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ENGLISH CONTRACT LAW

Das folgende Skript ist als Mitschrift im Rahmen der Fachfremdsprachenausbildung (FFA) zur Englischen Rechtssprache an der Universität Bielefeld entstanden. Es erhebt keinen Anspruch auf Vollständigkeit, sondern soll als Anregung dienen, was zur Prüfung über das Englische Vertragsrecht gelernt werden kann.

CONTRACT LAW

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A. Formation of a Contract

- **contract:**
 - legally binding agreement
 - enforceable agreement

I. Essential Requirements

1. Agreement

- concerning the terms of the contract

a) Offer

b) Acceptance

2. Intention to Create Legal Relations

3. Capacity

4. Consideration

5. No Conflict with Law or Public Policy *Gemeinwohl*

6. Form

- contract must observe the **form** (if there is a requirement of (i.e. written formalities)

- Person who makes the offer: “**Offeror**”
- Person who accepts/rejects/receives an offer: “**Offeree**”

II. Agreement

1. Invitation to Treat:

- *invitatio ad offerendum*
- PONS (Dictionary): asking s.o. to make an offer to buy (as by putting items for sale in a shop window) *Aufforderung zur Abgabe eines Angebotes*
- invites to treat, to do business
 - not an offer
 - not capable of being accepted
 - pre-contractual negotiations
- when other person makes the offer: seller can reject it (like every offer)
- i.e.:
 - **display of goods**/items on the shop-shelf of a supermarket
 - just showing the goods that are available to be purchased
 - the purchaser makes the offer at the counter
 - can be rejected by the supermarket (i.e. minors buy alcohol)

- **newspaper advertisements**
 - not possible to be in a legally binding agreement b/c the seller **does not want to contract with the whole world** – there could be millions who want to buy the good, although his stock is only 1,000 big
- tender:
 - one company asks for a tender to another company
 - to put a project out to tender
 - to invite tenders for a project
 - PONS (Dictionary): to ask contractors to give written estimates for a job *Angebote für ein Projekt einholen/ein Projekt ausschreiben*
 - if company does not want the tenders, it can reject
 - if other company gets an offer after the tender, it can also accept/reject

2. Offer

a) General Information

Def.: "...exists, when an **offeror** makes known the **terms** upon which he is prepared to contract and promises to be bound by those terms if they are accepted by the **offeree**."

- it can be considered as a **general rule** that:
 - an advertisement is not an offer in the legal sense (see above)
 - **unless:** it contains **elements which show that** the advertising person intends to create legal relations
- **Example:**
 - offer can be made to the world at large/can be universal
 - case: "**Carlill v. Carbolic Smoke Ball Company**" (1893)
 - Defendants (Carbolic Smoke Ball Company):
 - manufacturer of a medical product called "Carbolic Smoke Ball"
 - put an advertisement in a national newspaper stating: "We pay £ 100 to anybody who caught/got influenza after using the Smoke Ball correctly (according to the instructions)."
 - + "To prove our seriousness we have put £ 1,000 in the bank."
 - Plaintiff:
 - Mrs. Carlill used the Carbolic Smoke Ball according to what the instructions say
 - she got ill
 - she claimed £ 100 from the Carbolic Smoke Ball Company
 - Defendants:
 - "the advertisement was mere puff" (nothing to be really believed)
 - "just an invitation to treat"
 - "not possible to contract with the whole world"
 - **Court of Appeal:**
 - "Mrs. Carlill is entitled to the money"
 - "advertisement was an offer to the world at large"
 - "b/c the company has put more information than required"
 - "**they have shown that they had an intention to create legal relation**"
 - same in another case ("**hover**"):
 - "Everyone who buys a hover, gets a flight to America for free"
 - **Court:** "Yes, they have to pay the flights! It was an offer!"

b) Termination of Offers: (7 reasons)**(1) Lapse of time**

- when offeror may specify, when an offer is valid
 - i.e.: “for 20 days”

(2) Rejection through Offeree

- offeree cannot change his mind

(3) Acceptance

- unconditionally
- not partially

(4) Revocation

- offeror cancels offer
 - possible: “revoke any time prior to acceptance”
- not effective **until the offeree receives actual notice of it**
 - “Revocation must be communicated.”

