

CHAPTER 451

THE UNFAIR CONTRACT TERMS ACT

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UNFAIR CONTRACT TERMS

An Act respecting exemption clauses in contracts or for negligence.

(26th February, 1987.)

5/1987.

1. This Act may be cited as the Unfair Contract Terms Act. **Short title.**

2. In this Act— **Interpretation.**

"business" includes a profession and the activities of any government department or local or public authority;

"goods" includes all chattels personal other than things in action and money; the term includes emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale:

"hire purchase agreement" means an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee, and where by virtue of two or more agreements none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and either the bailee may buy the goods, or the property therein will or may pass to the bailee, the agreements shall be treated for the purposes of this Act as a single agreement made at the time when the last of the agreements was made;

"negligence" has the meaning given by section 5(1);

"notice" includes an announcement, whether or not in writing, and any other communication or pretend communication:

"personal injury" includes disease or impairment of physical or mental condition.

PART I

Application, Scope

Application. **3.** This Act does not apply to contracts made before the date on which the Act comes into force.

Scope of Part I. **4.** (1) Part 1 of this Act is subject to Part 2 and sections 5, 6, 7, and 10 of this Act in so far as they relate to contracts do not apply to those contracts listed in Item 1 of the First Schedule.

Fit Schedule.

(2) Sections 5 to 10 in so far as they relate to both contracts and tort apply (except where the contrary is stated in section 9(4)) only to business liability, being liability for breach of obligation or duty arising—

(a) from things done or to be done by a person in the course of a business;

(b) from the occupation of premises used for business purposes of the occupier.

(3) In considering a breach of duty or obligation it is not material for the purposes of this Act whether the breach was inadvertent or intentional or whether liability for breach arises directly or indirectly.

PART II

Avoidance of liability for negligence, breach of contract etc.

Negligence liability.

5. (1) No person may by reference to a contract term or to a notice given generally or specifically to another person, exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of negligence resulting in loss or damage other than death or personal injury no person may exclude or restrict his liability except by a term or notice that satisfies the requirement of reasonableness.

(3) A person's agreement to or awareness of a notice or contract term, which purports to exclude or restrict liability for negligence is not per se to be taken as indicating his voluntary acceptance of any risk.

6. Where one party to a contract deals as consumer or on the written standard terms of business of another party (herein called the supplier), as against the consumer or first named party, the supplier may not by reference to a contract term—

Liability arising on contract.

- (a) exclude or restrict liability in respect of his own breach of the contract; or
- (b) claim to be entitled—
 - (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
 - (ii) in respect of the whole or any part of his contractual obligation, to render no performance,

except in so far as the contract term satisfies the requirement of reasonableness.

7. No person dealing as consumer shall be made to indemnify another person whether a party to the contract or not for liability that may be incurred by the other person for negligence or breach of contract except by a contract term which satisfies the requirements of reasonableness.

Unreasonable indemnity Clauses.

8. (1) Where goods are of a type ordinarily supplied for private use or consumption and loss or damage—

Guarantee of consumer Goods.

- (a) arises from the goods proving defective while in consumer use; and
- (b) results from the negligence of the person concerned in the manufacture or distribution of the goods,

liability for the loss or damage may not be excluded or restricted by reference to a contract term or notice contained in or operating by reference to a guarantee of the goods.

(2) For the purpose of this section

(a) goods are "in consumer use" when a person is using them, or has them in his possession for use other-

wise than exclusively for the purposes of a business;
and

(b) anything in writing is a guarantee if it contains or purports to contain a promise or assurance however worded or presented, that defects will be made good by complete or partial replacement or by repair, monetary compensation or otherwise.

(3) This section does not apply as between parties to a contract under or in pursuance of which possession or ownership of the goods passed.

Sale and hire-purchase.

9. (1) No person may exclude or restrict by reference to a contract liability for breach of obligation arising from

Cap. 393.

(a) section 14 of the Sale of Goods Act (seller's implied undertakings as to title etc.);

Cap. 201.

(b) section 10 of the Hire-Purchase Act (conditions and warranties to be implied in hire-purchase agreements).

(2) No person may as against a person dealing as consumer exclude or restrict by reference to a contract term liability for breach of obligation arising from sections 15, 16, or 17 of the Sale of Goods Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose).

(3) As against a person dealing otherwise than as a consumer the liability specified in subsection (2) may only be excluded or restricted by reference to a contract term that satisfies the requirement of reasonableness.

