

What are the affirmative defenses to a breach of contract for Project Managers?^{1, 2}

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Abstract

Uncertainty is a major component of project management, as in contract management. Therefore, since the numbers of breach of contract are so constant and high, it is relevant to try to diminish the uncertainty caused by these breaches through the prism of defenses to a breach of contract a company can use.

However, each breach can be defended with various defenses which have themselves advantages and drawbacks.

To determine and explain the leading causes of breach, and what are the best solutions included in affirmative defenses, we will use several tools such as the root cause analysis, qualitative and quantitative methods. The results brought by the models will help a Project Manager to determine which affirmative defense is the most likely to suit their different problematics according to the characteristics of each alternative.

Keywords: Breach of contract, defendants, contracts, lawyer, faults, complainant, affirmative defenses.

Introduction

Have you ever been tempted to breach a contract with one of your employees? Companies do that all time and between them. In 2018, “Brickstreet Mutual Insurance Company sued A & B Logging LLC for breaching a contract because of a non-payment”³. In 2015, in a whole different sector, “Maintenance Enterprises sued Orascom E&C USA”, two American companies, “for a breach of contract”⁴ due to their bad practices and their

¹ Editor’s note: This paper was prepared for the course “International Contract Management” facilitated by Dr Paul D. Giammalvo of PT Mitratata Citragraha, Jakarta, Indonesia as an Adjunct Professor under contract to SKEMA Business School for the program Master of Science in Project and Programme Management and Business Development. <http://www.skema.edu/programmes/masters-of-science>. For more information on this global program (Lille and Paris in France; Belo Horizonte in Brazil), contact Dr Paul Gardiner, Global Programme Director, at paul.gardiner@skema.edu.

² How to cite this paper: Salmonière, R.d.L. (2019). What are the affirmative defenses to a breach of contract for Project Managers? *PM World Journal*, Vol. VIII, Issue I (January).

³Insurance company sues an employer for breach of contract (12/10/2018) West Virginia Record. Retrieved from <https://wvrecord.com/stories/511590842-insurance-company-sues-employer-for-breach-of-contract>

⁴Louisiana contractor wins \$62M in a lawsuit against \$3B southeast Iowa fertilizer plant's general contractor (15/10/2018) Associated Press. Retrieved from

refusal to supply them with materials. To be more exhaustive, statistic highlighted that since 2002, the percentage of failure of contracts oscillates between 20% and 30% per year⁵.

Indeed, every arrangement between two parties must be translated into a tangible contract. Conducting a project without can lead to disastrous consequences. However, situations can be worst. Imagine, driving a project when suddenly, the other parts brutally stopped their works, and blame you for this unbearable situation. In fact, there isn't any project that can be interrupted without damages. Strangely, the high proportion of breach of contract makes this situation quite common. Those cases of breach of contract are known as judicial litigation and are solved in court. The penalties generated by these lawsuits is counted in hundreds of millions or more. However, these practices are far from unusual in business and they cost a fortune to companies each year.

Therefore, Project Managers must integrate into their practices that a breach of contract is a plausible eventuality concerning the end of their project. An eventuality that implies many hazardous consequences and these consequences may be anticipated during the project. A project manager must set up boards of control to avoid getting trapped into an unexpected end of their project. The project, defined as a process for conducting work that produces a new product of one sort or another. However, the other point of view would be to consider a breach of contract as a strategic move. Either way, Project Manager would benefit from learning how to properly risk manage their projects.

Anyway, complainants dispose of various reason to sue the defendants. However, the Anglo-Saxon's law has some particularities. Indeed, the defendants have at his disposal a range of defenses that is called "affirmatives defenses". This particular method reverses the burden of the proof. More precisely, "the burden of proving the defense, if the dispute goes to trial". It is the opposite of the usual procedure, where the burden of the proof is on the complainant. However, affirmative defense doesn't contest frontally the primarily claim, it doesn't deny the breach of the contract. Instead, it proposes another point of view, underpinned by facts or circumstances, that questions the right of the other party to win the case. This means the defendant has to raise every plausible argument in order to justify their position, to justify that the complainant shouldn't win the judicial litigation.