(5) Failure of a Pre-Condition

- offeror/offeree did not satisfy a pre-condition

(6) Counter offer

- similar to the condition
- i.e.:
 - offeror: “I offer to sell 100 things.”
 - offeree: “I want to buy 110 things.”

(7) Death of Offeror or Offeree

- death kills offer
- but one exception:
 - offeree does not know about death and accepts

III. Consideration**1. General Information**

- the price paid by one person in exchange for the other person promising to do s.th. (an essential element in the formation of a contract)
- = *Gegenleistung*
- consists of:
 - payment (monetary or other form)
 - the doing of s.th./not doing of s.th. (i.e.: not enforcing rights)

2. Two Types of Consideration**a) Executed**

consideration where one party has made a promise in exchange for which the other party has done s.th. for him (erbrachte *Gegenleistung*)

- just for the return of an act
- contract does not come into being before act is done

b) Executory

consideration where one party makes a promise in exchange for a **counter-promise** (geschrieben "counter-promise" (mit Trennstrich!)) from the other party (wechselseitiges Leistungsversprechen)

- far more common/important
- contract comes into being as soon as promises have been exchanged
 - does not matter, what time promise is actually fulfilled

IV. Intention to Create a Legal Relationship

- not all agreements are legally enforceable
 - i.e. (-):
 - prostitution (in UK)
 - trading with the enemy in times of war
 - case: "Matrix Churchill"
 - MC traded with Iraq (sold gun to Iraq and could not sue Iraq for the money b/c it happened during Gulf War)
- **factor** to say whether agreement is done with intention to create a legal relationship:
 - Is agreement of a domestic nature or is it a commercial agreement?
 - **domestic** or family agreement
 - here: mostly **no** intention to create legal relations
 - i.e.: agree to go to the cinema (friend cannot sue you, if you do not come – just social agreement)
 - **commercial** or business agreement
 - presumption (thing which is assumed to be correct, b/c it is assumed from other facts *Annahme, Vermutung*):
 - intention to create legal relations (+)
 - the presumption is "**rebuttable**" *widerlegbar*
 - you can contradict it, go against it (you can fight the presumption)

V. Communication

- acceptance must be communicated to be effective
- contract comes into being at the time and place where the offeror receives communication

VI. Capacity

- another essential element of a contract: **age of legal capacity**
 - "**ability to enter** into a legal contract"
 - "Person who is over **18 years of age and of sound mind**, and therefore able to enter into a contract" *rechtsfähig, geschäftsfähig*
- protection of children
 - exception: children can buy small goods in shops *Bargeschäfte des täglichen Lebens, Taschengeldparagraph*

B. Privity of Contract

I. General Rule (doctrine of privity of contract)

- A third person (i.e.: C) cannot sue for the carrying out of promises made in the relationship between A and B.
- unlike German law, a **contract for the benefit of a third party** is not recognized
- Reason:
 - only the parties have provided consideration to the contract

II. Exceptions

- administrator of someone's estate
- action by a beneficiary under a trust
- restrictive covenants
- agency *Stellvertretung* (represented person can sue)
- case: "**Beswick v. Beswick**" (1967)
 - A owned a small coal stocks and his nephew, B, helped him to run it
 - Agreement between A and B that B gets the coal stocks after A's death and commits himself to make a payment to the widow of A
 - A died, B did not pay
 - C sued under two heads:
 - first: as the **administrator** of her husband's estate
 - second: in her **personal capacity**
 - **Court:**
 - as administratrix: the widow obtained an order of specific performance – **exception to the rule of privity of contract**
 - in your personal capacity: "you can obtain no satisfaction b/c of the doctrine of privity"

