguishing rights, since termination rarely produces a complete break.

The contract should specify what happens during the exit and transition: returning property, transferring records, providing data, completing handover activities, protecting confidential information, and cooperating with a replacement supplier. Intellectual property rights, audit rights, indemnities, confidentiality and dispute resolution provisions may all continue after termination. Effective drafting should enable the organisation to maintain service continuity and recover essential information, even where the relationship ended acrimoniously.

Financial consequences must also be addressed. The customer may need to pay undisputed sums for completed work while retaining rights to recover damages, service credits, or amounts arising from breach. The supplier may claim termination payments depending on the route used, and set-off provisions can become important where both parties assert monetary claims. Procurement teams should reconcile accounts carefully rather than assuming termination automatically resolves financial disputes.

Operationally, termination can pose substantial risk if replacement arrangements are not already in place. Procurement teams may need to coordinate contingency supply, emergency procurement, asset recovery, data transfer and stakeholder communications while preserving evidence for any dispute. The organisation should also review lessons from the failed relationship, as well as weaknesses in drafting, performance management, or escalation, so that a controlled exit does not itself become another operational failure.

Contractual Termination Versus Rescission

Contractual termination and rescission are different legal concepts, although both can bring contractual obligations to an end. Termination generally operates prospectively, ending future performance while preserving rights and liabilities that accrued before termination. Rescission, by contrast, seeks to unwind the contract and, so far as possible, restore the parties to their pre-contract position. Procurement teams should avoid using the terms interchangeably when assessing remedies or drafting correspondence.

Termination usually arises because an express contractual right has been exercised, or a repudiatory breach has been accepted. The contract terminates with respect to future obligations, but accrued payment rights, claims for damages, and surviving clauses remain in effect. Rescission is more commonly associated with defects in contract formation, misrepresentation, duress, undue influence or certain mistakes. It aims not to punish breach but to reverse a transaction that should never have stood.

Rescission is an equitable remedy and may be unavailable where restoration of the parties is impossible, excessive delay has occurred, third-party rights have intervened, or the contract has been affirmed. These limitations make rescission fundamentally different from ordinary contractual termination for breach. In commercial procurement, it is therefore far less common than termination, though it may become relevant where a supplier secured a contract through material misrepresentation or another vitiating factor.

The distinction matters because the consequences can differ significantly. A party terminating for breach may seek damages reflecting losses caused by non-performance, whereas rescission primarily focuses on reversing the transaction itself. Procurement professionals should identify the correct legal remedy before issuing notices or negotiating a settlement, since describing rescission as termination, or vice versa, can create confusion regarding accrued rights, repayment obligations, damages, and the intended legal effect.

Damages for Breach of Contract

Damages are the principal common-law remedy for breach of contract and are intended to compensate the innocent party rather than punish the defaulting one. The general objective is to place the claimant, so far as money can achieve it, in the position it would have occupied had the contract been properly performed. The amount recoverable therefore depends on the loss caused, applicable contractual provisions, and established legal limits on compensation.

Damages may include direct financial loss and, where legally recoverable, consequential losses resulting from breach. However, terminology used loosely in contracts can mislead, since labels such as direct, indirect and consequential do not always correspond neatly with commercial understanding. Exclusion and limitation clauses may significantly alter recoverability. Procurement professionals should examine the liability regime alongside the breach provisions before estimating potential financial recovery or exposure.

A damages claim also requires evidence. Organisations should retain replacement quotations, invoices, cost records, performance data, correspondence and calculations demonstrating how losses arose. Unsupported estimates or inflated claims may be challenged and weaken negotiating credibility. Contract managers should begin documenting financial consequences as soon as a serious breach occurs, since early evidence gathering supports settlement discussions, insurance notifications and informed decisions on whether pursuing damages is commercially proportionate.

Causation and Proving the Loss

Causation requires the claimant to show that the defendant's breach caused the loss being claimed. It is not enough to establish that a supplier breached the contract and that the organisation later suffered financial harm; the claimant must connect the breach to the loss on a legally sufficient basis. Procurement teams should separate losses genuinely resulting from supplier failure from costs that would have arisen regardless.

The factual inquiry commonly asks what would have happened had the contract been performed correctly. This counterfactual analysis becomes complicated where several factors contribute to the loss, customer decisions, market conditions, or failures by other suppliers. Project plans, delivery schedules, production records and correspondence can help demonstrate causation, whereas weak records may make it difficult to prove that claimed costs actually resulted from the failure itself.

Proving quantum is distinct from proving that breach occurred. The claimant must establish the amount of recoverable loss with evidence, although absolute precision is not always required. Procurement teams should use transparent calculations and avoid including speculative costs without adequate support. Where replacement procurement, delays, or internal resources generate additional expenditure, records should clearly show how the figures were derived, since strong quantum evidence materially improves prospects of recovery.

Remoteness of Damage

Even where breach caused a loss, remoteness rules may prevent recovery if the type of loss was not sufficiently foreseeable when the contract was formed. The foundational authority, Hadley v Baxendale (1854) 9 Ex 341, permits recovery of losses arising naturally from the breach, or those contemplated by both parties because of special circumstances known at the time of contracting, limiting liability for unusual consequences a defaulting party could not reasonably anticipate.

Foreseeability concerns the type or kind of loss rather than its precise monetary amount. A supplier delivering components late might reasonably foresee production disruption, but extraordinary losses arising from an undisclosed customer arrangement may fall entirely outside the range of recoverable damages. Procurement teams should, where appropriate, communicate material dependencies during contracting, particularly where supplier failure could cause unusually severe consequences that would otherwise not satisfy the remoteness test.