<https://eu.desmoinesregister.com/story/money/business/development/2018/10/15/louisiana-contractor-wins-lawsuit-against-orascom/1655486002/>

⁵Why do contractors fail? (2015) retrieved from

https://c.yimcdn.com/sites/www.surety.org/resource/resmgr/learnaboutsurety/why_do_contractors_fail.pdf

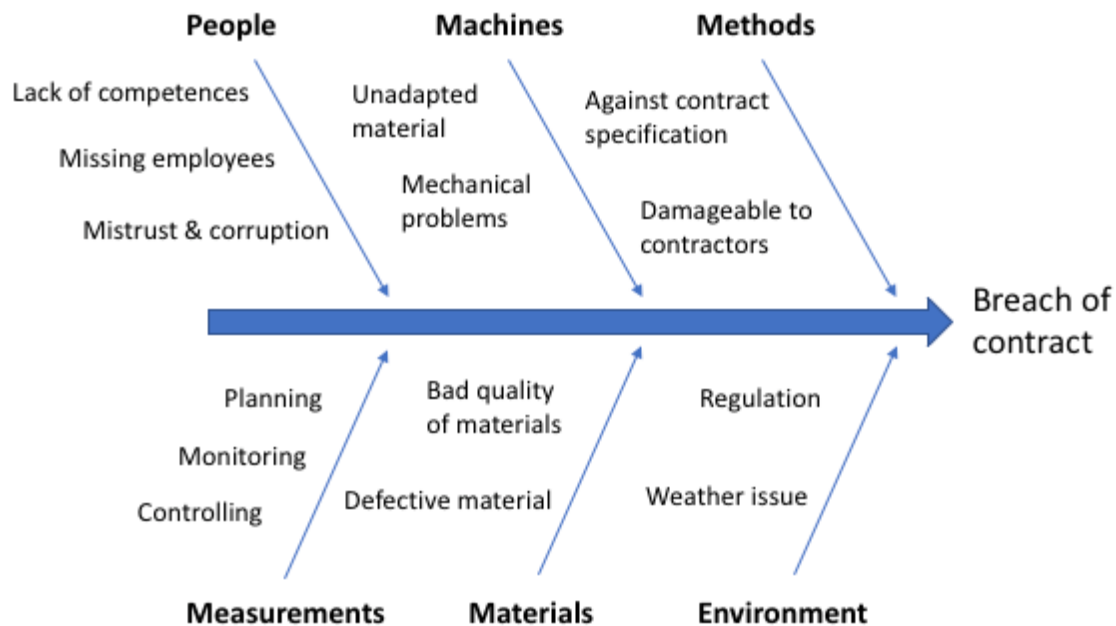


Figure 1. Possible cause leading to a breach of contract⁶

These breaches of contract may arrive because of various reasons. Some may be triggered by a delay in the delivery project or non-payment. Bad practices, failed in security specification, lack of communication, all these situations are also pretext for a company to breach their contracts. Yet, these high figures and various causes imply that companies must have thought how to solve problems generated by breach of contract. It's unthinkable to think a company can go on without trying to be reimbursed of their damages and cost of investments as much as to breach contracts without thinking of their defenses in case of an inevitable lawsuit.

- Considering all these facts and that affirmative defenses are the main defenses of the defendant, we shall now consider that affirmative defenses take a big part in breach of contract subject.
- This particular mean of defense must be analyzed with precaution and clarity.
- One must consequently answer this question: What are the affirmative defenses to a breach of contract?

Methodology

Step 1 – Problem definition

⁶ By Author

As stated previously, contracts have been suffering from the same problems for ages. The breaches of contracts induce defenses for the defendant. There is a list of common one used in this situation.

- Indefinite⁷:

To be sure that everything is fully understood by all signatories. The essential words in contracts must be defined, and every aspect of the contract must be written in clear before signing.

- Illegality⁸:

Every matter in the contract must be legal, including the purpose. Therefore, if the purpose isn't legal, it is arguable that the contract mustn't be enforced.

- Impossibility⁹:

The purpose of a contract must be achievable. Therefore a company can legitimately argue in front of a court that a contract is breached if the purpose of it became impossible to achieve because of an external reason.

