

# COMMERCIAL CONTRACTS

Drafting Techniques and Precedents

*Robert Ribeiro*

*Are you fully aware of all the recent changes to the law?*

*Are you up to speed on the latest case law?*

*How much do you know about the impact of The Human Rights Act?*

*For this and much more see over...*



### How aware are you of:

1. **The impact of the Human Rights Act on the law of third party rights?\***
2. **The significant difference between signature as a *simple contract* and execution as a *deed*?\***
3. **The *contra proferentem* rule?\***

These and many other vital questions are all covered in this expert report, now fully updated and expanded to take account of new legislation and case law.

When you sit down to draft a contract today you've got to be thinking of so many different issues.

For example, more cases are now being argued with reference to the Human Rights Act: how might your contract be interpreted in the light of it and what are the dangers of infringing it?

The distinction between exclusions of liability and limits of liability can cause problems. As of course can the difference between best endeavours and reasonable endeavours.

For all points of law and critical distinctions, you will find crystal-clear explanations and

guidelines and a host of case studies illustrating the law and its application.

This report is above all a practical guide to drafting a commercial contract. It will:

- Ensure that you are fully aware of all changes to the law
- Sharpen up your commercial awareness
- Improve your drafting skills
- Increase your appreciation of the rules and guidelines set out by the courts
- Help you better achieve your commercial objectives
- Radically reduce your chances of making an expensive mistake

**\*1.** The European dimension is now becoming much more significant – eg the law relating to third party rights was tested for the first time in 2004

**\*2.** The *Northern and Shell plc v John Laing* case shows the critical difference this can make – and did make

**\*3.** *Contra proferentem* rule: BHP Petroleum lost their record £200m claim against British Steel as a result of getting this wrong.

## CONTENTS

### 1 THE COMMERCIAL AND LEGAL OBJECTIVES

- Getting started: preliminary considerations
- Drafting precedents
- The wishes and needs of the client
- Four philosophies of drafting
- Case study: the need to draft terms that create mutual understanding and expectations
- Rectification
- Mutual understanding: plain intelligible language
- How to make a term clearer
- The uses of formulae to clarify commercial objectives

### 2 STRATEGIC ENDS: SOME IMPORTANT DECISIONS TO BE MADE ABOUT THE TERMS OF THE CONTRACT

- Time: is it to be or not to be of the essence?
- Positive obligations: firm undertakings or endeavours?
- What is the distinction between 'best endeavours' and 'reasonable endeavours'?

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- Third party rights: should they be permitted, restricted or excluded?
- Controlling assignment
- The creation of a trust of benefits arising from a contract
- The Contracts (Rights of Third Parties) Act 1999
- Termination provisions: the choices to be made
- Clauses providing for termination for breach of contract: the attitude of the courts
- Material breach; substantial breach; repudiation

### 3 STRUCTURING THE CONTRACT

- The title and description of the parties
- The recitals
- Recitals and the matrix theory
- The terms of the contract
- The signature: simple contract or execution as a deed?
- Pre-contractual arrangements
- Post-contractual arrangements
- What is the effect of an 'entire agreement' clause?
- What is a 'framework agreement'?

### 4 HOW TO MANAGE THE RISKS

- Risks
- Insurance
- Indemnities

- Boilerplate clauses
- Exclusions and limits of liability

### 5 HOW THE COURTS WILL INTERPRET WHAT IS WRITTEN

- Ambiguities, absurdities and technicalities
- The contra proferentem rule
- The interpretation of indemnities
- 'Consequential' loss or damages
- The 'knock on' effect of amendments

### 6 CONTROL BY THE COURTS: VALID AND INVALID TERMS

- The rule against penalties
- Unfair terms: some common law principles
- Unfair terms: the scope of the Unfair Contract Terms Act 1977
- Unfair terms: some cases on the test of reasonableness
- Unfair terms in consumer contracts
- Other tests of validity under statute

### APPENDICES

- Appendix 1: List of cases cited
- Appendix 2: List of statutes and other enactments mentioned in this Report

## EXPERT AUTHOR

**Dr Robert Ribeiro** is a barrister and a highly experienced speaker and consultant. He is the author of *Engineering Contracts – a Management Guide* and *Commercial Litigation – Damages and Other Remedies for Breach of Commercial Contract*.

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### ABOUT THE AUTHOR

**Charles Desforges** is currently a partner of CMD Associates (a Brussels-based, management consultancy group), and Chairman of Casetc.

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