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THE LAW OF CONTRACT

by

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CHAPTER SEVEN

STANDARD FORM CONTRACTS[1]

THE terms of many contracts are set out in printed standard forms which are used for all contracts of the same kind, and are only varied so far as the circumstances of each contract require. Such terms are often settled by a trade association for use by its members for contracting with each other or with members of the outside public. Standard contract forms are even provided by legislation[2] or under statutory authority.[3]

One object of these standard forms is to save time. The work of insurers, carriers and bankers, for example, would become impossibly complicated if all the terms of every contract they made had to be newly settled for each transaction.[4] Standard form contracts are also a device for allocating contractual risks: they can be used to determine in advance who is to bear the expense of insuring against those risks[5]; and they also facilitate the quotation of differential rates: *e.g.* where a carrier's form provides for goods to be carried either at his or at the customer's risk, and the charge is adjusted accordingly. Between businessmen bargaining at arm's length such uses of standard forms can be perfectly legitimate[6]; and this may also be true where one party to the transaction is a private consumer but is nevertheless likely to have insured against the risk quite apart from the contract.[7] But a less defensible object of standard form contracts has been to exploit and abuse the superior bargaining power of commercial suppliers of goods or services when contracting with private consumers. In particular, the supplier could use the form to exclude or limit his liability, while the consumer generally could not insist on varying the terms submitted to him; indeed he might not be aware of them or understand their effect only in part, if at all. Even between businessmen, the use of unusual or very broadly drafted exemption clauses could lead to similar hardship.

To some extent, the courts were able to redress the balance in favour of parties prejudicially affected by exemption clauses in standard form contracts. But legislative intervention has become increasingly common, the most important changes being contained in the Unfair Contract Terms Act 1977.[8] Under this Act, many exemption clauses are either wholly ineffective or subject to a requirement of reasonableness. In a significant number of cases, however, standard form contracts and exemption clauses are not affected by the Act[9] and remain subject to the rules of common law. These therefore still require discussion, though many of the cases from which they are derived would, on their particular facts, now be differently decided under the 1977 (or some other) Act.

The legislative and judicial restrictions on the efficacy of provisions in standard form contracts are largely concerned with exemption clauses. In other cases (to be discussed at the end of this Chapter)[10] legal intervention has been less marked so that there are still situations in which it can be argued that unfair use may be made of standard form contracts.

[1] Prausnitz, *The Standardisation of Commercial Contracts*; Coote, *Exception Clauses;* Yates and Hawkins, *Standard Business Contracts*; Lawson, *Exclusion Clauses* (3rd ed.).

[2] *e.g.* Companies' Articles of Association: see Companies Table A–F Regulations (1985 S.I. No. 805) as amended by Companies Table A–F (Amendment) Regulations (S.I. 1985 No. 1052).

[3] *e.g.* the Statutory Form of Conditions of Sale made by the Lord Chancellor under s.46 of the Law of Property Act 1925.

[4] *Cf.* also Schmitthoff, 17 I.C.L.Q. 551.

[5] See *The Maratha Envoy* [1978] A.C. 1, 8; *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827, 843, 851; *cf. A Schroeder Music Publishing Co. Ltd.* v. *Macaulay* [1974] 1 W.L.R. 308, 316.

[6] See *Marston Excelsior Ltd.* v. *Arbuckle Smith & Co. Ltd.* [1971] 1 Lloyd's Rep. 70, 95; *Photo Production* case *supra*, at p. 851; *Ailsa Craig Fishing Co. Ltd.* v. *Malvern Fishing Co. Ltd.* [1983] 1 W.L.R. 964, 966. In some cases liability is even limited by statute: *e.g.* Merchant Shipping Act 1979, ss.17, 18 and Sched. 4; see also s.35; Carriage of Goods by Sea Act 1971, Sched. Art. IV. 5 (as amended by Merchant Shipping Act 1981, ss.2, 3).

[7] *e.g.* in the car-park cases, such as *Hollins* v. *J. Davy Ltd.* [1963] 1 Q.B. 844. Contrast *Mendelssohn* v. *Normand Ltd.* [1970] 1 Q.B. 177 (where luggage stolen from a parked car did not belong to the owner of the car).

SECTION 1. EXEMPTION CLAUSES

A party who wishes to rely on a clause excluding or limiting liability[11] must show that the clause has been incorporated in the contract, and also that, on its true construction, it covers the breach which has occurred and the resulting loss or damage. Even if he can show these things, he may still find that the clause is invalid or inoperative.

1. Incorporation in the Contract

An exemption clause can be incorporated in the contract by signature, by notice, or by course of dealing.

(1) Signature

A person who signs a contractual document is bound by its terms even though he has not read them. In *L'Estrange* v. *F. Graucob Ltd.*[12] the proprietress of a café bought an automatic cigarette vending machine. She signed, but did not read, a sales agreement which contained an exemption clause "in regrettably small print."[13] It was held that she was bound by the clause, so that she could not rely on defects in the machine, either as a defence to a claim for part of the price, or as entitling her to damages. It would have made no difference had she been a foreigner who could not read English.[14]

[8] *Post*, pp. 226–244.

[9] *Post*, pp. 241–244.

[10] *Post*, pp. 245–248.

[11] For the distinction between these and certain other kinds of clauses, see *post*, pp. 219–220.

[12] [1934] 2 K.B. 394; *Levison* v. *Patent Steam Cleaning Co. Ltd.* [1978] Q.B. 69; *The Polyduke* [1978] 1 Lloyd's Rep. 211; *Singer (U.K.) Ltd.* v. *Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, 166; for criticism, see *McCutcheon* v. *David MacBrayne Ltd.* [1964] 1 W.L.R. 125, 133; *cf.* Spencer [1973] C.L.J. 104; Samek, 52 Can.Bar Rev. 351.

[13] [1934] 2 K.B. 394, 405.

[14] *The Luna* [1920] P. 22. The signer might be able to rely on the doctrine of *non est factum* (*post*, p. 291), but if this applied there would be no contract at all.