

Podcast 3: Regulating contracting

This podcast will introduce you to the key themes and topics covered in Part III of the book. Our discussion of the law of contract so far has focused on looking at how contracts come into being, and how we determine what they mean. In this Part, we move to a very different issue, namely, the manner in which the law regulates the contracting process. A useful way of thinking about the issues we will cover in this part is to relate them to freedom of contract. As we've discussed in Part 1, freedom of contract is a fundamental principle in English contract law. Freedom of contract has two key implications. Firstly, it implies the freedom to decide whether or not you want to transact with someone. You are free to decide where you buy your toothpaste, from which supplier you get your electricity, whether you contract with a bus company to get to your classes or whether you prefer to cycle or walk or drive, and so on. Choices are often constrained by social reality. For example, although you are in theory free to choose not to contract with Facebook, there are many social contexts where it would be difficult to do without a Facebook account. Nevertheless, the point remains that as a matter of law, you have the freedom to choose whether or not to contract.

The second implication of freedom of contract is the freedom to determine the terms that govern your transaction. As we've seen in Part 2, the starting point for determining the obligations one party has to another under a contract is the terms of the contract itself. It is those terms that determine what the parties' rights and obligations in respect of each other are. Your contract with Facebook, for example, gives Facebook the right to construct a detailed profile of you based on your use of Facebook, and to sell that profile, duly anonymised, to advertisers. Your contract with your credit card company, similarly, gives them the right to charge you a rate of interest which they set (and which they can increase from time to time) on your outstanding card balance. These rights and obligations flow from the contract, and parties have considerable freedom when it comes to setting them.

This makes contracts an extremely flexible and useful instrument. This flexibility is valuable and, indeed, of considerable importance to modern society. However, where the parties are not in an equal position at the time of contracting, it can become potentially problematic. Consider, once again, the contract you enter into with Facebook, or any other social media service, when you sign up for an account. You, as a consumer, are presented with a choice to 'take it or leave it'. You have no real opportunity to negotiate or seek to alter the terms, even if you believe them to be one-sided or oppressive. Situations like this also arise in relation to commercial contracts, where small suppliers or contractors dealing with large customers will often have no choice but to contract on the terms drafted by that large customer. The effect is to permit one party to the contract to impose terms on the other without the other party having any chance of having a say in what those terms are, and what rights and obligations they impose on the respective parties. Older cases in contract law are replete with examples of precisely such terms.

As a result, English law has over the years come to set boundaries to freedom of contract, by specifying certain minimum standards of fairness which are superimposed on the transaction, and which subject contractual transactions to external standards in two ways. Firstly, English law regulates selected aspects of the process by which contracts are formed. It is important to note that only certain aspects of the process are regulated. The law's emphasis, in particular, tends to be on two aspects: the information provided by one party to the other, and the pressure put by one party on the other. Secondly, English law directly regulates certain types of terms, by declaring

some types of terms to be unenforceable and other types of terms to be mandatory for reasons of public policy. A particularly important trend in recent years has been the move to protect consumers, which has resulted in a growing divergence between the legal approach to consumer and commercial transactions—an issue we will revisit in several chapters in this Part.

Each of the four chapters in this Part will pick up one aspect of the legal regulation of contracting. We will look not only at the rules, but also at the approach and rationale underlying the rules, asking why the law regulates these aspects of contractual transactions, and why it adopts the particular approach it does. As we will see, the answer sometimes lies in history, sometimes in economics, and sometimes in broader governmental priorities and policies.

Chapters 11 and 12 deal with the law's approach to regulating the process by which contracts are formed. Chapter 11 takes up the issue of the information each party provides the other, and the statements they make to the other. Transactions are often characterised by knowledge asymmetries, where one party knows a lot more than the other. What, then, happens if one party tells the other something that is not true, or remains silent knowing that the other party is entering into the transaction based on a mistaken assumption? These are the questions we will examine in Chapter 11, where we will look at the legal doctrines of misrepresentation and unilateral mistake, which chiefly regulate this area.

Chapter 12 considers how much pressure one party can exert on another. Commercial transactions are often entered into through high-pressure bargaining. Should there be limits to the amount of pressure a party can bring to bear on the other? Is there such a thing as too much pressure? When does high-pressure become excessive pressure? This, of course, also applies to non-commercial transactions. When you're dealing with contracts between individuals, rather than large corporations, there's also the additional issue of taking advantage of a relationship which places one party in a weaker position. English law deals with these issues through the doctrines of duress and undue influence, which Chapter 12 examines.

Chapter 13 and 14 examine the types of situations where the law directly regulates the terms of the contract. There are two reasons why the law regulates terms—to protect weaker parties, and to protect the public interest. Chapter 13 focuses on the first of these. We will examine, firstly, situations where the law regulates specific types of terms, focusing in particular on clauses which seek to exclude, limit, or enhance liability. We will then examine situations where the law regulates specific types of contracts, focusing on consumer contracts. Chapter 14 looks at situations where the law restricts freedom of contract to protect the public interest. We will focus, in particular, on how the law deals with situations where the parties' contract requires them to do acts which are illegal or which violate public policy.

A general point you should keep in mind when reading these chapters is that setting boundaries to freedom of contract is not a simple matter. There is always a balance to be struck between fairness and freedom in contracting. If the law goes too far in regulating contracts, it begins to adversely affect the flexibility of contractual instruments which, as we have seen, is of social and economic importance. English law is, therefore, set up to treat freedom of contract as the general principle, and to treat regulation as an exception to that principle. There is no general principle that contracts must be fair. The doctrines we will study in this part consist of norms and standards set by the law, but except in areas covered by these external norms and standards, the parties' rights and obligations will continue to be governed by the norms and standards set

out in the contract, even if those appear unfair or unbalanced. In the eyes of the law, contracts are about self-interested action, and not about behaving altruistically or in the other party's interest. Keep that in mind as you read the various issues set out in these chapters.