# Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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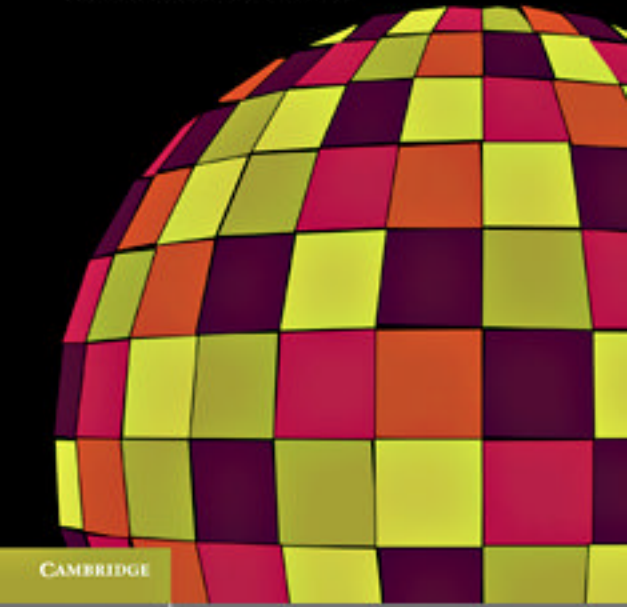

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exceptional context'[103] in which to rebut it. One might nevertheless add to this category the auction sale where the words 'subject to contract' were typed on one of the contractual documents by clerical error[104] or the notice exercising an option to purchase land which was expressed to be 'subject to contract'.[105] In both cases, those words were regarded as meaningless and there was found to be a clear intention to be bound. One might say that these decisions are examples of a 'purposive' interpretation and now that the courts seem more purposive[106] than they might have been in the past,[107] there may be greater scope to reach similar decisions in cases where the 'background'[108] would allow for it. This might be supported, indirectly, by cases where a similarly purposive approach has led to a finding that the parties did not intend to be bound, notwithstanding the absence of the words 'subject to contract'.[109]

The second category of case, where 'subject to contract' is expunged by implication rather than through formal exchange, includes cases where the courts have overlooked certain technical slips in the process of

[103] *Ibid.* at 730.

[104] *Munton* v. *GLC* [1976] 1 WLR 649. The intention of parties to an agreement for the sale of land by auction is to enter into a binding contract as soon as the bidder's offer is accepted by the fall of the auctioneer's hammer: *Treitel*, para. 2–008.

[105] *Westway Homes* v. *Moore* (1991) 63 P & CR 480.

[106] The 'literal' approach was never entirely literal and nor is the 'purposive' approach entirely purposive: *Charter Reinsurance Co Ltd* v. *Fagan* [1997] AC 313 at 326, 350; *Petromec Inc* v. *Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121 at [23]. See also *Prenn* v. *Simmonds* [1971] 1 WLR 1382 and the observation of Lord Wilberforce (at 1384) that: 'there is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Commissioners* v. *Adamson* (1877) 2 App Cas 743, 763 provides ample warrant for a liberal approach.'

[107] As a consequence of Lord Hoffmann's 're-statement' of the principles of interpretation in *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 WLR 896 at 912–913 (it might, strictly speaking, have to be said that they apply here only by analogy, since the question to be decided is whether there *was* a contract between the parties). And see now *Chartbrook Ltd* v. *Persimmon Homes Ltd* [2009] UKHL 38, (2009) 1 AC 1101. Not all agree with purposiveness: see, e.g., Sir C. Staughton, 'How Do Courts Interpret Commercial Contracts?' [1999] CLJ 303 and a number of Court of Appeal decisions referred to therein.

[108] Or the 'matrix of fact' as some may still prefer to call it.

[109] *Pateman* v. *Pay* (1974) 263 EG 467. It has to be said that there are equally few of these cases. The fact that the test of contractual intention is an objective one (in *Pateman*, there was a finding of sharp practice on the party who sought to claim that the agreement was binding) will usually mean that the parties *are bound* in the absence of an express qualification that their agreement is 'subject to contract': *Tweddell* v. *Henderson* [1975] 1 WLR 1496; *Storer* v. *Manchester CC* [1974] 1 WLR 1403 at 1408.

exchange itself[110] and those where the evidence supports the finding of a subsequent agreement to remove the effect of the words 'subject to contract'. In *Sherbrooke* v. *Dipple*,[111] the Court of Appeal adopted and applied the words of Brightman J in *Tevanan* v. *Norman Brett (Builders) Ltd*[112] that: 'parties could get rid of the qualification of "subject to contract" only if they both expressly agreed that it should be expunged *or if such an agreement was to be necessarily implied.*'[113] The position was perhaps best summed up by Bridge LJ in the unreported case of *Credit Suisse White Weld Ltd* v. *Davis and Morris*:[114]

> The common understanding of all who are familiar with conveyancing practice is that when a negotiation for the sale and purchase of land is being conducted with a stipulation introduced by either party that it shall be subject to contract, neither party will assume any binding contractual obligation until the formal written contracts have been exchanged.
>
> Of course, that common understanding can be displaced, and it is perfectly possible for the parties to such a negotiation to manifest an intention to assume contractual obligations at some other time and in some other way: but in order that the common understanding shall be thus displaced, the intention to be contractually bound at some other time and in some other way must be clearly and unambiguously manifested.

The same approach is taken in contracts generally, as opposed to those involved in conveyancing practice. See, for example, the view of Lord Walker in the very recent decision of the Supreme Court in *RTS Flexible Systems Ltd* v. *Molkerei Allois Müller GmbH & Co KG (UK Production)*:[115]

> Whether in such a case the parties agreed to enter into a binding contract, waiving reliance on the 'subject to [written] contract' term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold.

