



Lawspeak...

Augustin & Bugg

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Bugg's Boilerplate

As much as the unfettered entrepreneur would like to act otherwise, the fact is that contracts do not exist in a vacuum. In all legal systems the principles of justice (dressed up in common law jurisdictions as the white knight of equity) as well as statute and case law try to impose standards of reasonableness in contracts.

It is critical that we can avoid or minimise the impact of any challenges to contract provisions by staying within those standards.

This month's discussion covers exactly that point. In addition, on page 2 you will also find the solutions to the quiz in the last issue.

Have fun with your contracts!

Stuart Bugg

Nürnberg
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Trying to be "reasonable"

Throughout common law there are numerous references to a test of "reasonableness" or, as judges used to still call it at the beginning of the 20th century, the position of "the man on the Clapham omnibus."

But there is a difference between the Law of Torts and the Law of Contract:

The key element of the tort of negligence is a duty to take reasonable care. This duty is usually established in each specific case by court judgment and can arise from a variety of situations. In short, torts lived traditionally from case law.

By contrast, under the Law of Contract, it is the agreement of the parties itself which has traditionally imposed the obligations. Contracts, in a *laissez-faire* world, set out bargains freely negotiated between parties, so only the parties can voluntarily agree to exercise a particular level of care.

However, in the 20th century the imposition of external, social standards and statutory obligations of "reasonableness" in both torts and contract have become crucial. This is particularly true for contracts under the Unfair Contract Terms Act 1977 (UCTA)¹ which, under English law, prevents any "unreasonable" limitations of liability being effective in contracts.

But what is "reasonable" and "unreasonable" ? Well, the statute has a general response and states that judges in deciding this issue must have regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. And the relevant circumstances are set out (in a non-exhaustive list) in Schedule 2 to UCTA 1977 and include:

- The relative bargaining strength of the parties.
- How common this type of clause is in the market.
- Whether the buyer was aware of the clause, or should reasonably have been so aware. Whether the parties were legally advised.
- Whether the clause was open to negotiation.

Certainly, in contract negotiations we must be careful that in promoting our own interests we do not overstep the boundary of "reasonableness" and risk resulting ineffective or unenforceable clauses in a contract. In this regard we are often well-advised to expressly agree in the contract, in cases of doubt, that the respective clauses are "fair and reasonable" and provide information to support this. In this regard English law is not unique. ▽

¹The UCTA has a limited impact on international contracts as it does not apply to cross-border sales of goods.

Top Twenty Quiz Solutions

from the January edition

1. time is of the essence. *Contractual requirement specifying that the date, deadline or time period referred to is a material term and that in case of breach (a delay) the innocent party has a right to terminate the contract.*
2. a Romalpa clause. *Provision of a contract (named after a particular party in a case) retaining title or ownership in property until payment is made for the goods.*
3. without prejudice (in an offer of settlement). *The related information or offer may not be used in court as evidence.*
4. an invitation to treat. *Invitation to make an offer.*
5. garden leave. *In employment contracts, the period after giving notice of termination during which the employer may require the employee not to come to work i.e. stay at home (or in the garden!)*
6. a unilateral contract. *Contract formed when an offer (in the form of a promise) to a person or group of persons is accepted not by a counter-promise, but is accepted by performance e.g. a reward.*
7. an adhesion contract. *A "take-it-or-leave-it" contract the individual terms of which are not available for negotiation.*
8. the construction of a contract. *The interpretation of a contract.*
9. a Himalaya clause. *A provision in a transportation contract extending liability limitations which benefit the carrier to others (third parties) who act as agents for the carrier.*
10. a Chinese wall. *Internal organizational and information barrier within an organization to prevent exchanges of information that could cause conflicts of interest.*
11. *pro rata*. In proportion, accordingly.
12. rescission (of a contract). *Ending of a contract *ab initio* (ex tunc) so that the parties are returned to the position they were before the contract started.*
13. cancellation (of a contract). *Termination of a contract for breach.*
14. in camera. *To the exclusion of the general public, in secret.*
15. *et al.* And others, etc., and so on.
16. a non-reliance clause. *A provision stating that in deciding to enter into a contract a party has not relied on any statements except those contained in the contract document.*
17. avoid a contract. *To render a contract void.*
18. misrepresentation. *False statement of fact made to the other party made before a contract is entered into and upon which the other party relies.*
19. warranty. 1. *Undertaking of fact (e.g. of quality or specifications) made under a contract or, 2. a non-material term.*
20. rectification. *Equitable remedy of correcting the wording of a contract document to reflect the true intentions of the parties.*

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Nürnberg Seminar Workshops with Stuart Bugg

Places (participants limited to 14 per seminar) are still available in the following seminars:

1. **Masterclass on Boilerplate Clauses in Contracts**
11-12 April 2014
Hotel Victoria Nürnberg
2. **German Law Contracts in English**
27-28 June 2014
Hotel Victoria Nürnberg
3. **Legal English**
11-12 July 2014
Hotel Victoria Nürnberg
4. **Update 2014: Masterclass on Developments in English Contract Law**
5-6 December 2014
Hotel Victoria Nürnberg

REGISTRATION FORMS etc.: augustinbugg.com/en/we-do/seminars/

For further information on the above seminars and workshops please contact us by telephone +49 (0) 911 945 8867 or by email seminar@augustinbugg.com or see our homepage at augustinbugg.com/en/we-do/seminars/ for further details and seminar programmes. ▽