C. Contract Terms

- define rights and duties under the contract
 - often difficult to determine b/c there were **pre-contractual negotiations**

I. Term or Representation

- remedies are different for terms or representations
- **term:**
 - duty which has to be carried out as part of a contract
- **representation:**
 - **pre-contractual** statement made to persuade s.o. to enter into a contract
- How to differentiate?
 - "What was the **parties' intent**, when they agreed on the statement?"
 - "Did that statement **merely induce one party** to enter the contract/to persuade them to sign on the dotted line?"
 - **if yes:** then it is just a representation
 - but if the parties intended it to be a **basic, fundamental part** of the contract

- **if yes:** then it is a term of the contract

1. Terms

- contracting parties are free to agree on **express terms**
 - **freedom of contract** – free to enter into and free to create the contract
 - but there are also **implied terms** in a contract

a) Express terms

- term in a contract which is clearly stated *ausdrückliche Vertragsvereinbarung*

b) Implied Terms

- term in a contract which is not clearly stated, but which is legally taken to be present in the contract *stillschweigende, miteingeschlossene Bestimmungen und Bedingungen*
- parties are free to make own terms, but law may imply terms into contracts
 - **reason** why law might want to imply:
 - to give a contract “**business efficacy**” (to make contract possible)
 - case: “**The Moorcock**” (1889)
 - respondent agreed with appellant that appellant can use the respondent’s jetty and wharf (*Steg und Uferanlage*) to load and store cargo
 - but river bed was owned by a third party
 - appellant did not investigate river bed whether jetty was safe for the boat of the appellant
 - jetty was not!
 - boat sank
 - **court:** „there is an implied duty to appellant that he has to investigate whether it was safe for the boat to use the jetty and wharf or not“

c) Conditions, Warranties or Intermediate Terms

(1) Conditions

- **really important term** of a contract which forms the main basis of it
- **99,99%** of terms **implied** by law are conditions
- **remedy** in case of breach:
 - discharge of contract
 - damages

(2) Warranties

- a **term of minor importance** which is not so fundamental to the contract
- **remedy** in case of breach:
 - only damages (no discharge!)

(3) Intermediate Terms

- intermediate terms combine the nature of condition and warranty

- the breach of such a term may **either entitle** the innocent party
 - **to rescind** *aufheben* the contract **or**
 - otherwise entitle him to claim **damages**
 - depending upon the **circumstances**

(4) Court Decision

- How does court know what term it is?
 - court decides on answering the question:
 - “What would the **ordinary, reasonable man** think that the parties agreed to when they contracted? **Was it supposed to be** a condition or a warranty or an intermediate term?”

2. Exemption Clauses

- PONS (Dictionary): clause in a contract exempting a party from certain liabilities
Freizeichnungsklausel
- basic rule: offeror can put any clause he likes into a contract (offeree can choose to reject)
- but: companies can put clauses in which excuse them in case of a breach of contract or in case of tort
 - companies want to be excused from civil liability in these cases
 - court **restricts** these exemption clauses by putting rules on them:
 - one: offeror must do everything that is reasonably necessary to bring conditions to the notice of offeree.
 - two: Notice must be **before** or **at the time** the contract is made.
 - three: If offeror misrepresents about extent of exemption clause, then clause is not binding.
 - but the rule is: “What you **sign**, you are bound by!”
 - four: court looks at wording of exemption clause and then checks whether cause of breach is covered by it
- case: “**Olley v. Marlborough Court**” (1949)
 - Olley rented a room in a hotel
 - after she had contracted she entered the room and saw a sign on one of the walls of the room: “Owners are not responsible for things that get lost, stolen etc. unless they were given to them.”
 - Olley left room and gave the key to the hotel
 - s.o. stole the key, entered Olley’s room and stole things
 - **Court:** hotel is liable b/c Olley saw sign **after** completion of contract
 - if Olley had stayed in the hotel before (had known the sign) then her action would have been unsuccessful
- case: “**Karsales [Company] v. Wallis**” (1956)
 - s.o. bought car
 - car was **in good condition** when he inspected it
 - clause in contract: “no condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness or any purpose is implied herein”

