

1989 BILL 239

First Session, 22nd Legislature, 38 Elizabeth II

THE LEGISLATIVE ASSEMBLY OF ALBERTA

BILL 239

UNFAIR CONTRACT TERMS ACT

MR. WRIGHT

First Reading

Second Reading

Committee of the Whole

Third Reading

Royal Assent

Bill 239
Mr. Wright

BILL 239

1989

UNFAIR CONTRACT TERMS ACT

(Assented to , 1989)

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of Alberta, enacts as follows:

Definitions and
application of
Act

1(1) In this Act,

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

(b) "goods" has the same meaning as in the *Sale of Goods*
Act;

(c) "negligence" means the breach

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

(ii) of any common law duty to take reasonable care or
exercise reasonable skill, but no any stricter duty,

(iii) of the common duty of care imposed by the *Oc-
cupiers' Liability Act*;

(d) "notice" includes an announcement, whether or not in
writing, and any other communication or purported
communication;

- (e) "personal injury" includes any disease and any impairment of physical or mental condition.
- (2) Subject to section 6(4), sections 2 to 7 apply 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.
- (3) In relation to any breach of duty or obligation, it is immaterial for any purpose of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.
- (4) Sections 2 to 4 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
 - (i) to the information 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;
 - (d) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities.
- (5) Section 2(1) and (2) does not extend to a contract of employment, except in favour of the employee.

Negligence
liability

2(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 insofar 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

3(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 the 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 reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except insofar as the contract terms satisfied the requirement of reasonableness.

Unreasonable
indemnity
clauses

4(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 insofar as the contract term satisfies the requirement of reasonableness.

(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.

Guarantee of
consumer goods

5(1) In the case of goods of a type ordinarily supplied for private use or consumption, where loss or damage

(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 the purpose of this section

(a) goods are regarded for private use or consumption 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 to parties to a contract under or in pursuance of which possession or ownership of the goods passes.

Sale and
conditional sales

6(1) Liability for breach of the obligations arising from section 15(a) of the *Sale of Goods Act* cannot be excluded or restricted by reference to any contract term.

(2) As against a person dealing as consumer, liability for breach of the obligations arising from section 16, 17 or 18 of the *Sale of Goods Act* 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) cannot be excluded or restricted by reference to a contract term, but only insofar as the term satisfies the requirement of reasonableness.

(4) The liabilities referred to in this section are not only the business liabilities defined in section 1(2), but include those arising under any contract of sale of goods or conditional sales agreement.

Miscellaneous
contracts under
which goods pass

7(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 conditional sales, subsections (2) to (4) apply as regards the effect to be given to a contract terms excluding or restricting liability for breach of obligation arising by implication of law from the nature of the contract.

(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 insofar 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 insofar as the term satisfies the requirement of reasonableness.

Misrepresenta-
tion

8 If a contract contains a term which would exclude or restrict

(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 misrepresentation,

that term shall be of no effect except insofar as it satisfies the requirement of reasonableness for the party claiming that the term satisfies that requirement to show that it does.

Effect of breach

9(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.

(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.

Evasion by secondary contract

10 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 Act prevents that other from excluding or restricting.

Reasonableness test

11(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Act is that the term shall have been 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.

(2) In determining for the purposes of section 6 or 7 whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in the Schedule to this Act, but this subsection does not prevent a court or arbitrator from holding, in accordance with any rule of law, that a term 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 or any other Act, 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

12(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, and

(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 conditional sale, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

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

Varieties of
exemption clause

13(1) To the extent that this Act prevents the exclusion or restriction of any liability it also prevents

(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 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

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

Commencement

14(1) This Act comes into force on Proclamation.

(2) Nothing in this Act applies to contracts made before the date on which it comes into force, but subject to this, it applies to liability for any loss or damage which is suffered on or after that date.

SCHEDULE

GUIDELINES FOR APPLICATION OF REASONABLENESS TEST

The matters to which regard is to be had in particular for the purposes of sections 6(3), 7(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 a 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.