Remoteness should be considered alongside causation and mitigation rather than as an isolated test. A loss may have been caused by breach but still be unrecoverable because it was too remote, avoidable, or contractually excluded. Procurement teams evaluating a damages claim should map each claimed loss against the legal and contractual requirements, producing more realistic recovery *estimates and strengthening decision-making during negotiation, escalation, settlement or litigation.*

The Duty to Mitigate Loss

The duty to mitigate requires an innocent party to take reasonable steps to reduce losses caused by breach. It does not require extraordinary measures, acceptance of unreasonable risk, or expenditure disproportionate to the likely benefit. In British Westinghouse Electric Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673, the House of Lords confirmed that reasonable mitigation reduces recoverable damages; therefore, procurement teams should act promptly after a supplier failure.

Mitigation does not require the innocent party to sacrifice commercial interests. The standard is reasonableness in the circumstances, assessed with recognition that decisions often must be made quickly after breach. A purchaser may therefore choose a practical replacement supplier even if it is not the cheapest option available. What matters is whether the response was commercially reasonable at the time, not whether hindsight later reveals a more economical course.

Replacement procurement is a common form of mitigation where goods or services are no longer available from the original supplier. The purchasing organisation should document quotations, market searches, emergency arrangements, and the reasons for choosing a substitute provider, as these records help demonstrate that additional costs were reasonably incurred. Failure to investigate feasible alternatives may allow the supplier to argue that some claimed losses resulted from customer inaction rather than breach.

The duty to mitigate also prevents recovery of losses the innocent party successfully avoids. If replacement arrangements reduce the financial impact of breach, damages reflect the net loss rather than the original exposure. Procurement teams should therefore calculate additional costs and savings resulting from the response. A disciplined mitigation record demonstrates commercial responsibility, strengthens damages claims and supports scrutiny of decisions taken during a period of supplier failure.

Expectation, Reliance and Other Measures of Damages

Expectation damages seek to place the innocent party in the position it would have occupied had the contract been properly performed. They protect the benefit of the bargain and are the normal measure for breach of contract. In procurement, this may include additional replacement costs, lost contractual value, or reasonable rectification expenditure, provided the claimant establishes causation, remoteness, and mitigation, and remains subject to valid exclusions or liability caps.

Reliance damages compensate expenditure incurred because the claimant relied on the contract, particularly where the expected benefits are uncertain or difficult to prove. They aim to restore the claimant to the position it would have occupied had the contract never been made. For a purchasing organisation, recoverable reliance loss might include mobilisation expenditure, preparation costs, or wasted expenditure caused by breach, provided such costs are legally recoverable and not commercially unreasonable.

The cost of cure may be appropriate where defective performance requires remedial work to reach the contractual standard. This is particularly relevant in construction, maintenance, technology and service contracts, where correcting deficiencies matters more than measuring diminished value. However, the cost claimed must be reasonable and proportionate. Procurement teams should obtain evidence of remediation costs and consider whether full rectification represents a reasonable response to the failure.

Diminution in value provides another measure, in which defective performance reduces the value of what was supplied, but full rectification would be disproportionate. The difference between the value promised and the value received may then form the basis of damages. In procurement disputes, this approach can arise where goods, works or services remain usable despite non-compliance. The appropriate measure depends on contractual expectations, practicality, proportionality and available evidence.

Restitutionary remedies may be relevant when the focus is on reversing an unjust benefit rather than compensating losses of expectation or reliance. Their availability in breach-of-contract cases is *limited and depends heavily on the circumstances. Procurement professionals should avoid treating restitution as a routine alternative to compensatory damages; the priority is normally to identify the recognised measure that best reflects the loss caused by non-performance or defective performance.*

Liquidated Damages

Liquidated damages are predetermined sums or formulae agreed in the contract, payable upon specified breaches such as delay or failure to meet performance standards. They provide certainty by removing the need to prove actual loss each time a breach occurs. In procurement, they are useful where likely losses are difficult to quantify precisely, provided the clause is drafted clearly and reflects a legitimate contractual interest rather than a punitive purpose.

A well-drafted liquidated damages regime should define the triggering event, the calculation method, the maximum exposure and the relationship with other remedies. Delay damages may, for example, be calculated as a fixed daily or weekly amount until completion, subject to an agreed cap. Procurement teams should clarify expressly whether liquidated damages are the exclusive remedy for the breach, or whether termination and additional damages remain available alongside them.

Liquidated damages can simplify contract management because the parties know the financial consequence of defined failures in advance. However, the amount should still be commercially justified and supported by the interests the clause protects. Excessive or arbitrary figures may invite challenge, while amounts set too low may provide insufficient protection. Procurement professionals should align the remedy with the risk profile, anticipated consequences and liability structure established during negotiation.

When Liquidated Damages Become Penalties

A liquidated damages clause may be unenforceable if it constitutes a penalty. The Supreme Court's decision in Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis [2015] UKSC 67 reframed the test: the key question is whether the contractual detriment imposed for breach is out of all proportion to the innocent party's legitimate interest in enforcing the relevant obligation, rather than whether the sum represents a genuine pre-estimate of loss.

The penalty doctrine generally applies to obligations triggered by breach, rather than to every payment mechanism that produces an unfavourable consequence. Procurement teams should distinguish genuine primary pricing obligations from secondary obligations imposed following default. A clause requiring payment after delay, non-performance, or another breach may attract scrutiny, particularly where the financial consequences are severe, so drafting should identify the legitimate commercial interest protected and ensure the remedy remains proportionate.