(4) This section applies to the liabilities referred to in section 4 (2) and to any other liability arising under a contract of sale of goods or hire purchase agreement.

Miscellaneous contracts under which goods pass.

10. (1) Where possession or ownership of goods passes under or in pursuance of a contract not governed by the law of sale of goods or hire-purchase, this section applies as regards the effect, to be given to contract terms excluding or restricting liability for breach of obligation arising by implication of law from the nature of the contract.

(2) Liability in respect of goods' correspondence with description or sample, or their quality or fitness for a particular purpose may not as against a person dealing as consumer, be excluded or restricted by reference to a contract term.

(3) As against a person dealing otherwise than as consumer, the liability referred to in subsection (2) may only be excluded or restricted by reference to a term that satisfies the requirement of reasonableness.

(4) Liability in respect of—

(a) the right to transfer ownership of goods or give possession; or

(b) the assurance of quiet possession to a person taking the goods in pursuance of the contract,

may not be excluded by reference to a contract term which does not satisfy the requirement of reasonableness.

11. (1) A party to a contract deals as "consumer" **Dealing as consumer.** in relation to another party if—

(a) he neither makes the contract in the course of a business nor holds himself out as doing so; and

(b) the other party makes the contract in the course of a business; and

(c) in the case of a contract governed by the law as sale of goods or hire-purchase, or by section 10 of this Act, the goods passing under or in pursuance of the contract are or the type ordinarily supplied for private use and consumption.

(2) On a sale by auction or by competitive tender, the buyer is not to be regarded as dealing as consumer.

(3) The onus of proving that a person does not deal as consumer is on the person making the allegation.

12. (1) Where by this Act a contract term must satisfy the requirement of reasonableness it may be found to do so and be given effect notwithstanding that the contract **Effect of breach.**

may have been terminated either by breach or by a party electing to treat it as repudiated.

(2) Where a party entitled to treat a contract as repudiated on breach affirms the contract, the affirmation does not of itself exclude the requirement of reasonableness in relation to a term of the contract.

Evasion by means of secondary contract.

13. No person is bound by a contract term prejudicing or taking away rights of his which arise under or in connection with the performance of another contract, where those rights extend to the enforcement of another's liability and where that liability may not by virtue of this Part be excluded or restricted.

Test of reasonableness.

14. (1) For the purpose of this Part, the requirement of reasonableness in relation to a contract term is that the term is a fair and reasonable one to be included having 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.

Second Schedule.

(2) In determining whether a contract term satisfies the requirement of reasonableness for the purposes of sections 9 and 10, particular regard is to be had to the matters specified in the Second Schedule; but this subsection does not prevent the court or arbitrator or arbiter from holding in accordance with a rule of law, that a term which excludes or purports to exclude or restrict a relevant liability is not a term of the contract.

(3) The requirement of reasonableness in this Act, in relation to a notice (not being a notice having a contractual effect), is that it should be fair and reasonable to allow reliance on it having regard to all the circumstances obtaining when the liability arose, or but for the notice, would have arisen.

(4) Without prejudice to subsection (2), where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises under this or any other Act whether the term or notice satis-

ties the requirement of reasonableness, particular regard is to be had to—

(a) the resources which could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) The onus of proving that a contract term or notice satisfies the requirement of reasonableness is on the person making the allegation.

15. (1) To the extent that this Part prevents the exclusion or restriction of liability, it also prevents— **Varieties of exemption clauses.**

(a) making the liability or its enforcement subject to restrictive or onerous conditions;

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;

(c) excluding or restricting rules of evidence or procedure;

and to that extent, sections 5, 8, 9, and 10 also prevent exclusion or restriction of liability by reference to terms and notices which exclude or restrict the relevant liability.

(2) An agreement in writing to submit present or future differences to arbitration is not to be treated as excluding or restricting liability.

PART III

Miscellaneous

16. (1) The limits imposed by this Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under an international supply contract, and the terms of such a contract are not subject to the requirement of reasonableness under sections 6 and 7. **International supply contracts.**

(2) For the purpose of this Act, an international supply contract is a contract of sale of goods or a contract under or in pursuance of which the possession or ownership of goods passes, and which is made by parties whose place of business, or if they have none, habitual residences are in different States.

