DRAFTING AND ENFORCING CONTRACTS IN CIVIL AND COMMON LAW JURISDICTIONS

Edited by:
Kojo Yelpaala
Mauro Rubino-Sammartano
Dennis Campbell

Kluwer

DRAFTING AND ENFORCING CONTRACTS IN CIVIL AND COMMON LAW JURISDICTIONS

Edited by

KOJO YELPAALA
S.J.D. University of Wisconsin
U.S.A., 1985

MAURO RUBINO-SAMMARTANO
Studio Rubino-Sammartano & Associati
Milan, Italy

DENNIS CAMPBELL
J.D. University of the Pacific
U.S.A., 1973

KLUWER LAW AND TAXATION PUBLISHERS

DEVENTER – ANTWERP – LONDEN – FRANKFURT – BOSTON – NEW YORK

Distribution in the USA and Canada

Kluwer Law and Taxation Publishers
101 Philip Drive
Norwell, Massachusetts 02061
USA

Library of Congress Cataloging-in-Publication Data

Library of Congress Card no. 86-21512

Cover design: Bert Arts

D/1986/2664/85

ISBN 90 6544 279 0

DRAFTING AND ENFORCING CONTRACTS IN CIVIL AND COMMON LAW JURISDICTIONS

THE AUTHORS

JOHN A. E. YOUNG, Cameron, Markley
London, England

JEAN DE SAUGY, Poncet, Turrettini, Amaudruz & Neyroudd
Geneva, Switzerland

KENNETH CHRYSTIE, McClue, Naismith, Anderson & Gardiner
Glasgow, Scotland

CHRISTOPH VON TEICHMAN, Nolte & Lowe
Hamburg, W. Germany

ANTHONY COLLINS, Eugene F. Collins & Son
Dublin, Ireland

JACQUES HENROT, Gide Nouel
Paris, France

MAURO RUBINO-SAMMARTANO, Studio Rubino-Sammantaro & Associati
Milan, Italy

DONALD WORLEY, Worley, Schwartz, Garfied & Rice
San Diego, California, U.S.A.

ENRIC PICANOL, Butete Cuatrecasas
Barcelona, Spain

OTTO SANDROCK, Professor of Law, Munster University
Munster, West Germany

KOJO YELPAALA, Professor of Law, McGeorge School of Law
Sacramento, California, U.S.A.

FOREWORD

This is a collection of excellent papers that were first presented at the University of the Pacific McGeorge School of Law Third Annual Waidring Conference on comparative international transactions. This year the Conference attracted experienced practitioners, jurists and legal scholars from at least eighteen different countries and jurisdictions. The topic was on drafting and enforcing contracts in common and civil law jurisdictions. Several top quality reports were presented on the topic by selected participants from the common and civil law jurisdictions to provide a synthesis of the law from their jurisdictions. Floor discussions on how various jurisdictions approach similar issues followed the presentations. After the Conference the authors did a marvelous job revising the Conference papers.

This year's annual Waidring Conference was organized by Professor Dennis Campbell, Director of International Programs for McGeorge School of Law and chaired by Mauro Rubino-Sammartano, who was responsible for developing the topics, selecting the speakers and leading the Conference discussions. The Conference was a resounding success from both the organizational aspects and substantive legal discussions. This writer is honored to have been a part of it.

The organization of the topics in this book follows the natural stages of contract. That is, it starts out with the issue of the formation of contract, mutual assent and formalities. Then it covers issues of interpretation, construction and classification. Following that, it covers enforcement. The last topic covered is on choice of forum and law provisions in international contracts.

Several people made the work connected with this book easier and deserve special mention and thanks. Special thanks to Claude D. Rohwer, Associate Dean, Graduate and International Studies, McGeorge School of Law, for his enthusiastic support, to Gloria Durr whose organizational skills and watchful eye checked every page and kept everything under control, to Jo-Carol Arisman, Carla Janssen, Nancy Salamy and the other secretaries for an excellent job. Finally, as an editor I sought not to

alter the substance of the papers. If, however, my editing has inadvertently changed the substance, I, not the authors, am completely responsible for that.

Kojo Yelpaala

July 3, 1986
Sacramento, California

Drafting and Enforcing Contracts in Civil and Common Law Jurisdictions

Edited by

Kojo Yelpaala
S.J.D. University of Wisconsin
U.S.A., 1985

Mauro Rubino-Sammartano
Studio Rubino-Sammartano &
Associati, Milan, Italy

Dennis Campbell
J.D. University of the Pacific
U.S.A., 1973

SUMMARY TABLE OF CONTENTS

TABLE OF CONTENTS

CHOICE OF LAW AND FORUM CLAUSES IN INTERNATIONAL TRANSACTIONS IN COMMON LAW JURISDICTIONS

FORMATION OF CONTRACTS - CONSIDERATION IN ENGLISH LAW

JOHN A. E. YOUNG

1. INTRODUCTION: REQUIREMENTS OF BINDING CONTRACT IN ENGLISH LAW

Let me start with the warning that in the time available, any treatment of a large subject such as 'consideration' must inevitably be over-simplified and somewhat superficial. However, I hope it will serve its purpose of introducing those who were not brought up in common law systems to at least the main features of a doctrine which we have made peculiarly our own.