- however: when the car was delivered it was a totally different car b/c many new parts of it had been replaced by old ones which mostly were not even working
 - car was **in bad condition**
- Wallis claimed he did not agree to buy car in this condition
- **Court** (Lord Denning):
 - thing delivered was not a car, but a totally different thing than that which had been contracted on
 - company did **fundamental breach** of contract
 - so the clause does not apply

D. Void and Voidable Contracts

- a **void** contract has no binding effect at all, whereas a **voidable** contract is valid, but one party has the **right to set it aside** under certain conditions

I. Mistake

- def.:
 - wrong action or wrong decision *Fehler*

1. General Rule of Common Law

- a mistake does not affect the validity of a contract
 - applies to **inoperative** mistakes
- **“Caveat Emptor” (lat.)**
 - let the buyer beware!

2. Exception – Operative Mistakes

- but:
 - **operative mistake** – has effect on the validity of the contract
- two types:
 - **common** mistake
 - **mutual** and **unilateral** mistake

a) Common Mistake

- common to both parties – both parties have made a mistake on a fundamental aspect of the contract
- case: **“Courturier v. Hastie” (1856)**
 - two parties contracting on corn
 - corn was on transit (on route (ship)) on the time contract was made
 - unknown to both parties captain of ship sold corn on transit b/c it was going to perish (get rotten)
 - **Court:**
 - there was no contract since the corn was not really in existence

b) Mutual and Unilateral Mistake

(1) Mutual Mistake

- **mutual** (dictionary): gemeinsam

- parties are dealing cross purposes
 - they believe two different things
 - no agreement, no contract
- case: “**Raffles v. Wichelhaus**” (1864)
 - buyer agreed to buy cotton, which will be transported on a ship called “peerless”
 - in fact: there were two ships with that name
 - one ship went in October (buyer believed in this)
 - the other ship in December (seller believed in this)
 - **Court:**
 - contract is void b/c there is no agreement – **mutual** mistake

(2) Unilateral Mistake

- **unilateral** (dictionary): einseitig
- just one party has made a mistake on a **fundamental** aspect of the contract **and** the other party knows about this
- consequence: contract is void
- case: “**Cundy v. Lindsay**” (1878)
 - a man who was called **Blenkarn** was known to be a fraudster
 - he ordered some handkerchiefs from Lindsay
 - he signed the order in the way that signature looked like “**Blenk Iron + Co.**” (which was a reputable Company!)
 - Blenk Iron + Co. have offices in the same street
 - Lindsay delivered to Blenkarn, Blenkarn sold them to Cundy
 - now Lindsay wants them back
 - **Court:**
 - the original contract was void for **unilateral** mistake (one party was mistaken about the identity of the contracting person – **fundamental** aspect of the contract)
 - although Cundy bought handkerchiefs rightly, Lindsay got goods back

II. Misrepresentation:

1. Definition

- def. of **representation**:
 - representations are statements made for the purpose of persuading/inducing other persons or the persons making contracts
- representations may be made before or at the time of the contract, but they are not part of the contract itself (in contrary to conditions)
 - pre-contractual negotiation (see above)
- def. of **misrepresentation**:
 - **untrue** statement or fact made by one party to the other
 - **before or at the time of making the contract** and
 - with the **intention** that the person to whom the statement is made shall **act upon such misrepresentation** and
 - that **person** does **act upon such misrepresentation**

2. Three Types of Misrepresentation

a) Fraudulent Misrepresentation

(1) Definition

- an untrue statement made knowingly or without belief in its truth or recklessly (carelessly)

