Akhileshwar Pathak

Contract Terms in International Business

Principles and Applications

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For Ishaan

Preface

Businesses and contracts are synonymous. Businesses happen through contracts. The contract terms make detailed arrangements for the transaction and settle the duties, responsibilities, rights and obligations of the parties on all aspects of the transaction. Understanding the nature and scope of the terms of the contract has been crucial for the business managers, business leaders and the governments to efficiently and successfully formulate, negotiate, manage and perform contracts.

As an academic specialising in law with a business school, Indian Institute of Management Ahmedabad, contracts have demanded attention and engagement. The field has been at the centre of my teaching, research and executive education for over two decades now. A non-law person encounters contract terms as complex, technical and legalistic, almost incomprehensible. But this is only a surface appearance.

The principles of contracts were developed by the common law courts in the prior centuries on the basis of everyday lived experiences of the society, and the prevailing notions of common sense, fairness and justice. The principles got codified as contract law. For this reason, contract law is generalised common sense of the haats and bazars of the prior centuries. Modern businesses are founded on these simple common sense principles. These appear complex and sophisticated because a single transaction may network numerous of these principles together. The complexity dissolves once one goes beneath the surface.

My research and writings over the past two decades have been in doing a narration of the field of contract law in its founding common sense principles. Modern contracts are indeed complex and sophisticated in technology, economy and finance. For the courts and the law, however, a contractual dispute reduces itself to specific contract terms and the common law principles on them. The present book has grown from this engagement with contracts and contract terms for business managers.

From the idea of a book to a published work is a long journey. The journey was made possible with the guidance and coordination of Ms Nupoor Singh of Springer, the Commissioning Editor of the book. I acknowledge and value her help and support. Ms Jayarani Premkumar of Springer very cooperatively and ably coordinated with

me towards the production process of the book. I enjoyed writing and I hope it is of use to the readers.

Ahmedabad, India Akhileshwar Pathak

Competing Interests I declare that there is no competing financial and/or non-financial interests in relation to the content of the book.

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About the Author

Akhileshwar Pathak is Professor of Business Law at the Indian Institute of Management Ahmedabad (IIMA). An alumnus of St. Stephen's College and Campus Law Centre, University of Delhi, Professor Pathak did his PhD in law from the University of Edinburgh, UK. He has been researching on contract law and teaching students of management, and training executives for the past 25 years and has authored several books including Contract Law (2011), Law of Sale of Goods (2013), Law Relating to Special Contracts (2013), Law of Sale, Lease and Mortgage (2017) and Business Lawsuits and Disputes (2022). He has authored a textbook Legal Aspects of Business, which is in its eighth edition.

Chapter 1
Introduction

Businesses and contracts are synonymous. Businesses happen through contracts. Contracts can be domestic or international; public or private; consumer or B2B; for sale or service; short term or long term; vertical or horizontal; and online or offline. A company has hundreds of vendors, suppliers and service providers, it contracts with. A business entity contracts with business partners, associates, distributors, franchises and exporters for selling and buying goods and services. The governments do infrastructure development, including highways, power, telecommunications, airports, mines and minerals, and railways through contracts by employing private business entities. The state has been getting into long-term contracts with private businesses through Public–Private Partnerships (PPPs). Immovable properties are leased, mortgaged and sold through contracts. Intellectual property rights, including software and artificial intelligence, are developed, assigned and licenced through contracts.

The contract terms make detailed arrangements for the transactions and settle the rights and obligations of the parties on all aspects of the transactions. Understanding the nature and scope of the terms of the contract has been crucial for the business managers, business leaders and the governments to efficiently and successfully negotiate, manage and performance contracts. The contract terms have got standardised at the global level and are internationally being adapted, revised and adopted. The contract documents setting the terms have come to be called the general conditions of contract (GCC) or standard contract terms.

