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I am privileged, once again, to be the editor of *The Complex Commercial Litigation Law Review*, now in its second edition. This volume is published at a time when the world grows ever smaller and commercial relationships are the common currency that links countries and cultures across the globe. And, with apologies to the poet Robert Burns, because the best laid plans of commercial counterparties go oft awry, businesses and their legal counsel in every jurisdiction must be familiar not only with the law governing commerce but also must be keenly aware of the legal issues that most frequently arise in commercial disputes.

I have had the good fortune to practise law for many years as a litigation partner of a global law firm, Sidley Austin LLP, in New York City, one of the world’s great commercial and financial centers, and a crossroads where many significant and complex disputes are litigated and tried, whether in our US federal or state courts or arbitrated under the auspices of pre-eminent ADR providers. I also have had the pleasure of working alongside, or opposite, some of the most accomplished disputes practitioners anywhere, whether down the street or halfway around the world, in matters both domestic and cross-border in nature. In serving our respective clients, I would like to think that we have learned from each other, and have become better and more effective for the education. I know I have.

It is with that spirit and intention that we have assembled a truly distinguished roster of leading practitioners to contribute to this second edition, which significantly expands the range of jurisdictions from those covered in the inaugural edition. The authors of this publication are from among the most widely respected law firms in their jurisdictions. Their practices run the gamut of complex commercial litigation experience, and the home jurisdictions about which they write span the world’s geography. We hope you will find their experience invaluable and enlightening when dealing with issues arising in commercial litigation in your own experience or practice.

These authors practise in disparate legal systems under dissimilar procedural regimes. One of the great strengths and, we hope, utility, of this volume is that, notwithstanding these differences, we have asked the authors to report on core principles and recent developments in the law of their country concerning the same set of fundamentally important legal issues likely to feature in complex commercial disputes, wherever they may arise. These issues include contract formation and modification; contract interpretation; breach of contract; defences to enforcement; fraud, misrepresentation, and other claims impacting contracts; dispute resolution; and remedies. The emphasis is on the law and practice of each jurisdiction, but discussion of emerging or unsettled issues is included where appropriate.

Whether you are a corporate counsel, a business executive, a private practitioner, or a government official, and whether you are facing litigation or arbitration of a commercial
dispute, negotiating a contract with an eye toward minimising litigation risk, or simply interested in learning more about this important area of law as related by seasoned and savvy practitioners, we hope you will find this volume informative, instructive, and enjoyable.

Steven M Bierman
Sidley Austin LLP
New York
November 2019
I  OVERVIEW

Australia has well-developed structures to deal with disputes between commercial parties where they have identified that the advantages of a particular commercial relationship no longer outweigh strict reliance on and enforcement of legal rights.

Litigation is the main method for managing and resolving complex commercial disputes in Australia due to the streamlined procedures in most superior courts and the rigorous enforcement of ‘just quick and efficient’ principles in procedure. Many state superior courts have special divisions designed to manage commercial disputes with streamlined interlocutory procedures. Increasingly, courts also utilise representative (class) actions with docket judges to manage multi-claimant cases. Class actions are on the increase in Australia.

In some commercial disputes, the parties will agree (or be directed by the court) to refer some aspects of the dispute for expert determination. Arbitration is also widely used in commercial disputes. Of course, most court procedures actively promote alternative dispute resolution (for example mediation, in which a neutral third party (the mediator) assists the parties to agree on a solution to their dispute).

II  CONTRACT FORMATION

Australian contract law consists of a combination of common law principles and statute. The common law principles of contract are largely based on inherited principles of English contract law, with a number of jurisprudential divergences and statutory modifications.

In Australia, the existence of a binding contract requires that the following elements be satisfied:

a  existence of an offer;

b  acceptance of the offer;

c  consideration;

d  intention to create legal relations; and

e  certain contractual formalities (e.g., statutory requirements that certain agreements be made in writing).
i Offer and acceptance

In order to enter into a binding contract, the parties must reach agreement. Agreement is achieved where one party has made an offer (the offeror) that has been accepted by the other party (the offeree).

An offer may be made in writing, orally, or implied through conduct, and can be directed to a specific person or persons, a class of persons or indeed to the world at large. The offer must be sufficiently clear and also communicated, that is, brought to the notice of the offeree. In addition, the offer must be distinguished from a mere ‘invitation to treat’ or statement of price. It is important that the offeror intends for the offer to become binding upon acceptance. An offer will terminate in the event of revocation, lapse of time, failure of a contingency, where a counter-offer is made, or in the event of death of either the offeror or offeree.

Acceptance by an offeree can be express or implied through conduct. However, acceptance is only effective where it is unequivocal, made by the offeree and communicated to the offeror, made with knowledge of the offer, and where the offeree holds a clear intention to accept the offer.

ii Consideration

Consideration is a requirement for all promises made by way of contract unless the parties have entered a formal contract under seal (such as by way of a deed).

Consideration must be sufficient but need not be adequate, that is, it need not form a proportionate or fair exchange. Valuable consideration may consist of some benefit, profit, interest, or right accruing to one party, or some act of forbearance, responsibility, detriment or loss given, suffered or undertaken by the other.

Although consideration must move from the person receiving the promise (the promisee), it need not necessarily move to the person making the promise (the promisor).

As a general rule, consideration can be executed or executory, but must not be past consideration. This means that a promise that has already been performed is not able to constitute consideration for a new promise. However, in the context of bills of exchange, this general rule has been supplanted by legislation and valuable consideration for a bill may be constituted by an antecedent debt or liability.

iii Intention to create legal relations

Australian law requires that the parties exhibit an intention to create legal relations as an essential element to a valid contract. In the context of commercial agreements, the parties will be presumed to have intended to create legal relations, as distinct from agreements in family, social or domestic contexts where there is a presumption against intention. Intention will be determined objectively, having regard to the content of the agreement, the language and conduct of the parties, the relationship between the parties and the context of the agreement as a whole.

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2 A mere request for further information is not considered a counter-offer: Stevenson Jaques & Co v. McLean [1880] 5 QBD 346.
3 Principles of agency are also able operate in these circumstances: Wilson v. Winton [1969] Qd R 536.
4 Bills of Exchange Act 1909 (Cth), Section 32(1); Cheques Act 1986 (Cth), Section 35(1).
iv  Certainty and completeness of terms
In order for a contract to be enforceable, the essential components to a contract such as identification of the parties, subject matter and price must generally be agreed upon and be sufficiently certain. The contract must also be substantially complete. However, the Courts give primacy to the need to uphold agreements, and as such, can be inclined to imply any reasonable term so as to preserve the validity of the contract and give effect to parties’ intentions. Courts will readily do so for commercial agreements. seeking to give commercial efficacy to their terms.

v  Conditional contracts
Where an agreement contains a condition precedent, the meaning and effect of the provision will be a question of construction having regard to the intention of the parties. Conditions precedent, particularly time stipulations in commercial contracts, are presumed to have been given essentiality by the parties.

Agreements made ‘subject to contract’ have received considerable judicial consideration in Australia. The existence of a binding contract which is afoot, and whether, by corollary, the parties are immediately bound to some or all of its terms, is subject to the courts’ characterisation of the factual circumstances. Courts have devised four categories for agreements that may be deferred.

vi  Contracts required to be in writing
As a general rule, contracts in Australia may be made oral, written, or a blend of both oral and written terms. Contracts may also be implied through conduct. However, in Australia certain promises must be made or evidenced by writing (for example, a contract for the sale of land, or any interest in or concerning it, must be in writing).

vii  Forms of pre-contractual liability
Where the legal requirements for formation of a contract are not satisfied, there are still a number of bases of pre-contractual liability that may be enforced. Pre-contractual liability can be based in contract (e.g., under an implied preliminary contract), tort (e.g., negligence or fraud), equity (e.g., promissory estoppel), restitution or under statute (e.g., misleading or deceptive conduct).

III  CONTRACT INTERPRETATION
i  Interpretation of commercial contracts
In Australia, a court will construe the terms of a contract objectively by determining what a reasonable business person would have understood the words to mean, having regard to the language used by the parties and their context, including the surrounding circumstances.

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7 For example, timely notice in construction contracts are strictly enforced in Australia when drafted in mandatory terms (absent extraordinary circumstances): CMA Assets Pty Ltd (formerly known as CMA Contracting Pty Ltd) v. John Holland Pty Ltd [2015] WASC 217, [375].
known to them and the commercial purpose or objects to be secured by the contract. The Courts undertake the task of contractual interpretation pragmatically, on the basis that the parties intended to produce a commercial result, and so will construe a contract’s terms so as to avoid a commercially nonsensical or inconvenient interpretation.

The commercial purpose of a contract may be appreciated by an understanding of the origin and background of the transaction and the context and market in which the parties are operating. The context of a contract is comprised of the entire text of the contract as well as any contract, document, or statutory provision referred to in the contract. These factors are not considered to be ‘extrinsic’ to the contract, and may therefore be taken into account without offending common law or statutory rules of evidence discussed below.

ii Admissibility of extrinsic evidence in contractual interpretation

Where a contract has been reduced to writing ‘extrinsic’ evidence, such as evidence of the parties’ prior negotiations, it is generally inadmissible for the purpose of contradicting the plain meaning of a provision if the provision is unambiguous and susceptible of only one meaning. In such circumstances, Australian courts will determine the meaning of what the parties have recorded in the written agreement, not what the parties contend they intended to say. Apart from affording contracting parties consistency in interpretation, and therefore a greater measure of commercial certainty, there is also a pragmatic underpinning of this rule of evidence described neatly as follows:

Difficulties and expense may arise not only from disputed oral communications, but also from the parties inviting the court to parse and construe the (often significant) volume of pre-contractual emails and the like which themselves may be redolent with equivocation (deliberate or otherwise) and ambiguity.