A clause is not automatically penal merely because the sum exceeds the loss proved after breach. Legitimate interests may include protecting operational continuity, maintaining performance discipline, or safeguarding important wider commercial arrangements that are difficult to value precisely. Nevertheless, an extravagant consequence bearing little relationship to those interests remains vulnerable. Procurement teams should avoid using liquidated damages primarily as a deterrent designed to punish rather than protect performance.

The strongest liquidated damages provisions are negotiated transparently and integrated with the contractual risk model. Records explaining how the amount or formula was selected can prove valuable if enforceability is later challenged. Procurement professionals should consider contract value, likely disruption, alternative remedies and liability caps when setting the figure. A balanced clause offers certainty without imposing a consequence so disproportionate that a court may decline to enforce it.

Specific Performance and Injunctive Relief

Specific performance is an equitable remedy requiring a party to perform its contractual obligation rather than merely pay damages. It is granted at the court's discretion and is generally unavailable where damages provide an adequate remedy. The remedy is more likely where the contractual subject matter is unique or a replacement cannot readily be obtained. In procurement, it may occasionally matter where critical assets or irreplaceable deliverables are involved.

Courts are generally reluctant to order specific performance of contracts requiring continuous supervision, personal services, or complex cooperation. This limitation reduces its usefulness for many outsourced service arrangements, where forcing parties to continue working together may prove impractical. Procurement teams should therefore not assume a court will compel a failing supplier to deliver indefinitely; alternative supply, damages and contractual step-in rights often offer more workable protection in practice.

An injunction is an equitable remedy that may require a party to stop conduct or, in some circumstances, take specified action. It can matter where damages would not provide adequate protection, in cases of threatened misuse of confidential information, infringement of rights, or conduct capable of causing irreversible harm. Interim injunctions may preserve the position before trial, although applicants must satisfy demanding legal tests and may need to provide cross-undertakings in damages.

Procurement contracts can support equitable remedies by clearly defining obligations involving confidentiality, intellectual property, data, restrictive covenants and asset protection. However, the wording of a contract cannot guarantee that a court will grant an injunction or specific performance, as equitable relief remains discretionary. Procurement professionals should combine drafted rights with practical remedies, transition assistance, access rights and security mechanisms, so operational protection does not depend entirely on urgent judicial intervention.

Specific performance and injunctions are powerful but exceptional remedies compared with damages. Their availability depends on the adequacy of damages, practicality, fairness, delay and the claimant's own conduct. Procurement teams facing supplier disputes should assess whether equitable relief is realistically achievable and commercially worthwhile. Where urgent action is required, evidence should be preserved and legal advice obtained before any conduct that could make securing effective relief harder occurs.

Limitation and Exclusion Clauses

Limitation and exclusion clauses allow contracting parties to define, restrict or remove particular liabilities that might otherwise arise following breach. They can limit recoverable losses, exclude specified categories of damage, cap financial exposure or allocate responsibility for particular risks. In commercial procurement, these provisions are heavily negotiated because they determine the practical value of contractual remedies; a strong performance regime can be undermined if corresponding liabilities are excluded too broadly.

The effectiveness of such clauses depends on clear drafting, proper incorporation and applicable legal controls. Ambiguous wording may be interpreted narrowly, particularly where a party seeks to exclude substantial liability. In Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, the House of Lords confirmed that a validly incorporated exclusion clause can, subject to the Unfair Contract Terms Act 1977's reasonableness test, apply even to a fundamental breach of contract.

Exclusion clauses commonly address indirect or consequential loss, loss of profit, loss of revenue, business interruption, data loss or reputational damage. These expressions can carry technical legal meanings that differ from everyday commercial usage, so procurement professionals should avoid relying on labels alone and examine which losses genuinely matter to the organisation. Drafting should reflect realistic exposure arising from supplier failure, rather than applying broad categories without understanding their effects.

Can a Supplier Contract Out of Liability?

A supplier cannot necessarily contract out of every form of liability merely because exclusion wording appears in the agreement. English law permits substantial freedom of contract between commercial parties, but that freedom is subject to statutory controls, public policy and rules of interpretation. Some liabilities cannot be excluded at all, while others may be excluded only if the wording is sufficiently clear and, where relevant, satisfies a statutory reasonableness test.

Liability for death or personal injury resulting from negligence cannot be excluded under the Unfair Contract Terms Act 1977 (UCTA). Other negligence liability may be restricted only where the term satisfies UCTA's reasonableness requirement, and different controls apply depending on how the contract was concluded and whose standard terms are used. Procurement teams should avoid *treating liability clauses as purely commercial drafting matters divorced from this statutory framework.*

Suppliers frequently seek exclusions for lost profits, lost revenue, indirect losses, cybersecurity incidents, data loss or third-party claims. Whether these exclusions should be accepted depends on the contract's risk profile and the likely consequences of supplier failure. A purchasing organisation should identify which risks the supplier is best placed to control and which losses would be significant, since blanket exclusions can transfer disproportionate exposure back to the customer without a corresponding reduction in price.

Negotiation should focus on a rational allocation rather than on imposing unlimited liability for every breach. Suppliers need exposure that remains insurable and proportionate, while customers need meaningful protection against foreseeable harm. Procurement teams should consider targeted carve-outs, appropriate caps, insurance requirements and specific indemnities rather than relying solely on broad exclusions, aiming for a regime that remains enforceable, credible and aligned with the risks actually being purchased.

Liability Caps and Commercial Risk Allocation

Liability caps set the maximum financial exposure a party may face for contractual claims. They provide certainty and help suppliers price risk, obtain insurance and avoid unlimited losses. For customers, however, a cap set too low can leave residual exposure following serious failure. Procurement teams should assess whether the proposed cap bears a sensible relationship to contract value, foreseeable loss, service criticality and the supplier's ability to control risk.