In the *Müller* case itself, work had begun on the supply and installation of automated packaging under a letter of intent. When the four-week term of that letter of intent had expired and work continued, the question was whether it did so under contract. The principal argument against the existence of a contract was that the parties negotiated on the basis that it

[110] E.g., *Harrison* v. *Battye* [1975] 1 WLR 58. [111] (1980) 255 EG 1203.
[112] (1972) 223 EG 1945. [113] Emphasis added. [114] Unreported, 20 December 1977.
[115] [2010] UKSC 14, [2010] 1 WLR 753 at [56]. The Supreme Court is the successor to the House of Lords and has been sitting since late 2009.

would be governed by Müller's standard terms (the MF\1 Form of Contract), Clause 48.1 of which stated: 'This Contract may be executed in any number of counterparts provided that it shall not become effective until each party has executed a counterpart and exchanged it with the other.' Nonetheless, the Supreme Court found that this was a case where the parties had waived reliance on 'subject to contract', particularly because they had reached agreement on all the terms that were essential and work had been carried out. The language in which this conclusion is expressed is worthy of note:[116]

> The clear inference is that the parties had agreed to waive the subject to contract clause, viz Clause 48. Any other conclusion makes no commercial sense. RTS could surely not have refused to perform the contract as varied pending a formal contract being signed and exchanged. Nobody suggested that it could and, of course, it did not. If one applies the standard of the reasonable, honest businessman suggested by Steyn LJ, we conclude that, whether he was an RTS man or a Müller man, he would have concluded that the parties intended that the work should be carried out for the agreed price on the agreed terms, including the terms as varied by the agreement of 25 August, without the necessity for a formal written agreement, which had been overtaken by events.

One should be wary of drawing too much by way of a conclusion from this decision. As Lord Walker noted, the court will not lightly hold that the parties waived reliance on 'subject to contract' and each case will depend on its own facts.[117] He also noted that: 'The moral of the story is to agree first and to start work later.'[118] Nonetheless, one observation might be made. A reference is made in the passage to Lord Steyn[119] and the standard of the reasonable honest businessman. It is Lord Steyn, as noted above, who has said that 'there is not a world of difference between the objective requirement of good faith and the reasonable expectations of parties'.[120] Is this then, in some sense, the doctrine of good faith at work in English law? If it is, it is invoked only in the same limited sense as has been seen with interpretation; in this context, one asks whether the parties really meant 'subject to contract' in the strict sense (cases in the first category, such as *Alpenstow*) or whether they still intended to be 'subject to contract' (cases in the second category, such as *Müller*).

[116] At [86], per Lord Walker. [117] At [54]. [118] At [1].
[119] In this context as Steyn LJ in *G Percy Trentham Ltd* v. *Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 25 at 27.
[120] See text to note 31.

That there is no room for a full-blown application of good faith would seem to be borne out by the unjust, or potentially unjust, results which can flow when the parties intended to and remained 'subject to contract'. Some of this potential stems from the fact that, despite the arguments of some to the contrary,[121] it seems that the effect of 'subject to contract' in English law is not just to negate the intention to be bound *in contract*, but to negate any form of liability at all.

A good illustration in this regard is *Regalian Properties Plc* v. *London Docklands Development Corporation*.[122] The parties were negotiating for a licence to develop land for housing. These negotiations were at all times described as 'subject to contract'. The contract envisaged by the parties was delayed because of the Development Corporation's request for further designs by new architects, which led to the claimant incurring very considerable expenditure. An increase in the value of the land led to the Corporation's refusal to go ahead at the price originally agreed upon, and the negotiations then came to an end. Regalian sought recovery of the approximately £3 million which they had paid to professional firms in respect of the proposed development, not in contract, but by way of a *quantum meruit*. They failed for two reasons: (1) the work done had not benefited the Development Corporation; and (2) they had, in any event, taken the risk that because the negotiations remained subject to contract, they would not result in a contract. The first reason is perfectly valid. There can be no *quantum meruit* where the expenditure incurred has not benefited the claimant; the second is a little more arguable if it means that even if a benefit had been conferred on the development corporation, there could be no claim for unjust enrichment.[123]

There may now be further room for argument here, after the decision of the House of Lords in *Yeoman's Row Management Ltd* v. *Cobbe*.[124] A developer and the owner of a block of flats reached an agreement 'in principle' that if the developer succeeded in securing planning permission to demolish the flats and build six new terraced houses, the owner would sell the flats to the developer for an upfront price of £12 million

[121] I have made my own attempt in *The Blundell Lectures* 2007, 'Pre-contractual liability in property law – a contradiction in terms?'.

[122] [1995] 1 WLR 212. Cf. *William Lacey (Hounslow) Ltd* v. *Davis* [1957] 1 WLR 932.

[123] To some extent, the additional wording in the sample clause above is intended to produce the same 'over-inclusive' effect given to 'subject to contract' in English law, in its references to '*any* liability'. At least as a matter of English law, it is wording that is likely to succeed.

[124] [2008] UKHL 55, [2008] 1 WLR 1752.

and a half-share of any surplus of the proceeds of sale in excess of £24 million. After permission was granted, the owner resiled from the agreement and sought better terms, which the developer refused. The House of Lords reversed the decision of the lower courts and refused the developer a proprietary remedy, on the basis that the developer had taken the risk involved in an unenforceable agreement in principle.[125] They did, however, award the developer a personal remedy in the form of a *quantum meruit* to cover his expenses and a fee for his services assessed at a rate appropriate for an experienced developer.[126] What is not explained is why the same reasoning which ruled out the proprietary claims did not also rule out the personal claim, namely that the developer had taken the risk that there would not be an enforceable contract so that he might not be 'paid' at all. As we have just seen with the *Regalian* case, that has been the approach of the courts in cases where work has been done 'subject to contract' and, in its discussion of the proprietary claims, the House of Lords had seemed to assimilate the reasoning in other subject to contract cases[127] with those applicable to the incomplete and unenforceable agreements in *Cobbe*.

### *2.7 Liquidated damages*

The sample clause states as follows:

> If, due to the fault of the Seller, the goods have not been delivered at dates according to the delivery schedule as provided in this Agreement, the Seller shall be obliged to pay to the buyer liquidated damages for such delayed delivery at the following rates:
>
> i) For each complete week, the liquidated damages shall be 0.5% of the value of the goods delayed.

[125] Even if the agreement had been complete, it was unenforceable for want of writing under the Law of Property (Miscellaneous Provisions) Act 1989, Section 2.