Despite this general prohibition, there are exceptions to the rule prohibiting extrinsic evidence of surrounding circumstances to be used for the task of contractual interpretation. Extrinsic evidence may be admissible when used for limited purposes, such as assisting the court to identify the commercial purpose or objects of the contract, particularly where that task of contractual interpretation is facilitated by an understanding of the origin and background to the contract, its context, and the market in which the parties operate.


9 Electricity Generation v. Woodside, [35]; Mount Bruce Mining v. Wright, [51]; Simic v. NSWLHC, [78].

10 Electricity Generation v. Woodside, [35].


12 Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales (1982) 149 CLR 337 (‘Codelfa v. SRANSW’), 352; Mount Bruce Mining v. Wright, [48].

13 Byrnes v. Kendle (2011) 243 CLR 253, [17], [53], [98] - [99]; Simic v. NSWLHC, [18].

14 Technomin Australia Pty Ltd v. Xstrata Nickel Australasia Operations Pty Ltd (2014) WASCA 164, [175].


16 Electricity Generation v. Woodside, [35]; Mount Bruce Mining v. Wright, [49], [108]; Simic v. NSWLHC, [78].
Extrinsic evidence may also be admissible to assist in the interpretation of a contract where the language is ambiguous, or in determining the proper construction of a contractual term where there exists a ‘constructional choice’ (that is, a choice between two interpretations which are reasonably open on a review of the plain wording of the contract).

IV DISPUTE RESOLUTION

i Jurisdiction

Australia’s court system is comprised of both federal and state jurisdictions. Each state and territory has established its own Supreme Court, which is a superior court of record reposed with general and unlimited jurisdiction within their own state or territory. Each state has also created various intermediate and lower courts with jurisdiction over specified subject matter or general jurisdiction in civil claims up to a jurisdictional limit.

In terms of federal jurisdiction, federal courts and the supreme courts of the states and territories have been vested with a broad range of federal jurisdiction to determine matters arising under federal legislation. The High Court of Australia is the final appellate court in Australia for both federal and state matters. The High Court is also vested with original federal jurisdiction in relation to certain matters, such as those arising under treaty, matters in which the Commonwealth of Australia is a party, or matters as between states, and generally hears matters which involve questions relating to the Australian constitution or its interpretation.

Aside from certain tribunals (such as the Administrative Appeals Tribunal and Industrial Relations Tribunals), no Australian jurisdiction has established specialist courts per se to hear only complex commercial disputes. However, most superior Australian courts have established dedicated ‘lists’ to manage complex or specialised cases. One example is the Technology and Construction List in the Supreme Court of New South Wales, which is responsible for managing large and complex construction disputes involving claims over A$750,000 in that jurisdiction.

Ordinarily, Australian courts will give effect to an express choice of law and jurisdiction used by parties to a contract even where the contract has no factual connection with the chosen legal system. A clause which submits the parties to a particular jurisdiction may be either:

a exclusive, which creates a contractual obligation on a party to sue or be sued in the stipulated jurisdiction with the bringing of proceedings in a court other than the chosen tribunal constituting a breach of contract;

b non-exclusive, which specifies a place for litigation in the contract but allows the parties to proceed elsewhere, if they wish; or

17 Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales (1982) 149 CLR 337
18 Mount Bruce Mining v. Wright, [49], [113], [118].
asymmetrical, which obliges one party to submit to a particular exclusive jurisdiction but allows a different party to have the option of bringing proceedings in a different court.\textsuperscript{22}

Where a party is found to have commenced proceedings in contravention of a choice of jurisdiction clause, the remedies available can include anti-suit injunctive relief or a stay of proceedings. In the absence of an express choice by the parties, Australian courts generally view the proper law of the contract as being ‘the law with which the contract has the closest and most real connection’.\textsuperscript{23}

\textbf{ii Alternative dispute resolution}

Alternative dispute resolution or ‘ADR’ is frequently used by commercial parties in Australia. The main types of alternative dispute resolution methods employed are arbitration, mediation, conciliation, and expert determination. Parties may also agree upon mandatory dispute resolution processes, which can comprise of any number and combination of these forms of dispute resolution.

\textit{Arbitration}

Arbitration is a consensual process where parties agree to refer all, or particular, disputes for determination by one or more independent arbitrators. Such a referral must arise by way of an arbitration agreement with respect to a recognised legal relationship between the parties, such as a contractual relationship. The tribunal is then called to make a determination of the dispute in the form of an arbitral award, which is usually legally binding on the parties and enforceable.

Australia is considered to be a pro-arbitration jurisdiction, in the sense that it has established mechanisms which support the conduct of arbitration proceedings and the enforcement of arbitral awards (Australia has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). As with other like jurisdictions, arbitration in Australia is typically viewed as a flexible process in which the parties are free to agree upon the rules of evidence and procedure that will apply to the resolution of their dispute. At the federal level, the International Arbitration Act 1974 (Cth) (IAA) provides the legal framework for international commercial arbitrations with a connection to Australia. Domestic commercial arbitrations in Australia are governed by separate legislation within each State based upon a uniform framework for domestic arbitrations (the Commercial Arbitration Acts, referred to below collectively as the CAAs).\textsuperscript{24}

The High Court\textsuperscript{25} recently confirmed Australia’s pro-arbitration approach to the construction of arbitration agreements, which is in line with the approach adopted in

\textsuperscript{22} See Reinsurance Australia Corporation Limited v. HIH [2003] FCA 56, [343]-[346]


\textsuperscript{24} See Commercial Arbitration Act 2010 (NSW); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT); Commercial Arbitration Act 2013 (Qld); Commercial Arbitration Act 2011 (SA); Commercial Arbitration Act 2011 (Tas); Commercial Arbitration Act 2011 (Vic); Commercial Arbitration Act 2012 (WA); Commercial Arbitration Act 2017 (ACT).

\textsuperscript{25} [2019] HCA 13.
most sophisticated legal jurisdictions. The Court confirmed, in effect, that the scope of an arbitration agreement will be construed liberally (as opposed to narrowly) and by reference to the surrounding circumstances of the agreement.26 This has the effect that agreements to arbitrate will be given a broad meaning, unless clear words are included to narrow the scope of disputes captured by the agreement. Parties may therefore expect Australian courts to generally look unfavorably upon litigation commenced in the face of a valid and enforceable arbitration agreement (although the assessment is one of case-by-case). It should be noted, however, that the High Court’s decision did not go as far as to endorse the ‘presumptive liberal approach’ to the interpretation of arbitration agreements that is applicable in other jurisdictions, such as Singapore and the United Kingdom.27

The IAA and the CAAs each adopt a version of the United Nations Commission on International Trade Law (UNCITRAL) ‘Model Law’, meaning that Australia’s arbitration framework is generally consistent with the framework applicable in other Model Law States. The statutes provide Australian courts with a wide range of powers to oversee and support the conduct of arbitration proceedings, such as:

- staying court proceedings when there is a valid arbitration agreement governing the parties’ dispute;
- providing parties with interim measures of protection;
- assisting with the appointment of a tribunal;
- determining the jurisdiction of a tribunal;
- recognition and enforcement of awards and interim measures issued by an arbitral tribunal subject to a number of grounds for resistance; and
- assisting in taking evidence.

There are, however, certain areas where Australian courts have restricted the latitude for parties to gather evidence in Australia to support arbitral proceedings seated in foreign jurisdictions. It remains to be seen whether this approach will also be adopted by the state courts in Australia, where there are examples of equivalent applications for subpoenas (albeit earlier in time) having been granted.

In contrast, where arbitral proceedings are ‘seated’ in Australia, an Australian court may issue subpoenas under the IAA where the application is made with the permission of the arbitral tribunal and the issue of the subpoena is reasonable in the circumstances.28

Mediation

Mediation is a structured negotiation process in which an independent mediator assists the parties to identify and assess options and to negotiate a resolution of their dispute. Unlike litigation or arbitration, a decision determining the dispute in a final and binding manner cannot be forced on a party. Any settlement must be agreed upon and accepted by the parties, and any negotiations held at mediation are generally conducted on a confidential and without prejudice basis.

Most courts in Australia have introduced mandatory rules or procedures for case management which require parties in complex commercial cases to submit their dispute to

26 Rinehart v. Hancock Prospecting Pty Ltd [2019] HCA 13, [16]-[17].
28 UDP Holdings Pty Ltd v. Esposito Holdings Pty Ltd [2018] VSC 316, [8].
mediation at an early stage in any legal proceedings, either through court-driven process or private mediation. These rules are designed to encourage the early resolution of disputes before parties become entrenched in litigation.

Australia is also a signatory to the recent United Nations Convention on International Settlement Agreements Resulting from Mediation, convened in August 2019. Although Australia has not, at the timing of writing, taken steps to implement the convention, once ratified it is expected to have the effect of simplifying the direct enforcement of cross-border settlement agreements resulting from mediation between parties whose principal places of business are located in Australia and other signatory states.