Contract Terms and Common Law

The contract terms appear complex and legalistic but are based on simple principles. The principles come from the past when trade and commerce was rudimentary. The world has seen trade and commerce for a very long time. As disputes arose in the prior

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centuries, these were taken to the local courts. The courts, on the basis of usage and custom of the community, and the prevailing notions of equity and justice, settled the disputes. As similar cases were decided alike, the reasoning and principles came to be formulated. The courts, thereafter, followed these principles as the law. This court made law came to be called common law. Common law developed everywhere. Due to the British colonial expansion, however, the British took their common law to all the territories they went to, America, Australia, Canada, Africa and Asia, including India. The British common law was used in these territories with some adaptations. Contract law was the most basic and foundational common law. For these reasons, the principles of contracts were generalised common sense prevailing in the 1800s.

The founding principle of contracts is that these are in the domain of individual freedom. Every society has a state, the governing mechanism, which governs through its laws. The state enforces the law with the threat of punishment. The law has to be followed. Beyond the realm of the law, however, individuals are free to do what they like. Contracts fall in this domain of individual freedom. The contract is of the contracting parties and they are free to set the terms of the contract so long as it does not violate the law or encroach in the domain of law.

Contracts are agreements and an agreement is reached between two persons, when there is a meeting of minds. A meeting of minds is secured through a communicative process. One person makes an offer or proposal to the other and if the other were to accept it, the two have become of one mind and an agreement is reached. Agreements for exchanging benefits or imposing obligations on one another came to be contracts. This was to distinguish the transactions of the traders, who travelled great distance for exchanging goods and services, from the mutual help in the realm of social and family. The state and law recognised the contracts and enforced them. If a party failed to do his duty within the contract, the courts awarded damages for the losses suffered to the other party.

Contracts emerged centuries back and were orally made. As the contracts were orally made, the contracting parties could not have spoken out all the details of their transactions. As disputes arose, the courts settled the default principles for the details of the transaction. The courts, thereafter, followed these principles as the law. As a part of this law itself, the courts recognised that contracts were voluntary and the contracting parties were free to replace the default principles formulated by the courts. In several fields, through this process of precedence, a body of principles followed by the judges developed gradually, which came to be called the common law. Contract law was a general law dealing with all business transactions. To systematise the common law, England initiated to codify the principles in the common law countries in the mid-nineteenth century. As it was a shared project, the legislations which emerged in the common law countries were alike. For this reason, Australia, Canada, and most countries of Africa and Asia, including India follow the same contract law. Curiously, while the British enacted laws in the countries they controlled or influenced, for example Indian Contract Act, 1872 in India, they could not enact a codification act in their home country. Till date, contract law in England is based on principles developed by the courts. America developed its own common law, which was very similar to the English common law.

An axis on which we can understand the development of contracts and contract law is the advance of technology for writing and printing. Indeed, the impetus for these advances came from businesses themselves to facilitate contracts and create records of their transactions. As writing and printing became affordable, businesses introduced them in their contracts. A written document brought certainty to what the contract was and bound the parties to it. As written contracts proliferated, the businesses learnt that further certainties could be secured by introducing contract terms than the expenses and the doubts of litigating before the courts. The introduction of a term in a written contract either elaborated the cryptic default principle or ousted it. Every time a court gave a judgment on a default principle, or a contract term, the businesses were quick to introduce a corresponding term, either amplifying the interpretation of the court or ousting it by providing otherwise. Over the decades, the process of introducing contract terms has entirely overrun the contract law and replaced the default common law principles.

The contract terms have become so comprehensive and detailed that these leave no space for the default principles to apply. The digital medium has exponentially accelerated the trajectory as electronic documents can be readily moved and documents generated by copy paste without worrying about the number of pages and the cost of paper and printing. As a result, the contract terms have become free of the national laws and circulate internationally. The terms are picked up, revised, refined and adopted at the global level. The disputes before the courts are no more on the default principles but the meaning and scope of the terms employed in the contract. The only thing which anchors a contract to the law of a country is the contract term specifying the applicable law. The world has come to share the contract terms. The book introduces, explores and details the globally prevalent contract terms.