[126] In addition to possible claims based on estoppel or unjust enrichment, the parties may try to protect themselves from the wasted expenditure and loss of opportunity that may result from the breakdown of negotiations which are 'subject to contract' by entering into collateral contracts such as an agreement to negotiate ('lock-in agreements'). Here, it has to be said, English law has set itself against any enforceable standard of good faith, with the result that such agreements are unenforceable: *Walford* v. *Miles* 1992] 2 AC 128. See, generally, E. Peel, 'Agreements to Negotiate in Good Faith', in Burrows and Peel, *Contract Formation*, Chapter 2. However, the parties may create an enforceable 'lock out', i.e., an agreement not to negotiate with any other party for a defined period of time: *Pitt* v. *PHH Asset Management Ltd* [1993] 1 WLR 327; cf. *Tye* v. *House* [1997] 2 EGLR 171.

[127] Most notably, *A-G of Hong Kong* v. *Humphreys Estate* [1987] 1 AC 114.

ii) The total amount of the above mentioned liquidated damages will not exceed 25% of the Price for the delayed goods.
iii) The payment of liquidated damages shall not release the Seller from its obligation to continuously deliver the goods.

Such clauses are among the most commonplace in Anglo-American contract models. Without them, of course, damages would be assessed at large in accordance with the general law. Quite what that would amount to in any case will often be very uncertain and often more litigation costs are incurred disputing questions of quantum than of liability. Therefore, it is self-evident that a liquidated damages clause is intended to remove some of this uncertainty.

The approach of English law to liquidated damages clauses is somewhat anomalous. With one possible exception,[128] they are the only type of clause in which the courts, in the exercise of their common law powers, exercise a specific supervisory role over enforceability, i.e., a role going beyond that which would apply to any other contract term, such as defects in formation (incorporation) or questions of interpretation. It does not seem to fit easily with an attachment to freedom of contract, even in the attenuated form in which it exists in an age of consumer welfarism, for the courts to reserve a power to impose limits on what the parties have agreed they will pay to each other in the event of a breach of contract. This explains why the parties have always been given a significant degree of latitude in the assessment of whether they have attempted a 'genuine pre-estimate of loss'.[129] If anything, the current trend is for an even greater degree of latitude. The courts have regularly observed that,

[128] In this regard, note the observation of Lord Diplock in *A. Schroeder Music Publishing Co. Ltd* v. *Macaulay* [1974] 1 WLR 1308 at 1313: 'Under the influence of Bentham and of laissez-faire the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at the reasoning of 19th-century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it and upheld it if they thought that it was not.' Restrictive covenants are not the subject of consideration in this chapter; relief against forfeiture is, on one view, just the equitable counterpart of the rule against penalties (see *Treitel*, para. 20–141).

[129] The proof of the pudding is in the eating of course. In the case of *Alfred McAlpine Capital Projects Ltd* v. *Tilebox Ltd* [2005] EWHC 281 (TCC), [2005] Build. LR 271 at [48], Jackson J noted that in only four cases out of the many that had been brought by that time had a clause been struck down as a penalty.

in commercial contracts where the parties are of equal bargaining power, the presumption must be that the parties themselves regarded the sum stipulated or the sanction laid out as a genuine estimate of the loss to be incurred as a consequence of the breach in question.[130] They have also stressed the broad nature of the enquiry to be made in assessing a clause under the penalty rule. In *Murray* v. *Leisureplay Plc*,[131] Buxton LJ referred to a 'broad' and 'cautious' approach which emphasises that the test for a penalty is one of extravagance or unconscionability:[132]

> that (the sum stipulated) exceeds the likely amount of contractual damages . . . does not render the terms penal unless the party seeking to avoid the terms can demonstrate that they meet the test of extravagance . . . I regard that as a comparatively broad and simple question, that will not normally call for detailed analysis of the contractual background.

Nevertheless, it remains the case that the English courts may, and still occasionally do, strike down a liquidated damages clause as contrary to the rule against penalties.[133] The only instance in which I have come across a stated preference for a governing law other than English law on the basis that the parties' agreement is *more* likely to be upheld under that other law has occurred in the context of liquidated damages.[134]

[130] See, e.g., *Philips Hong Kong Ltd* v. *Attorney-General of Hong Kong* (1993) 61 Build. LR 41; *Alfred McAlpine Capital Projects Ltd* v. *Tilebox Ltd* [2005] EWHC 281 (TCC), [2005] Build. LR 271 at [48], per Jackson J: 'Because the rule about penalties is an anomaly within the law of contract, the courts are predisposed, where possible, to uphold contractual terms which fix the level of damages for breach. This predisposition is even stronger in the case of commercial contracts freely entered into between parties of comparable bargaining power.'

[131] [2005] EWCA Civ 963, [2005] IRLR 946.

[132] At [110]. Cf. *The General Trading Co (Holdings) Ltd* v. *Richmond Corporation Ltd* [2008] EWHC 1479 (Comm), [2008] 2 Lloyd's Rep. 475 at [133]. There are some who see the prevention of unconscionability as the best explanation for that rule: M. Chen-Wishart, 'Controlling the Power to Agree Damages', in P. Birks (ed.), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press, 1996).

[133] See, most recently, *Lansat Shipping Co Ltd* v. *Glencore Grain BV* [2009] EWCA Civ 855, [2009] 2 Lloyd's Rep. 688.

[134] In this regard, the decision of Colman J in *Lordsvale Finance Plc* v. *Bank of Zambia* [1996] QB 752 is of particular note. In a syndicated loan, he upheld a provision which applied an additional interest rate of 1 per cent p.a. for the period from the date of any default until payment. He took into account that syndicated loans almost invariably provide for enhanced rates of default interest to apply and that they are not struck down as penalties under New York law, which is the principal alternative governing law for such loans. The commercial implications for international banking in London, had he decided otherwise, are self-evident.

This is a view which may understate the significance of another aspect of the rule against penalties. The rule only applies *at all* to sanctions imposed for a *breach* by the payor. It does not apply to sums payable 'upon the happening of a specified event other than a breach of a contractual duty owed by the contemplated payor to the contemplated payee'.[135] The drafting possibilities to which this may give rise can be demonstrated by reference to a recent decision of the English courts concerned with another form of standard provision, in the shape of a 'take or pay' clause.