**Conciliation**

Conciliation is employed in Australia, although less commonly than mediation. It is a process in which parties seek to resolve their dispute with the assistance of an independent conciliator. The primary difference between conciliation and mediation is that a conciliator is usually expected to take a more active role throughout the process, providing the parties with their views on particular issues in an effort to resolve the dispute. The conciliator may offer views to the parties with respect to the content of the dispute or the outcome of its resolution. The conciliator may also make suggestions for terms of settlement, give expert views on likely settlement terms, and may actively encourage the participants to reach an agreement.

**Expert determination**

Australian courts are generally supportive of parties adopting contractual dispute resolution mechanisms which provide for the independent determination of all, or part, of a dispute by way of an independent expert (who are often either legally or technically qualified, or both). Such provisions may provide for expert determination to be:

- binding on the parties;
- non-binding, meaning that the determination will generally serve only as a tool to assist parties in facilitating a negotiated outcome;
- binding or non-binding up to certain monetary limits; or
- binding or non-binding in relation to specific technical questions or issues (for example, a construction contract may provide for the referral of technical questions for binding determination, but leaving open questions of contractual entitlement and quantum); or both.

The scope and role of any expert determination process in Australia is governed by the parties’ contractual agreement. Experts are also generally considered to owe a duty to act consistently with the parties’ agreement, including with respect to the provision of reasons for the determination.29

Parties entering into complex or long term contractual relationships may adopt mechanisms which enable disputes to be resolved, or referred to, a standing board of experts. These boards are generally known as a Dispute Avoidance Board (DAB) (other common names are Dispute Resolution Board, Dispute Review Board, or Dispute Adjudication Board) and will usually remain established throughout the life of a contract. The scope of a DAB’s powers to resolve a dispute are also governed by the parties’ contractual agreement. In

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a typical example, usually either party will be provided with a right to refer a dispute to the DAB, who is empowered to hold a hearing, question witnesses, and provide a determination. Like the simpler forms of expert determination, the contract may provide for the DAB’s determination to be binding, binding unless disputed, or have the status of a recommendation to the parties with no contractual effect.

Dispute resolution clauses

In Australia, parties may agree upon contractual provisions which require that they participate in specific procedures in the event of a dispute, such as negotiations, senior representative meetings, or other forms of alternative dispute resolution, before commencing formal dispute resolution proceedings. This extends to multi-tiered dispute resolution clauses, which may, for example, require parties to:

- **a** first, have their senior, or authorised, representatives negotiate in good faith with a view to resolving the dispute or difference;
- **b** second, if the negotiation is unsuccessful, refer the matter to a mediator for mediation; and
- **c** third, if the mediation is unsuccessful, refer the matter to the courts or to arbitration.

Both multi-tiered and single-tiered dispute resolution clauses will be strictly enforced where they provide for a mechanism which is sufficiently certain and identifiable, and is cast in mandatory language.30

V BREACH OF CONTRACT CLAIMS

In Australia, a cause of action for breach of contract arises where one party fails to perform its obligations under a contract. This may occur by way of a failure to perform or an anticipatory breach (in essence, a failure to perform or a contractual obligation that is foreshadowed by a party’s actions or inaction). The burden of proof lies with the party alleging the breach of contract,31 whether this is by way of failure to perform or anticipatory breach.32

i Failure to perform

A failure to perform arises when the promising party fails to perform its obligations under the contract. This may occur by way of non-performance,33 defective performance,34 late performance (where time is of the essence),35 or breach of any contractual warranties.

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33 See, e.g., Chanter v. Hopkins (1838) 4 M & W 399, 404.
34 See, e.g., Grant v. Australian Knitting Mills Ltd [1936] AC 85; (1935) 54 CLR 49.
35 See Conveyancing Act 1919 (NSW) Section 13; Civil Law (Property) Act 2005 (ACT), Section 501; Law of Property Act 2000 (NT), Section 65; Property Law Act (Qld), Section 62; Law of Property Act 1936 (SA), Section 16; Supreme Court Civil Procedure Act 1932 (Tas), Section 11(7); Property Law Act 1958 (Vic), Section 41; Property Law Act 1969 (WA), Section 21.
Where a breach of contract occurs, the non-breaching party will generally accrue a right to claim damages, but will not always be entitled to an automatic right of termination.\(^\text{36}\) The question of whether a breach gives rise to a right to terminate the contract will depend upon the agreement between the parties and any relevant legislation. But generally, a right to terminate does not arise unless the breach strikes at the ‘root of the contract’ (such as a breach of a condition as opposed to a mere warranty) or amounts to a sufficiently serious breach of a non-essential term which indicates a refusal by the party to be bound by the contract.\(^\text{37}\) Importantly, where a breach has occurred, the non-breaching party may elect to affirm the contract and continue with its performance, but in doing so will relinquish their right to terminate the contract in reliance upon the breach.\(^\text{38}\)

\textbf{ii Anticipatory breach or repudiation}

An anticipatory breach occurs where the promising party repudiates their obligations under the contract, for example by indicating that they are unable or unwilling to perform the terms of the contract,\(^\text{39}\) and the other party consequently terminates the contract prior to performance.

The time of occurrence of the anticipatory breach is the time that the non-breaching party terminates the contract.\(^\text{40}\) Unlike a failure to perform, if a party repudiates their obligations of a contract, the non-breaching party has an automatic right to termination.\(^\text{41}\) If the non-breaching party does not terminate the contract there will be no anticipatory breach and breach will instead occur at the time of failure to perform.\(^\text{42}\)

The test for repudiation in Australia involves a high threshold. The courts have made clear that it is ‘is not to be lightly found’\(^\text{43}\) and will determine whether repudiation has occurred objectively by inquiring into ‘whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.’\(^\text{44}\)

\section*{VI DEFENCES TO ENFORCEMENT}

There are myriad of arguments that parties to a contract may raise in defending a claim for breach of contract. These range from straightforward arguments (such as pleading a statute of limitation which precludes the plaintiff from bringing a claim), to the complex and fact-sensitive (such as pleading that a contract has already been repudiated by the party bringing a claim). This section of the chapter describes a number of the most common defences to enforcement raised in Australia.


\(^{37}\) Associated Newspapers Ltd v. Bancks (1951) 83 CLR 322, 339.


\(^{40}\) Ogle v. Comboyuro Investments Pty Ltd (1976) 136 CLR 444, 450.

\(^{41}\) See, e.g., Ogle v. Comboyuro Investments Pty Ltd (1976) 136 CLR 444, 450.


Statutes of limitation

In Australia, there are strict time limits within which a party must commence proceedings to bring a claim for breach of contract, and most other causes of action. A party is precluded from commencing proceedings if it files after the time limit expressed by statute. In Australian contract law, the general rule is that a cause of action arises immediately upon the breach of contract occurring, even if the breach is unknown to the prospective plaintiff until later. Pleading that a claim is time-barred by a statute of limitations is perhaps the simplest means by which a party can, granted the conditions are met, resist a breach of contract claim.

Each Australian state and territory has its own regime, which differ in certain respects and a party must be careful to ensure their action is not barred. For breach of contract in NSW, Victoria, Western Australia, South Australia and Queensland, a party must commence proceedings within six years of the breach occurring. For breach of a deed, they must commence proceedings within 12 years of the breach occurring.

Force majeure and frustration

Australian contract law is very familiar with the doctrines of force majeure and frustration. Commonly, issues arise around whether a force majeure event has arisen.

Force majeure is generally dealt with in Australian contracts by way of a specific contractual term addressing the consequences of an extreme or unexpected event that renders the performance of a contract different from what was agreed by the parties, or altogether impossible. Depending upon the particular terms of the contract, a force majeure event will commonly entitle the affected parties to additional cost or an extension of time for performance, provide a right which excuses non-performance of a contractual obligation, or even serve to discharge the contract as a whole.

The doctrine of frustration is governed by the common law in Australia. It will be applicable when, without default of either counterparty, a contractual obligation becomes incapable of being performed because the circumstances called for in the performance of the contract have become radically different from that which was contemplated by the parties when entering into the agreement. Frustration operates in the absence of an express reference to the concept in the contract. This means that parties to an agreement in Australia which does not make provision for force majeure may still avail themselves of relief via the (similar) doctrine in frustration.

