



UiO : **Department of Private Law**
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Reasonableness and Good Faith



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Reasonableness – Norwegian law

- The Formation of Contracts Act sec. 36 – an unfair contract term may be modified or set aside – broad and flexible evaluation
 - The remaining content of the contract, the positions of the parties, the circumstances at the time of conclusion, subsequent circumstances – not restricted to these circumstances
- The courts are reluctant facing commercial contracts and “agreed documents”

Reasonableness – German law

- A rather well developed control with “general conditions” – whether they are part of agreement and “direct control” of content
- A party must exercise its rights and perform its obligations according to good faith and fair dealing – not abusing a right
- Correction of a contract is only allowed in exceptional cases

Reasonableness – Italian law

- Less invasive when it comes to general condition than Norwegian and German law – sometimes a prerequisite that the conditions are specifically signed
- Some specific rules which gives the courts the power to substitute unreasonable terms – but no general rule
- The criterion of good faith is used more to ensure the proper performance of a contract, rather than correcting the rights and obligations

Reasonableness – English law

- Even less invasive than Italian law
- General conditions have to be brought to the attention of the party to be a part of the contract, but little possibility to control the content
- The parties have excessive freedom

Reasonableness – CISG

- No specific reference to good faith and fair dealing as a corrective to the contract's content

Reasonableness – UNIDROIT

- General conditions – “unexpected” terms must be expressly accepted
- No express basis for correcting a contract based on reasonableness

Reasonableness – PECL

- Terms not individually negotiated – must be known to the other party or the party having drafted the terms has taken reasonable steps to bring them to the other party's attention
- A term contained in general conditions may be unenforceable if it, against the principle of good faith and fair dealing, causes a significant imbalance
- Reference to good faith and fair dealing when it comes to interpretation – basis for correction?

Reasonableness – CESL

- Special rules on unfair contract terms not individually negotiated between a business seller and a consumer
- Rule on unfair contract terms in B2B contracts – not individually negotiated + grossly deviates from good commercial practice, contrary to good faith and fair dealing

Timeline – Limitation of Contractual Remedies (Reasonableness)

A Software Company licenses an accounting program to a Law Firm. The accounting program proves to be inadequate – can only handle a limited number of clients. Contractual regulation on the non satisfactory performance of the program – replacement (after 6 months) , other remedies excluded

The Law Firm seeks to make use of other remedies that would be available under the governing law (for example reimbursement of damages or resolution of the contract)

**Is the contractual clause –
limiting available remedies
– fully enforceable, or can it
be modified or declared
unenforceable?**

Limitation of Contractual Remedies

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL

Timeline – Termination for Immaterial Breach (Reasonableness)

A Company borrows a considerable amount from a Bank, to be repaid over 10 years. In the contract there are a lot of covenants on the Company's hands, hereunder a commitment to submit copies of the quarterly accounts within 7 days after they have been certified

The Company fails to comply with the obligation concerning the quarterly accounts after a year – according to the contract the Bank is entitled to terminate the contract, even though the Company offers to remedy the breach

The Bank chooses to terminate the contract in spite of an offer from the Company to remedy the breach

Is the clause fully enforceable, or can it be modified or declared unenforceable because it is unreasonable, or because its exercise in the particular situation would be unreasonable?

Termination for Immaterial Breach

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL

Timeline – Determination of Price (Reasonableness)

Enterprise 1 enters into an agreement with Enterprise 2 concerning supply of energy. Price to be paid on the basis of the square area of each enterprise – most reliable method of calculating the price (principle: no gain or loss)

A meter is installed – Enterprise 2's consumption is higher than what it is paying for. Enterprise 2 requires renegotiation of the contract, so the price can be calculated in accordance with the actual consumption – no clause giving the right to require renegotiations

May the contract clause which determines the price be modified or is it fully enforceable?

Determination of Price

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL

Good Faith – Norwegian law

- Good faith as a overarching principle – precontractual phase and beyond
- A duty to take reasonable account of the other party's interests – may have a duty to disclose information of some importance

Good Faith – German law

- General rule on good faith during the precontractual phase and beyond
- A duty of care – inform the other party of material aspects that are relevant to the proper understanding or performance of the contract
- The contract must be performed in accordance with the principle of good faith and fair dealing

Good Faith – Italian law

- Has a general clause on good faith and a specific clause on good faith applying to phase of negotiation – duties of disclosure, of cooperation and in the phase of performance
- A means of ensuring proper performance of a contract

Good Faith – English law

- Assumes that each party is to take care of its own interests (*caveat emptor*)
- No general duty to disclose information under the phase of negotiations and beyond – some specific exceptions for certain types of contract

Good Faith – CISG

- No general duty of good faith
- A part of legal doctrine is eager to read a guideline of good faith into the convention, even though proposals to insert such a rule into the convention were rejected

Good Faith – UNIDROIT

- Rule on good faith regarding negotiations – unjustified break off and start of negotiations without a real intention to complete them – no express rule on disclosure
- A general rule on good faith – reference to international trade, but hard to establish a uniform notion of “good faith”

Good Faith – PECL

- General duty to act in accordance with good faith and fair dealing and duty to cooperate
- Specific regulation on negotiations with the same focus as UNIDROIT – no specific rule on disclosure

Good Faith – CESL

- General duty of good faith, fair dealing and cooperation
- Special rules on duties to disclose information in the pre-contractual phase – different rules towards consumers and in B2B relationships

Timeline – Withheld Information (Good Faith)

A Food Producer starts negotiating for the sale of a building where it was, a few years ago, operating a bakery. Food Producer knows that the facilities does not meet the criteria set by new health regulations for the operation of a bakery. The Prospective Buyer intends to initiate a bakery in the facilities, something which the Food Producer knows. The Prospective Buyer does not mention the intention expressly, and the Food Producer does not disclose the information on the health regulations

The parties enter into a contract for the sale of the building.

Has the Food Producer breached a duty of disclosure towards the (Prospective) Buyer, or does the (Prospective) Buyer has a duty of diligence in enquiring about the contracts' object?

Withheld Information

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL

Timeline – Undue Influence on Calculation of Royalty (Good Faith)

Contract between Licensor and Licensee which allows the Licensee to produce certain products using Licensor's technology. Royalty is to be paid according to a percentage of the price the Licensee charges the company with which it has entered an agreement on distribution of the products

Licensee establishes a Subsidiary with which it enters an agreement on distribution of the product, at a very low price. The Subsidiary makes a huge profit.



Is the Licensee's behavior in conflict with the purpose of the contract with the Licensor, or is the Licensee at liberty to arrange the distribution as it deems fit?

Undue Influence on Calculation of Royalty

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL