

Excluding Liability in Contracts

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**Excluding Liability
in Contracts**

For Peow Peow and our parents

Editorial Adviser: Professor Visu Sinnadurai

Preface

Much has been said about exception clauses but their treatment remains perplexing. In the now familiar case of *Photo Production v Securicor* the House of Lords again reiterated that the effect of exception clauses is a matter of their construction. But no further guidance was offered by the House on the vexed question other than some views on freedom of contract.¹ The vagaries of 'construction' continue and somewhere in that process, the 'juristic function' of exception clauses features without more certainty or clarity.

The need for a response that goes beyond the mere construction of exception clauses is confirmed by judicial and legislative activities in recent years. Notions of reasonableness and unconscionability have emerged in Anglo-Australian contract law just as the Unfair Contract Terms Act 1977 of the United Kingdom and the Contracts Review Act 1980 of New South Wales make their mark in the respective jurisdictions. But these have not really come to grips with what we shall see to be the crucial problem, namely: when is a performer under a contract liable for his own misperformance notwithstanding the presence of an exception clause *prima facie* exempting him from liability?

Not surprisingly, it has also not been appreciated that there is already in Anglo-Australian common law a means by which exception clauses can be sensibly and effectively controlled. For the problem as stated was also central to the controversial doctrine of fundamental breach for which *Karsales v Wallis*, *Suisse Atlantique* and, more recently, *Photo Production v Securicor Transport* are key decisions. And in the cases on fundamental breach, the courts have intuitively marked out various types of misperformance, mainly

¹ See for eg Ogilvie, MH, 'The Reception of *Photo Production Ltd v Securicor Transport Ltd* in Canada: Nec Tamen Consumebatur' (1982) 27 McGill LJ 424, Collins, B St J 'Fundamental Breach and Exclusion Clauses' (1980) 31 No IreLQ 356.

those within the control of the performer, for which liability cannot be excused by the incorporation of an exception clause. In other words, even an exception clause does not always imply that a party has necessarily accepted all the risks of a contract, including those of misperformance which the clause attempts to cover.

In grappling with fundamental breach and the range of exception clauses, courts have not always clearly identified the crucial problem of exception clauses. Indeed the career of fundamental breach had been dominated by the familiar debate on whether it is a rule of law or a rule of construction. This debate thoroughly obfuscated the thrust of fundamental breach. Fuller analysis of the cases on fundamental breach shows a differentiated scale of misperformance against which a performer cannot protect himself if they are avoidable or culpable. These *indicia* of culpability bear only a vague resemblance to notions of moral reprehensiveness or fault in tort law. And they form the basis for a theory of what will be called risks of avoidable misperformance, or more briefly, 'performance-related' risks, which is residually distinct from the notions of reasonableness and unconscionability.

The objective of this book is to develop the theory of performance-related risks which will determine the legal margins of control of exception clauses. Accordingly it is not intended to consider in detail fine and subtle factual differences that determine the outcome of marginal cases. In the first five chapters, legal history is combined with interpretative analysis to develop the theory of performance-related risks. To bring the crucial problem of exception clauses into sharper focus, Chapter I studies a theme of conflict between a 'strict principle' and an 'adjustment principle' underlying our contract law. This theme defines the problem in a historical perspective for the phenomenon of fundamental breach, in its attempt to give us an acceptable solution to excessive exception clauses, adumbrates the conflict. In Chapter II it will be shown that by the time of *Karsales v Wallis* there was already in the law a discernible pattern of differentiated risks the liability for which could not be excused in advance by the use of an exception clause.

Chapter III examines three competing 'theories': the 'core theory', Coote's theory of the juristic function of exception clauses and Lord Devlin's views of a fundamental term. We will see that these theories do not fully understand the problem of exception clauses and cannot provide a 'solution' to the dilemma. Chapter IV reconsiders *Suisse Atlantique* because it involves a particular type of performance-related risk which was not then and has not since been appreciated. In other words it is not significant because of its doctrinal contribution or its status as the formal turning point in the

career of fundamental breach but, interestingly, because it shows how in the absence of a theory of performance-related risks, important questions are left unanswered. Chapter V looks at the recent cases which raise extremely difficult questions relating to negligent misperformance and 'culpable' breach. An attempt is made to extrapolate from them a subtle pattern of principle revealing different degrees of contractual misbehaviour and, in particular, misperformances which can be exempted from liability at the one extreme, and at the other, misperformances which cannot be exempted.

Finally, Chapters VI, VII and VIII study the relations between the regulation of performance-related risks and the legislative and common law notions of reasonableness and unconscionability. These developments are influenced by and deal with exception clauses. However, they are directed at a problem discernibly different from that which a theory of performance-related risks addresses.

N Y Chin
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