Duress, undue influence and unconscionable conduct

Where a contract was entered into by a party under duress or induced by undue influence or unconscionable conduct, Australian law provides that the contract may be voidable by the counterparty subject to the impugned conduct. In the event that the innocent party is

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46 See, Limitation Act 1969 (NSW) Section 14(1)(a); Limitation of Actions Act 1974 (Qld) Section 10(1)(a); Limitation of Actions Act 1958 (Vic) Section 5(1)(a); Limitation Act 1935 (WA) Section 38(1)(c)(v).
47 See, eg, Limitation Act 1969 (NSW) Section 16.
48 See the classic formulation of the doctrine of frustration in Davis Contractors Ltd v. Fareham Urban District Council [1956] AC 696 at 729 (per Lord Radcliffe), which was embraced by members of the High Court of Australia in Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales (1982) 149 CLR 337 (see Mason J (as his Honour then was) at 356, Brennan J (as his Honour then was) at 408, and Aickin J at 376).
later subject to a breach of contract claim in respect of the contract, that party is entitled to seek to have the contract ‘rescinded’ on equitable principles, and possibly also counterclaim for damages. ‘Rescission’, an equitable remedy that is also known to other common law jurisdictions, means the contract is treated as if it never existed.

iv Mistake

Where both parties to a contract have entered into it on the basis of a shared misapprehension of the facts or of their rights under it (a ‘common mistake’), Australian law holds that contract void or voidable. Common mistake between all parties to a contract rarely occurs in practice, and thus, more typically is the situation where a mistake infects only one party’s entry into a contract. In the circumstances of a ‘unilateral’ mistake, Australian Courts will treat the contract as effective and enforceable unless that party’s entry into the contract was induced by misrepresentation or affected by unconscionable conduct by the counterparty. These concepts are discussed in Section VII below.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Fraud, misrepresentation, and misleading or deceptive conduct

In Australia, the ACL has largely simplified the elements that have to be proved in actions for misrepresentation. While other similar legislation in other common law systems is directed towards ‘consumer’ protection, the ACL operates broadly and is usually invoked by one party against another in a large commercial dispute. Section 18 of the ACL provides a general prohibition on engaging in conduct, in trade or commerce, that is misleading or deceptive or is likely to mislead or deceive. In general, the elements to be provide include the existence of a representation that is misleading or deceptive (or likely to mislead or deceive), reliance on the representation and damage.

In addition to the ACL, parties to a contract may pursue a common law claim for negligent misrepresentation. This alternative cause of action requires a greater number of elements to be satisfied to prove negligence. In general, the common law action will only be argued in circumstances where Section 18 of the ACL does not apply (i.e., in a non-commercial context).

The tort of deceit is also applicable in Australia and provides a common law action for fraud (often referred to as fraudulent misrepresentation). Fraudulent misrepresentation requires proof of two additional elements: namely, knowledge that a false representation has been made either without belief in its truth or reckless carelessness as to whether it is true; and an intention that the representation should be acted upon. Rescission for fraud may also be available in equity. Establishing fraud in equity does not require an actual intention to cheat to be proved.

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50 Commercial Banking Co of Sydney Ltd v. Brown & Co (1972) 126 CLR 337.

ii Unconscionable conduct

Section 21 of the ACL imposes a general duty to trade fairly by establishing a broad contractual norm prohibiting unconscionable conduct in commercial dealings.

In the recent decision of ACCC v. Get Qualified Australia Pty Ltd, Beach J provided a helpful summary of the approach which the Courts will generally adopt in applying Section 21.52 The Court held that the term ‘unconscionable’ in the context of the ACL refers to conduct that is not done in good conscience, or is against good conscience, by reference to the norms of society. The determination of whether conduct is unconscionable must also result from an assessment of the conduct within its context as a whole, and generally speaking, a high degree of ‘moral obloquy’ must be established.53 Section 22 of the ACL provides a non-exhaustive list for the Court to have regard to in order to assist in its assessing whether particular conduct is, at law, unconscionable.

iv Good faith

While this area of the law is evolving, there is presently no general implied contractual obligation of good faith which applies to the negotiation or performance of contracts in Australia. A number of intermediary appellate courts in Australia have sought to define the concept of good faith as being ‘an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied content’54, but the question of its broader application is yet to be determined by the High Court.55 Australian law will therefore only recognise such an obligation where express terms are included to that effect, or where the factual matrix of a particular contract is such that a term of good faith should be implied. However, it should be noted that concepts of unconscionable conduct (discussed above) do come close to the application of an overarching principle of good faith, while not being based on the same principles per se.

Where a contract is found to include an obligation of good faith, the term will generally be interpreted as requiring that that the relevant parties:

a cooperate in achieving the objects of the contract (loyalty to the promise itself);

b comply with recognised standards of honesty; and

c comply with standards of conduct that area reasonable having regard to the respective interests of the parties to the contract.56

iii Promissory estoppel

The doctrine of promissory estoppel is applicable in Australia.57 This equitable remedy may arise in circumstances involving any non-contractual promise with respect to a future contractual relationship, or some future relationship or course of conduct between the parties. If an estoppel is made out, a promise of this nature will become binding in equity, or serve to restrain the promisor from enforcing its strict legal rights where the enforcement of those rights would be contrary to the promise in question.

52 ACCC v. Get Qualified Australia Pty Ltd (in liq) (No 2) [2017] FCA 709, at [59]–[66].
56 Sec, e.g.: Burger King Cor v. Hungry Jacks Pty Ltd [2001] NSWCA 187, [171].
Promissory estoppel typically (but not always) arises in the context of a nascent contract between two or more parties, which has not yet been formalised. The essential elements are:

a promise or representation by one party;
reliance on that promise or representation by the other party to its detriment; and
in all of the circumstances, it would be inequitable or unconscionable for the first party to be permitted to resile from its promise. 58

There is some uncertainty in terms of whether promissory estoppel can itself be enforced independently as a source of rights, or cause of action. Until recently, the prevailing view was that promises made with respect to future conduct or a future relationship would give rise to an equitable cause of action in its own right. However, the recent decisions of Saleh v. Romanous and DHJPM v. Blackthorn Resources have cast some doubt on this position, at least in New South Wales. 59

v Interference with contractual relations

The tort of interference with contractual relations is good law in Australia. It may arise either where a party induces a breach of a contract to which it is not a party, or otherwise intentionally interferes with the performance of contractual obligations, without justification, resulting in damage. 60 In LED Technologies Pty Ltd v. Road Vision Pty Ltd, 61 the Full Federal Court held that a person will be considered to have ‘knowledge’ of a breach where they are ‘recklessly indifferent’ as to whether a breach of contract would result from their conduct.

VIII REMEDIES

Monetary damages is the most common form of remedy for breach of contract in Australia. 62 However, where the subject matter of the contract is particularly unique or there is some other distinctive characteristic of the contract which money cannot make good, the court may, at its discretion, order equitable remedies in the form of specific performance or injunctive relief.

The objective of remedies awarded for breach of contract in Australia is to compensate the non-breaching party, not to punish the breaching party. 63 Orders for accounts of profits or restitutionary damages, which can be viewed as more punitive in nature, are not generally available for breach of contract. 64

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60 Ryan and Briggs (as executrices of estate of late Donoghue) v. Wikramanayake [2013] NSWSC 115.
64 Such damages are available in England, See, e.g., Attorney General v. Blake [2001] 1 AC 268 (Blake). However, Australian courts have declined to follow that decision, see, e.g., Biscaey Partners Pty Ltd v. Valence Corp Pty Ltd [2003] NSWSC 1016, [59]; Town and Country Property Management Services Pty Ltd v. Kalroum [2002] NSWSC 166, [85]. The High Court is the only body likely to be able to adopt a course similar to the one taken in Blake, but aside from Deane J’s dissent in Hospital Products Ltd v. United States Surgical Corp 156 CLR 41, 124-125 (which suggested that a constructive trust may be available over unjust gains associated with a breach of contract), little support has been expressed for the idea.
i Available remedies

**Damages**

Australian law applies orthodox principles of common law with respect to the assessment of damages for breach of contract seek. The fundamental principle is that the non-breaching party should be placed in the same position as if the contract had been performed, to the extent possible, through an order for monetary compensation.\(^\text{65}\) If a plaintiff is able to establish that there has been a breach of contract but fails to establish loss or damage, the entitlement will be to nominal damages only.\(^\text{66}\)

**Liquidated damages**

Where the contract specifies the payment of a fixed amount, such as a debt due, the court may award an amount of damages for the payment of that sum as a ‘liquidated’ amount. For example, a contractual provision may provide for the payment of a set rate or amount of liquidated damages upon the failure by the other party to perform. Unlike general damages, which are compensatory and require an assessment of the loss caused by the breach of contract, a claim for liquidated damages does not require the non-breaching party to demonstrate that the breaching party’s conduct has resulted in any particular loss or damage.\(^\text{67}\)

However, it should be noted that the doctrine of penalties applies in Australia. As such, terms which provide for liquidated damages are susceptible to being struck down (voided) by the court if the amount payable is ‘out of all proportion’ with the legitimate commercial interests of the party seeking to enforce the payment of liquidated damages.\(^\text{68}\) It should be noted that following the decision in Paciocco, this argument has been weakened.

**Specific performance**

If damages would provide an inadequate remedy for breach of contract,\(^\text{69}\) the court may order the breaching party to perform particular duties or obligations under the contract.\(^\text{70}\)

**Injunctions**

Injunctive relief is not commonly awarded in contractual cases. However, in certain circumstances the Australian courts will exercise equitable jurisdiction to grant an injunction to enforce, or prevent the enforcement of, contractual obligation. For example, cases involving restraints of trade or attempts at recourse to security interests generally lend themselves to injunctive relief.

Injunctions may be granted on an interim (interlocutory) basis, or by way of final relief. In considering whether to grant an injunction, the courts will look at whether, in all

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66 See, e.g., Luna Park (NSW) Ltd v. Tramways Advertising Pty Ltd (1938) 61 CLR 286, 301.
69 See, e.g., McIntosh v. Dalwood (No 4) (1930) 30 SR (NSW) 415, 419.
the circumstances, it would be just for a non-breaching party to be ‘confined to his remedy in damages’\textsuperscript{71} or whether damages are seen to be an ‘inadequate’ remedy having regard to the nature of the loss, or likely loss, suffered by the plaintiff.\textsuperscript{72}

\textbf{ii  Limitations on availability of remedies}

There are a number of limitations that apply in Australia in relation to claims for damages for breach of contract. These limitations mainly arise from questions of causation and remoteness. Depending upon the nature of any defenses raised, the court may also inquire into whether a plaintiff has acted reasonably in mitigating its loss. There are also important limitations that need to be considered in relation to extra-contractual causes of action.