A single aggregate cap is simple but may not suit every risk. Contracts often use separate caps for different categories: general breach, data protection, confidentiality, intellectual property infringement or property damage, and certain liabilities may remain uncapped where the law or commercial circumstances justify it. Procurement professionals should understand which claims fall within each cap, whether caps reset annually, and whether multiple claims share the same financial limit.

Contract value is a useful reference point but should not automatically determine liability. A low-value contract can create high operational exposure where services are critical, while a high-value contract may present relatively modest consequential risk. Procurement teams should consider the maximum credible loss arising from supplier failure, replacement costs, business interruption and regulatory exposure. Scenario testing provides a stronger basis for setting caps than applying standard percentages without analysis.

Commercial risk allocation should place responsibility with the party best able to prevent, control, insure or price the relevant exposure. The customer may reasonably retain risks arising from its own decisions, while the supplier should bear risks created by performance failures. Negotiations should also consider insurance availability, market practice and proportionality, since excessive transfer can reduce competition, increase prices, or encourage suppliers to qualify bids rather than accept unmanageable exposure.

Procurement teams should assess liability provisions as an integrated package rather than negotiating caps in isolation. Exclusions, indemnities, service credits, liquidated damages, insurance and termination rights all affect the customer's ultimate financial protection. The resulting arrangement should remain understandable enough to operate in the event of a dispute. Clear drafting, realistic caps and targeted carve-outs create stronger commercial protection than complicated provisions whose interactions become uncertain when failure occurs.

Force Majeure and Events Beyond the Parties' Control

Force majeure clauses address exceptional events beyond a party's reasonable control that prevent or delay contractual performance. English common law provides no general doctrine of force majeure, so rights depend principally on contractual wording. Clauses commonly address natural disasters, war, terrorism, governmental action, industrial disruption or infrastructure failure. Procurement teams should define covered events and consequences carefully rather than relying on the label alone during a live dispute.

A party invoking force majeure will normally need to show the event falls within the clause, affected contractual performance, and could not reasonably have been avoided or overcome. The precise requirements depend on the drafting. Economic difficulty, increased costs or ordinary supply problems may not suffice unless expressly covered. Procurement teams should examine causation, foreseeability, mitigation obligations and notice requirements before accepting that supplier non-performance is genuinely excused.

Well-drafted clauses should explain what happens during the event: obligations may be suspended, deadlines extended, or affected performance temporarily excused, while payment for completed work may remain due. The clause should also require prompt notification, reasonable mitigation and updates on likely duration. Procurement professionals should ensure force majeure does not become an unrestricted excuse for underperformance where alternative sources or contingency measures could have reduced the impact.

Prolonged force majeure may justify termination where continued suspension makes the contract commercially unworkable. Contracts often permit either party to terminate after a defined period, several weeks or months, without treating either side as being in breach. Procurement teams should consider how long disruption can realistically be tolerated before replacement supply becomes necessary; critical services may require shorter thresholds, stronger continuity obligations and specific contingency arrangements than routine purchases.

Force majeure should be distinguished from frustration, a separate common-law doctrine applying only in limited circumstances where an unforeseen event fundamentally changes contractual performance or makes it impossible. Because frustration is narrowly applied, as CTI Group Inc v Transclear SA [2008] EWCA Civ 856 illustrates below, parties usually obtain greater certainty through detailed contractual drafting aligned with business continuity, disaster recovery and supply chain resilience requirements than by relying on the doctrine alone.

Procurement Scenario – Persistent Supplier Underperformance

The British Army's Recruiting Partnering Project illustrates persistent supplier underperformance in public sector procurement. In 2012, the Army committed £1.36 billion over ten years to the programme, including a £495 million, ten-year contract with Capita Business Services to transform recruitment. The National Audit Office later found that Capita missed the Army's annual recruitment targets every year from 2013, with shortfalls ranging from 21% to 45% of the requirement.

The consequences were both operational and financial. In 2017–18 alone, Capita recruited 6,948 fewer regular and reserve soldiers and officers than the Army required. The Army responded through the contract's performance regime, deducting £26 million in service credits, around 6% of total contract payments, with Capita meeting its recruitment KPI in just four of 228 monthly assessments since August 2015. The planned £267 million savings for the Ministry of Defence were never achieved.

The case also shows why repeated underperformance cannot always be treated as a supplier-only problem. The National Audit Office found that the Ministry of Defence had failed to provide critical IT infrastructure on time, contributing to an online recruitment system that launched 52 months late and cost £113 million, triple its original budget. Both parties, the NAO concluded, had underestimated the programme's complexity from the outset.

Rather than immediately terminating Capita, the Army renegotiated the performance regime in 2017, lowering targets by around 20% and introducing an improvement plan, although revised targets continued to be missed. The example shows why procurement teams need escalation routes beyond financial deductions alone. Persistent supplier underperformance may require remediation, contractual renegotiation, stronger governance, or eventual termination, depending on operational consequences and the realistic alternatives actually available.

Procurement Scenario – Repeated Late Delivery

Transport for London's procurement of Bombardier Class 710 trains illustrates repeated late delivery affecting a major public transport service. The new electric trains were intended to replace older diesel rolling stock on the Gospel Oak to Barking line from March 2018. Persistent software problems in Bombardier's Train Control Management System repeatedly delayed the introduction, and in January 2019 TfL confirmed that further development was needed before driver training could even begin.

The first Class 710 finally entered passenger service on 23 May 2019, roughly sixteen months late. TfL confirmed that the full Gospel Oak to Barking service operated exclusively with Class 710 trains from 6 August 2019. The delay had wider consequences: planned frequency improvements elsewhere on the Overground network could not proceed as scheduled, so late delivery affected asset replacement, network capacity and customer service commitments simultaneously across the route.

