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LIQUIDATED DAMAGE CLAUSES IN COMPUTER RESERVATIONS SYSTEMS CONTRACTS: ARE THEY ENFORCEABLE?

Yasue Koezuka

FUN-FILLED TRAVEL AGENCY contracts with Airline One for a five-year computer reservations system (CRS) subscription. During the second year of the contract, Airline Two approaches Fun-Filled to persuade it to switch to a different CRS owned by Airline Two. The new CRS offers different and improved services which will be useful to Fun-Filled in checking and confirming flights and making reservations for its customers. Fun-Filled, however, is reluctant to switch because the contract with Airline One includes a liquidated damage clause stipulating the damages that Fun-Filled must pay if it breaches the five-year contract. Realizing and understanding Fun-Filled's concerns, Airline Two promises to indemnify Fun-Filled for legal expenses and damages if Airline One initiates and wins a lawsuit for breach of contract. When Airline One sues Fun-Filled to enforce the liquidated damage clause, Fun-Filled defends by alleging that the liquidated damage clause represents a penalty and is therefore void as a matter of law.

Though the above fact situation is a hypothetical, a number of lawsuits are currently pending which contest the enforceability of liquidated damage clauses in CRS subscription contracts.1 The typical case involves a new CRS vendor attempting to enter the CRS market which is

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1 Godwin, Dim Outlook For Agents In UAL Cases, TRAVEL WEEKLY, Sept. 7, 1989, at 1 [hereinafter Godwin, Dim Outlook]. For example, Texas Air is currently defend-
already dominated by an older CRS. The problem that the new CRS vendor faces is that most travel agencies are already obligated to CRS subscription contracts containing liquidated damage clauses. Although Department of Transportation regulations limit these contracts to five years, this restriction provides little help to a new CRS vendor. To succeed in the CRS market, the new vendor must either wait until the travel agency has fulfilled its obligations under its current CRS contract or promise to indemnify the travel agency for any legal expenses or damages that result from the agency breaking its current CRS contract.

This comment analyzes the enforceability of liquidated damage clauses in CRS contracts by reviewing the current law governing liquidated damages; discussing the development and role of the CRS in the travel industry; and examining United Air Lines, Inc. v. Austin Travel Corp., a 1988 case in which a court upheld a liquidated damage clause in a CRS subscription contract. Furthermore, this comment presents an analysis of the issue of whether

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2 Belitsos, MIS Pilots The Air Wars, COMPUTER DECISIONS, Mar. 1988, at 36, 40. Delta Air Lines and Texas Air, both newcomers to the CRS market, use similar tactics to win over agencies which have contracts with older CRS. Id. Neither airline uses liquidated damage clauses in its contracts. Id. The General Accounting Office conducted an investigation and found that American Airlines' SABRE and United Airlines' Apollo, the two oldest CRS, hold a combined 75% market share in the industry. Proctor, House Members Call For Tighter Regulation of Reservation Systems, AVIATION WK. & SPACE TECH., Sept. 19, 1988, at 123.

3 14 C.F.R. § 255.6(a) (1989). Section 255.6(a) provides that "[n]o subscriber contract shall have a term in excess of five years." Id. A Department of Transportation report on CRS stated, however, that five-year lengths of travel agency contracts may be restricting competition. Godwin, DOT Report Triggers New Debate On Requiring Res System Changes, TRAVEL WEEKLY, Oct. 31, 1988, at 34. The American Society of Travel Agents and newer CRS vendors have requested a three-year cap on agreements. Id. at 35, 37.

4 681 F. Supp. 176 (S.D.N.Y. 1988) [hereinafter Austin Travel Corp. 1], aff'd, 867 F.2d 737 (2d Cir. 1989).

5 Id. at 189. United Airlines sued Austin Travel for breach of three CRS contracts. Id. at 181. The court awarded $408,375.00 in damages to the carrier, of which $269,684.66 represented liquidated damages. Id. at 191-92. For a detailed discussion of this case, see infra notes 96-143 and accompanying text.
courts should enforce such clauses or void them as penalties by applying the general principles of liquidated damage clauses to CRS subscription contracts.

I. LIQUIDATED DAMAGE CLAUSES

Liquidated damage clauses are contractual provisions which predetermine the measure of damages for breach of contract.6 One reason that parties include such provisions is that liquidated damage clauses help ease the calculation of damages,7 which in turn reduces the cost of proving complicated damages.8 Furthermore, the liquidated damage provision may be the only measure of damages for an injured party when it is difficult, if not impossible, to prove with sufficient certainty that damages were actually sustained by the party.9 As a general rule, courts uphold the clauses as valid to the extent they attempt to reasonably compensate the injured party for nonperformance of the contract.10

A problem, however, arises in distinguishing between clauses which reasonably compensate an injured party and clauses that are unenforceable penalty clauses.11 Until the early 1900's, courts were not only opposed to any predetermined damage clauses, but they were also confused as to what conditions were required for the enforce-

6 See Black's Law Dictionary 353 (5th ed. 1979). "Liquidated damages is the sum which party to contract agrees to pay if he breaks some promise and, which having been arrived at by good faith effort to estimate actual damage that will probably ensue from breach, is recoverable as agreed damages if breach occurs." Id. (citing In re Plywood Co. of Pa., 425 F.2d 151, 154 (3d Cir. 1970)).
7 E.A. Farnsworth, Contracts § 12.18, at 896 (1982).
8 Id.
9 Id. The requirement of sufficient certainty can be described as a requirement for satisfactory evidence to support an award of damages. Id. § 12.15, at 881. Courts impose this requirement "to control the discretion of juries in awarding contract damages . . . ." Id.
ment of the clauses. Now, courts consider some or all of the following elements when deciding whether to enforce a liquidated damage clause: (1) the anticipated damages from the breach must be uncertain or difficult to prove, (2) the parties must have intended to liquidate the damages when making their contract, and (3) the fixed damage amount must be reasonable in relation to the anticipated loss or injury.

A. Uncertainty or Difficulty of Proof

The Restatement of Contracts, the Restatement (Second) of Contracts, and the Uniform Commercial Code have all adopted the common law requirement that liquidated damage clauses are not enforceable unless the anticipated damages are uncertain or difficult to prove. An example of damages that are difficult to prove are damages resulting from a contractor’s failure to timely complete a construction project. Construction contracts, therefore, often include a stipulation requiring a contractor to pay a specific sum for each day the contractor delays in completing a project. Another example of uncertain damages are those which result from a breach of a cove-

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12 See Giesecke v. Cullerton, 280 Ill. 510, 117 N.E. 777, 778 (1917) (“no branch of the law is involved in more obscurity by contradictory decisions than whether a sum specified in an agreement . . . will be treated as liquidated damage or a penalty”); Note, supra 11, at 862-63.


14 U.C.C. § 2-718(1) (1978) (“damages for breach . . . may be liquidated . . . at an amount which is reasonable in the light of . . . the difficulties of proof of loss”); RESTATEMENT OF CONTRACTS § 339(1)(b) (1932) (“the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation”); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979) (“damages for breach . . . may be liquidated . . . but only at an amount that is reasonable in the light of . . . the difficulties of proof of loss”).

15 United States v. Bethlehem Steel Co., 205 U.S. 105 (1907). In this landmark Supreme Court case, a provision which required the contractor to pay thirty-five dollars per gun carrier per day of delay was held valid because of the uncertainty of the damage to the United States government. Id. at 118; see also Banta v. Stamford Motor Co., 89 Conn. 51, 92 A. 665 (1914) (stipulated damages of fifteen dollars per day for delay in delivery of a yacht upheld).
nant not to compete.\textsuperscript{16} Such damages include harm to a business' goodwill or reputation which is usually both uncertain and difficult to prove.\textsuperscript{17}

Courts, however, seem to take the uncertainty or difficulty of proof of loss as an element to consider, rather than a necessary condition, in determining whether to enforce a liquidated damage clause. Though courts will usually demand more accurate estimation of resulting damages in order to deem the amount as reasonable, courts will still uphold liquidated damage clauses where the damages are neither uncertain nor difficult to prove.\textsuperscript{18}

For instance, in contracts for the purchase of real estate, courts frequently uphold clauses calling for the forfeiture of earnest money deposits as liquidated damages even though such damages are easily calculable since courts can order specific performance of these contracts.\textsuperscript{19}

Courts, therefore, can easily calculate the damages by taking the difference between the contract price and the price received at a forced sale. Courts also regularly uphold accelerated rental clauses in leases as enforceable liquidated damage clauses.\textsuperscript{20}

Damages from a breach of a lease usually are not difficult to prove, and an acceleration clause simply totals the rents due for the remaining months of a contract and makes the sum payable upon a breach.\textsuperscript{21} Thus, given the variance of the courts' empha-

\begin{itemize}
\item \textsuperscript{16} E.A. Farnsworth, \textit{supra} note 7, § 12.18, at 899 n.18.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} See \textit{id.} § 12.18, at 899-900. ("the ease of forecasting and proving the loss may make it incumbent on the parties to make a more accurate forecast if it is to be sustained as reasonable . . . ").
\item \textsuperscript{19} See Zucht v. Stewart Title Guaranty Co., 207 S.W.2d 414 (Tex. Civ. App. 1947). The court held "a provision for liquidated damages in the contract for the sale and purchase of real estate is proper . . . ." Id. at 419; see also Biesinger v. Behunin, 584 P.2d 801 (Utah 1978) (provision for forfeiture of amounts paid as liquidated damages upheld by court). But see Freeman v. Warrior, 409 F.2d 1101 (10th Cir. 1969). The Tenth Circuit held that liquidated damages are not applicable in real estate contracts because the damages are not difficult to ascertain. An Oklahoma statute required that damages "be impracticable or extremely difficult to fix" before a liquidated damage clause would be valid. Id. at 1103.
\item \textsuperscript{20} See E.A. Farnsworth, \textit{supra} note 7, § 8.18, at 619-20.
\item \textsuperscript{21} Id. § 8.18, at 619. Under an acceleration clause, "if the debtor is in breach as
sis on this element, contracting parties must be careful when liquidating an easily determinable damage amount.

B. Intention of the Parties

Courts have placed the least importance on the requirement that the parties must have intended to liquidate the damages in advance. Judicial intolerance of penalty clauses which insure performance of a contract causes courts to examine the actual effect of the clause when determining whether it is enforceable. Consequently, the parties' characterization of the provision as a liquidated damage clause is immaterial if the effect of the clause is to compel performance by a party. Furthermore, the parties' characterization of a provision as a penalty or forfeiture is also not controlling.

C. Reasonable Amount

Of the three elements, the most conflict and confusion exists concerning the requirement that the amount stipulated in the liquidated damage clause be reasonable in relation to the anticipated loss or injury from the breach of the contract. The traditional approach is to judge the reasonableness of the stipulated amount at the time the parties entered into the contract. Under this approach, courts allow the recovery of liquidated damages if the par-
ties have reasonably estimated the damages that are expected to result from nonperformance of the contract. However, if the stipulated damages are unreasonable or disproportionate to the anticipated loss from the nonperformance, courts hold that the provisions are unenforceable penalties.

Though the Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts (Restatement 2d) require that the stipulated damage amount be reasonable with regard to the anticipated loss, they differ from the traditional approach in that they place additional emphasis on the actual damages. Both the UCC and the Restatement 2d judge the reasonableness of the stipulated amount in light of actual damages as well as anticipated damages. Thus, a breaching party could raise as a defense to the enforcement of the clause that the injured party suffered little or no damages.

The following subsections provide an analysis of the

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26 See supra note 15.
27 Note, supra note 11, at 863 (citing Bignall v. Gould, 119 U.S. 495 (1886)). Preset damage provisions which were "disproportionate to the damage which could have been anticipated from breach of the contract... [were] agreed upon in order to enforce performance...." Id. Therefore, the provision was an unenforceable penalty. Id.; see also Chicago House-Wrecking Co. v. United States, 106 F. 385 (7th Cir. 1901) (stipulated damage amounts were penalties).
28 U.C.C. § 2-718(1) (1978). Section 2-718(1) provides:
   Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.
Id.
29 RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979). Section 356(1) provides:
   Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.
Id.
30 For the language of UCC section 2-718(1) and Restatement (Second) of Contracts section 356(1), see supra notes 28-29.
31 See Note, supra note 11, at 876.
different methods used by courts to determine the reasonableness of specified damages in liquidated damage clauses. Most jurisdictions have adopted one of these approaches.

1. **Common Law**

Courts view the common law as the traditional approach to determining reasonableness. Early cases emphasized "freedom of contract" and enforced the liquidated damage clauses when the parties had made reasonable attempts to estimate the losses from an anticipated breach. These courts regarded nonenforcement of an otherwise valid liquidated damage clause as an infringement on the parties' freedom of contract. Judges deferred to the parties' decision as to what was a "reasonable" amount and tended to uphold liquidated damage clauses unless a party proved fraud or illegality. This emphasis on the parties' freedom of contract often resulted in enforcing liquidated damage clauses even when the injured party sustained little or no loss.

Some common law courts, however, allowed the breaching party to use as a defense the fact that the other party had suffered no actual damages. In fact, courts occasionally invalidated liquidated damage clauses for equitable reasons even though the parties had made a reasonable estimate of anticipated losses. Still, some

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32 *Id.* at 863 ("Judicial encouragement of freedom of contract has been important throughout American legal history.").

33 *Id.* at 864; see *Byron Jackson Co. v. United States*, 35 F. Supp. 665 (S.D. Cal. 1940).

34 *Note*, *supra* note 11, at 864; see *Sun Printing & Publishing Ass'n v. Moore*, 183 U.S. 642 (1902). The Supreme Court held that "[i]f [the parties] are competent to contract within the prudential rules the law has fixed as to [them], and there has been no fraud, circumvention or illegality in the case, the court is bound to enforce the agreement." *Sun Printing & Publishing Ass'n*, 183 U.S. at 669-70.

35 *See* *Note*, *supra* note 11, at 866. "An evidentiary rule arose as a corollary to the freedom of contract analysis. Because the plaintiff need not plead or prove actual damage in order to recover, the defendant could not introduce evidence of the absence of damage." *Id.* (footnote omitted).

36 *Id.*

37 *Id.* at 866 n.32, *citing Priebe & Sons, Inc. v. United States*, 332 U.S. 407
courts continued to apply the strict common law rule rather than temper rulings with equitable concerns.\textsuperscript{38} Thus, under the common law, it is difficult to predict the result of a case in which the liquidated damages differ greatly from the actual losses.\textsuperscript{39}

2. \textit{Restatement of Contracts Section 339}

Section 339 of the Restatement of Contracts (Restatement) follows the common law and provides a two-part test to determine the validity and enforceability of a liquidated damage clause.\textsuperscript{40} The first part requires that the stipulated amount be a reasonable estimate of the damages at the time the parties entered into the contract.\textsuperscript{41} The second requirement provides that the harm caused by the breach must be difficult to ascertain.\textsuperscript{42} Hence, the Restatement follows the common law approach of giving deference to the parties' freedom of contract and their reasonable estimate of anticipated damages when they entered into the contract. Courts following the Restatement, however, do not consider the equities of a case and will enforce a liquidated damage provision even if the breach results in no actual loss.\textsuperscript{43}

\footnotesize{(1947) (liquidated damages for delay in obtaining inspection certificate void as a penalty because delay did not affect delivery of the goods), and Massman Constr. Co. v. City Council of Greenville, Miss., 147 F.2d 925 (5th Cir. 1945) (liquidated damages for delay in bridge construction unenforceable because the bridge was completed before the road leading to it was finished).}

\footnotesize{\textsuperscript{38} Note, supra note 11, at 867.}

\footnotesize{\textsuperscript{39} See id.}

\footnotesize{\textsuperscript{40} \textit{Restatement of Contracts} § 339(1) (1932). Section 339(1) provides:

An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

\textit{Id.}}

\footnotesize{\textsuperscript{41} \textit{Id.} § 339(1)(a).}

\footnotesize{\textsuperscript{42} \textit{Id.} § 339(1)(b).}

\footnotesize{\textsuperscript{43} Note, supra note 11, at 869 n.49, citing Mc\textit{Carthy} v. Tally, 46 Cal. 2d 577, 297 P.2d 981 (1956). The \textit{Mc\textit{Carthy}} court relied on United States v. Bethlehem Steel Co., 205 U.S. 105 (1907), and section 339 of the first Restatement and concluded that evidence of actual damages could not be admitted. \textit{Mc\textit{Carthy}}, 46 Cal. 2d at
3. Uniform Commercial Code Section 2-718(1)

The Uniform Commercial Code (UCC) provides a departure from the traditional approach of judging the reasonableness of a stipulated amount in a liquidated damage clause. Under section 2-718(1), parties may agree to liquidated damages only if the stipulated amount is reasonable in relation to the anticipated or actual harm resulting from the breach. The section further provides that courts evaluate the stipulated damages in light of the uncertainty of damages and the lack of other adequate remedies. The UCC approach differs from the common law approach by allowing courts to consider evidence of actual damages when determining the reasonableness and enforceability of a liquidated damage clause. Thus, in situations where the breach causes no injury, the UCC mandates that courts not enforce the liquidated damage clauses.

A literal interpretation of the UCC language, however, may result in a deviation from the results of both common law and equity. Since the UCC states that the standard for the validity of a liquidated damage clause is the reasonableness in relation to anticipated or actual harm, it is possible that a court could enforce a provision which was unreasonable at the time of contracting but reasonable in relation to actual damages. The New York Court of Appeals, however, has indicated that such a result is precluded by an application of the second sentence of UCC section 2-718(1). This sentence provides that a stipula-

577, 297 P.2d at 981. It is interesting to note, however, that the commentary to the Restatement states that if "the breach causes no harm at all or none that is incapable of accurate estimation without difficulty, [the liquidated damage] amount . . . is not enforceable." RESTATEMENT OF CONTRACTS § 339 comment c (1932).

41 See supra note 28 for the text of section 2-718(1) of the UCC.

42 Id.

43 See Note, supra note 11, at 872. The deviation which may occur is not adequately resolved by the UCC. Id. at 872 n.64.

44 Id. at 872.

tion for "unreasonably large liquidated damages is void as a penalty." Thus, courts may consider the second sentence of the section as an overarching standard parties must meet when determining the enforceability of a liquidated damage clause.

Though very few courts have directly addressed the meaning of section 2-718(1), the courts that have interpreted the section have had varying interpretations. Some courts have construed the section as a "reasonable-ness" test. Others, because of the confusing wording of section 2-718(1) and the difficulty of application, have interpreted the section consistently with common law on liquidated damages.

4. Restatement (Second) of Contracts Section 356

The Restatement (Second) of Contracts (Restatement 2d) differs from the Restatement because it closely follows

damage provision for attorney's fees of thirty percent of the money recovered if the buyer breached the contract. Id. at 516, 381 N.Y.S.2d at 459, 344 N.E.2d at 391. The court found that, although the provision met the reasonableness test of the UCC, the provision did not survive the second sentence of UCC section 2-718(1). Id.


51 Id.; Note, supra note 11, at 873.

52 Comment, supra note 10, at 127 (citing Pasquale Food Co. v. L & H Int'l Airmotive, Inc., 51 Ala. App. 127, 283 So. 2d 498 (1973), and Lee Oldsmobile, Inc. v. Kaiden, 32 Md. App. 556, 363 A.2d 270 (1976)); see also 2 R. Anderson, supra note 50, § 13:05. In Pasquale Food Co., the contract for the sale of an aircraft provided for forfeiture of a $10,000 deposit if the buyer failed to accept delivery of the aircraft. Pasquale Food Co., 51 Ala. App. at 127, 283 So. 2d at 446-47. The court held that the "[UCC] does not change the substantive law regarding liquidated damage as announced in [a 1953 common law case]." Id. at 127, 283 So. 2d at 447. In Lee Oldsmobile, Inc., the court followed case law to determine that anticipated damages must be difficult to determine in order to enforce a liquidated damage clause under UCC section 2-718(1). Lee Oldsmobile, Inc., 32 Md. App. at 556, 363 A.2d at 274. The court stated:

We do not say this from hindsight made possible because the actual figures claimed were in evidence. We say it because at the time the contract was made, it was clear that the nature of any damages which would result from a possible future breach was such that they would be easily ascertainable.

Id.
UCC section 2-718(1) rather than the common law. Section 356 uses a two-part test to evaluate the validity of a liquidated damage clause. First, the stipulated amount must be reasonable in light of the anticipated or actual harm resulting from the breach of the contract. Second, the amount must also be reasonable in light of the difficulties of proving the harm.

Unlike the UCC's test, which provides no guidelines for interpreting the test, the comments and illustrations to the Restatement 2d facilitate the interpretation and application of section 356. The first part of the test evaluates the reasonableness of the liquidated damage clauses at either the time of contract (anticipated loss) or at the time of the breach (actual loss). The second part of the test requires that the anticipated loss be difficult to prove. A question remains, however, as to when must the loss be difficult to prove. Though courts following the common law evaluated the difficulty of proof of loss at the time of

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53 Restatement (Second) of Contracts § 356(1) (1979); see supra note 29 for the text of section 356(1) governing liquidated damages.
54 Restatement (Second) of Contracts § 356(1) (1979).
55 Id.
56 See Note, supra note 11, at 874-79.
57 Restatement (Second) of Contracts § 356(1) (1979). The relevant part of section 356(1) reads as follows: "Damages for breach . . . may be liquidated . . . but only at an amount that is reasonable in light of the anticipated or actual loss . . . ." Id. Comment b clarifies the issue further by stating that the reasonableness of the amount should be judged in light of either the anticipated or the actual loss.

Under the test stated in Subsection (1), two factors combine in determining whether an amount of money fixed as damages is so unreasonably large as to be a penalty. The first factor is the anticipated or actual loss caused by the breach. The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches . . . . Furthermore, the amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss.

Id. § 356 comment b.
58 Id. § 356(1). The relevant part of section 356(1) provides that the amount must be "reasonable in light of . . . the difficulties of proof of loss." Id.
59 Note, supra note 11, at 874-75.
the making of the contract, the illustrations to the Restatement 2d indicate that the time to assess the difficulty of proof is at the time of trial.

Furthermore, in determining whether the stipulated damages are reasonable, the comments suggest balancing (1) the reasonableness of the liquidated damage clauses in light of anticipated or actual damages and (2) the difficulty of proving damages. If the difficulty of proving the damages is great, the court requires less proof of the ac-

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60 Id. at 875 ("the old rule [considered] the 'difficulty of proof of loss' from the perspective of the making of the contract").
61 Id. Illustration 3 describes the following hypothetical:
A contracts to build a grandstand for B's race track for $1,000,000 by a specified date and to pay $1,000 a day for every day's delay in completing it. A delays completion for ten days. If $1,000 is not unreasonable in light of the anticipated loss and the actual loss to B is difficult to prove, A's promise is not a term providing for a penalty and its enforcement is not precluded on grounds of public policy.

RESTATEMENT (SECOND) OF CONTRACTS § 356 illustration 3 (1979). Illustration 4 describes a similar situation:
The facts being otherwise as stated in illustration 3, B is delayed for a month in obtaining permission to operate his race track so that it is certain that A's delay of ten days caused him no loss at all. Since the actual loss to B is not difficult to prove, A's promise is a term providing for a penalty and is unenforceable on grounds of public policy.

Id. § 356 illustration 4. The difference between the two is, that in Illustration 4, an event occurs before trial. That is, B fails to get authorization to operate the track. In Illustration 3, the clause is valid because B's damages are difficult to prove. On the other hand, in Illustration 4, B's damages—none—are not difficult to prove because B could not have operated the track. Hence, the clause is invalid.

62 Note, supra note 11, at 875; see RESTATEMENT (SECOND) OF CONTRACTS § 356 comment b (1979). The part of the comment which suggests a balancing approach provides:

The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty (see § 351), the easier it is to show that the amount fixed is reasonable. To the extent that there is uncertainty as to the harm, the estimate of the court or jury may not accord with the principle of compensation any more than does the advance estimate of the parties. A determination whether the amount fixed is a penalty turns on a combination of these two factors. If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm. If, on the other hand, the difficulty of proof of loss is slight, less latitude is allowed in that approximation.

curacy of the stipulated damages.\textsuperscript{63} Conversely, if the difficulty of proving the loss is minimal, the court allows less discrepancy between the stipulated amount and the actual loss.\textsuperscript{64} This balancing approach seems to suggest that courts will look more often to actual damages when determining the reasonableness of a liquidated damage clause.