\textbf{Causation}

To establish an entitlement to damages a plaintiff must prove a sufficient connection between the loss or damage said to have been suffered and the defendant’s breach of contract.\textsuperscript{73} This can generally be made out by establishing that the loss or damage would not have been suffered ‘but for’ the breach of contract.\textsuperscript{74} If the loss or damage was the result of multiple causes, it is sufficient if the defendant’s breach of contract was one of those causes.\textsuperscript{75} If one of those causes contributed more significantly to the loss or damage, it is generally enough to establish that the defendant’s breach was the ‘dominant’, ‘decisive’ or ‘substantial’ cause.\textsuperscript{76}

\textbf{Remoteness}

No party will be liable for general damages for breach of contract, or in tort, where the loss claimed is found to be too remote (that is, it is found to be lacking a sufficient connection to the breach). In assessing whether the loss or damage is ‘too remote’, the Court will typically award damages under two categories of loss in accordance with the principles set out in \textit{Hadley v. Baxendale:}\textsuperscript{77}

\begin{itemize}
  \item[a] the first category is losses which arise in the usual course of things from the nature of the breach in question. Australian authorities generally accept that a loss or damage arise in the usual course of things if it is ‘not unlikely’ to have resulted from the breach;\textsuperscript{78} and
  \item[b] the second category is losses which do not fall within the first category, but may be supposed to have been in the contemplation of the parties as a probable result of the breach. Such an assessment is undertaken with reference at the time at which the parties entered into the contract.
\end{itemize}


\textsuperscript{72} \textit{Australian Broadcasting Corporation v. O’Neill} [2006] 227 CLR 57.


\textsuperscript{74} \textit{Tabet v. Gett} (2010) 240 CLR 537, 578.

\textsuperscript{75} \textit{Henville v. Walker} (2001) 206 CLR 459, 482.


\textsuperscript{77} [1854] EWHC J 70.

Mitigation

The principle of mitigation is applicable to both contractual and tortious claims in Australia. The law imposes a positive duty on any party that has suffered loss as a result of a breach of contract or negligence to mitigate its loss, failing which, any award of damages will be reduced to the extent that the party has failed to mitigate. Importantly, however, a defendant bears the onus of proving a failure to mitigate.

The courts look unfavourably on pleas which seek to raise purely hypothetical scenarios in which a defendant says that a plaintiff could have reduced its loss. Instead, the courts will look to whether a plaintiff has acted reasonably in the circumstances.79 This is generally not considered to be a high threshold, as the duty to mitigate does not require that a commercial party ‘do anything other than what would be in the ordinary course of business’.80

Proportionate liability

At both the federal and state levels, legislation has been introduced in Australia which provides for the apportionment of loss between ‘concurrent wrongdoers’ with respect to particular causes of action.81 These statutes establish a system of ‘proportionate liability’ – which replaces the common law system of joint and several liability for certain types of fault based losses. Overall, the various regimes of proportionate liability apply to claims ‘arising from a failure to take reasonable care’, such as claims involving:

- a breach of a duty of care in tort;
- a breach of an express or implied contractual obligation to take reasonable care;
- a breach of a statutory duty to take reasonable care;
- a breach of corporate law obligations which require that directors and office holders act with reasonable care and diligence in discharging their duties in the management of the company; and
- a breach of any implied warranty to render services with due skill and care;
- claims alleging loss occasioned by misleading or deceptive conduct; and
- claims concerning involvement in misleading or deceptive conduct by another party.

The system of proportionate liability broadly operates to apportion a plaintiff’s loss between the parties (i.e., to a proceeding) and also other non-parties (known as ‘concurrent wrongdoers’) that are each liable for the same loss. For example, liability may be apportioned between a solicitor who negligently drafts a mortgage and a fraudster who induces a lender to advance funds on security of the same mortgage.82 Where a party is found to be a concurrent

80 Sacher Investments Pty Ltd v. Forma Stereo Consultants Pty Ltd (1976) 1 NSWLR 5, 9.
81 Federally, certain causes of action under the Competition and Consumer Act 2010 (Cth), Australian Securities and Investments Commission Act 2001 (Cth), and Corporations Act 2001 (Cth) are subject to proportionate liability. At the State level, the regime is established in relation to State based causes of action under the Civil Liability Act 2002 (NSW), Wrongs Act 1958 (Vic), Civil Liability Act 2002 (WA), Civil Liability Act 2003 (Qld), Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), Civil Liability Act 2002 (Tas), Proportionate Liability Act 2005 (NT), and Civil Law (Wrongs) Act 2002 (ACT). Various State level consumer protection statutes also contain provisions for proportionate liability.
wrongdoer, the Court will determine and apportion the proportion of the damage or loss claimed by the plaintiff which that party should bear, having regard to the extent of the defendant’s responsibility for that damage or loss.\textsuperscript{83}

\textit{Contributory negligence}

In Australia, the doctrine of contributory negligence does not provide a defendant with a complete defence to a plaintiff’s claim in contract or in an action for negligence, unless the chain of causation can been shown to have been completely broken. Instead, if a plaintiff is found to have contributed to the loss or damage resulting from the breach of contract or negligence in question, the court may reduce damages to the extent it considers ‘just and equitable’.\textsuperscript{84} This generally involves:

\textit{a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man and of the relative importance of the acts of the parties in causing the damage . . . It is the whole conduct of each [breaching] party in relation to the circumstances of the [breach] which must be subjected to comparative examination.}\textsuperscript{85}

\section*{IX CONCLUSIONS}

Australian contract law is based on a long line of British legal precedents but is highly developed and has been modernised to meet the demands of present-day interactions. Increasingly, in response to the more global nature of commerce, the Australian system provides a pragmatic and flexible approach to the creation, interpretation and enforcement of contracts. The focus on alternate disputes also has resulted in a flexible and wide ranging set of options.

\begin{flushright}
\textsuperscript{84} See, e.g., Law Reform (Miscellaneous Provisions) Act 1965 (NSW), s 9(1). \\
\textsuperscript{85} \textit{Podrebersek v. Australian Iron and Steel} [1985] HCA 34.
\end{flushright}
I  OVERVIEW

Austria has a civil law system; the codification of the main civil law provisions (the Austrian Civil Code (ABGB)) includes core concepts of contract law and dates back more than 200 years. The Austrian Civil Code governs legal relationships between consumers as well as consumers and companies. Similarly, the Austrian Commercial Code, which regulates business relationships between companies and entrepreneurs, and amends and expands the Austrian Civil Code regarding the business-to-business relationship, was introduced in 1938 under a slightly different name, whereas its predecessor in the German Confederation dates back to 1862. Both codes are comprehensive codifications of substantive law as they regulate the rights, duties and authority of the parties to a contract. Therefore, contract law is largely ruled by statute and Supreme Court case law, interpreting the statutory provisions.

From a procedural point of view, the Austrian Civil Procedure Code is a comprehensive set of rules for state court proceedings, from the filing of the claim to appeals to the Supreme Court. The judge’s role is to issue a judgment on the facts of the case by applying the codified legal provisions and, to some extent, the Supreme Court’s case law, which interprets and substantiates the codified provisions.

II  CONTRACT FORMATION

The Austrian Civil Code contains provisions for certain ‘standard’ types of contracts, such as sales contracts, loan agreements, donations, rental or lease agreements. Austrian contract law is ruled by the fundamental principle of freedom of contract.

Section 861 of the Austrian Civil Code stipulates that whoever declares that he or she intends to transfer his or her rights to someone else (which means they will allow or give them something, do something for them or refrain from something to their benefit) makes a promise. However, if the other person validly accepts the promise, a contract is concluded by mutual consent. As long as the negotiations are pending and a promise has not yet been made or has neither been accepted in advance nor afterwards, no contract is established.2 A contract is thus concluded by one party making an offer and the other party accepting said offer.

An offer is binding as soon as it reaches the other party, and it remains binding for the time specified by the party making the offer or a reasonable period of time.3

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1 Sara Khalil is an attorney-at-law and Andreas Natterer is a partner at Schoenherr Attorneys at Law.
Consent to a contract must be declared freely, seriously, in a determined fashion and clearly as per Section 869 of the Austrian Civil Code. Offer and acceptance must be definite and must express the parties’ intent to be legally bound by the effect of their declaration (declaration of will). The offer is definite and precise if it includes the key terms, such as goods and price for sales contracts.\(^4\) Certain limited types of contracts, such as safekeeping contracts, require actual delivery of the goods.

Most contracts may be concluded without complying with any special form – an oral offer and acceptance suffices. Some contracts, such as suretyships, require written form; others, such as donations not handed over immediately, need to draw up as a notarial deed.