In *M&J Polymers Ltd* v. *Imerys Minerals Ltd*,[136] the relevant provisions in a supply contract were as follows:

> 5.3. During the term of this Agreement, the Buyer will order the following minimum quantities of Products:
> 5.5. Take or pay: The Buyers collectively will pay for the minimum quantities of Products as indicated in this Article at 5.3 . . . even if they together have not ordered the indicated quantities during the relevant monthly period.

The first issue for the court to resolve was whether Clause 5.5 was subject to the rule against penalties. On this issue, the view of Burton J was that he could 'not see how a payment obligation can arise under Article 5.5 in a case *other than* where there has been a breach of the obligation to order under Clause 5.3. If the goods are in fact ordered, then they will be delivered, and the price will be due quite irrespective of Article 5.3 or 5.5'.[137] Nevertheless, he went on to decide that the clause was not a penalty, adopting the 'broad' approach referred to above.[138] The point to be stressed is that it seems that it would have been a relatively easy matter to have drafted the contract such that no breach would have been involved. This could have been achieved if the buyer had simply agreed

[135] *Export Credit Guarantee Department* v. *Universal Oil Products Co* [1983] 1 WLR 399, per Lord Roskill. Cf. *Alder* v. *Moore* [1961] 2 QB 57; *Jervis* v. *Harris* [1996] Ch 195; *Office of Fair Trading* v. *Abbey National Plc & Others* [2008] EWHC 875 (Comm), [2008] EWHC 2325 (Comm).

[136] [2008] EWHC 344, [2008] 1 Lloyd's Rep. 541.

[137] He distinguished the earlier case of *Euro London Appointments* v. *Claessens International* [2006] EWCA Civ 385, [2006] 2 Lloyds Rep. 436, where the right to a refund was lost if invoices remained unpaid for seven days or more. The fact that there was also an obligation to pay the invoices within seven days was only a coincidence; two quite separate periods could have been set for the obligation to pay and the entitlement to the refund.

[138] See text to note 132; cf. *Tullett Prebon Group Ltd* v. *Ghaleb El-Hajjali* [2008] EWHC 1924 (QB), (2008) IRLR 760.

to the minimum payment required and the supplier agreed to deliver product up to the limit represented by that payment, at the time and in the quantities ordered by the buyer. If the buyer did not then order up to the amount for which he had paid, or agreed to pay, he would not be in breach but would still have to pay, and the rule against penalties could not apply. If the buyer wanted even more product than the minimum, this could be covered by an agreement to deliver in excess, if the product is available, to be paid for *pro rata*.

Similarly, in the sample clause the same result could be achieved by redrafting it so that there is no obligation on the seller to deliver by a particular date. Instead the parties could fix the price by reference to that date, but agree that the price would reduce by 0.5 per cent for each week beyond that date when the goods were in fact delivered. Once again, one encounters here a question of interpretation, but one which can be manipulated by the parties to avoid the intervention of the courts. The ease with which a liquidated damages clause can be converted into a price variation clause and be made potentially immune from the rule against penalties provides another test case for the adherence of English law to freedom of contract when set against the prospect of an unjust result.[139]

In this regard, one might finish by considering the decision of the Court of Appeal in *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd*,[140] a case already cited for the views expressed therein by Bingham LJ on the role of fairness or good faith.[141] As part of their business, the defendants ordered some photographic transparencies from the claimants, which were sent round with a delivery note containing nine printed conditions in four columns on one sheet of A4 paper. Amongst the conditions was one which stated that the defendants had to return the transparencies within fourteen days and, if they failed to do so, there would be a holding fee of £5 per day per transparency. The defendants overlooked that they had not returned the transparencies and, by the time they did so, the holding fee amounted to £3,800. The court was clearly troubled by the prospect that the fee should be enforceable, but was able to avoid its application by recourse to the rule of incorporation noted above – that additional steps are necessary in order to have given sufficient notice of an unusual clause. It was found that a holding fee as such was quite common, but the amount to be paid was usually in the

[139] For some, it simply exposes the anomaly of the rule against penalties and leads to the view that it should be abolished.

[140] [1989] QB 433. [141] See the text following note 27.

region of £3.50 per week per transparency; therefore, a holding fee clause was not a clause of an unusual type, but a holding fee for this amount was. On the face of it, the decision is consistent with the 'orthodox' position referred to in the first part of this chapter – the court acknowledged the parties' freedom of contract, but found that they had not both agreed to the holding fee. The motivation for the decision was nonetheless fairness,[142] but what would the position have been if the terms and conditions had been set out in a document which had been signed by the defendants? It seems that there would have been no room to deny incorporation,[143] but equally there would have been no room to apply the rule against penalties because the holding fee did not involve any breach; it was just another form of price variation clause. One suspects that it is with this prospect in mind that Bingham LJ observed that he did 'not wish to be taken as deciding that (the) condition was not challengeable as a *disguised* penalty clause'.[144] This residual attachment to a notion of good faith, or fairness, is occasionally detected,[145] but is often achieved indirectly by recourse to supposedly orthodox doctrines such as incorporation.

## *2.8 Indemnity*

The sample clause states as follows:

> 30.1 Contractor shall indemnify Company Group from and against any claim concerning:
> a) personal injury to or loss of life of any employee of Contractor Group, and
> b) loss of or damage to any property of Contractor Group,
> and arising out of or in connection with the Work or caused by the Contract Object in its lifetime. This applies regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Company Group.
>
> Contractor shall, as far as practicable, ensure that other companies in Contractor Group waive their right to make any claim against Company

[142] Bingham LJ noted (at 445) that the rule of incorporation employed by the courts 'may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned'.

[143] See text to note 10.

[144] At 445–446.

[145] See also Bingham LJ in *Timeload Ltd* v. *British Telecommunications Plc* [1995] EMLR 459 when granting an interlocutory injunction to restrain the termination of a contract on notice.