D. Modern Treatment of Liquidated Damages

In summary, a division exists among the different jurisdictions as to which of the preceding tests should be used to judge the reasonableness of liquidated damage clauses.\textsuperscript{65} Under the common law and Restatement tests, courts uphold liquidated damage clauses when the stipulated amounts are reasonable at the time of the making of the contract. Courts applying these tests disregard any evidence of actual damages. Of course, courts may always consider the equities of the case to invalidate a liquidated damage clause when the injured party suffered little or no actual damages.

Under the UCC and Restatement 2d, courts evaluate the reasonableness of a liquidated damage clause in relation to the anticipated losses and/or in light of the actual damages. Under the UCC, an interpretive problem arises when the stipulated damages are reasonable in light of actual damages but appeared unreasonable at the time of contracting. Few courts have addressed whether to uphold the liquidated damages in such a situation or void them on the grounds that they were initially adopted as penalties. The Restatement 2d eliminates this problem by requiring enforcement of a clause which is reasonable in light of either anticipated or actual damages. Additionally, the Restatement 2d requires setting aside the liquidated damages only if no actual damages have resulted from the breach.

\textsuperscript{63} \textit{Restatement (Second) of Contracts} § 356 comment b (1979).

\textsuperscript{64} \textit{Id}.

\textsuperscript{65} Note, supra note 11, at 879.
II. COMPUTER RESERVATIONS SYSTEMS (CRS)

In order to appreciate the implications of liquidated damage clauses in CRS subscription contracts, it is necessary to understand both the CRS industry and the context in which liquidated damage clauses arise in the industry.

A. Development and Role of CRS in the Travel Industry

Though airline carriers began developing CRS before deregulation of the airline industry in 1978, the airlines did not fully realize the importance of this development until after deregulation. Deregulation increased the number and frequency of flights, complicated the fare structures, and added new routes to airlines' schedules. This "information explosion" made it impractical for agencies to continue booking flights and issuing tickets to their customers simply from information published in flight schedules.

As a result of deregulation, the CRS became a valuable tool because it provides travel agents with information about flight schedules, availability of seating on particular flights, and airfares. The CRS also allows agencies to

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66 14 C.F.R. § 255.3 (1989). Section 255.3 defines carrier as: "any air carrier, any foreign air carrier, and any commuter air carrier, as defined in 49 U.S.C. 1301(3), 49 U.S.C. 1301(22), and 14 C.F.R. 298.2(f), respectively that are engaged directly in the operation of aircraft in passenger air transportation." Id.

67 Belitsos, supra note 2, at 36-37.

68 Id. Before deregulation "alternative fares and flying schedules had been few, and fares changed only a few times a year." Id. at 36.

69 See id. at 36-37. The "information explosion" included increases in "'discount fares and the proliferation of new carriers and added routes' " which "'caused fares to change at phenomenal rates'. . . ." Id. For example, on a flight from Philadelphia to San Francisco, five passengers sitting in coach paid five different fares. Passenger A paid $586, B paid $483, C paid $358, D paid $229 and E paid $124. Eichel, Deregulation's legacy: skewed fares and hassles, The Dallas Morning News, Dec. 12, 1989, at 1D, col. 2.

70 14 C.F.R. § 255.3 (1989). Section 255.3 defines a CRS as "a computerized airline reservation system offered by a carrier or its affiliate to subscribers for use in the United States that contains information about schedules, fares, rules or availability of other carriers and that provides subscribers with the ability to make reservations and to issue tickets." Id.; see also Austin Travel Corp. 1, 681 F. Supp. at 180. A CRS permit[s] a travel agent to have access to a vast data bank that in-
make reservations and issue tickets directly to their customers. The data bases of a CRS, further, are not limited to airline information. An agency can also access hotel, rental car, and various other travel related information through a CRS and make reservations for these services. Such a system is indispensable to most travel agencies because a CRS provides such a wide array of information. Almost ninety percent of the travel agencies in the United States are automated as a result of the airline industry's development of these systems.

The CRS owners are called system vendors. The five carrier-owned CRS are: (1) American Airlines' SABRE, (2) Delta Air Lines' DATAS II, (3) TWA and Northwest Airlines' PARS, (4) Texas Air's SystemOne, and (5) United Airlines' Apollo. Besides providing information on their own flights, each system also gives information on participating carriers. A participating carrier is an

includes listings of flights of virtually all airlines, as well as information on many hotels, rental car companies, and other travel services. The agent can use the system to make bookings (or to change or cancel bookings), to print tickets and itineraries, to store relevant information about customers and their travel plans, and to perform a variety of other travel-related functions.

Austin Travel Corp. I, 681 F. Supp. at 180.

For a discussion of CRS, see supra note 70.

See Austin Travel Corp. I, 681 F. Supp. at 180; Belitsos, supra note 2, at 40.

SABRE's network includes nearly a million miles of data circuits and holds the schedules of 650 airlines—some 30 million fares—and information on 16,000 hotels and 33 car rental agencies, among many other elements. With 550 gigabytes of online storage, SABRE is the largest nonmilitary database in the world and is likely the world's largest private network.

Austin Travel Corp. I, 681 F. Supp. at 180.

Belitsos, supra note 2, at 40. ("Of the nearly 40,000 travel agencies in the United States, 90 percent are automated. The airline that provides an agency's [CRS] is up to 30 percent more likely to gain bookings on its flights . . . .")

14 C.F.R. § 255.3 (1989). Section 255.3 defines system vendor as "a carrier or its affiliates that owns, controls or operates a system." Id.

Belitsos, supra note 2, at 36. ("Texas Air's SystemOne is a merger of Continental and Eastern Airlines' CRS. Id. at 180. In February 1990, the Department of Justice approved the merger of Delta's DATAS II and TWA and Northwest's PARS systems. The Dallas Morning News, Feb. 8, 1990, at 1D, col. 4."

14 C.F.R. § 255.3 (1989). Section 255.3 defines participating carrier as "a
airline which contracts with a system vendor to have its flight information placed in the particular CRS data base. In return, the system vendor receives a fee from the participating carrier for each booking made through its system. Consequently, a CRS is not only a marketing tool for the system vendor’s own flights but is also a revenue producer from contracts entered into with participating carriers. According to an airline market analyst, a CRS gives the system vendor a twenty percent profit margin; whereas, the overall profit margin for an airline is only eight to ten percent.

With returns such as this, it is not surprising that the established vendors—American Airlines, United Airlines, TWA and Northwest Airlines—zealously protect their markets from competing vendors by inserting liquidated damage clauses in their CRS subscription contracts. This practice makes it very difficult and costly for travel agencies to switch to a competitor’s CRS. Two relative newcomers to the CRS market, Delta Air Lines and Texas Air, are trying to persuade travel agencies to switch to

carrier that has an agreement with a system vendor for display of its flight schedules, fares, or seat availability, or for the making of reservations or issuance of tickets through a system." Id.

78 Id.

79 Id.; see also Austin Travel Corp. 1, 681 F. Supp. at 186-87. "Each time a travel agent makes a booking on an airline or with another vendor through the Apollo Services, that airline or vendor pays a booking fee to United." Austin Travel Corp. 1, 681 F. Supp. at 187.

80 Belirosos, supra note 2, at 37. The article noted, "[a]ccording to Edward Stackman, an airlines analyst at Wall Street brokerage Paine Webber Inc., in a good quarter the airlines have an 8 percent to 10 percent profit margin overall, while CRSs make as much as 20 percent profit. In 1984, SABRE netted American a 40 percent profit." Id.

81 See id. at 40.

Generally when an agency seeks release from a contract with one airline to convert to a rival’s CRS, it must pay the airline for the cost of removing the equipment and for the lost equipment rental fees. In addition, these contracts, which typically run for five years, contain "liquidation damages" clauses that make agencies responsible for the estimated value of the offline booking fees from rival carriers whose passengers they would have booked.

Id.
their systems. Neither of these newcomer vendors use liquidated damage clauses in their contracts.