TfL's commercial response combined contractual leverage with public accountability. As compensation for the disruption, Bombardier funded a month of free travel on the Gospel Oak to Barking line, running from 31 August to 1 October 2019, at an estimated cost to the manufacturer of around £2 million. This illustrates the value of drafting contracts around foreseeable delivery failure, specifying replacement arrangements, delay consequences and responsibilities before a supplier actually misses an important milestone.

The commercial response also extended beyond a single remedy. TfL and the Mayor of London had pressed Bombardier directly throughout the delay, and the free travel gesture followed sustained public and political pressure alongside the underlying contractual relationship. Passenger groups noted that commuters had waited some fourteen months beyond the original passenger service date, showing how reputational consequences can compound financial ones when a major public infrastructure contract slips repeatedly.

Repeated late delivery should therefore trigger more than routine chasing of revised dates. Procurement and contract management teams should establish whether time is of the essence, whether liquidated damages or service credits apply, and whether replacement supply or termination rights have arisen. The Bombardier experience also demonstrates the importance of understanding technical dependencies: where software, testing, certification and operational readiness interact, delivery failure may require coordinated remediation rather than simple allegations of lateness.

Procurement Scenario – Supplier Refusal to Perform

CTI Group Inc v Transclear SA [2008] EWCA Civ 856 is a useful example of a supplier being unable to perform because its own supply chain refused to cooperate. Transclear had agreed to sell 27,000 tonnes of cement to CTI for shipment from Padang, Indonesia. Its intended supplier, PT Semen Padang, whose parent company was 25% owned by Cemex, refused to release the cargo after Cemex applied commercial pressure.

The Court of Appeal rejected Transclear's argument that the contract had been frustrated merely because its upstream supplier would not provide the goods. The court emphasised that a supplier's decision not to perform does not automatically make the downstream contract impossible in the legal sense frustration requires. Transclear had undertaken the supply obligation itself and therefore bore the commercial risk of actually obtaining the cement it needed to perform.

For procurement teams, the case demonstrates why a supplier cannot usually escape contractual responsibility simply by pointing to failure further down its own supply chain. Unless the contract transfers that risk, or an applicable force majeure provision provides relief, the supplier remains responsible for delivering what it promised. CTI ultimately recovered damages of roughly US$450,000 for the cost of sourcing substitute cement from an alternative supplier *following Transclear's failure.*

A clear refusal to perform should be documented and assessed against the contract before the customer reacts. The purchasing organisation may have the right to require performance, source substitutes, recover additional costs, or terminate where the refusal is sufficiently serious. However, the CTI decision also shows the value of expressly drafting upstream supply risk, so that prime suppliers cannot convert foreseeable sourcing difficulties into unplanned customer exposure merely because a preferred supplier withdraws.

Procurement Scenario – A Disputed Termination Notice

Topalsson GmbH v Rolls-Royce Motor Cars Ltd [2023] EWHC 1765 (TCC) is a particularly relevant procurement example involving a disputed termination of a major technology supply contract. In October 2019, Rolls-Royce Motor Cars had appointed Topalsson to design and supply digital visualisation software for a new car configurator ahead of the Ghost launch. Delays developed, responsibility was contested, and revised milestones were formally agreed as the March Plan.

On 17 April 2020, Rolls-Royce served a first termination notice alleging repudiatory breach because Topalsson had missed delivery dates from an earlier plan. Topalsson rejected that notice, argued the relied-upon milestones had been superseded, and expressly affirmed the agreement, contending that Rolls-Royce had itself repudiated the contract by attempting an invalid termination. Later that month, Rolls-Royce served a second notice, relying on missed March Plan milestones and invoking both common-law and contractual termination.

The High Court concluded that the first termination notice was erroneous because it relied on deadlines the March Plan had already superseded. However, this did not resolve the dispute because Topalsson had rejected that notice and affirmed the contract. The second notice was different: the court found that the March Plan was binding, that time was of the essence, and that Topalsson had failed to achieve the relevant milestones, entitling Rolls-Royce validly to terminate Topalsson's appointment under the Agreement.

The dispute shows why termination notices must identify the correct contractual and factual basis. A customer may genuinely believe supplier performance is unacceptable yet still rely on the wrong milestone, clause or legal characterisation in its first notice. Where the supplier challenges termination, the precise wording of each notice becomes evidence of what right was actually exercised. Procurement teams should carefully verify amendments, delivery plans, cure requirements, and incorporated documents before serving a notice.

The case also demonstrates the value of preserving alternative termination routes where they genuinely exist. Rolls-Royce's second notice relied on both the express contractual provision and common-law repudiation, succeeding because the March Plan failures supported each route. At first instance, the High Court awarded damages subject to a €5 million liability cap. However, the Court of Appeal later adjusted the calculation, reducing Rolls-Royce's recovery to approximately €4.2 million plus interest.

For procurement professionals, Topalsson is a warning against treating termination as an administrative endpoint. The notices triggered competing allegations of repudiatory breach, claims and counterclaims running into many millions of euros, and lengthy litigation over project responsibility. Before termination, the customer should establish the operative contract, agreed-upon milestones, evidence of non-performance, and a precise termination mechanism, since the more prepared the customer is, the less opportunity a supplier has to convert performance problems into a dispute about process.

Why Poorly Drafted Termination Clauses Create Problems

Providence Building Services Ltd v Hexagon Housing Association Ltd [2026] UKSC 1 is a powerful illustration of why termination wording must be unambiguous. The dispute concerned an amended JCT Design and Build 2016 contract, worth approximately £7.2 million, for construction works in Purley, London, entered into in February 2019. Hexagon missed a payment of £264,242 in December 2022, then a further payment of £365,812 in May 2023.