(3) A contract is within subsection (2) if—

(a) the goods in question are at the time of the conclusion of the contract, in the course of a carriage, or will be carried, from the territory of one State to the territory of another;

(b) the acts constituting offer and acceptance have been done in the territories of different States; or

(c) the contract provides for the goods to be delivered to the territory of a State different from that within whose territory the acts of offer and acceptance were done.

Choice of law clauses.

17. (1) Where the proper law of a contract is the law of Antigua and Barbuda by choice of the parties, and apart from that choice would be the law of some country other than Antigua and Barbuda, sections 5 to 10 do not operate as part of the proper law.

(2) This Act has effect notwithstanding a contract term which applies or purports to apply the law of some country other than Antigua and Barbuda where—

(a) the term appears to the court, arbitrator or arbiter to have been imposed mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or

(b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in Antigua and Barbuda, and the essential steps necessary for making the contract were taken there, whether by him or by others on his behalf.

Temporary provision for sea carriage of passengers.

18. (1) This section applies to a contract for carriage by sea of a passenger or of a passenger and his luggage where the Athens Convention does not have in relation to the contract, the force of law in Antigua and Barbuda.

(2) No person is precluded by this Act from excluding or restricting liability for loss or damage, being loss or damage for which the provisions of the Athens Convention would, if they had the force of law in relation to the contract, impose liability on him where—

(a) the contract is not made in Antigua and Barbuda; and

(b) neither the place of departure nor the place of destination under the contract is in Antigua and Barbuda.

(3) In a case not mentioned in subsection (2), no person is precluded by this Act from excluding or restricting liability for loss or damage referred to in subsection (2) by reference to a term of the contract—

(a) in so far as the exclusion or restriction would have been effective in such a case had the Athens Convention had the force of law in relation to the contract; or

(b) in such circumstances and to such extent as may be prescribed by the Minister by Order subject to affirmative resolution of Parliament.

(4) For the purposes of subsection (3) (a), the values which shall be taken to be the official values in Antigua and Barbuda of the amounts, expressed in gold francs, by reference to which liability under the Athens Convention is limited shall be such amounts in Eastern Caribbean dollars as the Minister may by Order specify.

(5) In this section—

(a) a reference to excluding or restricting liability includes doing anything mentioned in section 15 in relation to the liability;

(b) the "Athens Convention" means the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

19. (1) This Act does not remove or restrict the ^{Saving.} effect of, or prevent reliance on any contractual provision which—

(a) is authorised or required by the express terms or necessary implication of any law; or

(b) being made with a view to compliance with an international agreement to which Antigua and Barbuda is a party, does not operate more restrictively than is contemplated by the agreement.

(2) A contract term is to be taken for the purpose of Part I, as satisfying the reasonableness if it is incorporated or approved by, or incorporated pursuant to a decision or ruling of a competent authority acting in the exercise of any specific function or jurisdiction conferred by an Act and is not a term in the contract to which the competent authority is itself a party.

(3) In this section "competent authority" means any court, arbitrator or arbiter, government department or public authority.

FIRST SCHEDULE

Section 4(1)

Scope of sections 5, 6, 7, and 10

1. Sections 5, 6, 7 of this Act do not extend to—

(a) any contract of insurance, including a contract to pay an annuity on human life;

(b) any contract so far as it relates to the creation or transfer of an interest in land, or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise;

(c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright, registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest;

(d) any contract so far as it relates to the formation or dissolution of a company which means any body corporate or unincorporate association and include a partnership, or its constitution or the rights or obligations of its corporators or members;

(e) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities.

2. Section 5(1) extends to—

(a) any contract of marine salvage or towage;

(b) any charterparty of a ship; and

(c) any contract for the carriage of goods by ship;

but subject to this, sections 5, 6, 7 and 10 do not extend to any such contract except in favour of a person dealing as consumer.

3. Where goods are carried by ship in pursuance of a contract which either—

(a) specifies that as the means of carriage over part of the journey to be covered; or

(b) makes no provision as to the means of carriage and does not exclude that means,

then section 5(2), 6 and 7 do not, except in favour of a person dealing as consumer, extend to the contract as it operates for and in relation to the carriage of the goods by that means.

4. Section 5(1) and (2) do not extend to a contract of employment, except in favour of the employee.

SECOND SCHEDULE

Section 14(2)

"Guidelines" for Application of Reasonableness Test

The matters to which regard is to be had in particular for the purposes of sections 9(3), 10(3) and (4) are any of the following which appears to be relevant:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term, having regard, among other things, to any custom of the trade and any previous course of dealing between the parties;

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.