- Waiver¹⁰:

This term refers to a situation where a party gives up their right to sue you because of a breach of contract. Give up their right is known as "waiver".

Step 2 – Feasible alternative solution

To improve the chance of winning their litigation, a company has looked through other means of defenses. These alternatives solution has been known as "affirmatives defenses". It may now be interesting to list the affirmative defenses to make the contract defense more likely to be won.

1. The first one is the unconscionability
2. The second one is the mistake cause
3. Fraud, which is an important alternative solution

⁷ Contract for indefinite duration. Legal Match. Retrieved from <https://www.legalmatch.com/law-library/article/contracts-for-indefinite-duration.html>

⁸ in contract law. Up Counsel. Retrieved from <https://www.upcounsel.com/illegality-in-contract-law>

⁹ Ken LaMance. (03/07/2018). Grounds for contract termination: impossibility of performance. Legal Match. Retrieved from <https://www.legalmatch.com/law-library/article/grounds-for-contract-termination-impossibility-of-performance.html>

¹⁰ Gregory Garth Brown. (01/08/2011). Waiver as a defense. Avvo. Retrieved from <https://www.avvo.com/legal-guides/ugc/waiver-as-a-defense>

4. Undue influence
5. Duress, which is less likely to happen
6. Lack of formation
7. Lack of capacity
8. Lack of consideration
9. Lack of meeting of the minds
12. Statute of frauds error
13. Estoppel
14. Laches
15. No privity
16. Absence of condition precedent
17. Assumption of the risk
18. Comparative or contributory negligence
19. Release
20. Statute of limitations

These are the affirmatives defenses that have been identified.

Step 3 - Development and outcomes for each alternative

All of the previously cited alternatives must be developed through this section, in order to develop the following step.

- Unconscionability:

“Unconscionable contracts are those that violate public policy by being so unjust as to offend the court’s sense of fairness”¹¹. It can be sometimes named as “contracts against

¹¹ Unconscionability definition, retrieved from <https://contracts.uslegal.com/breach-of-contract-defenses/unconscionability/>

public policy”¹². In another word, it results from an indecent disparity between the parties. However, the court must find that the resultant contract is evaluated as a contract that no mentally competent person would sign.

- Mistake:

Mutual mistake made by all the parties to the contract. The mistakes must be evident considering the contract, and as stated by the court. Moreover, the consequences must be faced equally by all the parties concerned.

- Fraud:

It occurs when “one party intentionally deceives another party as to the nature and consequences of a contract, and the deceived party is injured as a result”¹³. Generally, frauds are created intentionally, or in another word, by an affirmative act. The defendant must produce proof that it has been induced to sign the contract by a fraudulent mean or that the plaintiff made a false statement.

- Undue Influence:

When a party overcomes the judgment or free will of another one by an exaggerate control. The control can be assumed by exploiting a physical or psychological weakness during the process of signature. However proof of these actions may not be enough in the eyes of the court. Unless those actions resulted in the substitution of the plaintiff will by that of the defendant.

- Duress:

It “consists of any wrongful act that coerces another person to enter a contract that he or she would not have entered voluntarily”¹⁴. Therefore, everything that can lead to institute abusively a contract or a legal procedure may generate a sufficient duress to void a contract. Nevertheless, the defendant must demonstrate that it didn't have any choice better than signing the contract.

- Lack of formation:¹⁵

The contract failed to precise correctly the

- Lack of capacity

¹² Unconscionability definition, retrieved from <https://contracts.uslegal.com/breach-of-contract-defenses/unconscionability/>

¹³ Fraud definition. US Legal. Retrieved from <https://contracts.uslegal.com/breach-of-contract-defenses/fraud/>

¹⁴ Duress definition. US Legal. Retrieved from <https://contracts.uslegal.com/breach-of-contract-defenses/duress/>

¹⁵ Athena Ponce (08/08/2016). Three more affirmative defenses to a breach of contract suit. De Leon Washburn & Ward P.C. Retrieved from <https://www.dwlawtx.com/three-affirmative-defenses-breach-contract-suit-2/>

It's another potential defense to a breach of contract. "A lack of capacity can occur when one of the contractors is minor, or is mentally incapacitated"¹⁶.