Providence served notice of the first specified default in December 2022, but Hexagon paid in full within the 28-day cure period, so no termination right accrued under clause 8.9.3. When Hexagon then missed the May 2023 payment, Providence immediately purported to terminate under clause 8.9.4, treating this as a repetition of a specified default even though the earlier default had already been cured before any right to terminate arose.

The dispute travelled through the High Court, the Court of Appeal, and ultimately the Supreme Court, demonstrating the cost and uncertainty that ambiguous termination wording can generate. The High Court supported Hexagon's interpretation, the Court of Appeal preferred Providence's, and on 15 January 2026 the Supreme Court unanimously restored Hexagon's position, holding that a right to terminate under clause 8.9.3 must first have accrued before clause 8.9.4 could ever be triggered.

The Supreme Court focused on wording linking repeated default to the earlier termination mechanism, concluding that Providence needed a previously accrued right before the repeated-default provision could operate. Without that requirement, two marginally late payments made months apart could in theory justify termination, an outcome the Court described as extreme, likening Providence's reading to using a sledgehammer to crack a nut over what were ultimately short-lived payment defaults.

For procurement teams, the lesson extends well beyond construction contracts using JCT forms. Termination clauses should clearly explain what constitutes a default, whether a breach must continue for a stated period, when cure rights apply, and what happens if the same failure recurs. They should also state whether repeated breaches accumulate independently or only after an earlier termination entitlement has arisen, since ambiguity at these junctions can turn routine contract management into expensive litigation.

Preserving Evidence and Building the Contractual Record

Preserving evidence is essential once contractual performance begins to deteriorate. Procurement and contract management teams should retain correspondence, meeting notes, performance reports, delivery records, invoices, photographs, technical assessments and copies of all formal notices. These materials help establish what happened, when it happened, and how the parties responded. A complete record can determine whether breach, causation, loss and procedural compliance can later be successfully demonstrated in a dispute.

Records should distinguish contemporaneous facts from later interpretation. Notes made during meetings, service reports and documented supplier responses generally carry greater evidential weight than recollections reconstructed months afterwards. Procurement teams should maintain contract files throughout the performance period rather than gathering evidence only when a dispute emerges. Version control is equally important where specifications, change controls, revised programmes or amendments alter the obligations against which performance must ultimately be judged.

The contractual record should also capture the customer's own performance. Suppliers may defend claims by alleging late approvals, incomplete information, scope changes, access problems or other customer failures. Procurement teams should therefore preserve evidence showing that dependencies, decisions and payments were handled properly. A balanced record strengthens credibility because it demonstrates the organisation examined its own conduct as well as the supplier's before asserting breach, damages or termination rights.

Evidence preservation should continue after termination or settlement discussions begin. Emails should not be deleted, documents should remain accessible, and personnel should record events *while memories remain fresh. Where litigation is reasonably contemplated, legal advice may be needed regarding document preservation and disclosure obligations. Procurement teams should treat record-keeping as part of contract governance, since strong evidence supports negotiation, protects legal rights, and improves accountability for future decisions.*

Warnings, Cure Periods and Escalation Procedures

Warnings provide an opportunity to address underperformance before stronger contractual remedies are exercised. Informal discussions may suit isolated problems, but recurring or serious failures should normally be documented formally. A warning should identify the obligation concerned, describe the failure, explain the required corrective action and reserve the organisation's rights. Procurement teams should avoid language that unintentionally suggests acceptance of continuing breach or surrender of available remedies.

Cure periods allow a defaulting party to remedy specified breaches before termination or another remedy becomes available. The contract should state which breaches are capable of cure, how the period begins, and what constitutes satisfactory remediation. As Providence v Hexagon shows, procurement teams should calculate deadlines carefully and avoid acting before a cure period genuinely expires, since premature termination can undermine an otherwise valid case entirely.

Escalation procedures can prevent operational problems becoming formal disputes by requiring progressively senior intervention. A contract may move issues from operational meetings to contract managers, senior executives, mediation, or another dispute resolution mechanism, with each stage having clear timescales, responsibilities, and decision points. Procurement professionals should ensure escalation is used actively rather than treated as a procedural formality, particularly where supplier performance is deteriorating, but recovery remains realistically achievable.

Warnings and escalation should be proportionate to the seriousness of the breach. A critical safety failure may justify immediate action, whereas repeated administrative failures may warrant a staged improvement plan instead. Contract managers should avoid applying identical responses to different risks; the objective is a defensible progression from identification through remediation to stronger remedies, showing the organisation acted reasonably while preserving its ability to intervene decisively where necessary.

Effective procedures also require internal coordination. Procurement, operational teams, finance, legal advisers and senior decision-makers should understand which notices have been issued, which rights are being reserved, and which deadlines are approaching. Conflicting messages weaken an organisation's position, especially when one team threatens to terminate while another continues business as usual with the same supplier. A single documented strategy helps ensure that warnings, cure periods, and escalation reinforce rather than undermine contractual enforcement.

Negotiation, Settlement and Commercial Resolution

Negotiation can provide a faster and more useful response to breach than formal proceedings. Where the relationship remains salvageable, the parties may agree revised milestones, additional resources, price adjustments, service credits, enhanced reporting or corrective measures. Procurement teams should enter negotiations with a clear understanding of legal rights, operational priorities and acceptable outcomes; commercial flexibility is strongest when backed by evidence and a credible alternative.

Settlement becomes valuable where liability is disputed, or the cost of enforcing strict legal rights exceeds the likely recovery. A negotiated settlement can allocate payments, future obligations, confidentiality, transition support and the release of claims in a controlled manner. Procurement teams should ensure that settlement terms are properly documented and that internal authority to compromise claims has been obtained; informal assurances should never replace a binding agreement that surrenders significant rights.