Especially where actual delivery of goods is required, preliminary agreements may be concluded. A preliminary agreement is an agreement to conclude a (main) contract in the future. It is only binding if the key terms of the main contract and the time of the conclusion of the main contract are determined. One party can sue the other for conclusion of the main contract within one year of the date of the intended conclusion of the main contract stipulated by the preliminary agreement, otherwise the right lapses.\(^5\)

Contracts may benefit a third party who is not party to the contract, but it must not imply duties on any third party. Contracts benefiting a third party may either grant the third party the right to demand delivery in his or her own right or only entitle one of the parties to the contract to demand performance to the third party.\(^6\)

III CONTRACT INTERPRETATION

If the parties to a contract agree on its terms, there is no need to interpret the contract. Even if the parties use a different terminology, the contract is concluded if the parties meant the same thing (principle of falsa demonstratio non nocet).

If the contract’s terms are unclear and the parties disagree, a court would first look at the common literal meaning of the wording of the contract. If the contract’s wording is not clear enough, or the parties in hindsight cannot agree what certain words mean or should have meant, the courts interpret the contract by applying the ‘reliance theory’ to determine the true intention of the parties at the time of the conclusion of the contract. The court aims to determine how the meaning of the declaration of intent could have been objectively understood by its recipient.\(^7\) A judge may also consider the relevant practice of fair dealing. If the wording of the contract does not give way for a succinct interpretation, non-mandatory statutory law may fill in any gaps. As a third step, if an issue arises that the parties did not provide for in the contract, the court tries to determine what fair and reasonable parties would have negotiated.\(^8\)

If interpretation cannot solve the vagueness of the contract, Section 915 of the Austrian Civil Code stipulates that if contracts are only obligatory for one party, it is assumed in doubt that the obliged party wanted to accept the lesser rather than the more cumbersome burden; in the case of contracts that are obligatory for both parties, an unclear expression is

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\(^4\) Perner/Spitzer/Kodek, Bürgerliches Recht Fifth Edition, 54 ff.
\(^7\) Perner/Spitzer/Kodek, Bürgerliches Recht Fifth Edition, 59 f.
\(^8\) Perner/Spitzer/Kodek, Bürgerliches Recht Fifth Edition, 61 f.
interpreted to the detriment of the party who used such expression.\(^9\) Thus, it should be kept in mind that unprecise or ambiguous language, while often employed to give the parties certain flexibility in their dealings, could affect the party drafting the unprecise or ambiguous clause negatively in the end.

If the parties clearly disagree and the court cannot determine unequivocally the contract’s meaning, the contract is void.

**IV DISPUTE RESOLUTION**

**i Court system**

Contractual claims can be filed with a district court or a regional court. There are no minimum amounts in dispute – small claims may be brought; technically, a €1 claim would be possible.

District courts are competent to hear any cases where the amount in dispute does not exceed €15,000 (including small claims cases of any value) as well as marital and family law disputes, property disturbance disputes and disputes regarding immovables or properties.

Regional courts are competent to hear cases where the amount in dispute exceeds €15,000, as well as unfair competition claims and intellectual property disputes (such as copyright infringements) as per Section 51(2) of the Jurisdictional Rules.

The parties may appeal any first instance judgments within four weeks of the day the judgment was served. The appeal must be signed by a member of any of the nine regional Austrian Bar Associations. An appeal to the Supreme Court is only admissible if certain prerequisites are met, such as the amount in dispute (in second instance) exceeding €30,000.\(^{10}\) A Supreme Court appeal is entirely inadmissible if the amount in dispute (in second instance) does not exceed €5,000 (exceptions apply, eg in family law matters).\(^{11}\)

Monetary claims up to €75,000 may be filed using a simplified procedure – the judicial payment procedure. The court first issues a conditional court order as soon as the claim is filed, and serves the conditional court order. The defendant may pay the claimed amount within 14 days of service or may object to the conditional court order within four weeks of service. If the defendant does not object, the conditional court order becomes unconditional and enforceable.

In commercial law matters, especially business-related transactions where the defendant is registered in the company register, disputes between the shareholders of a company or between the company and its shareholders, product liability disputes and disputes with regard to cheques and bills of exchange, the competent courts are commercial courts.\(^{12}\) Two specialised courts for commercial matters have been established in Vienna: the district court for commercial cases and the regional court for commercial cases.

Furthermore, labour and social law disputes are handled by the regional court for labour and social law in Vienna.

If a commercial claim or a labour claim is brought outside of Vienna, the regional court or district court (depending on the amount in dispute in commercial law matters) decides as a commercial court or as a regional labour and social law court.

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\(^9\) Eschig/Pircher-Eschig, Das österreichische ABGB – The Austrian Civil Code, 222.


ii Territorial jurisdiction
Territorial jurisdiction differentiates between the place of general jurisdiction, which is the place of domicile or habitual residence of a natural person or the seat of a company, and places of special jurisdiction – places of either exclusive jurisdiction (i.e., claims regarding a certain property) or elective jurisdiction (i.e., place of performance). Furthermore, certain places of compulsory jurisdiction exist, such as an entrepreneur’s claim against a consumer (Section 14 of the Consumer Protection Act). Furthermore, Regulation (EU) No. 1215/2012 (‘Brussels 1a’) must be taken into consideration.13

iii Jurisdiction and arbitration clauses
Parties to a contract may agree on a different forum; however, in some cases a different forum cannot be chosen in advance (e.g., an entrepreneur’s claim against a consumer). If another forum is selected, Austrian law provides that when in doubt such a chosen forum represents only an additional forum and not the sole forum, where any claims must be exclusively filed. Thus, a jurisdiction clause under Austrian law should include a phrase determining that the chosen forum is the place of exclusive jurisdiction. In contrast, in accordance with Article 25 of Brussels 1a, a chosen forum under Brussels 1a is generally seen as a place of exclusive jurisdiction.14

The parties may also choose to include an arbitration clause in a commercial contract. The arbitration clause may apply to all or certain disputes that have arisen or may arise in the future between the parties to the contract. Section 582 of the Civil Procedure Code contains a general rule that states that every claim involving an economic interest may be decided by an arbitral tribunal. Therefore, any actions in connection with public or administrative law, falling within the jurisdiction of administrative authorities, the Austrian Constitutional Court or the Administrative Court of Austria as well as any criminal proceedings, are not arbitrable. Certain types of claims such as family law claims cannot be arbitrated either (Section 582, Paragraph 2 of the Civil Procedure Code).

Alternatively, parties may also include a mediation clause in a commercial contract. The Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber introduced the Vienna Mediation Rules in January 2016. VIAC is thus competent to administer any ADR proceedings supported by a neutral third party.15 The parties may also agree on a multi-tiered dispute resolution clause, as long as the multi-tiered clause is precise and not immoral; in particular, the duration of a mediation attempt (before bringing a claim in front of a state court) should not exceed six months, otherwise it might be argued that the clause delays the party’s right to ordinary legal procedures.16

iv Court fees
To file a claim, the claimant first must settle the court fees in accordance with the Court Fees Act. The court fees are taxed on the amount in dispute; for example, if the amount in dispute is €500,000 the court fees, due at filing, amount to €9,488. Other than that, the prevailing

13 As this chapter only covers Austrian law, we will not go into the EU Regulations.
16 Knoetzl/Schacherreiter, ‘Schlichtungsvereinbarungen: Gültigkeit, Wirkung und Musterschlichtungsklausel’ in AnwBl 2016, 445 [446 f].

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party may recover its costs of legal representation in the proceedings (and any court fees or costs of expert witnesses) based on the Austrian Lawyers Tariff Act; this Act provides tariff rates depending on the amount in dispute - not hourly rates.

v Preparation of claim or evidence
In order to bring a breach of contract claim, the injured party to the contract should gather any documentation in connection with the contract including, if available:

- the document of the contractual agreement, unless the contract was concluded orally;
- any supporting correspondence prior to the conclusion of the contract; and
- any further correspondence between the parties relating to the contract and its execution.

Austrian civil procedure law is not familiar with any specified rules of evidence; however, proper documentation gives any claimant a solid advantage in the proceedings. Naturally, Austrian courts hear witnesses, but it is entirely up to the judge whom he or she believes. The judge must substantiate in the judgment why he or she believes a certain witness and not the other; however, only the court of first instance hears all the facts and witnesses. Neither the Court of Appeal nor the Supreme Court generally hear witnesses; they only receive the minutes of the hearing dictated by the first instance judge.

V BREACH OF CONTRACT CLAIMS
Austrian contract and tort law is based on a fault-based liability system, it presupposes wrongful behaviour. A claimant generally has to prove that a damage occurred and that it was caused by the other contracting party. Furthermore, the claimant carries the burden of proof of the unlawfulness of the other party’s behaviour; a breach of contract indicated unlawful behaviour. As a fourth step, the defendant’s fault has to be proven; in contractual matters slight negligence of the defendant is assumed (Section 1298 Austrian Civil Code). The defendant thus carries the burden of proof with regards to culpability.17

Contractual damages claims are privileged compared to tort claims (delict). First, Section 1313a of the Austrian Civil Code provides for extensive vicarious liability; anyone is liable for the fault of their legal representatives as well as persons he or she employs to deliver the performance of services – even if these persons are entrepreneurs.

Secondly, usually the injured party has to prove that the other party is at fault; nevertheless, contractual liability differs, because in this case the injuring party has to prove that it is not at fault (see above).

Thirdly, pecuniary loss is not compensated in tort.