> Group when such claims are covered by Contractor's obligation to indemnify under the provisions of this Art. 30.1.
>
> 30.3 Until the issue of the Acceptance Certificate, Contractor shall indemnify Company Group from:
>
> a) costs resulting from the requirements of public authorities in connection with the removal of wrecks, or pollution from vessels or other floating devices provided by Contractor Group for use in connection with the Work, and
> b) claims arising out of loss or damage suffered by anyone other than Contractor Group and Company Group in connection with the Work or caused by the Contract Object,
>
> even if the loss or damage is the result of any form of liability, whether strict or by negligence in whatever form by Company Group.
>
> Contractor's liability for loss or damage arising out of each accident shall be limited to NOK 5 million. This does not apply to Contractor's liability for loss or damage for each accident covered by insurances provided in accordance with Art. 31.2.a) and b), where Contractor's liability extends to the sum recovered under the insurance for the loss or damage.
>
> Company shall indemnify Contractor Group from and against claims mentioned in the first paragraph above, to the extent that they exceed the limitations of liability mentioned above, regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Contractor Group.
>
> After issue of the Acceptance Certificate, Company shall indemnify Contractor Group from and against any claims of the kind mentioned in the first paragraph above, regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Contractor Group.

An 'indemnity' may take a number of forms[146] and in English law models, it is becoming increasingly common to find an 'indemnity' given against the consequences of the breach of a contract between the indemnifier and the indemnified.[147] In its more 'traditional' form and in the form appearing in the sample clause, an indemnity is given against

[146] See R. Zakrzewski, 'The Nature of a Claim on an Indemnity', *Journal of Contract Law*, 22 (2006), 54.

[147] Where the principal controversy is whether such an indemnity against 'loss' excludes remoteness and mitigation: see *Treitel*, para. 21–004; *Royscot Commercial Leasing Ltd* v. *Ismail* (1993) *The Independent*, 17 May; *The Eurus* [1996] 2 Lloyd's Rep. 408, affirmed [1998] 1 Lloyd's Rep. 351; *Jervis* v. *Harris* [1996] Ch 195; *Maple Leaf Marco Volatility Master Fund* v. *Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [259]; *ENE Kos* v. *Petroleo Brasileiro SA (Petrobas)* [2009] EWHC 1843 (Comm), [2010] 1 Lloyd's Rep. 87 at [34].

claims brought against the indemnified by third parties. Such an indemnity may be available as a matter of the general law even in the absence of express agreement between the parties, now regulated mainly by the Civil Liability (Contribution) Act 1978.[148] It is only available if the party which has been successfully sued by the third-party claimant can establish that another party is liable for the 'same damage'.[149] Thus, in the context of the first part of the sample clause, if there was no such clause and a member of the Company Group was sued by an employee of the Contractor, it would be necessary for the Company Group member to establish that the Contractor was, or would also have been, liable for the same injury before it could claim any contribution or indemnity under the Act. The point about a contractual indemnity is, of course, that it turns simply on the agreement of the parties and not on the need for any prior joint liability.

Indemnity clauses of this type are subject to the same sort of controls applied to exclusion clauses, i.e., they are subject to the principle of *contra proferentem* in their interpretation and, in some cases, they are also subject to the controls set out in the Unfair Contract Terms Act 1977.

A good example of the application of *contra proferentem* is provided by *EE Caledonia Ltd* v. *Orbit Valve Co Europe Plc*.[150] Caledonia (or Occidental Petroleum (Caledonia) Ltd at the relevant time) was the owner and operator of the Piper Alpha oil rig when it exploded in the North Sea in 1988. Orbit Valve was an engineering company who supplied a service engineer to work on the rig who was killed in the explosion. A claim was made against Caledonia by the family of the engineer and settled out of court, Caledonia admitting that it was guilty both of negligence and breach of health and safety regulations. Caledonia claimed an indemnity against Orbit Valve under one of the clauses of the service contract, the material parts of which were as follows:

> Each party hereto shall indemnify . . . the other . . . from and against any claim, demand, cause of action, loss, expense or liability arising by reason of the death of any employee . . . of the indemnifying party, resulting from . . . the performance of this (contract).

[148] See, generally, W. V. H. Rogers, *Winfield & Jolowicz on Tort* 18th edn (Sweet & Maxwell., 2006), paras. 21–24ff.

[149] Civil Liability (Contribution) Act 1978, Section 1; *Royal Brompton Hospital NHS Trust* v. *Watkins Gray International (UK)* [2002] UKHL 14, [2002] 1 WLR 1397.

[150] [1995] 1 All ER 174. See also *Casson* v. *Ostley PJ Ltd* [2001] EWCA Civ 1013, [2003] BLR 147.

Caledonia was unable to rely on the indemnity clause because it failed to satisfy what are sometimes referred to as the *Canada Steamship* rules.[151] These rules can be summarised as follows:

1. If the clause expressly refers to negligence, or words synonymous with negligence, it will be interpreted to cover claims based on the defendant's negligence.
2. If there is no reference to negligence but the wording used is wide enough to cover liability for negligence, it will cover claims based on the defendant's negligence but not if the defendant might have incurred some other form of liability 'not so remote or fanciful' as to be discounted. If there is another potential form of liability, the clause will be presumed to cover this and not the defendant's negligence.[152]

The indemnity in the *Caledonia* case failed because although it used general words wide enough to cover negligence, there were other forms of liability of which Caledonia could have been guilty, not the least of which was the breach of statutory duty which they had admitted under the health and safety regulations. It is with these rules and their application in the *Caledonia* case in mind that the sample clause above is probably worded, especially the express references to 'negligence'.

As far as the Unfair Contract Terms Act 1977 is concerned, the relevant provision is Section 4, which states that an indemnity must satisfy the test of reasonableness, but only if the indemnifier 'deals as consumer'.[153] If the indemnifier is acting in the course of business, the Act has no application. However, the English courts have been astute to ensure that a clause which is worded as an indemnity clause does not have the effect of operating as an exclusion clause. This is well illustrated by comparing two cases.

[151] After *Canada SS Lines Ltd* v. *The King* [1952] AC 192 at 208.

[152] This rule applies equally to indemnity clauses (see *Smith* v. *South Wales Switchgear Ltd* [1978] 1 WLR 165) and to clauses which seek to exclude liability. Where liability is only limited, general words will suffice to cover claims in negligence even though some other form of liability may have been incurred: the rules 'cannot be applied in their full rigour to limitation clauses' – *George Mitchell (Chesterhall) Ltd* v. *Finney Lock Seeds Ltd* [1983] 2 AC 803 at 814. It should be noted that the 'rules' are not rules as such; rather, they act as guidelines and the overall aim is to construe the relevant clause to find the meaning intended by the parties; the court may therefore find that the parties did intend to exclude liability for negligence even if, strictly speaking, the clause did not satisfy the rules: *HIH Casualty & General Insurance Ltd* v. *Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61.

