

LAWS OF BRUNEI

CHAPTER 171

UNFAIR CONTRACT TERMS

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UNFAIR CONTRACT TERMS ACT

S.14/94

An Act to limit the extent to which civil liability for breach of contract, or for negligence or other breach of duty can be avoided by means of contract terms and otherwise and for matters connected therewith

Commencement : 3rd May 1994

PART I

PRELIMINARY

Citation

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

Application
and
interpretation

2. (1) This Act applies to any contract or purported contract which is made on or after the date of commencement of this Act.

(2) In this Act, unless the context otherwise requires —

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

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“goods” has the same meaning as in the Sale of Goods Act ;

“negligence” has the meaning given by section 3(1) ;

“notice” includes an announcement, whether or not in writing, and any other communication ; and

“personal injury” includes any disease and any impairment of physical or mental condition.

PART II

EXCLUSIONS

3. (1) For the purposes of this Part, “negligence” means the breach — Scope of Part II

(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care to exercise reasonable skill in the performance of the contract ;

(b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty) ;

(c) of the common duty of care imposed by any written law.

(2) This Part is subject to Part III ; and in relation to contracts, the operation of sections 4, 5, 6 and 9 is subject to the exceptions made by Schedule 1. Schedule 1

(3) In the case of both contract and tort, sections 4, 5, 6, 7, 8 and 9 apply (except where the contrary is stated in section 8(4)) only to business liability, that is liability for breach of obligations or duties arising —

(a) from things done or to be done by a person in the course of a business (whether his own business or another’s) ; or

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

and references to liability are to be read accordingly, but liability of an occupier or premises for breach of an obligation or duty towards a person obtaining access to the premises for recreational or educational purposes, being liability for loss

or damage suffered by reason of the dangerous state of the premises, is not a business liability of the occupier unless granting that person such access for the purposes concerned falls within the business purposes of the occupier.

(4) In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.

Negligence
liability

4. (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

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

Liability
arising in
contract

5. (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term —

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach ; or

(b) claim to be entitled —

- (i) to render a contractual performance substantially different from that which was reasonable expected of him ; or
- (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness.

6. (1) A person dealing as consumer cannot by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness.

Unreasonable
indemnity
clauses

(2) This section applies whether the liability in question —

(a) is directly that of the person to be indemnified or is incurred by him vicariously ;

(b) is to the person dealing as consumer or to someone else.

Liability arising from sale or supply of goods

7. (1) In the case of goods of a type ordinarily supplied for private use or consumption, where 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 a person concerned in the manufacture or distribution of the goods,

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

(2) For these purposes —

(a) goods are to be regarded as “in consumer use” when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business ; and

(b) anything in writing is a guarantee if it contains or purports to contain some 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 the parties to a contract under or in pursuance of which possession of ownership of the goods passed.

Sale and
hire-purchase
Cap. 170

8. (1) Liability for breach of the obligations arising from section 14 of the Sale of Goods Act (implied terms about title, etc.) cannot be excluded or restricted by reference to any contract term.

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(2) As against a person dealing as consumer, liability for breach of the obligations arising from sections 15, 16 or 17 of the Sale of Goods Act (sale by description, implied terms about quality or fitness and sale by sample) cannot be excluded or restricted by reference to any contract term.

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

(4) The liabilities referred to in this section are not only the business liabilities defined by section 3(3), but include those arising under any contract of sale of goods or hire-purchase agreement.

9. (1) Where the 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, subsections (2), (3) and (4) apply as regards the effect (if any) 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.

Other
contracts
where goods
pass

(2) As against a person dealing as consumer, liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term.

(3) As against a person dealing otherwise than as consumer, that liability can be excluded or restricted by reference to such a term, but only in so far as the term satisfies the requirement of reasonableness.

(4) Liability in respect of —

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

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

cannot be excluded or restricted by reference to any such term, except in so far as the term satisfies the requirement of reasonableness.

10. Where a person has entered into a contract after a misrepresentation has been made to him, and —

Rescission for
innocent
misrepresenta-
tion

(a) the misrepresentation has become a term of the contract ; or

(b) the contract has been performed,

or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b) of this section.