- Lack of consideration:

It is a contract that, at the moment of its writing, forgot to impose "obligation to both parties"¹⁷. It may be unenforceable.

- Lack of meeting of the minds:

A meeting of the mind is when two parties found an agreement, and they both understand the commitment they are taking. Conversely, when they do not understand each other, we, therefore, speak of "lack of meeting of the minds."¹⁸

- Estoppel:

This defense needs a prerequisite. There must be a precedent litigation, and it must have been settled already. Therefore, the estoppel's defense is valid. Indeed, a "criminal is civil case cannot be taken to court twice."¹⁹

- Laches:

It a "legal defense that you can claim in a civil dispute if an unreasonable amount of time has passed since the incident has actually occurred."²⁰ It supposedly prevents someone from ambushing another person.

- No privity:

This defense is based on a simple concept: only "parties to contract should be able to sue."²¹

- Absence of condition precedent:

If an "action is conditioned by a precedent obligation"²², if the obligation isn't fully respected, then the parties offending can be sued.

¹⁶ Defenses to a breach of contract. Texas Litigation Law Firm. Retrieved from <https://www.mylawteam.com/contract-law/breach-contract/defenses/>

¹⁷ Defenses to a breach of contract. Texas Litigation Law Firm. Retrieved from <https://www.mylawteam.com/contract-law/breach-contract/defenses/>

¹⁸ Meeting of the minds. Up Counsel. Retrieved from <https://www.upcounsel.com/meeting-of-the-minds>

¹⁹ Collateral Estoppel. Up Counsel. Retrieved from <https://www.upcounsel.com/collateral-estoppel>

²⁰ Laches defenses. Up Counsel. Retrieved from <https://www.upcounsel.com/laches-defense>

²¹ McCarthy Tetrault (04/04/2013). Can a non-contracting party sue for a breach of contract. Lexology. Retrieved from <https://www.lexology.com/library/detail.aspx?g=8a843e85-8d29-43e3-876f-d90e9a8f391e>

²² Athena Ponce (08/08/2016). Three more affirmative defenses to a breach of contract suit. De Leon Washburn & Ward P.C. Retrieved from <https://www.dwlawtx.com/three-affirmative-defenses-breach-contract-suit-2/>

- Assumption of the risk:

At any time, if the plaintiff recognized the risk and however, decided to fulfill the obligation, the “defendant can assess that the plaintiff fully assumed the risk”²³.

- Comparative or contributory negligence:

A correct defense when it is “proved that the claimant's own negligence contributed to its loss or damage.”²⁴

- Release:

As is says, a release defense is when the two parties agreed that there isn't any claim between each other's²⁵.

- Statute of limitations:

“A statute of limitations is a law which says how long a person can wait before bringing a lawsuit.”²⁶

These are the affirmatives defenses that have been identified.

Step 4 – Selection of the criteria to accept or reject the alternative solutions.

The four alternatives solutions listed above need to be analyzed in order to be ranked. To do so, an MADM (Multi-Attribute Decision Making) is required.

Therefore, those are the criteria which seems the most relevant to help us during the process.

- The “universality“ of the defense.²⁷ It defined if the defenses are usable in many cases or not. Since every case has their particularities.

²³ Contract affirmative defenses. Up Counsel. Retrieved from <https://www.upcounsel.com/contract-affirmative-defenses>

²⁴ Contributory negligence. Thomson Reuters Practical law. Retrieved from [https://uk.practicallaw.thomsonreuters.com/3-107-6337?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/3-107-6337?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)

²⁵ Contract affirmative defenses. Up Counsel. Retrieved from <https://www.upcounsel.com/contract-affirmative-defenses>

²⁶ Statute of limitation for a breach of contract action. Legal Match. Retrieved from <https://www.legalmatch.com/law-library/article/statute-of-limitations-for-breach-of-contract-actions.html>

²⁷ Breach of Contract, what happens Now? Rocket Lawyer. Retrieved from <https://www.rocketlawyer.com/article/breach-of-contract-what-happens-now.rl>

- “Communication.”²⁸The communication management of the defenses, since this is a major element to manage stakeholders for a company²⁹.
- “Consequences.”³⁰ They defined how the consequences of the breached contract are distributed between the parties.