[153] As defined by Section 12.

In *Thompson* v. *T Lohan (Plant Hire) Ltd*,[154] under a contract of hire, Lohan provided an excavator and a driver, subject to standard terms and conditions. The excavator was driven negligently with the result that the claimant's husband was killed. The claimant sued Lohan as the employer of the driver and Lohan claimed an indemnity from the hirer under Clause 8 of the terms and conditions, which stated:

> 8 . . . drivers . . . shall for all purposes in connection with their employment in the working of the plant be regarded as the servants or agents of the Hirer . . . who alone shall be responsible for all claims arising in connection with the operation of the plant by the said drivers . . .

Although not strictly speaking an indemnity clause, such a provision has the same effect and was treated as an indemnity clause for the purposes of the Unfair Contract Terms Act.[155] Section 4 did not apply because the hirer hired the plant in the course of his business and was not dealing as a consumer.

In the case of *Phillips Products* v. *Hyland*,[156] precisely the same clause was under consideration, but the facts differed in one significant respect. The hirer was also the claimant in that the effect of the driver's negligence was not to injure a third party but to damage the hirer's property. The hirer could sue the owner for the negligence of his employee, but the owner then sought an indemnity from the hirer. The effect of Clause 8 in such a case is that no claim will be brought at all.[157] Since the liability in question was negligence liability, the clause was therefore treated as an attempt to exclude liability for negligently inflicted property damage. Section 2 of the Unfair Contract Terms Act applied and, unlike Section 4, it was not necessary for the indemnifier to be dealing as a consumer. The reasonableness test applied and the clause was found to be unreasonable and unenforceable. It is a rather good illustration of the principle that the courts will look at the substance of a clause and not merely at its form.[158]

[154] [1987] 1 WLR 649.

[155] The standard terms did contain an express indemnity in the following terms: '13 . . . During the continuance of the hire period, the Hirer shall . . . fully and completely indemnify the Owner in respect of all claims by any person whatsoever for injury to person or property caused by or in connection with or arising out of the use of the plant.' It could not be relied upon because it failed the *Canada Steamship* rules.

[156] [1987] 1 WLR 659.

[157] Unless one can find a lawyer whose powers of persuasion extend to persuading a client to sue himself or herself.

[158] 'There is no mystique about "exclusion" or "restriction" clauses. To decide whether a person "excludes" liability by reference to a contract term, you look at the effect of the term. You look at its substance': per Slade LJ in *Phillips Products* v. *Hyland* at 666. Cf.

If one applies all of this to the relevant parts of the sample clause above, it passes the *Canada Steamship* rules with flying colours (though could one get the other party to agree to such a clause?),[159] but it may not be effective if the company group tried to use it as a means of excluding its own liability to the contractor (as opposed to other members in the contractor group), since then it would be vulnerable to the reasoning in the *Phillips* case.

### *2.9 Representations and warranties*

The sample clause states as follows:

> Each Party represents and warrants to and for the benefit of the other Party as follows:
> (1) It is a company duly incorporated and validly existing under the laws of . . . (in respect of the Seller) and of . . . (in respect of the Buyer), is a separate legal entity capable of suing and being sued and has the power and authority to own its assets and conduct the business which it conducts and/or proposes to conduct;
> (2) Each Party has the power to enter into and exercise its rights and perform and comply with its obligations under this Agreement;
> (3) Its entry into, exercise of its rights under and/or performance of, or compliance with, its obligations under this Agreement do not and will not violate or exceed any power granted or restriction imposed by any law or regulation to which it is subject or any document defining its constitution and do not and will not violate any agreement to which it is a party or which is binding on it or its assets;
> (4) All actions, conditions and things required by the laws of . . . to be taken, fulfilled and done in order to enable it lawfully to enter into, exercise its rights under and perform and comply with its obligations under this Agreement, to ensure that those obligations are valid, legally binding and enforceable and to make this Agreement admissible in evidence in the courts of . . . or before an arbitral tribunal, have been taken, fulfilled and done;

the approach taken to the effect of 'no representation' or 'non-reliance' clauses under Section 3 of the Misrepresentation Act 1967: text to note 52.

[159] The fact that it is easy enough to satisfy the rules by including the word 'negligence' may provide the justification for their application against the criticism that they constitute a survival of the strained construction of exemption clauses adopted prior to the Unfair Contract Terms Act (N. E. Palmer, 'Negligence and Exclusion Clauses. Again' [1983] LMCLQ 557). If it is easy to use the appropriate words, the most likely reason they are not used is because the other party did not, or would not, agree to them. In that event, it should not be open to the defendant to claim that agreement was reached by reference to more general words; it is yet another instance of interpretation being approached on the basis of reasonableness or, perhaps, good faith.

(5) Its obligations under this Agreement are valid, binding and enforceable;
(6) . . .
(7) . . .

As the non-exhaustive nature of these representations and warranties implies, what calls for comment is less the particular representations and warranties set out[160] and more the need for, and role of, such provisions in English law. Put simply, warranties and representations about certain matters will be essential because without them, there will or may be no basis for a claim; it is a good illustration of the general observation made at the outset of this chapter that the content of a contract remains almost entirely in the hands of the parties to it. An obvious example is a warranty that the accounts of a target company give a true and fair view of the assets and liabilities of the company. Such a warranty may be implied,[161] but the parties will certainly wish to insist that it is made express.

The particular need for express representations and warranties is explained by the very limited nature of any duty of disclosure in English law. Indeed, the general rule is that a person who is about to enter into a contract is under no duty to disclose material facts known to

[160] Some of those set out strike one as superfluous in the sense that the common law, like the civil law one suspects, would regard the matters to which reference is made as already regulated by the general law. Clause 5 strikes one as almost nonsensical: either the party's obligations under the Agreement are valid, binding and enforceable or they are not; if they are not, what use is a warranty that they are when that warranty itself is an obligation under the contract? One is left with the impression that these sorts of provision may provide comfort, but are unlikely to have any real legal effect such that the position would be different if they were not there.