Typical types of reasons for filing a breach of contract claim are given below.

i Non-performance
If the performance of the contract has become (accidentally) impossible before the contractually agreed date of delivery, the contract falls apart and the parties must return any benefits already received. If a party is at fault, the infringed party may either stick with the contract, perform its part of the contract and then demand the value of the (meanwhile)

impossible consideration, or rescind the contract and demand the balance between its own performance and due consideration. Moreover, the infringed party may claim damages for any disadvantages suffered by the contract’s non-performance.  

Any other non-performance such as mere non-delivery constitutes a breach of contract and gives rise to damage claims.

ii Delay

One party’s failure to perform within the agreed time frame, to deliver at the agreed place or to fulfil the contract in the determined manner entitles the other party to insist on performance of the contract or to set a grace period and to rescind the contract. Usually, it is not too difficult to determine whether a party failed to deliver at a certain point in time or at a certain place; however, failure to fulfil the contract in the determined manner is harder to establish. If a party to a contract does not deliver the contracted goods, no matter if the goods delivered are completely different or just faulty, the other party to the contract may reject delivery or accept delivery under reservation. If the party accepts delivery, it may only assert warranty claims (see below). If the party in delay of performance is at fault, the injured party may additionally claim for damages caused by delay.

iii Warranties

Statutory warranty against defects applies to any non-gratuitous contract under Austrian law. Statutory warranty must not be mistaken for a contractual guarantee (or warranty). Section 922 of the Austrian Civil Code stipulates that the party selling goods is liable for the asset having the agreed or generally assumed qualities, that it must conform with its description, a sample or a model and that it can be used in line with the nature of the transaction or the concluded agreement. Thus, any deviation from the contractually agreed service or goods, or what is usually expected from the contracted services or goods, may be a defect. There are defects of legal title and quality or quantity defects. In the first case, the debtor failed to transfer the promised right (partially or fully); in the second case, the debtor does not deliver enough or insufficient quality of goods. According to Section 924 of the Austrian Civil Code, it is presumed that any defects appearing within six months from the date of delivery were already present at the time of delivery. The debtor then must prove that the defect did not exist at that time, which is quite difficult in most cases. The creditor may primarily request repair or replacement of the goods, only if repair or replacement is impossible, disproportionate, inconvenient for the creditor, unreasonable for the debtor or if the debtor fails to perform entirely, the creditor may request a price reduction or the rescission of the contract.

In recent years, the Supreme Court has ruled that a party that repairs or replaces contracted goods or services before the debtor has been given a second chance to perform any warranty work, has to pay the full price, but does not have to pay the amount that the debtor saved by not repairing or replacing the contracted goods or services.

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19 Gruber in Kletečka/Schauer, ABGB-ON1.04 Section 918 margin 5 ff.
20 Eschig/Pircher-Eschig, Das österreichische ABGB – The Austrian Civil Code, 224.
In accordance with statutory law, entrepreneurs must give the other party, if said party is also an entrepreneur, notice of any defects within an appropriate time frame, otherwise the right of warranty or damage claim relating to the defect is lost.\textsuperscript{22}

Instead of asserting a warranty claim, a party may file a damages claim instead; the advantage is that the damage claim becomes time-barred within three years from the time the party becomes aware of the damage and the identity of the damaging party (see below),\textsuperscript{23} whereas the warranty period for movables is only two years.

\textbf{iv\ Other breaches of contract}

If negligent defective performance causes any consequential damage to a party to a contract or a damage is caused by a negligent violation or breach of ancillary obligations, the injured party may recover these consequential damages as contractual damages claims.\textsuperscript{24}

\textbf{v\ Pre-contractual liability}

Even if the parties do not conclude a contract, a party may be liable for damages if the party negligently breaches pre-contractual duties of protection and care or any pre-contractual disclosure obligations (\textit{culpa in contrahendo}). The parties are free to discontinue negotiations of a contract at any given time; however, they must act in good faith and may not end negotiations arbitrarily if the other party was induced to rely on the conclusion of the contract and damages would ensure from the discontinuance of the negotiations.\textsuperscript{25} The injured party may then claim the damages the party suffered owing to its reliance on the conclusion of the contract.

\textbf{VI\ DEFENCES TO ENFORCEMENT}

\textbf{i\ Initial impossibility}

Evident initial impossibility of a contract, such as legally impossible or ridiculous (e.g., sale of a unicorn), means that a contract cannot be validly concluded. The contract is void. If one party knew or had to know about the impossibility of, the other party, who was unaware of the fact, may claim reliance interest.\textsuperscript{26}

\textbf{ii\ Subsequent impossibility}

See above (non-performance).

\textbf{iii\ Frustration}

The basis of a contract is defined as typical circumstances, which the parties usually assume at the time of the conclusion of the contract and see as the basis of the contract without expressly including them in the contract. The parties’ intention to conclude a contract is based on the

\begin{itemize}
\item \textsuperscript{22} Kramer/Martini in Straube/Ratka/Rauter, UGB I 4 § 378 margin 1 ff.
\item \textsuperscript{23} Perner/Spitzer/Kodek, \textit{Bürgerliches Recht} Fifth Edition, 190 ff.
\item \textsuperscript{24} Hausmaninger, \textit{The Austrian Legal System} Fourth Edition, 256.
\item \textsuperscript{25} Hausmaninger, \textit{The Austrian Legal System} Fourth Edition, 251.
\item \textsuperscript{26} Perner/Spitzer/Kodek, \textit{Bürgerliches Recht} Fifth Edition, 76.
\end{itemize}
idea of the existence of future occurrence of certain circumstances. If these circumstances change fundamentally (e.g., a major earthquake at a future holiday destination), the contract may be challenged.

iv Laesio enormis
If one party has not even received half of the fair market value of what he or she transferred to the other party, the infringed party may demand rescission or reinstatement. The other party is entitled to pay the remaining amount up to fair market value in order to keep the contract. The objective value at the time the contract was concluded is relevant (Section 934 of the Austrian Civil Code). This principle only applies to contracts with a certain consideration (e.g., not donations). Entrepreneurs may contractually exclude this provision at their own expense (Section 351 of the Commercial Code). The infringed party must raise the objection.

v Limitation of liability
Liability may be limited by party agreement; however, parties may not exclude any possible liability. Entrepreneurs may limit their liability in non-consumer contracts except for personal injuries, damage caused with intent and blatant gross negligence. Entrepreneurs may only limit their liability vis-à-vis consumers for slight negligence but even then not for personal injuries; limitation of liability clauses in consumer cases should be carefully considered on a case-by-case basis.

vi Statute of limitations
The Austrian Civil Code knows two different limitation periods. The default limitation period is 30 years and applies if statutory law does not provide for a shorter (or, seldomly, longer) limitation period. A three-year period applies, for example, to damages claims, starting from the time the party becomes aware of the damage and the identity of the damaging party (Section 1489 of the Austrian Civil Code) as well as contractual damages claims such as damages for error, where the statute of limitations starts at the time of the conclusion of the contract. The statutory warranty period is two years for movable objects and three years for immovable objects.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS
i Illegality and immorality
Section 879, Paragraph 1 of the Austrian Civil Code acts as a catch-all rule: a contract that violates a legal prohibition or public policy is void. According to jurisprudence, anything that contradicts the sense of justice of the legal community is immoral (i.e., against public policy). This leaves vast room for interpretation and hundreds, if not thousands, different cases. A few examples:

27 Perner/Spitzer/Kodek, Bürgerliches Recht Fifth Edition, 98.
28 Graf in Kletečka/Schauer, ABGB-ON1.04 Section 879 margin 303 ff; Apathy in Schwimann/Kodek, ABGB: Praxiskommentar, Section 6 Consumer Protection Act margin 41ff.
According to jurisprudence, contracts are immoral if the weighing of interests results in a gross violation of legally protected interests, or if there is a gross imbalance between the interests violated and those promoted in a conflict of interests.  

Contractual penalties are immoral if they unduly impair the debtor’s economic freedom of movement or clearly favour the creditor without cause.

Risk transfer clauses are ineffective if they pass on an unforeseeable or nevertheless incalculable risk to the opponent without corresponding compensation.

When examining long-term contractual commitments, the dissolution interest of one party must be weighed against the existing interest of the other and the content and purpose of the contract must be taken into account in addition to the term of the contract.

Whether an immoral or illegal contract is deemed void or contestable depends on the severity of the illegality/immorality; whether a party has to claim illegality/immorality or if the court can take it up on its own depends on the severity as well.

### ii Fraud and duress

Deceit and duress (illegal and well-founded fear) invalidate any contract. A deceived party may contest the contract within 30 years. A party who agreed to an agreement under duress can contest the agreement within three years after the threat is dropped.

### iii Error

Error is a misconception of reality. A material error has occurred if an error is made regarding the nature of the matter or an essential quality or the other party to the contract. The contract may be challenged within three years of the conclusion of the contract, if one of the following applies:

- the error was caused by the other party to the contract;
- the error should have been noticed by the other party by taking into account the specific surrounding circumstances; or
- the mistaken party informs the other party in good time of the error (particularly, before the contractual partner has acted in reliance on the declaration).

Entrepeneurs may exclude reliance on error upfront if the other party to the contract is an entrepreneur as well, and the error has not been caused with intent or grossly negligent.

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31 OGH 20.06.2006, 4 Ob 113/06f; Bollenberger in Koziol/Bydlinski/Bollenberger, *Kurzkommentar zum ABGB* Fifth Edition, Section 879 ABGB margin 7.
34 Section 870, 1487 Austrian Civil Code.
VIII REMEDIES

Austrian law does not know the concept of punitive damages. Damages should compensate actual losses suffered and not serve as a punishment for wrongful behaviour.