An international contract is between two parties from different countries. Left to itself, a dispute would arise as to which countries law should apply to the contract. As the contract is of the contracting parties, the contracting parties are free to settle the applicable law. Thus, international contracts always have an applicable law clause settling the law that will govern the contract. The clause is also titled as governing law clause. In addition, contracts have a jurisdiction clause, which settles the court to which a dispute on the contract would be taken to. The jurisdiction of a court can be a different country than the county of applicable law. Thus, if the contract has provided that courts of France have the jurisdiction and the applicable law is English law, the French courts would decide the dispute on the basis of the English law. Further, the contract may provide for arbitration in a particular place. The arbitrators too, say sitting in Singapore, would apply English law to the contract as the applicable law stated in the contract is English law.

English law is most widely chosen applicable law in international contracts. This is even when the contracting parties have no geographical connection with the United Kingdom and the parties are not from the common law countries. There are several reasons for this. The English courts, with the United Kingdom Supreme Court at the apex, are at the forefront in developing the contract law and other foundational aspects of business law. The judgments are valued and cited in the entire common law world and beyond. This is not surprising. The common law countries follow

the same legal principles, introduced by England in the prior centuries. As England has maintained its intellectual leadership in the field of common law, the judgments from the English courts are relied on and cited in all the common law countries. As a result, English law provides a high degree of familiarity, certainty and predictability. This makes English law as the market standard for many industries.

The English law recognises the principle of freedom of contract and has no formalities and procedures associated with formation and performance of contracts. This gives flexibility to the parties to structure the transaction and proceed towards its performance. The English courts are continuously and rigorously developing the English law by its application to newer business contexts and circumstances. As a result, the English law becomes most relevant and appropriate. Further, as English remains the default language for international business and commerce, English law gets preferred. The judicial system and the individual judges of the United Kingdom are independent and free from external pressure or influence. This gives confidence in the English law as based on principles, and just and fair. In an international contract, the parties look for neutrality, and English law emerges as a strong contender for the above reasons. Thus, the book will explore contract terms with reference to the English law.

Method of the Book

As the above exploration brings out, while the prevailing contract terms are elaborate, their origin is in simple common sense principles. The book will traverse this journey from simple to the elaborate and contemporary. Each chapter on a contract term will start out by the simple common sense principles and build on it to the current contract term and its application. The chapter will detail out the scope and meaning of the term by exploring latest court judgments on the theme. The reference of the book is to contracts with English law as the applicable law and correspondingly, the court judgments reviewed are from the British courts. We could explore further with the following brief overview of the chapters. We follow this introductory chapter with written contracts and signing clauses.

Chapter 2—Written Contracts and signing clause: The chapter introduces the founding principles of formation of contracts. As contracts are voluntarily made, the contracting parties are free to employ any modality of communication. An oral contract is as binding as a written contract. Businesses for a century have zealously moved to written signed contracts as these bring clarity and certainty. GCCs have a signing clause insisting that there would be a signed contract document confining the parties to its boundaries.

Chapter 3—Entire Agreement Clause: The hope of the businesses that a signed contract would bring certainty and clarity proved illusory. As the contracting parties are free to employ any means of communication, a party not willing to continue with the contract could simply assert the existence of further collateral oral or written agreements. This will rupture the contract. The response to this challenge has been

the entire agreement clause. The clause seeks to exclude everything outside the signed contract by insisting that all representations and agreements outside the written signed document are extinguished. This has unfolded to pose a new challenge. Does it mean that all the misrepresentations are also extinguished, vacating the right of a party against misrepresentation?

Chapter 4—No Oral Modification Clause: An entire agreement clause prevents the threat to a signed contract only till the contract is made and not after. A party not keen to continue with a contract can claim that subsequent to the signed contract, the parties had entered into an oral contract modifying the contract or even terminating it. Applying the founding principles of contract, that a contract can be formed by any modality of communication, and a contract is modified by another contract, the claim would be unimpeachable. In response to this, a No Oral Modification (NOM) Clause has been introduced in the GCCs. The clause sets out a formal procedure, invariably insisting on signing, for the parties to be able to modify a contract. As the businesses have come to communicate through electronic means, questions have arisen on the scope of 'signing'.