[161] It is a moot point whether, because such a clause is so routinely included, this militates *in favour* of its implication, should it be omitted, or *against*. Lord Hoffmann has recently 're-stated' the test for implied terms in *Att-Gen of Belize* v. *Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [21]: 'There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?' There is a close connection here with interpretation which, as we have seen in earlier instances, has allowed for considerations of reasonableness (and perhaps good faith). But the same limit is applied here as is apparent in questions of interpretation: 'The fact that a particular implication is reasonable may be evidence that the parties would have agreed to it . . . But the courts will not imply a term in fact merely because it would be reasonable to do so; they will not . . . improve the contract which the parties have made for themselves, however desirable the improvement might be' (citing *Trollope & Colls Ltd* v. *NW Metropolitan Hospital Board* [1973] 1 WLR 601 at 609): *Treitel*, para. 6–032.

him or her but not to the other party.[162] Some of the 'exceptions' to this general rule are not, in reality, exceptions, since they are best explained on the basis of an implied representation. This is true, for example, of a representation which is true when made but falsified by later events[163] or a statement which is literally true but misleading.[164] Genuine exceptions are limited in nature, being confined either to contracts of a particular type, e.g., contracts of insurance,[165] or to the effect of specific legislation.[166]

So far as 'representations' are concerned, it is important to stress the difference between representations which are made *in* the contract and those which are made in the negotiations leading up to the contract, i.e., precontractual representations. Where representations are made in the contract, they add little to the claims which are available for breach of warranty, which are considered below. The real and additional potency lies in the claims which may be made on the basis of precontractual representations. If such a representation is false, the contract may be set aside and damages may be available depending on the degree of fault of the misrepresentor;[167] such damages aim to put the claimant in the same position as if no misrepresentation had been made (which usually means recovery of the price on the basis that, in the absence of misrepresentation, the claimant would not have done the deal). The setting out of 'representations' in the contract has led to a submission, the gist of which is that one might, in fact, be at a disadvantage if one includes boilerplate 'representations'. The argument is that if representations are made in the contract they may ultimately lead to overpayment on completion, but they are not *precontractual* representations such that they can be said to have induced the contract in the first place, thereby providing the remedy of rescission or damages of the type just referred

[162] *Norwich Union Life Ins Co Ltd* v. *Qureshi* [1999] 2 All ER (Comm) 707 at 717.
[163] *With* v. *O'Flanagan* [1936] Ch 575
[164] *Notts Patent Brick and Tile Co* v. *Butler* (1886) 16 QBD 778.
[165] 'It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life, guarantee and every kind of policy, that, as the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured . . . to make a full disclosure to the underwriters, without being asked, of all the material circumstances': *Rozanes* v. *Bowen* (1928) 32 Ll. L.R. 98 at 102.
[166] For example, under certain provisions of the Financial Services and Markets Act 2000.
[167] At common law, for fraud, or negligence; under statute applying the provisions of Section 2(1) of the Misrepresentation Act 1967. See, generally, *Treitel*, paras. 9–026–9–041.

to. It has found support from Bingham LJ,[168] but the prevailing view is that a representation can amount to both a precontractual and contractual representation, e.g., where, as is often the case, any representations made in the executed contract have also appeared in earlier drafts.[169] Indeed, when considered in conjunction with 'non-reliance' clauses which are analysed above,[170] it is clear that the parties have very considerable freedom to agree on the representations they have and have not made as the basis for the contract between them. As we have seen, it is primarily in relation to their attempts to say that they have *not* made representations that English law has some scope for intervening in the contract made.

So far as warranties are concerned, the remedies for non-fulfilment are those available for breach of contract. By contrast with damages for precontractual misrepresentation, damages for breach of warranty are awarded to put the claimant in the same position as if the warranty was true (which means recovery of any lost profit, assuming the deal was a good bargain). Whether such claims are available will, of course, depend on other boilerplate provisions such as exclusion clauses, limitation clauses and contractual time limits. Therefore, as with representations, the parties are, in this context, free to agree on the promises they have and have not made to each other. And again, it is primarily in relation to their attempts to say that they have *not* made promises that English law has some scope for intervention and is more willing to intervene in the final contract.[171] This may be borne out by the approach of the English courts to the disclosures in conjunction with which so many warranties are given.

[168] In *Senate Electrical* v. *STC*, unreported, 26 May 1994, he summarised the argument as follows: 'it is a manifest absurdity for the entering into the agreement to be relied upon when it is the very agreement in which the representations for the purpose of the tortious claim are said to be contained.' Though he did not, ultimately, strike out the claim, Bingham LJ did 'go almost the whole distance' with this argument.

[169] See, to this effect: *Eurovideo Bildprogramm Gmbh* v. *Pulse Entertainment Ltd* [2002] EWCA Civ 1235 at [19]. And see *MAN Nutzfahrzeuge AG and Others* v. *Freightliner Ltd and Others* [2005] EWHC 2347 (Comm), where it was not thought to be problematic that claims were advanced for misrepresentation on the basis of precontractual representations that also appeared as contractual representations in the 'representations and warranties' set out therein.

[170] Section 2.1.

[171] For a convincing thesis that no distinction should be drawn between provisions setting out the promises which have been made and those which have not, see B. Coote, *Exception Clauses* (Sweet & Maxwell, 1964).

For example, in *Infiniteland Ltd* v. *Artisan Contracting Ltd*,[172] the seller of the entire issued-share capital in three companies was said to have breached a warranty in the following terms: 'The Principal Accounts (a) give a true and fair view of the assets and liabilities of each Group Company at the Last Accounts Date and its profits for the financial period ended on that date.' As is usually the case, this warranty and others given in the share purchase agreement were qualified by disclosure in the following terms: 'The Warrantors warrant to the Purchaser that . . . save as set out in the Disclosure Letter.' The seller supplied the disclosure letter and a large amount of information which, it claimed, was sufficient to disclose the error in the accounts which was said not to have given a 'true and fair view'. The trial judge had found that the level of disclosure provided had not been sufficient to avoid a claim for breach of warranty. He relied heavily on the following *dictum* in the *New Hearts* case:[173]

> Mere reference to a source of information, which is in itself a complex document, within which the diligent enquirer might find relevant information will not satisfy the requirements of a clause providing for fair disclosure with sufficient details to identify the nature and scope of the matter disclosed.