(2) Four Remedies

(a) Repudiation

- to refuse to perform one's obligation under a contract
 - **repudiate** (dictionary: to refuse to accept *nicht anerkennen*; to refuse to perform one's obligations under an agreement or contract *eine Vereinbarung/einen Vertrag nicht anerkennen*)
 - you are no longer bound by the contract

(b) Action in Tort (for Damages)

- a civil wrong

(c) Action for Rescission

- dictionary: cancellation of a contract *Nichtigkeits-, Ungültigkeitserklärung, Annullierung, Aufhebung*
 - to put you in the exact same position you were before the contract

(d) Criminal Offence

b) Innocent Misrepresentation

(1) Definition

- untrue statement not knowingly or you believed in its truth

(2) Four Remedies

(a) Repudiation

- to refuse to perform one's obligation under a contract
 - **repudiate** (dictionary: to refuse to accept *nicht anerkennen*; to refuse to perform one's obligations under an agreement or contract *eine Vereinbarung/einen Vertrag nicht anerkennen*)
 - you are no longer bound by the contract

(b) Action in Tort (for Damages)

- a civil wrong

(c) Action for Rescission

- dictionary: cancellation of a contract *Nichtigkeits-, Ungültigkeitserklärung, Annullierung, Aufhebung*
 - to put you in the exact same position you were before the contract

(d) Affirmation

- to confirm that contract is correct

- to perform contract nevertheless

c) Negligent Misrepresentation

(1) Definition

- untrue statement not knowingly or you believed in its truth but you have not had a reasonable ground to believe in its truth

(2) Two Remedies

(a) Damages

(b) Action for Rescission

- dictionary: cancellation of a contract *Nichtigkeit*-, *Ungültigkeitserklärung*, *Annullierung*, *Aufhebung*
 - to put you in the exact same position you were before the contract
- case: “**Esso Petroleum v. Mardon**” (1976)
 - Esso wanted to sell a petrol station to Mardon
 - Esso told M. that the petrol sales will reach 200,000 gallons a year
 - however, due to restricted access to site, sales were < 78,000 gallons
 - **Court:**
 - given their experience/skill in market research, Esso should have known about the correct number of petrol sales
 - **negligent misrepresentation!**

E. Duress and Undue Influence

- it is **assumed** that there is voluntary consent between the parties
 - if not voluntary on one side: contract is **voidable**
 - b/c it is performed under duress or undue influence
- def. of **duress**:
 - actual or threaten violence
 - economic duress (company only agrees b/c it cannot get goods elsewhere > and pays a huge amount of money for s.th. cheap)
- def. of **undue influence**:
 - one party has more power than the other
 - i.e.: doctor – patient; lawyer – client
 - any contract as a result of undue influence is voidable
 - burden of proof is on stronger party to show that there was no abuse of position
 - best way to get out: you can show that there was a third person giving the less powerful party independent advice

F. Contracts Illegal at Common Law

I. General Rule

- **contracts in restraint of trade**
 - contracts which stop s.o. from carrying on a trade or profession are prima facie (*auf den ersten Anschein*) illegal and void as they are against public policy (*öffentl. Ordnung*)

II. Exception

- **restraint of trade clauses**
 - but a business may be sold **on condition** that the seller will not carry on a similar business within a fixed time and/or area
 - worker is not allowed to move to another job in the same trade
 - his experience might prove useful there
- case: “**Nordenfelt v. Maxim Nordenfelt Guns + Ammunition Co.**” (1894)
 - Nordenfelt = known throughout world as an inventor and manufacturer of guns and ammunition
 - sold his business to a company and promised not to work in same field for 25 years
 - was liberally compensated (£ 200,000)
 - but: after some years N. did enter into business with a rival company
 - M. Nordenfelt Co. served an injunction to restrain him from doing so
 - **Court (HoL):**
 - **injunction is granted** as the agreement was reasonable and valid
 - and this is the case here b/c Nordenfelt was liberally compensated (£ 200,000)