B. Typical Liquidated Damage Clauses in CRS Subscription Contracts

Most liquidated damage clauses in CRS subscription contracts include some or all of the following elements:

1. Fixed Monthly Fees

System vendors charge travel agencies a fixed monthly service fee for use of their CRS. These monthly service fees are similar to rental charges on equipment and are paid in addition to any other charges that a travel agency may incur while using the CRS. The acceleration clause simply adds together the service fees due for each month remaining in the life of the CRS subscription contract and makes the total due upon breach of the contract.

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82 Id.; see supra note 76.
83 Belitsos, supra note 2, at 40.
84 Id.; see also Austin Travel Corp. 1, 681 F. Supp. at 186 n.5.
85 See supra note 84 and accompanying text.
86 See supra notes 20-21 and accompanying text for a discussion of acceleration clauses.
2. *Lost Booking Fees*

The system vendors contract with participating carriers\(^7\) to make the carriers' flight information available to travel agencies through the CRS.\(^8\) In return, the participating carriers pay an average fee of $1.75 to $1.85 per booking segment\(^9\) to the system vendors for tickets sold through the CRS.\(^9\) The liquidated damage clauses dealing with lost booking fees attempt to recover from the travel agencies those fees which the system vendor would have received from participating carriers had the travel agency not switched to a competitor's CRS. The amount due is calculated by multiplying the average number of bookings made by the agency in previous months by (1) the booking fee and (2) the number of months remaining in the contract.\(^9\)

3. *Variable Fees*

In addition to the fixed monthly service fees, travel agencies pay variable fees to system vendors for the different services that are available through the CRS.\(^9\) These services range from printing tickets and travel itineraries to storing customer information.\(^9\) Furthermore, most system vendors market compatible programs for the travel agencies' accounting and management-related functions.\(^9\) The typical liquidated damage clause provides for recovery of these variable fees. The damage

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\(^7\) See supra note 77 for a definition of participating carriers.

\(^8\) See 14 C.F.R. § 255.5 (1989).

\(^9\) "A 'segment' is the reservation of a seat on a specific flight." Mifsud, *Computer Reservations Systems and Automated Market Distribution In A Deregulated Aviation Industry*, 1 J.L. & TECH. 143, 146 n.10 (1986). For example, if a customer books a flight from Dallas to New Orleans with a plane change in Houston, a total of four segments is charged for the round-trip. See id.

\(^10\) Id. at 146. American Airlines charges an average of $1.75 per booking segment. *Id.; see also Austin Travel Corp. I*, 681 F. Supp. at 191 attachment A (United Airlines charges $1.85 per booking segment).

\(^11\) *Austin Travel Corp. I*, 681 F. Supp. at 186 n.5.

\(^12\) *Id. at 186.* "Variable" charges are based on the travel agency's generation of tickets or itineraries. *Id.*

\(^13\) *Id.* at 180.

\(^14\) *Id.* For example, "United also markets [the] . . . Apollo Business System
amount is calculated by multiplying the average variable fees paid in preceding months by the number of months remaining in the contract term.\footnote{\textit{Austin Travel Corp. I}, 681 F. Supp. at 189, 191.}

III. \textit{United Air Lines, Inc. v. Austin Travel Corp.}\footnote{United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737, 738 (2d Cir. 1989) [hereinafter \textit{Austin Travel Corp. II}].}

\textit{Austin Travel Corp.} is the first case to directly address the issue of the enforceability of liquidated damage clauses in CRS contracts.\footnote{\textit{Id.} at 738.} After the federal district court granted summary judgment in favor of the CRS vendor and enforced such a clause against the travel agency,\footnote{\textit{Id.} at 738.} the travel agency appealed and reasserted its position that the liquidated damage clause imposed a penalty and therefore was void as a matter of law.\footnote{\textit{Austin Travel Corp. I}, 681 F. Supp. at 181.} The Second Circuit Court of Appeals, however, disagreed with the travel agency and affirmed the district court's summary judgment.\footnote{\textit{Id.} at 738.}

A. District Court Decision

1. Background and Holding

This lawsuit involved the CRS subscription contracts which covered Austin Travel's agencies in Oceanside, Great Neck, and Mitchell Field, New York.\footnote{\textit{Id.} at 738.} In 1985, (ABS), which is a back-office accounting system that performs travel agency accounting, reporting and management reporting functions.” \textit{Id.}

\footnote{\textit{Id.} at 186 n.5.}

\footnote{681 F. Supp. 176 (S.D.N.Y. 1988), aff’d, 867 F.2d 737 (2d Cir. 1989).}

\footnote{Since the \textit{Austin Travel Corp.} decisions, the same district court issued a similar opinion in \textit{In re “APOLLO” Air Passenger Computer Reservation System (CRS)}, 720 F. Supp. 1061 (S.D.N.Y. 1989), on April 5, 1989. \textit{In re “APOLLO”} was a consolidated action involving 18 different travel agencies. \textit{Id.} at 1063. As in \textit{Austin Travel Corp.}, each of these agencies was persuaded to switch from Apollo to SystemOne under an agreement whereby SystemOne would indemnify the agencies for any liabilities arising from the breach of their Apollo contracts. \textit{Id.} Judge Milton Pollack of the District Court for the Southern District of New York dismissed the agencies' affirmative defense that the liquidated damage clauses constituted penalties and granted summary judgment to United Airlines. \textit{Id.} at 1065-67; see infra note 144 for a discussion of other decisions since the \textit{Austin Travel Corp.} case.}

\footnote{\textit{Austin Travel Corp. II}, 867 F.2d 737, 738 (2d Cir. 1989).}
Austin Travel, the largest travel agency in Long Island, New York, purchased a travel agency in Oceanside and another in Great Neck. Both agencies were located on Long Island and were subscribers to United's Apollo CRS. Before purchasing these two travel agencies, Austin Travel used American Airline's SABRE CRS at most of its locations. After the acquisition, Austin Travel assumed the Apollo CRS contract at the Great Neck location and an Apollo Business Systems contract at the Oceanside location. Shortly thereafter, Austin Travel entered two five-year Apollo contracts for its Mitchell Field and Oceanside locations. Austin Travel, however, continued to use SABRE at its Mitchell Field agency and moved SABRE into the Oceanside and Great Neck locations a few months later.

In June 1986, Eastern Airlines wrote Austin Travel offering to indemnify Austin Travel for any liability to United under the Apollo contracts if Austin Travel would contract with Eastern Airlines for service with its SystemOne CRS. Austin Travel subsequently notified United that it was installing SystemOne at the Mitchell Field location and requested that United remove the Apollo CRS from that location. Austin Travel further notified United that Austin Travel did not intend to use Oceanside's Apollo Business System, and that under an oral agreement, Austin Travel was liable only for removal

102 Id.
103 Id. The two agencies were Karson Travel in Oceanside, New York, and Fantasy Adventures in Great Neck, New York. Id.
104 Id.
105 Id.
106 See supra note 94 for a description of the Apollo Business System.
108 See id.
109 Id.
110 Id. at 181-82. William S. Lush, who is the vice-president of Marketing Automation at Eastern Airlines, wrote to Jeffrey Austin of Austin Travel on June 3, 1986. Id.
111 Id. at 181. Although the record does not provide the specific date that this request was made, it appears that Austin Travel's decision to discontinue use of United's Apollo CRS was a direct result of the letter from Eastern Airlines.
fees. Austin Travel never paid United for the use of equipment and services under any of the Apollo contracts.

In 1987, United initiated an action in federal district court seeking $423,155.09 for (1) accrued rentals, (2) amounts stipulated in the liquidated damage clauses of the CRS subscription contracts, and (3) consequential damages resulting from breach of the contracts. Austin Travel counterclaimed seeking an injunction and a declaratory judgment that the subscription contracts were void because of United’s alleged monopoly power in the CRS market. Austin Travel also asserted that United’s liquidated damage clauses were penalties and therefore unenforceable.

United then filed for a motion for summary judgment. The district court granted United’s summary judgment ruling that Austin Travel had not introduced sufficient evidence to support a genuine issue of fact and that Austin Travel’s defenses were frivolous. The district court, therefore, ruled that United was entitled to re-

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112 Id.
113 Id. at 182.
114 Id. at 181.
115 Id. at 178-79, 182-86. Austin Travel claimed that United’s CRS agreements were part of an unlawful scheme to monopolize the local and national markets for computerized reservation systems and airline passenger services and to engage in unlawful anticompetitive practices in those markets, in violation of §§ 1 and 2 of the Sherman Act and §§ 2 and 3 of the Clayton Act.