Four elements must be present before there can be a binding contract in English law and usually there must also be a fifth. The first four are:

(a) Offer.
(b) Acceptance.
(c) Certainty, by which I mean that the terms must neither be too vague nor obviously incomplete.
(d) Intention to create legal relations, by which I mean that both parties must have intended to enter into a legally enforceable contract.

The fifth element, which must be present in most cases, is 'consideration.'

2. WHEN IS CONSIDERATION NOT REQUIRED IN ENGLISH LAW?

There are five principal situations where the English courts will enforce a contract even in the absence of consideration:

(a) Contract Made Under Seal. If a document is signed under seal, i.e., if the document is what we call a deed, then there is no need for consideration. Of course many documents executed under seal are in fact supported by substantial

consideration. However, if a lawyer is drafting a contract where it could at least be argued that one party was providing no consideration for the promise of the other, then he will put matters beyond doubt by providing for sealing. In the old days the requirements for executing and delivering a deed were formal. Now there need not even be an actual seal; it is enough if the document indicates where the seal is intended to be and if the parties sign it with the intention of executing it as a deed. 'Delivery' too is now more simple in that any conduct indicating that one is releasing the document with the intention to be bound by it is usually enough.

(b) Gratuitous Bailment. The law of bailment in England has always had its special rules. These apply, for example, where A accepts B's property for safe-keeping. The bailment can be for the benefit of either bailor or bailee. It was for the benefit of the bailee in Bainbridge v. Firmstone[1] where the defendant asked for and was given permission from the plaintiff to weigh two boilers belonging to the plaintiff. In the course of the weighing, the defendant damaged the boilers. He was held liable for breach of his promise to return them in good condition, even though there was no agreement that he should be paid for weighing or looking after the boilers.

(c) Bankers' Irrevocable Credits. In international contracts for the sale of goods, payment is often to be made by irrevocable credit. The buyer instructs his bank to open an irrevocable credit in favour of the seller; the bank tells the seller that the credit has been opened and that it will be paid when the seller lodges specified shipping documents with the bank. Although the seller has given no consideration for the bank's promise, it is generally accepted that the bank cannot withdraw from the arrangement. Some other systems might perhaps have regarded the bank as making a 'firm offer' to the seller coupled with an implied promise not to revoke it provided the shipping documents were presented within a reasonable time. This would not have been a solution in England as the rule is that a firm offer is not binding unless the offeree has provided some consideration for it.

(d) Auction Sales Without Reserve. Where goods are put up for auction without a reserve price being stipulated, there is no contract of sale if the

---

1. (1838) 8A&E 743.

auctioneer refuses to knock the goods down to the highest bidder. However, the auctioneer can be made liable to the highest bidder in damages for having broken what amounts to a separate contract (to which he rather than the seller is a party) that the sale will be without reserve.

(e) Estoppel. There are some situations where English law regards a person as being 'estopped' from going back on the promise he has made and on which the other party has relied, even if that other party has given no consideration for it. I will deal with this in more detail in Section 7 below.

3. CONSIDERATION DEFINED

I will start by describing a case which illustrates neatly the distinction between consideration on the one hand, and motive or conditions on the other. In Thomas v. Thomas,[2] a man shortly before he died expressed the wish that his widow should be allowed the use of his house during her lifetime. After his death, his executors promised to transfer the house to the widow during her life or (apparently being more cautious than the testator) for so long as she should remain a widow. The promise of the executors was expressed to be 'in consideration of the wishes of the testator, and provided also that the widow pays one pound per annum towards the ground rent and keeps the house in repair'. The executors then had second thoughts and the widow sued them for breaking the agreement. The court held that the fact that the executors expressed themselves as entering into the agreement 'in consideration of the wishes of the testator' did not in fact amount to consideration in law; it was merely their motive. Moreover, that the plaintiff should remain a widow was not part of the consideration but merely a condition of her remaining entitled to enforce the promise by the executors. However, the widow was successful in her action since the court accepted that the widow's undertaking to pay one pound per annum and to keep the house in repair amounted to sufficient consideration for the executors' promise.

Basic to the English doctrine of consideration is the idea of reciprocity. Something which the law would regard as being of value must be given in return for a promise before that promise will be enforceable. The doctrine is concerned not with the consideration for a contract but with whether each

---

2. (1842) 2QB 851.