Attributes	Universality	Communication	Consequences
Unconscionability	Worse	Equal	Worse
Mistake	Equal	Worse	Better
Fraud	Worse	Equal	Worse
Undue influence	Worse	Better	Better
Duress	Worse	Better	Equal
Lack of formation	Worse	Worse	Equal
Lack of capacity	Equal	Worse	Worse
Lack of consideration	Equal	Worse	Equal
Lack of meeting of the minds	Better	Worse	Equal
Estoppel	Worse	Better	Equal
Laches	Worse	Equal	Better
No privity	Worse	Better	Worse
Absence of condition precedent	Worse	Equal	Better
Assumption of the risk	Equal	Equal	Equal
Comparative or contributory negligence	Equal	Better	Worse
Release	Worse	Worse	Better
Statute of limitations	Worse	Worse	Better

Figure 2. Qualitative analysis

This table is MADM result of our qualitative analysis.

It is coded as:

- Green: indicates that the attribute has the best impact on the alternative solution examined.

²⁸ Breach of contract and lawsuits. Small Business. Retrieved from <https://smallbusiness.findlaw.com/business-contracts-forms/breach-of-contract-and-lawsuits.html>

²⁹ Dr. Stefan Gassner. How to communicate with confidence to manage your contract. GrosVenor. Retrieved from <https://www.grosvenor.com.au/resources/how-to-communicate-with-confidence-to-manage-your-contract/>

³⁰ Consequences of Breach of Contract in General. Fondia. Retrieved from <https://virtuallawyer.fondia.com/en/articles/consequences-of-breach-of-contract-in-general>

- Yellow: the attributes have a positive impact on the solutions, but implies inevitable consequences.
- Red: This color indicates the worst solutions among others.

To conclude from this point, the fourth alternative “Undue Influence” seems to be the best affirmatives defenses. At the opposite, “Unconscionability » and « Fraud » are the worst defenses to choose.

Step 5 – Development and outcomes for each alternative

To begin with, we listed numerous defenses to a breach of contract. Then we identified several affirmative defenses. Finally, a qualitative analysis determined that two of them, fraud and unconscionability, were the worst to choose. However, in order to confirm this preliminary conclusion, we should run a quantitative analysis that will guide us to the best solution.

This quantitative analysis will be held by replacing each color previously obtained by a score. Then a relative weighted technique will provide us a conclusion.

- Green = 1
- Yellow = 0.5
- Red = 0

Therefore, the following table shows the score of each alternative considering their attributes.

Attributes	Universality	Communication	Consequences	SUM
Unconscionability	0	0,5	0	0,5
Mistake	0,5	0	1	1,5
Fraud	0	0,5	0	0,5
Undue influence	0	1	1	2
Duress	0	1	0,5	1,5
Lack of formation	0	0	0,5	0,5
Lack of capacity	0,5	0	0	0,5
Lack of consideration	0,5	0	0,5	1
Lack of meeting of the minds	1	0	0,5	1,5
Estoppel	0	1	0,5	1,5
Laches	0	0,5	1	1,5
No privity	0	1	0	1
Absence of condition precedent	0	0,5	1	1,5
Assumption of the risk	0,5	0,5	0,5	1,5

Comparative or contributory negligence	0,5	1	0	1,5
Release	0	0	1	1
Statute of limitations	0	0	1	1

Figure 3. Quantitative analysis

From the table above, we can now determine the best alternative among the seventeen's alternative, thanks to the additive weighting model.