G. Discharge of Contract + Remedies for Breach

I. Discharge

- four ways how a contract may be discharged by (*Erlöschen eines Vertrages*):
 - agreement
 - performance
 - breach
 - impossibility (“frustration”)

1. Agreement

- in the same way parties can agree to make a contract they can also end the contract by mutual agreement
- often contracts include a clause which provides for the possibility of termination by agreement
 - i.e. tenancy-contracts
 - landlord wants his house back, clause in contract gives tenants six weeks to get out

2. Performance

- **usual rule:** contract is discharged by performance
- parties have carried out their promises
 - completed successfully their obligations

a) Substantial Performance

- more than $\frac{3}{4}$ of the performance done
- the **fundamental part** of contractual obligations is done

- if there are i.e. only a few minor defects, the performing party can claim the contract price **minus** the costs of putting it right
- but defect may not be > than ¼ of the price
 - then performance is less than substantial
- case: “**Hoenig v. Isaacs**” (1952)
 - plaintiff was employed by the defendant as a decorator and furniture designer
 - to decorate the defendant’s flat and
 - to provide furniture, including a bookcase, a wardrobe and a bedstead
 - for the total sum of £ 750
 - but: defendant only paid £ 400 b/c he found the work badly and faulty done
 - **Court:**
 - there has been **substantial performance**
 - defendant is liable for £ 750 **less the costs of putting right** the listed defects
 - court here assessed £ 55 – defendant had to pay another £ 295

b) Divisible Contracts

- usually part-performance = no performance, unless it is a divisible contract
 - where a contract is divided up into various stages
 - i.e.: each delivery has to be paid for
- **but:**
 - if there has been agreed on a lump sum (*Pauschalpreis*) the contract often is **not** held a divisible one (as in “**Bolton v. Mahadeva**” (1972))

3. Breach

a) Actual Breach

- a failure by either of the contracting parties to carry out his/her part
 - either wholly or in part
 - and which may cause the contract to be terminated by breach
 - [“may” does not commit to anything – means nothing actually]
- **remedies:**
 - breach = the innocent party can claim contractual **damages** and
 - option to say that contract is at an end (**discharge**)

b) Anticipatory Breach

- can be either:
 - **express repudiation** (*ausdrückliche Zurückweisung*)
 - which arises when one party states that he will not perform his part of the contract
 - or some other action by a party which makes **performance impossible**
 - case: “**Hochster v. De La Tour**” (1853)
 - D agreed to engage H as a courier (*Reiseleiter*) for a European tour to commence on 1st June

- on 11th May D informed H that he no longer required his services
- plaintiff (H) sued for breach of contract on 22th May (for damages)
- defence: there was no cause of action until date due for performance
- **Court:**
 - D had broken his contract by **express repudiation**, and H could, because of this anticipatory breach of contract, bring an action **immediately**

4. Impossibility (also known as “Frustration”)

- when s.th. happens without the fault of either party to make performance impossible, illegal or radically different
 - some intervening factor which is beyond the control of either of the contracting parties
 - both parties are released from the contract
 - classic example: 11th September 2001
- case: “**Krell v. Henry**” (1903)
 - defendant agreed to hire the plaintiff’s flat
 - in order to watch the coronation of Edward VII.
 - but: King was ill and procession was cancelled
 - **Court:**
 - contract was **discharged b/c of frustration** and no rent was payable
 - b/c the primary purpose was to watch the coronation

a) Impossible or Difficult?