Without-prejudice communications can assist settlement discussions by allowing parties to explore compromise without those negotiations being relied upon as admissions in subsequent formal proceedings. However, the protection carries legal requirements and should not be assumed merely because correspondence carries a label. Procurement professionals should understand when the rule applies and seek advice where necessary, particularly when combining settlement proposals *with operational instructions or formal contractual notices.*

Mediation can provide a route to commercial resolution where direct negotiation has stalled. An independent mediator does not impose an outcome but helps the parties explore settlement, risk and practical alternatives. This can prove useful where continuing relationships, complex technical issues or litigation costs make compromise attractive. Procurement teams should prepare thoroughly, identify decision-makers with real authority, and understand both the legal case and the operational consequences of failing to settle.

Commercial resolution should not be measured solely by the amount recovered or conceded. A settlement that secures continuity, replacement assistance, data transfer, accelerated remediation, or an orderly exit may deliver greater value than prolonged litigation. Procurement teams should compare proposed settlements against alternatives, legal costs, time, uncertainty, and business disruption to protect organisational interests rather than pursue principle when the underlying case for doing so is weak.

When Termination Is the Wrong Commercial Decision

Termination may be legally available yet commercially damaging. Ending a contract can interrupt critical services, create emergency procurement requirements, increase replacement costs and consume substantial management time. Where a supplier's performance can realistically be restored, remediation may preserve more value than immediate exit. Procurement teams should therefore distinguish between having a right to terminate and whether exercising that right actually represents the best outcome for the organisation at that time.

Market conditions can make termination unattractive where alternative suppliers are scarce, switching costs are high, or mobilisation would take many months. A replacement procurement exercise may result in higher prices, reduced competition, or weaker contractual terms than the existing arrangement. Procurement teams should assess supplier availability, transition times, internal capacity and continuity risk before deciding to terminate; legal entitlement should inform, rather than automatically determine, a wider commercial options appraisal.

A negotiated recovery plan may therefore be preferable where failures are remediable, and trust has not disappeared entirely. Enhanced governance, revised milestones, additional resources, financial consequences and executive oversight can restore performance while preserving contractual leverage. However, continued tolerance should have clear limits; procurement teams should define measurable recovery conditions and preserve termination rights, so choosing remediation does not amount to indefinite acceptance of poor performance without a credible exit strategy.

Drafting Contracts to Protect Future Remedies

Contracts should be drafted with failure in mind rather than assuming satisfactory performance throughout the term. Clear obligations, measurable standards and defined remedies give the customer options when problems emerge. Procurement teams should identify risks during sourcing and convert them into enforceable contractual mechanisms, connecting performance requirements to monitoring, breach consequences, remediation and termination, creating a coherent framework rather than disconnected clauses that prove difficult to operate later.

Termination provisions should distinguish among material breach, persistent breach, repeated breach, insolvency, illegality, and other events that require different responses. The contract should explain which failures permit immediate termination, which require notice and cure, and how repeated failures accumulate over time. Procurement teams should avoid vague expressions such as "serious underperformance" without definitions or objective triggers, as precision reduces arguments over whether the contractual termination threshold has been genuinely reached.

Remedies should be cumulative where appropriate, and their interactions should be stated clearly. Service credits, liquidated damages, indemnities, step-in rights, suspension, damages and termination may address different aspects of failure, but poor drafting creates uncertainty over exclusivity. Procurement teams should determine whether using one remedy precludes another and whether liability caps apply, so that the contract provides a coherent hierarchy of responses rather than numerous remedies whose relationships become disputed during enforcement.

Notice provisions deserve the same attention as termination rights themselves. The contract should identify permitted methods of service, authorised recipients, deemed receipt rules, cure periods and the information required in notices. Procurement teams should keep these details current throughout the contract term, since a powerful termination clause becomes ineffective if the customer cannot serve a compliant notice, miscalculates the required period, or relies on obsolete contact information at the critical moment.

Exit provisions should protect continuity after termination. Contracts may require transition assistance, transfer of records, return of assets, continued service for a defined period, data migration and cooperation with a replacement supplier. Charges and responsibilities should be specified before leverage deteriorates. Procurement teams should also identify provisions intended to survive termination, confidentiality, intellectual property, audit, indemnities and dispute resolution, ensuring essential protections continue after operational performance ends.

Risk allocation should be tested against failure scenarios before signature. Procurement teams can ask what would happen if delivery stopped, data became unavailable, a critical subcontractor failed, or replacement supply was suddenly needed. With over 23,900 company insolvencies recorded across England and Wales in 2025 alone, these are not remote hypotheticals. Scenario testing converts legal drafting into operational analysis, exposing gaps while negotiation remains possible rather than only after a serious breach has already occurred.

Best Practice for Procurement and Contract Managers

Procurement and contract managers should begin by understanding the contract before performance problems arise. Key obligations, service levels, notice requirements, escalation routes, liability provisions and termination rights should be identified during mobilisation and translated into practical contract management controls. Relying on the agreement only after a dispute emerges creates avoidable risk; strong governance makes contractual rights visible throughout delivery and allows emerging failures to be addressed before positions become entrenched.

Performance should be monitored consistently against agreed contractual standards rather than informal expectations. Missed milestones, defects, service failures and supplier commitments should be recorded promptly, supported by objective evidence, and discussed in governance forums. Procurement teams should distinguish minor issues from recurring patterns that may warrant formal action, since accurate records create a reliable history of performance and prevent later disputes over whether warnings were given or obligations were genuinely breached.