Damages for
misrepresenta-
tion

11. (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

(3) Damages may be awarded against a person under subsection (2) whether or not he is liable to damages under subsection (1), but where he is so liable any award under subsection (2) shall be taken into account in assessing his liability under subsection (1).

12. If a contract contains a term which would exclude or restrict —

Liability for
misrepresentation

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made ; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 15(1) ; and it is for those claiming that the term satisfies that requirement to show that it does.

Other Provisions about contracts

13. (1) Where for reliance upon it a contract term has to satisfy the requirement of reasonableness, it may be found to do so and be given effect accordingly notwithstanding that the contract has been terminated either by breach or by a party electing to treat it as repudiated.

Effect of
breach

(2) Where on a breach the contract is nevertheless affirmed by a party entitled to treat it as repudiated, this does not of itself exclude the requirement of reasonableness in relation to any contract term.

14. A person is not bound by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another's liability which this Part prevents that other from excluding or restricting.

Evasion by
secondary
contract

Explanatory Provisions

15. (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part is that the term shall have been a fair and reasonable one to be included having

The
"reasonableness"
test

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.

Schedule 2

(2) In determining for the purposes of sections 8 or 9 whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 ; but this subsection does not prevent the court from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act 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) 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 Act or any other law) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) in the case of contract terms) to —

(a) the resources which he 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) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

“Dealing as consumer”

16. (1) A party to a contract “deals 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 ;

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

(c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 9, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

(2) But on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.

(3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

17. (1) To the extent that this Part prevents the exclusion or restriction of any liability it also prevents —

Varieties of
exemption
clause

(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 4, 7, 8 and 9 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

(2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part as excluding or restricting any liability.

PART III

MISCELLANEOUS

International
supply
contracts

18. (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 such a contract as is described in subsection (3).

(2) The terms of such a contract are not subject to any requirement of reasonableness under sections 5 or 6.

(3) Subject to subsection (4), that description of contract is one whose characteristics are the following —

(a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes ; and

(b) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States.

(4) A contract falls within subsection (3) only if either —

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

(b) the acts constituting the 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 other than that within whose territory those acts were done.

19. (1) Where the law applicable to a contract is the law of Brunei Darussalam only by choice of the parties (and apart from that choice would be the law of some country outside Brunei Darussalam) sections 4 to 9 do not operate as part of the law applicable to the contract.

Choice of law clauses

(2) This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside Brunei Darussalam, where (either or both) —

(a) the term appears to the court to have been imposed wholly or 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 Brunei Darussalam, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

20. (1) In a case where —

Sea carriage of passengers

(a) a contract for carriage by sea of a passenger or of a passenger and his luggage is not made in Brunei Darussalam ; and

(b) neither the place of departure nor the place of destination under it is in Brunei Darussalam,

a person is not precluded by this Act from excluding or restricting liability for loss or damage.

21. (1) Nothing in this Act removes or restricts the effect of, or prevents reliance upon, any contractual provision which —

Saving for other legislation

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

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

(2) A contract term is to be taken, for the purposes of Part II, as satisfying the requirement of 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 statutory jurisdiction or function and is not a term in a contract to which the competent authority is itself a party.

(3) In this section —

“competent authority” means any court, government department or public authority ;

“statutory” means conferred by a written law.

Section 3(2)

SCHEDULE 1

Scope of sections 4, 5, 6 and 9

1. Sections 4, 5 and 6 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 —
- (i) to the formation or dissolution of a company (which means any body corporate or unincorporated association and includes a partnership) ; or
 - (ii) to 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 4(1) extends to —

- (a) any contract of marine salvage or towage ;
- (b) any charterparty of a ship or hovercraft ; and
- (c) any contract for the carriage of goods by ship or hovercraft,

but subject to this sections 4, 5, 6 and 9 do not extend to any such contract except in favour of a person dealing as consumer.

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

- (a) specified 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 sections 4, 5 and 6 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. Sections 4(1) and (2) do not extend to a contract of employment, except in favour of the employee.

SCHEDULE 2

Section 15(2)

“Guidelines” for application of reasonableness test

The matters to which regard is to be had in particular for the purposes of sections 8(3), 9(3) and (4), are any of the following which appear 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 for 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.