Contractual Termination Clauses – A Commonwealth Divided?

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This paper looks at aspects of the common law concerning express termination clauses, now a widespread if not universal feature of modern commercial contracts.

The right to terminate contracts early for serious breach of one sort or another (often collectively termed ‘repudiation’) has been an important feature of the common law for many years. However parties entering into commercial contracts, and particularly those intended to operate over an extended period, have increasingly sought to supplement this common law right with express rights to terminate. Although in general terms the law of contract is an area which has remained strikingly coherent across the common law world, in certain important respects the appellate courts of leading jurisdictions within the Commonwealth have adopted markedly different approaches to such clauses, their operation and effects.

The main areas of cohesion and of divergence are identified and considered. The divergent areas include:

- whether expectation damages are recoverable following a termination pursuant to such clauses (where the Canadian approach fundamentally differs from the established Anglo-Australian approach - and it is suggested that the former should be preferred, as more commercial);
- whether the common law imposes any form of constraint on unconscientious terminations pursuant to such clauses, or a requirement of good faith in deciding to operate them (much discussed in Australia, but hitherto rejected in the UK - it is suggested wisely)
- how far the courts are prepared to go in implying requirements for a termination pursuant to such a clause to be valid, in addition to the express requirements set out in the clause itself (where the UK Supreme Court has recently adopted a much more liberal approach than that which has been said to be appropriate in the High Court of Australia - but the latter is suggested to be the sounder approach).
The paper goes on to deal with a related area where further development of the common law appears likely, namely its hitherto rigid requirement that termination by acceptance of a repudiation has to take effect immediately upon communication of that acceptance. This seriously detracts from the commercial value of the right for the innocent party, and is one of the reasons why an express termination provision, allowing for delayed termination, may be adopted. The paper welcomes the first indication of a possible English development to permit delayed termination at common law.

The identification of reasons why the divergences dealt with above may have come about is then attempted, and the extent to which the role of the common law of contract may be weakened – or conversely strengthened - by the same in providing a widely recognised international code for the regulation of commercial dealings is discussed.