- important for lawyers to distinguish:
 - was it “impossible” or just “more expensive/difficult/time consuming”?

b) Point of Time of Invalidity

- contract is made invalid (is voided) from the date of the frustrating event
 - then parties are released from any further contractual performance

c) Exclusion of Frustration

- frustration will not occur **if parties have foreseen** the frustrating event
 - if they have a **good idea** that this event might happen and they made provisions for that
- these provisions are called “**force majeure**” (french, *höhere Gewalt*)
 - def. “force majeure”:
 - s.th. which happens which is out of the control of the parties who have signed a contract (i.e.: strike, war, storm) and which prevents the contract being fulfilled *höhere Gewalt*

II. Remedies for Breach of Contract

- when there has been a breach of contract, various remedies are available
- two categories:
 - remedies at **common law**

- damages
- **equitable** remedies
 - specific performance
 - injunction
 - rescission

1. Damages

- **aim/function:** to put the injured party in the same financial position he would have been in, had the contract been properly completed
 - rewarded to innocent party
- two types of damages (the amount may be):
 - **liquidated** (*beziffert*) or
 - **unliquidated** (*unbeziffert*)

a) Liquidated Damages (*bezifferter SE*)

- a certain figure (number) **is agreed on by the parties**
- businesses often put a liquidated damages clause into contracts
 - b/c they want to set down the amount of damages that must be paid in the event of a breach of contract
- advantage: provides **certainty**
- if the amount of liquidated damages is much **higher** than the **actual loss** suffered, it may be considered as a **penalty clause**, and a fairer (lower) amount is substituted by court

b) Unliquidated Damages (*unbezifferter SE*)

- court determines the amount of damages

2. Equitable remedies

a) Specific Performance (*Naturalerfüllung*)

- court can make an order of specific performance
 - which makes the defendant **carry out his promise** under the contract
- court will do so when damages are not enough to compensate
 - when specific performance is “**just and equitable**”
- if you refuse to do the specific performance you can go to prison for it

b) Injunction (*einstweilige Verfügung/gerichtliches Verbot*)

- court can make an order stopping a person from doing s.th. which breaches a term of a contract
- deals with enforcement of a negative term of a contract
 - negative term: a term saying what you **cannot** do (as opposed to positive terms)

c) Rescission

- the parties are no longer bound by the contract
- rescission endeavours (*ermächtigen*) to place the parties in the pre-contractual position
 - by returning goods or money to the original owners

3. Time Limit (*Frist*)

- legal action for damages must be started within appropriate time period
 - these periods are stated in **Limitation Act (1980)**
 - generally: within **six years** after breach of contract

H. Consumer Protection Acts

I. Unfair Contract Terms Act 1977 (UCTA 77)

- **only for exclusion clauses**
 - UCTA provides protection **not for all unfair terms**, but only for unfair **exclusion clauses**
- in practice the UCTA has preplaced the common law in many areas

1. Requirements

a) Dealing As a Consumer

- UCTA provides protection only when a party is dealing **as a consumer**
 - def. in **s.12**:
 - a party deals as a consumer with another, if:
 - private + business + goods ordinarily supplied for private use
 - 1) that person neither makes the contract in the course of a business nor holds himself out as doing so
> **"private individuals"**
 - 2) the other party does make the contract in the course of a **business**
 - 3) the goods passing under the contract are of a type **ordinarily supplied for private use or consumption**
- a company can also deal as a consumer:
 - if the contract **is not** an integral part of the business carried on or
 - if the contract **is not** of a type regularly entered into
- case: **"R + B Customs Brokers Company Ltd. v. United Dominions Trust Ltd." (1988)**
 - plaintiff company bought a second hand car for one of their directors
 - this car was to be used partly for business/partly for private motory
 - price was paid through defendant's financing company
 - part of that contract contained an exclusion clause
 - "when car leaked (lacked water) we can recover the price"
 - car leaked - exclusion clause valid?
 - **Court :**
 - car ist not fit for purpose (*not important*)
 - in considering the provisions of the Unfair Contract Terms Act 1977, which provide protection to those who "deal as consumer", the Court

of Appeal held that that protection is only lost if the transaction is an **integral part of the business** carried on **or**, if only incidental thereto, is of a **type regularly entered into**

- here: R + B bought only the second or third car – therefore buying cars is not an integral part of its business and R + B has to be classed as a consumer

b) Reasonableness

- exclusion clauses are often rendered (*erlassen*) ineffective by UCTA
 - but:
 - sometimes **these exclusion clauses may be valid to the extent they are reasonable**
- 5 criteria to judge this (laid down in schedule 2 to UCTA 77)

(1) Relative Bargaining Strength

- are both parties in similar position concerning the power to enter/not to enter into a contract – economic power?