Attributes		Universality	Communication	Consequences	Total	
Step 1		1	3	2	Sum	
Step 2		1/6	3/6	2/6		
Normalized Weight: A		=	=	=		
		0,17	0,50	0,33	1,00	
Alternative 1	Unconscionability	B	0	0,5	0	Sum
		A x B	0	0,25	0	0,25
Alternative 2	Mistake	C	0,5	0	1	Sum
		A x C	0,08333333	0	0,33333333	0,41666667
Alternative 3	Fraud	D	0	0,5	0	Sum
		A x D	0	0,25	0	0,25
Alternative 4	Undue influence	E	0	1	1	Sum
		A x E	0	0,5	0,33333333	0,83333333
Alternative 5	Duress	F	0	1	0,5	Sum
		A x F	0	0,5	0,16666667	0,66666667
Alternative 6	Lack of formation	G	0	0	0,5	Sum
		A x G	0	0	0,16666667	0,16666667
Alternative 7	Lack of capacity	H	0,5	0	0	Sum
		A x H	0,08333333	0	0	0,08333333
Alternative 8	Lack of consideration	I	0,5	0	0,5	Sum
		A x I	0,08333333	0	0,16666667	0,25
Alternative 9	Lack of meeting of the minds	J	1	0	0,5	Sum
		A x J	0,16666667	0	0,16666667	0,33333333
Alternative 10	Estoppel	K	0	1	0,5	Sum
		A x K	0	0,5	0,16666667	0,66666667
Alternative 11	Laches	L	0	0,5	1	Sum
		A x L	0	0,25	0,33333333	0,58333333
Alternative 12	No privity	M	0	1	0	Sum
		A x M	0	0,5	0	0,5
		N	0	0,5	1	Sum

Alternative 13	Absence of condition precedent	A x N	0	0,25	0,333333333	0,58333333
Alternative 14	Assumption of the risk	O	0,5	0,5	0,5	Sum
		A x O	0,083333333	0,25	0,166666667	0,5
Alternative 15	Comparative or contributory negligence	P	0,5	1	0	Sum
		A x P	0,083333333	0,5	0	0,58333333
Alternative 16	Release	Q	0	0	1	Sum
		A x Q	0	0	0,333333333	0,33333333
Alternative 17	Statute of limitations	R	0	0	1	Sum
		A x R	0	0	0,333333333	0,33333333

Figure 4. Additive Weighting model

Step 6 – Selection of the preferred alternative

Considering the previous table, the fourth alternative “Undue influence” is better than the others.

However, two other alternatives “Duress” & “Estoppel” have a great score and arrived equally in the second position.

Therefore, we can conclude our selection by a ratio scale between the first alternative and the score of the second ones.

$$((2/1,5)-1)*100 = 33\%$$

Consequently, the alternative of “Undue influence” 33% better than the second one.

Step 7 – Performance monitoring and post evaluations of results

The previous steps brought us to the conclusion that the best defense for a project manager in case of a breach of contract is by pleading undue influence. This alternative is the best if the Project Manager wants to anticipate a defense in case of breach of contract, deal appropriately with the stakeholders when communicating, and manages the consequences. Moreover, several solutions are available if it is needed to track the performance of that solution:

- Comparison of breach of contract consequences depending on which defenses were used.
- Comparison of stakeholders implications

- Considering the availability of each defense when anticipating problems.

Conclusion

Nowadays, contract management represents an important part of project management. Breach of contract and the defenses to anticipate in case, represents, therefore, very important matters, more precisely, the affirmative defenses. But what are common defenses, and what are affirmative defenses?

The root cause analysis defined the boundaries of our reflection. Then, linked to project management, we chose a listed of defenses in case of breach of contract, going from illegality to waiver. Following these results, our research was focused on the alternative solutions represented by affirmative defenses in case of breach of contract that would help the Project Manager in his management.

The five alternatives defenses where the following: Unconscionability, Mistake, Fraud, Undue, Influence, Duress.

Firstly, the qualitative process using MADM (Multi-Attribute Decision Making table) enable us to delete two of them: Unconscionability and Fraud. Then, the MADM guided us into the following process of quantitative analysis. This last process is divided into two steps: first, a basic quantitative method that highlighted the defense of Undue Influence. Lastly, in order to confirm this result, we performed a weighting model. This last process clearly underlined the preeminence of Undue influence as affirmative defenses as an alternative solution to common defenses. Indeed, this alternative doesn't tarnish the Project reputation and therefore help through the communication process. It also limits the consequences of a breach of contract on the owner of the project.

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