

# VALIDITY AND ENFORCEABILITY OF CONTRACTS

Comparative study between Common and Civil Law

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## RESCISSION

- terminates, generally, the contract - obligations under the contract are only discharged prospectively
- Ex. the parties freely have decided to terminate the contract
- Discretionary remedy for actionable **misrepresentation**  
= *fraudulent statements made during the negotiations which have induced the other party to enter into a contract*



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## RESCISSION

### ***In case of misrepresentation:***

- cancels the contract - restores the pre-contractual state (the *status quo ante*)
- The only remedy under law of contract for misrepresentation or duress often accompanied by an order for restitution



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## DAMAGES

- an award of money to redress a wrongful event
- damages are only available for misrepresentation under the **law of tort, not the law of contract**
- can seek damages only if the misrepresentation was either fraudulent or negligent in nature



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## EXCLUSION CLAUSE

- often included in a standard form agreement to protect a party from legal liability (can be contract liability or tort liability)
- *example: to avoid liability for accidental injury during an excursion with an adventure company*
- **requirements for enforceability of exclusion clause:**
  - the term must be drafted in clear, unambiguous language
  - reasonable notice of the term and its effect must be given to the affected party
  - it must be shown that the affected party was in agreement, by signature or otherwise



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## FUNDAMENTAL BREACH

- Should an exclusion clause contained within a contract be enforced where there has been a fundamental breach?
- Traditional approach “rule of law”
- a breach that goes to the root of the contract will not be enforceable
- in order to determine whether an exclusion clause is enforceable, one must look to the intentions of the parties
- however, a clause may be found to be unenforceable despite intentions if it is found to be “unfair”, “unreasonable” or “unconscionable”



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## UNFAIR TERMS

- Unfair Contract Terms Act 1977 (UK)
- Unfair Terms in Consumer Contracts Regulations 1999 (UK)
- The Unfair Terms in Consumer Contracts Directive 93/13/EEC (Europe)
- Article 51 Brazilian Consumer Protection Code (1990)

### Requirements:

- Standard forms contracts (not negotiable)
- Contrary to good-faith
- Significant imbalance in the parties' rights and obligations

• *Holman Group Limited v Sherwood International Group Limited [2001] MCLR 72*




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## REASONABLENESS TEST

### Schedule 2 (Unfair Terms Act 1977 - UK):

- (a) the strength of the bargaining positions of the parties relative to each other;
- (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 a similar term;
- (c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term;
- (d) where the term excludes or restricts any relevant liability if some condition was not complied with;
- (e) whether the goods were manufactured, processed or adapted to the special order of the customer.




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## UNCONSCIONABLE DOCTRINE

- *Unequality of bargaining power*
- *Unfair obligations assumed by one of contractual parties*

• Equitable jurisdiction (*Slator v. Nolan (1876), Ir. R. 11 Eq. 367 at 386*) - Canada:  
 "I take the law of the Court to be, that if two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, by reason of the circumstances I have mentioned, a transaction resting upon such unconscionable dealing will not be allowed to stand, and there are several cases which shew, even where gets a benefit cannot hold it without proving that everything has been right and fair and reasonable on his part".




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## UNCONSCIONABLE DOCTRINE

- **Substantive unconscionability** refers to the unconscionability in the terms of a contract. It means that the objective terms of the contract are unfair.
- **Procedural unconscionability** refers to the unconscionability in the conditions of contract formation.



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## CARLILL V. CARBOLIC SMOKE BALL CO. [1893] Q.B. 256 (C.A.)



*"£1000. reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball."*



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