116 *Austin Travel Corp. I*, 681 F. Supp. at 186. The scope of this comment is limited to this issue. For a complete discussion of antitrust issues, see Comment, *supra* note 115, at 157.

117 *Austin Travel Corp. I*, 681 F. Supp. at 178.

118 Id. at 179, 182. The court noted that Austin Travel’s response to United’s motion included “five and one-half inches of briefs and appendices containing governmental reports, ... affidavits, letters, the lease agreements, their assignments and lengthy (yet sometimes misleading) depositions excerpts.” Id. at 179. The court continued: “The requisite evidence ... is found wanting. The defendant failed to submit admissible specific probative evidence in support of the relevant matter involved herein.” Id. In fact, Austin Travel presented its own expert
lief as a matter of law.\textsuperscript{119} Furthermore, the court ordered Austin Travel to pay United $408,375.00 in damages plus interest and costs.\textsuperscript{120} Of this amount, $269,684.66 represented the damages calculated under the liquidated damage provisions of the CRS contracts.\textsuperscript{121}

2. United's Liquidated Damage Clause

Under its CRS subscription contract with Austin Travel, United received a fixed monthly usage fee and a variable fee charge for different uses such as ticket and itinerary printing from the travel agency.\textsuperscript{122} United also received fees of $1.85 per booking for each ticket sold through Apollo.\textsuperscript{123} When Austin Travel breached the subscription contract, United lost the revenue from these charges and fees as well as a fraction of its market share.\textsuperscript{124} The liqui-

\footnotesize
\begin{footnotes}
\item \textsuperscript{119} Id. at 179. The court stated that "[s]ummary judgment will be rendered only when no genuine issue as to any material fact exists" per rule 56(c) of the Federal Rules of Civil Procedure. \textit{Id.} Rule 56(c) provides in relevant part: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
\item \textit{FED. R. CIV. P. 56(c).}
\item \textsuperscript{120} \textit{Austin Travel Corp. I}, 681 F. Supp. at 191. Interest was calculated from February 26, 1987, the day United filed the action in federal district court. \textit{Id.} at 179, 191; cf. 2 R. ANDERSON, \textit{supra} note 50, \S\ 13:01 ("liquidated damage clause[s] ... liquidate damages at the time of the breach so that prejudgment interest will begin to run immediately against the breaching party" (footnote omitted)).
\item \textsuperscript{121} \textit{Austin Travel Corp. I}, 681 F. Supp. at 191-92 attachment A. The $269,684.66 figure for the liquidated damages under the three CRS contracts is calculated as follows:
\begin{tabular}{lrr}
& Oceanside location & $62,102.70 \\
& Mitchell Field location & 198,135.56 \\
& Great Neck location & 9,446.40 \\
\hline
TOTAL & $269,684.66
\end{tabular}
\item \textsuperscript{122} Id. at 186; see \textit{supra} notes 92-95 and accompanying text for discussion of these fees.
\item \textsuperscript{123} \textit{Austin Travel Corp. I}, 681 F. Supp. at 187, 191-92 attachment A. "Each time a travel agent makes a booking on an airline or with another vendor through the Apollo Services, that airline or vendor pays a booking fee to United." \textit{Id.} at 187.
\item \textsuperscript{124} See \textit{id.} The court noted: "When an existing subscriber abandons Apollo prior to expiration of the contract term, United does not recoup part of its loss by
dated damage provision of the contract between United and Austin Travel included a separate calculation for each of the three elements.\textsuperscript{125}

United’s contract with Austin Travel provided that in case of breach:

Subscriber will pay to United liquidated damages in an amount calculated as follows:

A. The amount of the monthly fixed charge . . . multiplied by the number of months, including any portion thereof, remaining under the term of this Agreement and the product thereof multiplied by .80;

B. The amount of the variable charges . . . paid by Subscriber for the calendar month immediately preceding the date of termination . . . multiplied by the number of months, including any portion thereof, remaining under the terms of this Agreement and the product thereof multiplied by .80;

C. The Monthly Minimum Guarantee . . . multiplied by the amount of the airline booking fee in effect on the date of termination . . . multiplied by the product of the number of months, including any portion thereof, remaining under the term of this Agreement multiplied by the number of Apollo CRTs . . . ; and

D. The amount of the liquidated damages will equal the sum of the amounts derived under [A., B., and C.].\textsuperscript{126}

3. Court’s Rationale

The district court held that, under New York law, liquidated damage clauses should be sustained if (1) the actual

\textsuperscript{125} Id. at 186 n.5.

\textsuperscript{126} Id. Only eighty percent of the fixed and variable charges were stipulated to be recovered under parts A and B of the liquidated damage clause because United determined through consultation with personnel at Apollo Services that, once equipment was removed from an agency, United would avoid approximately twenty percent of the costs associated with the revenues. Id. at 187. “The Monthly Minimum Guarantee” in part C is the level of business United’s CRS contracts require. Id. This figure is set at “50 percent of the average level of bookings the agent made in the early months of its contract.” Id.
damages are uncertain and difficult to prove and (2) the stipulated amount is not unreasonable or disproportionate to the anticipated loss.\textsuperscript{127} In analyzing the first requirement, the court analogized the uncertainty involved in proving damages resulting from a breach of a CRS contract to the speculative nature of assessing the value of repossessed trucks and heavy equipment.\textsuperscript{128} The court cited \textit{Leasing Service Corp. v. Justice},\textsuperscript{129} in which the Second Circuit upheld a liquidated damage clause of a lease agreement which allowed a lessor to sell repossessed equipment and then to deduct fifteen percent of the accelerated lease payments from the sale proceeds before applying the proceeds to the balance payable to the lessor.\textsuperscript{130} The lease also provided that the lessor could retain the equipment at the end of the lease term.\textsuperscript{131} In \textit{Leasing Service Corp.}, the Second Circuit reasoned that, since the residual value of equipment at the end of a contract depended on the physical condition of the equipment and the current market demand, the value could not be precisely estimated, and therefore, fifteen percent of the accelerated lease payments was reasonable.\textsuperscript{132} Thus,

\begin{quote}
\textsuperscript{127} \textit{Id.} The court held:
\begin{quote}
where the actual damages are certain and difficult to ascertain or prove, or are of a peculiarly speculative character, and the contract furnishes no data for their ascertainment, a stipulated amount which on the face of the contract does not appear to be unreasonable or disproportionate to the probable loss will be held to be one for liquidated damages rather than a penalty.
\end{quote}
\textit{Id.} (citation omitted). This test for the validity of liquidated damage clauses is based on the common law and section 339 of the first Restatement. In both common law and Restatement jurisdictions, evidence of actual loss is not considered when evaluating the reasonableness of a liquidated damage clause. \textit{See supra} notes 32-43 and accompanying text for a discussion of these two approaches.

\textsuperscript{128} \textit{Austin Travel Corp. I}, 681 F. Supp. at 187-88, \textit{citing} \textit{Leasing Serv. Corp. v. Justice}, 673 F.2d 70 (2d Cir. 1982).

\textsuperscript{129} \textit{Id.} at 70 (2d Cir. 1982).

\textsuperscript{130} \textit{Id.} at 73. The Second Circuit applied the following standard: "[c]ontractual provisions fixing liquidated damages in the event of breach will not be voided as unconscionable or contrary to public policy if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation." \textit{Id.} (citation omitted).

\textsuperscript{131} \textit{Id.} at 72.

\textsuperscript{132} \textit{Id.} at 74. In reaching its decision, the court held that "[s]ince [the residual]
the court in *Austin Travel Corp.* stated that United’s losses under the CRS contracts were just as speculative and difficult to prove.  

As for the requirement that the stipulated amount is not unreasonable or disproportionate to the anticipated loss, the court focused on the CRS industry’s custom of including liquidated damage clauses in subscription contracts and decided that United’s clause was a standard clause.  