Chapter 5—Termination of Contract for breach: The common law principle is a party can elect to terminate a contract if the other breaches a core part of the contract or renounces the contract. GCCs have a clause(s) on termination for breach. A party can terminate the contract as provided in the written term. The written term may be at variance with the common law principle. Termination for breach has become an interplay of the general principles and the contract terms. A termination notice must accurately assess the nature of the breaches and clearly state them in the notice. A faulty notice will make the party serving the notice liable for damages for the wrongful termination of the contract.

Chapter 6—Termination of Contract for non-breach: GCCs have clauses giving the right to a party to elect to terminate the contract on the occurrence of an even, without any breach. Examples of these events are, a company appointing an administrator or proceeding to merge or amalgamate. As it is a contractual right, on the occurrence of the stated event, the party can elect to terminate the contract. The contract will come to an end and the parties will get discharged from its further performance. But would the party terminating the contract be able to claim damages for the loss of the contract? He has lost the contract but the other party is not in breach.

Chapter 7—Force Majeure (Impossibility) Clause: No one can do an impossible act or be required to do an impossible act. Recognising this, the courts developed the common law principle that a contract which has become impossible to performance can be terminated on the grounds of frustration by either party. The force majeure clause or the impossibility clause either expands the scope of the impossibility principle or attempts to limit its application by allowing time for the impossibility to subside. Significantly, changes in the market conditions or financial impossibilities cannot be a ground for frustrating the contract.

Chapter 8—General Damages: For every breach of a term of a contract, the other party can claim damages for the losses arising from the breach. The principle for award of damages is rudimentary, dating back to the prior centuries. The principle

is to put the parties in a position they would be, by money amount, if the contract had been performed. The damages are only to cover the losses and these cannot be punitive or to profit from. The damages clauses create a mechanics substituting and giving effect to this general overarching principle.

Chapter 9—Liquidated Damages: For claiming damages arising from breach, to bring certainty, the simplest would be to state the amount to be paid in damages for a breach. If this were allowed, the stronger party would stipulate any amount to penalise the other or profit from it. But the general principle is that damages are to cover losses not to penalise the other or to profit from. For this reason, the courts award liquidated damages only if it appears to be a genuine pre-estimate of the losses. The liquidated damages clause finds limited application. Its most common application is for delays in performance of contracts.

Chapter 10—Consequential and Indirect Losses: A breach can have several consequences. The contracting parties would invariably get into a dispute on the extent to which the effect of the breach should be taken. A limitation of liability clause excludes or limits liabilities by employing terms indirect losses, consequential losses and loss of profit. The meaning and scope of these terms have been disputed in the context of the contract.

Chapter 11—Exclusion Clauses: Negligence and Liabilities in torts: The field of tort and negligence is separate from contracts. A person, proximate to another, owes a duty to not cause harm to the person by his action or lack of it. If the person does not take reasonable care and causes harm, the person is negligent and liable to cover the losses. As the contracting parties are proximate, the parties come to owe duties of reasonable care. A party in breach may concurrently be negligent and liable to cover the losses. If the exclusion clause does not specifically exclude liabilities for losses arising from negligence, the party in breach may be liable. Similarly, tort law covers all civil wrong, other than contracts, that cause a person loss or harm. Exclusion clauses should specifically refer to and exclude liabilities from torts and negligence.

Chapter 12—Ownership retention clause: In a sale of goods contract, the seller agrees to transfer the ownership in goods for a price in money. As we live in a material physical world, a sale of goods is an important component of running businesses or business transactions. In a sale of goods contract, the transfer of ownership is a watershed moment. Once the ownership transfers, the buyer can resell or use the goods. If the seller is unpaid, he can only claim the price but not the reverting of the ownership. To protect the seller, the GCCs have an ownership retention clause which insists that the ownership would not transfer to the buyer till the seller is fully paid.