Formal remedies should be exercised carefully and strictly in accordance with the contract. Before issuing breach or termination notices, teams should confirm the relevant clause, evidence, notice method, recipient, cure period and effective date, and secure internal approvals. Where legal consequences are significant or interpretation uncertain, specialist advice may be appropriate. Procedural discipline reduces the risk that an avoidable enforcement error undermines an otherwise valid complaint against a genuinely underperforming supplier.

Commercial options should be considered alongside legal rights throughout any dispute. Remediation, negotiation, additional controls, replacement supply, settlement and termination each carry different consequences for service continuity, cost and organisational risk. Procurement managers should compare these alternatives systematically rather than treating termination as the inevitable response to serious failure, and should select the course that protects contractual rights while delivering the strongest achievable operational and financial outcome.

Lessons from supplier failures should inform future procurement activity. Contract reviews should identify whether unclear specifications, weak governance, unsuitable performance measures, poor evidence, inadequate remedies or badly drafted exit provisions contributed to the problem. Those findings can improve templates, evaluation criteria and negotiation strategies. Effective contract management therefore extends beyond resolving a single dispute: it strengthens organisational capability and reduces the likelihood that similar contractual weaknesses recur in later procurements.

Summary – Knowing What the Contract Actually Allows

Commercial contracts provide rights and remedies, but those rights depend on the precise agreement, the nature of the breach and the way the parties respond. Poor supplier performance *does not automatically justify termination, just as contractual dissatisfaction does not necessarily establish recoverable loss. Procurement teams must therefore move from instinct to disciplined analysis, identifying the obligation breached, the available remedy, and the procedural steps required before taking significant action.*

The distinction between minor, material and repudiatory breach determines much of what follows. Some failures justify damages or corrective action while leaving the contract alive, whereas sufficiently serious breaches may permit termination. Express contractual rights provide greater certainty but must be exercised strictly in accordance with their wording, as Providence v Hexagon confirms. A customer that terminates without a valid basis may transform supplier underperformance into its own costly repudiatory breach.

Termination itself is not a single legal concept. Contractual termination, common-law termination, termination for convenience and rescission arise for different reasons and produce different consequences. Notice requirements, cure periods, waiver, affirmation and estoppel can further alter the position. Procurement professionals should therefore resist shorthand conclusions that a contract can be cancelled; the correct question is which legal route exists, what conditions apply, and what rights survive afterwards.

Legal and contractual principles also constrain damages. The claimant must establish loss, causation and remoteness, take reasonable steps to mitigate, and work within applicable exclusions and liability caps. Liquidated damages may provide greater certainty but must avoid becoming unenforceable penalties under the Cavendish v Makdessi test. Specific performance and injunctions remain exceptional remedies. Effective procurement requires the liability regime to be understood alongside performance obligations, not only after a serious failure occurs.

The strongest contractual position is created before any dispute arises. Clear specifications, measurable service levels, effective remedies, proportionate liability provisions, precise termination clauses and workable exit arrangements give contract managers meaningful options when performance deteriorates. Evidence, formal notices and consistent governance must then support these provisions. A well-drafted contract cannot prevent every supplier failure, but across the £385 billion spent annually on UK public procurement, it can determine whether the customer retains leverage when failure becomes serious.

Successful contract management depends on knowing both what the contract says and what the law permits. Procurement teams should combine legal discipline with commercial judgement, recognising that enforcing the strongest remedy is not always the best decision. The objective is to preserve value, continuity and accountability while protecting enforceable rights. When relationships break down, the decisive advantage lies with the party that understood its contract, and the law behind it, long before deciding how to act.

Further Reading

The following sources were consulted in preparing this article and provide further detail on the legislation, case law, and official reports discussed above.

Legislation

- *Procurement Act 2023 (c. 54) and the Procurement Regulations 2024 (SI 2024/692) — legislation.gov.uk*
- *Unfair Contract Terms Act 1977 — legislation.gov.uk*

Case Law

- *Hadley v Baxendale (1854) 9 Ex 341 — remoteness of damage*
- *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 — innominate terms*
- *White & Carter (Councils) Ltd v McGregor [1962] AC 413 — affirmation and the innocent party's election*
- *British Westinghouse Electric Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673 — mitigation of loss*

- *Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 — exclusion clauses and fundamental breach*
- *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis [2015] UKSC 67 — the modern test for penalty clauses*
- *CTI Group Inc v Transclear SA [2008] EWCA Civ 856 — frustration and supply chain failure*
- *Topalsson GmbH v Rolls-Royce Motor Cars Ltd [2023] EWHC 1765 (TCC) — termination notices and binding milestones*
- *Providence Building Services Ltd v Hexagon Housing Association Ltd [2026] UKSC 1 — accrued rights and repeated default under the JCT Design and Build Contract*
- *Topalsson GmbH v Rolls-Royce Motor Cars Ltd [2024] EWCA Civ 1330*

Official Reports and Guidance

- *National Audit Office, Investigation into the British Army's Recruiting Partnering Project, HC 1781, December 2018 — nao.org.uk*
- *House of Commons Public Accounts Committee, Capita's contracts with the Ministry of Defence, February 2019 — committees.parliament.uk*
- *Transport for London, press notices on the introduction of Class 710 trains on the Gospel Oak to Barking line, 2019 — tfl.gov.uk*
- *House of Commons Library, Procurement statistics: a short guide, CBP-9317, 2026 — commonslibrary.parliament.uk*
- *Insolvency Service, Company Insolvency Statistics, annual and monthly releases — gov.uk*
- *Cabinet Office, guidance on the Procurement Act 2023 and the National Procurement Policy Statement — gov.uk*