Equating custom with reasonableness, the court also pointed out that United only sought to recover eighty percent of the fixed and variable charges, compared to other system vendors which seek recovery of the full amount. This practice demonstrated to the court that United had a reasonable basis for recovery of the lost revenues and the terms constituted a “genuine pre-estimation” of damages.  

In concluding its discussion of liquidated damages, the court also noted that prudent business persons had made the estimate of probable damages and had agreed to the provision at the time they entered the contract. The court further commented that the uncontroverted evidence showed that the liquidated amount was reasonable in relation to the probable loss.

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value is incapable of precise estimation . . . and may in fact fluctuate radically over time, the lease agreement’s provision of fifteen percent of the total rent as a reasonable estimation of the residual value of the equipment is far from being unconscionable.” *Id.* (citation omitted).

*Austin Travel Corp.* 1, 681 F. Supp. at 188 (“Clearly the actual damages from the breach of contract were uncertain when the parties sat down to contract and were difficult both to ascertain or prove thereafter . . . .”).

*Id.* (“The Court is convinced that the United liquidated damage clause is standard and vindicated by industry practice.”).

*Id.* (“Indeed, the CRS contracts of the competitors of United were even more stringent; they called for payment of 100% of the rentals . . . . while the United contract obligated Austin for only 80% . . . .”).

*Id.*

*Id.* The court noted that the liquidated damage clauses were agreed to “by sophisticated parties fully aware of the terms and nature of the injury that would be caused by a future breach of the lease.” *Id.*

*Id.* The court stated: Defendant has failed to show the existence of any proof available to it to the contrary. The disputable analysis of presumed cost savings
B. Court of Appeals Decision

In affirming the district court's summary judgment in favor of United, the Second Circuit Court of Appeals basically adopted the lower court's opinion. After reiterating the two-part *Leasing Service Corp.* test for the enforceability of a liquidated damage clause, the circuit court found that United's damage provision was valid because it was reasonable at the time the parties executed the contract. The circuit court further equated industry custom to reasonableness and upheld the enforceability of the liquidated damage clause. The court, however, did not address the second part of the *Leasing Service Corp.* test which requires that the actual damages be difficult to estimate precisely.

IV. Analysis

Since *Austin Travel Corp.* is one of the few published opinions that has dealt with the issue of liquidated damage clauses in CRS contracts, it is difficult to ascertain its precedential value on other circuits. For instance, belatedly submitted by Austin does not discredit the reasonableness of United's anticipatory estimate in light of the anticipated or actual loss caused by the breach and the difficulties of proof.

*Id.*

139 *Austin Travel Corp. II*, 867 F.2d at 740-41.

140 *Leasing Serv. Corp. v. Justice*, 673 F.2d 70 (2d Cir. 1982).

141 *Austin Travel Corp. II*, 867 F.2d at 740 (citing *Leasing Serv. Corp.*, 673 F.2d at 73). "Liquidated damages are not penalties if they bear a 'reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation.'" *Id.*

142 *Id.* at 740-41. The circuit court repeated the district court's reasoning that since United only required 80% of the fixed and variable fees, as compared to competitors' requirement for 100% of these fees, United's liquidated damage provisions were reasonable. *Id.* at 740. The court went as far as to state: "[i]ndeed, the liquidated damages provisions edge closer toward overgenerousness to Austin than they do toward unreasonableness." *Id.* at 740-41.

144 See *In re "APOLLO" Air Passenger Computer Reservation System (CRS)*, 720 F. Supp. 1061 (S.D.N.Y. 1989); cf. *Godwin, Dim Outlook, supra* note 1, at 1, 4 (a U.S. District Court in San Diego ruled that a PARS' (Northwest Airlines and TWA's CRS) liquidated damage clause was an unenforceable penalty). But cf. *Godwin, Judge Backs UAL in Agency Res Case*, *TRAVEL WEEKLY*, Dec. 12, 1988, at 1 (a federal district court in San Francisco held Campus Travel liable to United for
some courts might hold that the provision was a penalty because the financial burden placed on the travel agency by the amount of the damages would tend to compel performance to the end of the contract. Other courts might classify United's liquidated damage clause as part liquidated damages and part penalties by enforcing the acceleration clause on the monthly service fees and voiding the clauses which provide recovery of lost booking fees and lost variable fees.

Furthermore, other circuits may not place much weight on the decision because the district court did not make an in depth legal analysis of the issue of the enforceability of the liquidated damage clause. Instead, the district court relied on equitable considerations and broad conclusory statements. The district court basically relied on the fact that Austin Travel had failed to pay anything at all under the Apollo contracts as a "fairness" advantage for United. The district court also made conclusory remarks throughout its opinion. It described Austin Travel's claims and defenses as "frivolous," "misleading," "inflated," and "bald contentions."

Proper analysis of these provisions should have in-

$229,212 in liquidated damages for the agency's breach of its Apollo contract); The Dallas Morning News, Sept. 6, 1989, at 3D, col. 1 (in a Dallas U.S. District Court, American Airlines won over $700,000 against eight former SABRE travel agencies for breach of CRS contracts). For a discussion of In re "APOLLO," see supra note 97.

145 See Belitoss, supra note 2, at 41. The article reported that the cost of switching CRS systems for "a large travel agency can run into millions . . . ." Id.

146 Austin Travel Corp. 1, 681 F. Supp. at 181, 188-89.

147 Id. at 182, 185. The court stated that "Austin frivolously contends that [United] did not give notice of breach or an opportunity to cure and . . . fail[ed] to identify the nature of the breach." Id. at 182. The court further found that Austin's allegations of United monopolization of the CRS market was "frivolous and had no basis in fact." Id. at 185; accord Godwin, Dim Outlook, supra note 1, at 4. In Godwin's article, an attorney familiar with the travel industry noted that SystemOne (the third largest CRS vendor) made a mistake in accusing United (the second largest CRS vendor) of monopolization. Godwin, Dim Outlook, supra note 1, at 4. He continued by stating, "[w]ith frivolous arguments, you hurt other claims[.]" Id.

148 Austin Travel Corp. 1, 681 F. Supp. at 179. The court concluded that Austin Travel's response to United's motion for summary judgment included "misleading[] deposition excerpts." Id.
cluded an application of the test for the validity of a liqui-
dated damage clause cited in the opinion and a
comparison of CRS contracts to various types of contracts
in which liquidated damage clauses are upheld. Instead,
the district court in *Austin Travel Corp.* analogized the diffi-
culty of calculating and proving damages to the uncer-
tainty associated with valuing used equipment. The
district court continued with its analysis of the liquidated
damages by equating reasonableness of the predetermined amount to custom in the CRS industry. Simply
because the industry has a standard practice does not nec-
essarily make that practice reasonable. It only indicates
that no one has successfully challenged the practice or
that no one has found an alternative.

The following is a recommended analysis of the liqui-
dated damage provision which another jurisdiction might
very well apply to a case similar to *Austin Travel Corp.* Each
section will address the different elements of the liqui-
dated damage clause in the CRS subscription contract be-
tween United and Austin Travel. United’s provision
provided for recovery of fixed monthly fees, variable fees,
and lost booking fees if the travel agency breached the
contract.

A. Acceleration Clause on Fixed Monthly Fees

In *Austin Travel Corp.*, the parties had agreed to an accel-
eration clause that totaled the monthly or periodic pay-
ments remaining under a contract and made the balance
due upon default or breach. Such clauses are found in

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149 Id. at 185. The court found that Austin Travel’s “inflated papers” men-
tioned no injury to competition by United’s alleged monopoly power. Id.
150 Id. “The alleged antitrust violations are mere bald contentions without any
admissible specifically identifiable evidence . . . .” Id.
151 See supra notes 127-138 and accompanying text for a discussion of the court’s
analysis.
152 Austin Travel Corp. I, 681 F. Supp. at 188; see supra notes 134-136 and accom-
panying text.
153 Austin Travel Corp. I, 681 F. Supp. at 186 n.5; see supra notes 122-126 and
accompanying text for a discussion of these clauses.
154 E.A. FARNSWORTH, supra note 7, § 8.18, at 620.
real estate or equipment leases, installment payment contracts, and any contract where payment of some debt is spread over a period of time. In analyzing acceleration clauses outside the context of liquidated damages, courts usually hold that such clauses are valid based on the public policy consideration that courts should avoid unnecessary legal costs for a plaintiff who would otherwise have to sue each month or payment period to collect on the agreement. Thus, courts that analyze the acceleration of monthly service fees as a “typical” acceleration clause would hold such clauses valid.