Chapter 13—International Commercial Terms: In a sale of goods contract, the buyer and the seller are mediated by a carrier in the movement of the goods from one to the other. The seller and the buyer have to allocate between them the transportation cost and insurance of the goods in transit. Questions arise as to when the goods are taken to be delivered to the buyer and the risk in the goods passes from the seller to the buyer. The International Chamber of Commerce, a non-governmental world organisation, has developed a menu of terms allocating these factors between the seller and the buyer. The terms are called the international commercial terms (Incoterms). The International Chamber of Commerce publishes the terms every

ten years. The prevailing Incoterms are 2020. A sale of goods contract chooses an appropriate incoterm and states it in the contract. The term settles all these varied crucial aspects of the contract.

Chapter 14—Description, Merchantability and Usefulness of Goods: The common law courts developed the principle that in a sale of goods contract, it is implied that the seller will supply goods which are in conformity with the description, of a merchantable quality and useful for the stated person. These came to be termed as implied conditions for whose breach, the buyer could terminate the contract. The implied conditions got codified in the Sale of Goods Act, 1983. The reenactment of the law of sale of goods as the Sale of Goods Act, 1979 has expanded the rights and elaborated them. In a sale of goods contract, the description clause makes express what is implied by law. The clause gets a meaning in the context of the implied conditions.

Chapter 15—Exclusion of Implied Conditions: Sale of Goods: Contracts are voluntarily made and the parties are free to set their own terms. The law of sale of goods vests implied conditions in the buyer but alongside, recognises the right of the contracting parties to oust them by express terms. In a sale of goods contract, where the seller is stronger, the contract excludes the rights of the buyer to terminate the contract on the grounds of the implied conditions of description, merchantability and usefulness. This is done through a warranty clause, where the clause would oust the rights and give limited warranty of repairing the goods for a limited period. Disputes arise whether the warranty clause has clearly ousted the implied conditions or not.

Chapter 16—Reasonable Care and Skill: In a sale of goods contract, the common law principles are developed on the implied conditions, giving protection to the buyer. In other contracts, including service contracts, there was no parallel comprehensive protection for the service receiver. The common law courts developed a basic principle to imply a term in a service contract that the service provider will provide the service with reasonable care and skill. The protection has been codified in the Supply of Goods and Services Act, 1982. Service contracts have warranty clauses stating the deliverables and other parameters specifying the service. The duty of reasonable care and skill can be ousted but only by using clear language. Disputes arise whether the exclusion clause has clearly ousted the implied term.

Chapter 17—Indemnity: The clauses on damages deal only with losses arising from a contractual breach. The parties may suffer all kinds of losses in the course of performance of the contract. These losses are covered by indemnity clauses. The two common indemnity clauses cover losses arising from a party not following the law; and violations in relation to intellectual property rights. In addition, there are indemnity clauses covering specific kinds of losses, if these were to arise. As the indemnity clauses are of a general nature, often, these are subject of interpretation to settle their scope.

Chapter 18—Guarantee: In its classical form, a guarantee is an undertaking to pay a debt on the default of another. Different variations of guarantee have developed, including, see to it guarantee. A guarantee is also misdescribed as an indemnity as it covers losses of another. The financial instruments, indemnity, guarantee and bond

form a spectrum but have very different rights and liabilities. GCCs have clauses on these financial instruments.

Chapter 19—Interpretation of Contracts: Three kinds of disputes arise in giving effect to the terms of a contract. One, the meaning of a term of the contract is contested. In this case, the courts put the term in relation to the other terms of the contract and the context of the contract to settle the rival contentions. Thus, rival meanings are resolved by the interplay of text and the context. Two, the contract may be silent, that is, not provided on an aspect. In this case, a term which is so very obvious that it goes without saying or gives the transaction efficacy is implied. Three, a term limiting or excluding the right of a party is interpreted like any other term of the contract. The rider to this is clear and definite words must be used to limit or oust the rights.