(2) Inducement to Consumer

- whether the party received any inducement
 - party got s.th. to accept the exclusion clause
 - then the clause is more likely to be called reasonable

(3) Knowledge About the Term

- whether the customer knew or ought to have known about the term
- was it drawn to their attention?
- were there courses of events so that the customer ought to have known the term?

(4) Compliance Practical

- where the exclusion clause excludes liability for non-compliance with a contractual term the court will look at whether such compliance was practical
 - i.e. term says: buyer of goods is required to tell seller of defect within 24 hours
 - cheese – **yes**, you can tell within 24 hours whether it is good or not
 - pair of jeans – **no**, you cannot tell within 24 hours
 - seeds – need time to become a flower – not possible to tell within 24 hours

(5) Product Customized

- to the special order of the customer?
- whether the goods were manufactured/processed/made to the special order of the customer
 - if they are customized then it is more likely that the manufacturer had made a mistake while producing it
 - then exclusion clause is more likely to be reasonable
 - b/c you may not have a “history” of producing such product (no experience)

- then it is more likely that you do s.th. wrong

c) Burden of Proof

- burden of proving reasonableness (**burden of proof**):
 - party who seeks to rely on the clause has to prove (party that uses the clause)

2. Regulations in UCTA 1977

- When are clauses rendered ineffective by UCTA?

a) S. 2 UCTA 77 – Negligence

- liability for negligence
- s. 2 prohibits/forbids notices to exclude liability for **death** and/or **personal injury** caused by negligence
 - other losses caused by negligence can be excluded if the clause is reasonable (see above, schedule 2 of UCTA)

b) S. 3 UCTA 77 – Contractual Obligations

- contractual liability (liability for contractual obligations)
- one of the parties is dealing as a consumer or is dealing on the other party's written standard terms of business (terms always used by this party)
 - s. 3 defines that the party cannot use a contract term (i.e. exclusion clause) to exclude liability in the case of a breach of contract

c) S. 4 UCTA 77 – Unreasonable Indemnity Clauses

- unreasonable indemnity clauses
- by s. 4 a consumer may not be required by contract to **indemnify** (*entschädigen*) any other person against a liability incurred by that other for negligence or breach of contract
 - unless it is shown that the requirement of reasonableness is satisfied (**unless term is reasonable**)

d) S. 5 UCTA 77 – Manufacturer's Guarantees

- manufacturer's guarantees
- producer (manufacturer) cannot use a contract term or a notice which is related to a guarantee to exclude liability for loss or damage to goods ordinarily supplied for private use or consumption if the loss or damage has been caused by the goods proven defective while in that consumer use and results from the negligence of the manufacturer
- guarantee: written promise that defects will be made good by complete or partial replacement or by repair, monetary compensation or otherwise
- (A/S) s. 5 is concerned with the relationship between manufacturer or distributor of goods and the customer
 - a manufacturer's/distributor's guarantee may not exclude or restrict liability for any loss or damage suffered by a customer due to negligence

e) S. 6 UCTA 77 – Sale of Goods and Hire Purchase

- sale of goods and hire purchase
- s. 6 deals with the validity of exclusion clauses relating to description, to satisfactory quality, fitness for purpose
- provides that implied terms cannot be excluded, if s. 12 (+) (dealing as a consumer)
 - if sale is “**b to b**” (business to business), then exclusion clauses are allowed to the extent they are reasonable
- S. 7 UCTA 77
 - similar to s. 6, but not important

f) S. 8 UCTA 77 – Misrepresentation

- liability for misrepresentation
- prevents the exclusion of liability for misrepresentation except to the extent they are reasonable

II. Other Consumer Protection Acts

- Sale of Goods Act (1979)