Under a liquidated damages analysis, a court also would probably uphold the acceleration clause in a CRS contract. The court would first evaluate the uncertainty or difficulty of proof of loss upon a breach of the CRS contract. Since the acceleration of monthly service fees provides for simple addition of the remaining payments to determine the amount due, a court may be reluctant to enforce the clause because it does not satisfy the requirement that the damages are to be uncertain and difficult to prove. The court would realize, however, that unless the parties include acceleration clauses in installment payment contracts, the system vendor must wait until each separate payment is due before asserting an action for the amount of the payment. Thus, the system vendor has a valid argument that the requirement of uncertainty and difficulty of proof is merely a factor to consider, rather than a condition necessary for enforcement, in determining the validity of the clause.

A court would also evaluate the reasonableness of the stipulated amount in relation to the probable loss. Since acceleration of the balance is equal to the amount the sys-

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155 See generally id. § 8.18, at 619-20.
156 For a discussion of acceleration clauses, see supra notes 20-21 and accompanying text.
157 E.A. Farnsworth, supra note 7, § 8.18, at 619-20.
158 See supra notes 14-21 and accompanying text for a fuller discussion of the uncertainty and difficulty of proof factor and its role in the analysis of liquidated damage clauses.
tern vendor will lose upon breach of the contract, the amount is reasonable in relation to both the anticipated and actual loss. Furthermore, when the amount due is expressed as a formula based on the number of outstanding months in the contract, the amount is reasonable whether judged at the time of contract, the time of breach, or the time of trial. Therefore, in the absence of unconscionability or other illegality, courts would probably uphold the acceleration clause of the monthly fixed service fees.

B. Recovery of Variable Fees

The parties in *Austin Travel Corp.* included in their contract a provision for recovery of variable fees which are the charges travel agencies pay to the system vendors for use of the CRS equipment to print tickets and travel itineraries. These fees are paid in addition to monthly usage or service fees. Proper analysis of this component of United's liquidated damages indicates that the court in *Austin Travel Corp.* erred because courts should not enforce the provisions which allow recovery of the variable fees.

Under a strict liquidated damages analysis, it appears that the loss of variable fees is a loss which is uncertain and difficult to prove. The damages from a breach are uncertain because the parties have no way to predict the exact amount of business and variable charges a travel agency will incur over the life of a contract. In addition, the provision sets out another formula which attempts to make a reasonable estimate of the probable variable charges. It is not altogether clear, however, that the formula results in a reasonable damage amount.

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159 See *Austin Travel Corp.* 1, 681 F. Supp. at 186 n.5. Footnote 5 of the court's opinion sets out the liquidated damage provisions of United's CRS contracts. *Id.* Most CRS contracts will probably have similar formulas because recoverable fees and charges must be calculated based on the number of months remaining on the contract.

160 See *supra* notes 92-95 and accompanying text for a discussion of these fees.
The Department of Transportation regulations provide that a system vendor cannot require a subscriber to use its CRS to sell its tickets.61 A reasonable inference would be that the system vendor cannot require the use of its system to sell any tickets. Therefore, if a subscriber decided that it did not like a particular CRS, the subscriber could stop using the system. In this situation, the subscriber would not incur any variable expenses and would continue to pay only the monthly service fees to the system vendor for the remainder of the contract term. Consequently, the system vendor would realize only the monthly fees from the contract.62

Furthermore, an overriding principle of contract remedies is to compensate the injured party for loss of the benefit of the bargain, not to penalize the breaching party.63 If a court enforces the variable fee recovery provision like in Austin Travel Corp., the system vendor recovers more than the benefit of its bargain. The very nature of the fees—variable—indicates that the system vendor expects this amount to vary from month to month. A travel agent could possibly have no business and therefore incur no variable fees. Therefore, requiring a travel agency to pay estimated variable fees for early termination of the CRS contract would amount to a penalty rather than a measure of damages for an anticipated breach.

On the other hand, a CRS vendor could argue that a travel agency would not let a CRS sit idle. Most travel agencies cannot operate efficiently and effectively without a CRS, and most agencies could not afford more than one

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61 14 C.F.R. § 255.6(c) (1989). This section provides: "No system vendor shall require use of its system, by the subscriber in any sale of its air transportation services." Id.
62 The result, however, may be different in a situation where the parties agree to a contract provision which sets a minimum monthly level of use. Although this seems contrary to the Department of Transportation regulations, section 255.6(c) is probably meant to prevent a carrier from requiring the use of its CRS as a condition before selling its tickets. See supra note 161 for the language of section 255.6(c).
63 E.A. Farnsworth, supra note 7, § 12.1, at 814; Note, supra note 11, at 862; Comment, supra note 10, at 123.
CRS. Thus, more likely than not, a CRS vendor would receive variable fees from a travel agency and would end up losing them because of the travel agency's breach of the contract.

In *Austin Travel Corp.*, however, Austin Travel contracted with two CRS vendors at its Great Neck and Oceanside locations and with three CRS vendors at its Mitchell Field location. This allowed Austin Travel to ignore the Apollo CRS with no significant impact on its business. The *Austin Travel Corp.* court, therefore, should have analyzed the issue in light of this special fact situation.

C. Recovery of Booking Fees

In *Austin Travel Corp.*, the parties' contract also provided for the recovery of booking fees. Booking fees are the fees the participating carriers pay to contracting CRS vendors for each booking made by a subscriber through the CRS. As with variable fees, booking fees satisfy one requirement for upholding the liquidated damage provisions because neither party to the CRS contract can accurately estimate the amount of booking fees a CRS vendor will receive over the life of a subscription contract.

One problem, however, with requiring a breaching subscriber to pay these lost booking fees is that the subscriber is never responsible for payment of these amounts under its contract. Instead, the participating carrier pays these fees. Another problem is that since the travel agency is not required to sell tickets through the CRS, the system vendor does not necessarily realize any book-

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164 The two CRS vendors were American Airlines and United Airlines. *Austin Travel Corp.* 1, 681 F. Supp. at 181.
165 The three CRS vendors were American Airlines, United Airlines, and Texas Air. *Id.* at 181-82.
166 See Mifsud, supra note 89, at 146; supra notes 87-91 for a discussion of booking fees.
167 See *Austin Travel Corp.* 1, 681 F. Supp. at 187. See generally Mifsud, supra note 89, at 146.
168 See supra note 161 and accompanying text. But see supra note 162.
ing fees under the contract. Thus, enforcing a booking fee provision and allowing recovery of these fees allows the system vendor a greater damage recovery than its lost expectations and imposes a penalty upon the travel agency.

V. Conclusion

Like the court in Austin Travel Corp., courts should enforce CRS contract liquidated damage clauses to the extent that they allow for acceleration of the fixed monthly service fees and recovery of the CRS equipment removal fees. If acceleration clauses are not upheld, the result would be contrary to the public policy which favors the efficient use of courts because the system vendor would have to bring an action for each installment as it became due. Furthermore, these clauses give the vendor the benefit of its bargain.

Courts, however, should not follow the holding in Austin Travel Corp. with regard to the recovery of lost variable fees and lost booking fees. The Austin Travel Corp. court failed to adequately address the issues regarding these provisions and merely accepted them as reasonable. These provisions are unenforceable penalties in that they compel performance of the contract because of the financial burden they place on the travel agencies. In addition, these provisions allow recovery of amounts a CRS vendor many not have realized had the travel agencies simply stopped using the CRS. Furthermore, the court did not consider public policy issues surrounding the CRS market. The proposed result allows travel agencies greater flexibility in choosing a CRS. Often, agencies do not switch systems because of the financial burden of the liquidated damage clauses even when another CRS would better meet the agencies' and markets' demands.169 Thus,

169 Belitsos, supra note 2, at 36. The report notes that "[t]he major reason agencies undergo the trauma of changing CRSs before a contract ends is market geography. Agencies may want to change if a new airline becomes the major carrier in its area." Id.
prohibiting these liquidated damage clauses may also encourage development of better CRS which in turn would benefit the traveling public.