Chapter 20—Assignment: A right arising from a contract is like any other right. The person bearing the right in the contract can transfer it to another. Transferring a right is called an assignment. This poses the question whether the transfer is of the future rights or also includes the rights which have already accrued. GCCs have clauses stating that the rights under the contract cannot be assigned without the written permission of the party. For understandable reasons, obligations of a contract cannot be assigned. For transferring both, the rights and obligations of a contract, a novation has to be done. Whether an arrangement is an assignment or novation is not to be determined by labels and descriptions but interpreting the terms of the contract to objectively assess the intention of the parties.

Chapter 21—Non-Disclosure and Restraint of Trade: A non-disclosure agreement (NDA) or a non-disclosure term in a contract protects against an information shared with a contracting party getting disclosed to a third person. The clause is also called a confidentiality agreement or secrecy agreement. A non-disclosure agreement has come to be tied with a restraint of trade agreement. In this agreement, an employee undertakes restraints on his activities after leaving the employment. It also applies to a vendor selling his business and goodwill; and exclusive trade relationships. The common law principle is unless the restraint on trade is reasonable, it is void. The chapter explores the validity and nature and structure of a non-disclosure agreement; and the principles developed by the courts to test the reasonableness of a restraint of trade and to severe void restraints from the others.

Chapter 22—Applicable Law, Jurisdiction and Arbitration: Contracts have a clause stating the law of the country that will govern the contract. This is called the applicable law clause or governing law clause. In addition, the contract will have a jurisdiction clause stating the court of a city or a country that will have the jurisdiction to take up a dispute arising from the contract. The jurisdiction clause may give exclusive jurisdiction to a court or provide for alternate jurisdictions. Where the jurisdiction is not exclusive, disputes arise as to the court which has jurisdiction over a dispute. In addition, the contract may provide for arbitration stating the law that will apply to the arbitration and the seat of arbitration. This could lead to a situation where arbitration is to take place in a country with the substantive law of the contract of another country and the arbitration law of yet another country. This poses challenging and interesting questions on contracts, arbitration and international law.

Chapter 23—Other Contract Terms: The chapter reviews other terms in GCCs including, warranties and representations, order of precedence, good faith and agency. A warranty is a contractual promise, for whose breach, the party can claim damages within the terms of the contract. Representations are statements made towards formation of the contract. The chapter explores the distinct nature of the two. An order of precedence clause lists the order in which the contract documents would be read to resolve conflicts and ambiguities. A contract may have express terms requiring the other to act in good faith. Agency is widely used in contracts. A special aspect of an agency is, even if the contract terms state it to be irrevocable, it can be terminated by the principal. In this case, the principal will need to pay damages to the agent.

The object of the book is to give an engaging accessible conceptual grasp of the meaning, scope and application of the important contract terms. For this reason, for each chapter, only a few contemporary and landmark judgments are taken up and reviewed. Every field of law is vast. Law by its nature and discipline, qualifies a qualified point; makes and exception to an exception; and creates branches to a branch. As a result, a law book is heavily footnoted, with references to numerous court judgments, past and present. The book abstains from this format to avoiding cluttering up the text. The footnotes and references are kept to a minimum. With a conceptual introduction secured, the reader can pursue on one's own through specialised books, blogs and internet sites.

As the book is with reference to the English law, law refers to the English law and common law to the English common law. The apex court of the United Kingdom is the United Kingdom Supreme Court. A reference to the Supreme Court is to this court. The second highest court of the United Kingdom is the Court of Appeal. There is only one Court of Appeal in London. The third layer of the hierarchy of the courts in the United Kingdom comprises High Courts. The High Court system has three divisions and within the divisions, there are several High Courts. The High Courts include Commercial Court which takes up international commercial disputes; and the High Court of Construction and Technology in London. Most cases reviewed have come up from these High Courts. We start our journey of contractual terms with an introduction to written and signed contracts.