The point which was emphasised by the Court of Appeal was that this *dictum* and disclosure generally have to be seen in context, in particular, in the context of the wording of the warranty given. In the *New Hearts* case, the relevant wording was that the warranties were given 'subject to matters fairly disclosed (with sufficient details to identify the nature and scope of the matter disclosed) in the Disclosure Letter'. In *Infiniteland*, the qualification was merely 'save as set out in the Disclosure Letter' and, on the basis of that wording and the documents disclosed to the buyer's reporting accountants, the Court of Appeal held that the test was as follows:

> could it fairly be expected that reporting accountants would become aware, from an examination of the documents in the ordinary course of carrying out a due diligence exercise, that an exceptional item in the amount of £1,081,000 had been taken as a credit against cost of sales and that the effect of that was to overstate the amount of operating profits from ordinary activities by that amount . . .

[172] [2005] EWCA Civ 758, [2006] 1 BCLC 632.
[173] *New Hearts Ltd* v. *Cosmopolitan Investments Ltd* [1997] 2 BCLC 249 at 258–259, per Lord Penrose.

It was found that that test had been satisfied. The point to be stressed in the context of this chapter is how crucial the wording of the boilerplate disclosure provision proved to be:[174] the words 'save as set out' in *Infiniteland* had the effect that the warranties given were much more heavily qualified than those given in the *New Hearts* case, based on the words 'fairly disclosed (with sufficient details to identify the nature and scope of the matter disclosed)'. It has been noted above how the courts have room for manouevre when it comes to interpretation, but this is a vivid illustration of the fact that they start with the words used in the contract.[175]

### 2.10 *Hardship*/force majeure

There are several examples set out in the introduction to Part 3 of hardship, or *force majeure*, clauses. The following may be thought most typical of such a provision:

> The Supplier shall not be liable for delay in performing or for failure to perform its obligations if the delay or failure results from any of the following: (i) Acts of God, (ii) outbreak of hostilities, riot, civil disturbance, acts of terrorism, (iii) the act of any government or authority (including refusal or revocation of any licence or consent), (iv) fire, explosion, flood, fog or bad weather, (v) power failure, failure of telecommunications lines, failure or breakdown of plant, machinery or vehicles, (vi) default of suppliers or sub-contractors, (vii) theft, malicious damage, strike, lock-out or industrial action of any kind, and (viii) any cause or circumstance whatsoever beyond the Supplier's reasonable control.

Without such a clause the parties are left with the doctrine of frustration.[176] Though the courts may long ago have departed from the doctrine of absolute contracts,[177] this doctrine continues to exert an influence and it is still no easy matter to persuade the courts that the parties should be

[174] Confirmation that everything depends on the particular wording of the warranty (or representation) and the disclosure, and on the context generally, is provided by the decision of Moore-Bick J in *Man Nutzfahrzeuge AG* v. *Freightliner Ltd* [2005] EWHC 2347.

[175] As a consequence, for the greater protection of buyers, one now often sees it stated that any warranties are qualified only by matters which are 'fully, fairly, specifically and accurately disclosed'. Before the decision in *Infiniteland*, such additional wording may have been viewed as surplusage.

[176] See, generally, *Treitel*, Chapter 19.

[177] As exemplified by *Paradine* v. *Jane* (1647) Aleyn 26.

discharged from their obligations because the contract has been frustrated. In that sense, what provisions of the type above endeavour to do is to set up a contractual regime for frustration, dependent only on what the parties have agreed upon, thereby providing the possibility of a greater degree of latitude.[178]

This may be illustrated by the leading case of *Super Servant Two*.[179] The defendants agreed to transport the claimants' drilling rig from Japan to the North Sea using, at their option, either the *Super Servant One* or the *Super Servant Two*. Shortly after the conclusion of the contract, the defendants allocated the *Super Servant Two* to transport the claimants' rig and the *Super Servant One* to the performance of another contract. Before the time set for performance of the contract with the claimants, the *Super Servant Two* sank and one of the issues for the Court of Appeal to decide was whether the contract with the claimants was frustrated. It was held that it was not frustrated because this was a case of self-induced frustration, i.e., it was not due entirely to events beyond the control of the defendants because they could have used the *Super Servant One* to fulfil the contract. This is a harsh decision and open to criticism,[180] but it is a vivid illustration of the narrow confines of frustration.

However, there was also a *force majeure* clause under which the defendants were entitled to cancel performance in the event of 'perils or danger and accidents of the sea'. The court held that, on a proper construction of this clause, the defendants were entitled to cancel provided that the sinking of the *Super Servant Two* was not attributable to any negligence on their part. Hence, a *force majeure* clause may allow for discharge in circumstances where the doctrine of frustration would not.[181] Whether a *force majeure* clause has this effect or not will, of

[178] See A. Berg 'The Detailed Drafting of a *Force Majeure* Clause', in E. McKendrick (ed.), *Force Majeure and Frustration of Contract*, 2nd edn (Informa Publishing, 1995).

[179] [1990] 1 Lloyd's Rep. 1.

[180] For example, the element of 'election' on the part of the defendant in preferring to fulfil the other contract with the *Super Servant One* could be eliminated if the question of which of the contracts was to be discharged was left to be determined not by the free choice of the promisor, but by a rule of law, e.g., by a rule to the effect that the various contracts should for this purpose rank in the order in which they were made. See, further, *Treitel*, para. 19–088.

[181] Another good example in this regard is that the closure of the Suez Canal was not regarded by the English courts as a frustrating event for the purpose of a number of charterparties. The crisis of 1956 produced only two reported cases in which frustration was successfully pleaded, but both cases were later overruled: *Carapanayoti & Co Ltd* v. *ET Green Ltd* [1959] 1 QB 131, overruled in the *Tsakiroglou* case [1962] AC 93; and *The Massalia* [1961] 2 QB 278, overruled in *The Eugenia* [1964] 2 QB 226. When the Canal