Chapter 2
Written and Signed Contracts

All business contracts have now come to be in writing and by signing. There have been two main reasons for this transition to formal written and signed contracts. One, written signed contracts are fully binding on the parties. Two, a written contract creates the space to introduce terms to detail the transaction. Both these aspects bring certainty and efficiency to contracts. For these reasons, businesses have much preferred written signed contracts. As the technologies for writing and reproduction, like printing press, typewriters, photocopiers and computers became affordable, written contracts expanded exponentially in the past century. The digital medium has taken it to an entirely new level. The earlier technologies required the expense of the paper, the digital medium has dispensed with this physicality. Electronic documents can be readily produced, modified and transmitted. The entire commercial, legal and administrative order has now come to be based on the sanctity of the signature. Let us review the court judgments that have secured the sanctity of contracts formed through signing.

L'Estrange V F Graucob, Ltd

L'Estrange was a cafe owner. [L'Estrange v F Graucob, Ltd, (1934) 2 KB 394] The representatives of F Graucob, Ltd, visited her for selling her a vending machine for cigarettes. Following her inclination to buy, the representative entered all the details in a form and gave it to her to sign. A few days later, she received an "order confirmation" from the seller. The seller delivered a machine, but it turned out to be defective. She claimed to return the machine and get her money back. The form she had signed was titled "sale agreement" and contained clauses excluding protection to the buyer against defect in the goods, exempting the seller from liabilities.

The buyer contended that she had not read the form and was not aware of the clause. The court stated the principle that a person signing a contract is bound whether

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they have read or understood the document or not. It is a principle of contracts that a contract formed by a party employing coercion, misrepresentation or undue influence on the other is a voidable contract, giving the right to the innocent party to set the contract aside. In this founding case on the sanctity of signature, the court asserted: [L'Estrange v F Graucob, Ltd, (1934) 2 KB 394: page 394].

> When a document containing contractual terms is signed, then, in the absence of fraud, or … misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The court constructed that a party cannot be 'heard to say that she is not bound by the terms of the document because she has not read them' [L'Estrange v F Graucob, Ltd, (1934) 2 KB 394: page 395]. The buyer further claimed that the clause excluding the buyer's rights were in small print. The court recognised that the exclusion clause was 'in regrettably small print' but this was of no consequence as the clause was 'quite legible' [L'Estrange v F Graucob, Ltd, (1934) 2 KB 394: page 395]. A party who has signed a document is fully bound to it so long as it is legible and it was irrelevant that the clause was in small print. The following is the second case on the significance of putting signature on a document.

The Coys of Kensington Case

Coys of Kensington Automobiles Limited (Kensington), a company incorporated in England, conducts auction of classic and vintage cars in different cities in Europe. [Coys of Kensington Automobiles Limited v Tiziana Pugliese, (2011) EWHC 655 (QB). Hereafter Coys of Kensington (2011)] Kensington had a form for an intending bidder to register in an auction. The form gave the option to bid at site or on the telephone. Kensington was conducting an auction in Monaco, a micro-city state in Europe.

Tiziana Pugliese, an Italian national visiting Monaco, downloaded the one-page registration form and completed and signed it opting for telephone bidding for a Bentley car. After the due date of auction, the company sent an auction bill of sale, requiring her to pay the bided price and take delivery of the car. Tiziana refused to proceed and pay. Kensington moved to an English court claiming the price of the car.

Tiziana at first put up that while she registered for the auction, she did not bid for it. But the auction manager, who had conducted the telephone auction, had annotated all the forms with their respective bids. Tiziana's form was annotated with bids and her final bid was the highest. The court concluded that she had bided and the sale was made to her.

In an open auction, the bids are orally made and the auctioneer accepts by striking a hammer. The bids are the offers and the striking of the hammer acceptance, forming a contract by auction. Prior to the auction, the auctioneer and the bidders agree on the terms of the offer. The auctioneer can orally announce these before the auction,