Section 1323 of the Austrian Civil Code provides that everything must be restored to its former condition or, if that is not possible, the estimated values must be reimbursed to provide compensation for damage caused. This means primarily restitution; more often than not, restitution in kind is not possible or feasible. The Supreme Court decided that restitution in kind is already unfeasible, if the injuring party's interest to provide monetary compensation significantly outweighs the injured party's interest for restitution in kind. If restitution in kind is possible, the claimant may choose whether he or she prefers monetary compensation or restitution in kind.37

The claimant is either awarded compensation for the actual loss but not lost profits or full compensation, including any loss of profits. The extent of compensation awarded depends on the degree of culpability – if the defendant’s wrongful behaviour was slightly negligent, then the claimant only receives damages for actual loss; or if he or she was grossly negligent, then the claimant receives full compensation. If claimant and defendant are both entrepreneurs, full compensation, including loss of profits, must also be paid, if the defendant acted only with slight negligence.38

Immaterial damage – any damage that cannot be measured in money, such as loss of reputation – is generally not compensable. Only in very specific instances does the Austrian Civil Code provide for such compensation; for example, compensation for pain and suffering or the lost enjoyment of one's holidays. Jurisprudence has been quite reluctant to grant any kind of immaterial damage; however, during the past few years, secondary opinion has discussed immaterial damage claims in connection with wrongful birth and mourning losses.39 Since Art 82 GDPR explicitly provides for possible compensation for immaterial damages, data protection infringements could be a new field where immaterial damages might be awarded.

Parties can also agree on contractual penalties. A contractual penalty should induce the debtor to perform the contract correctly and simplify the creditor’s claim for damages from a breach of contract. It is due even if no damage has occurred at all, unless otherwise agreed. Although the contractual penalty is, in principle, only triggered if the debtor culpably did not perform at all or performed deficiently; a contractual penalty could be due in the event of a non-culpable breach of contract if the parties provide for it.40 If the actual damage exceeds the contractual penalty, the excessive amount may be claimed among entrepreneurs. A mandatory judicial right of moderation exists.41

37 Hinteregger in Kletečka/Schauer, ABGB-ON1.04 Section 1323 margin 9-11.
38 Perner/Spitzer/Kodek, Bürgerliches Recht Fifth Edition, 297.
39 Hinteregger in Kletečka/Schauer, ABGB-ON1.04 Section 1325 margin 1ff.
40 Danzl in Koziol/Bydlinski/Bollenberger, Kurzkommentar zum ABGB5, Section 1336 ABGB Rz 3.
41 Perner/Spitzer/Kodek, Bürgerliches Recht Fifth Edition, 155.
IX CONCLUSIONS

The contractual provisions and concept described above have been developed during the past 200 years and have only been amended to adapt to modern law requirements, such as consumer law. Other than that, the main core of contract and commercial law has remained quite unchanged in the past 200 years (the Austrian Civil Code was introduced in 1812 and amended in 1914, 1915 and 1916). A few years ago, a revision of Austrian tort law was attempted, but failed. Therefore, Austrian contract law only gradually changes whenever a new EU legislation case law requires it. Even though case law develops and clarifies certain issues, the main legal concepts are the same. A definite trend is that courts are increasingly consumer-friendly.
Chapter 3

BRAZIL

Diógenes Gonçalves, Eider Avelino Silva, Gianvito Ardito and Pedro Ivo Gil Zanetti

I OVERVIEW

Brazil is a civil law-system country with a legal system based mainly on codes and legislation. The case law, however, has increasingly gained more relevance in guiding the interpretation of provisions of the Federal Constitution and the laws, especially when issued by the Supreme Court, a constitutional court that rules on appeals discussing violations of the Federal Constitution, or the Superior Court of Justice, which deals with violations of legal provisions and solves conflicting decisions issued by different courts of appeals on a same federal legal matter. As the Superior Court of Justice is ultimately the court for non-constitutional matters, it deals with most disputes involving commercial contracts.

The general regulations of commercial contracts are set forth in the Civil Code (Federal Law No. 10,406/2002), including the provisions on their formation, effectiveness, enforceability, modification and possible consequences in the case of a breach.

Court disputes addressing commercial contracts are conducted according to the provisions of the Code of Civil Procedures (Federal Law No. 13,105/2015), applicable in both federal and state jurisdictions.

Parties in Brazil face no hurdle or limitation to bringing commercial contract disputes to the courts, because this right is guaranteed by the Federal Constitution. In addition, Brazilian law does not foresee special conditions, limitation or requirements for a foreign individual or entity to bring a lawsuit to the Brazilian courts. However, if such foreign-based plaintiff does not hold any real estate property in Brazil, it must post a bond to secure the payment of court costs and attorneys’ fees in most of the cases. The posting of this guarantee may be exempted, for instance, in the case of an enforcement proceeding.

In Brazil, arbitration is widely used as an alternative method of dispute resolution when it comes to commercial litigation, especially for complex, high-profile cases. The majority of the commercial contract disputes, however, are still brought to the courts, because the parties ordinarily spend considerably less financial resources in comparison to a same dispute brought to arbitration. Although less expensive, a court dispute may take considerably more time to come to a definitive conclusion, especially in complex cases.

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II CONTRACT FORMATION

Brazilian law sets forth that a contract is considered as formed when capable parties freely agree upon a lawful set of their rights and duties, performing legal formalities if any. Before that moment, the parties are allowed to freely negotiate their interests and expectations towards a future, intended contract.

The preliminary negotiation phase is not disciplined by the Civil Code and usually does not impose on the parties the duty of entering into a final contract. Nevertheless, the legal principle of good faith, effective in all phases of contract formation, as well as in its future performance, protects the fair expectations created by the parties at this preliminary stage. Pursuant to the principle of good faith, abuses committed by one of the parties during the pre-contractual phase may give rise to indemnification for damages in favour of the innocent party.

The preliminary negotiation stage ends when one of the parties submits an offer to the other party. This offer generally binds the offering party upon its issuance, but the counterparty will only be bound to it upon acceptance. There are few situations in which an offer may become non-binding, for instance, when the acceptance is submitted after the deadline indicated in the original offer by the offering party.

The formation of a contract does not mean that it will become automatically valid and effective, as Brazilian law differentiates between the elements of existence, validity and effectiveness. A contract exists when two or more parties manifest a consent in a way that creates obligations for at least one of them (although the creation of reciprocal obligations is more usual). A contract will only be valid, however, if it meets the legal requirements imposed by law:

a the parties must be capable of contracting by themselves or through their duly empowered legal representatives;

b the purpose and the object of the contract must be lawful, and its object must be possible to make material and be determined or determinable; and

c the contract must comply with the specific formalities required by law, if any.

Brazilian law does not require specific forms for most of the contracts, and even accepts oral contracts, but, in certain cases, such as the sale and purchase of real estate and the incorporation of legal entities, the contracts must necessarily be entered into in writing to be valid. Although the parties are allowed to contract orally, it is highly advisable that any commercial contract of significant importance be made in writing to properly regulate the relationship between the parties and to be used as a proper piece of evidence in the course of litigation, if needed.

A valid contract will generally be effective as from the execution date until a certain or indefinite date, or its effectiveness may be subject to agreement between the contracting parties, for instance:

a the performance of a contract may be deferred in time or be subject to conditions precedent or subsequent; and

b the contract may be effective for a limited period of time or up until the occurrence of a fact, after which, it will be automatically terminated.

If the parties agree that a contract will be effective during a certain predefined term, and if one of the parties decides to terminate it before such date, the counterparty may demand the specific performance of it or, subsidiarily, may claim an indemnification. However, if
parties set forth that the contract will be effective for an indefinite term, it may be terminated upon a prior notice, ordinarily without indemnification, unless parties define so or there are investments to be recovered.

III CONTRACT INTERPRETATION

Pursuant to the constitutional principles of freedom to contract and free will (e.g., good faith, customs and traditions and sovereignty), and subject to relevant connection elements with regard to the contract (i.e., parties, subject and place of performance), Brazilian law authorises the parties to choose the governing law of the contract. Foreign law may be chosen in general when foreign connection elements are found in the contract.

If Brazilian law is chosen, the contract provisions will be interpreted in light of the applicable legal provisions effective in Brazil, notably the Civil Code, and of the parties’ practices, customs and traditions when complying with their obligations under the contract.

The principle of good faith is one of the most important interpretative drivers orienting the parties’ behaviour and the interpretation and performance of contracts. It plays a leading role in contractual relationships, and several other interpretative principles ultimately derive from it. Pursuant to the principle of good faith, the contracting parties must act with fairness, rectitude and honesty towards each other in order to thwart contradictory behaviour and abuse of rights, which may characterise a wrongdoing subject to indemnification. Therefore, both the wording of the clauses and the parties’ will when entering into a contract will be of relevance for interpreting the contract provisions and the parties’ obligation set forth in such contract.

The principle of good faith has gained such a relevance for Brazilian contractual law that the parties’ practice in performing the contract may ultimately impose an increase or a reduction in the contract’s obligational content, as it may create in the party the lawful expectation that a certain act will or will not be performed by the other party. Therefore, the manner in which the parties have been performing the contract, by mutual agreement and consent, is a way to assess the parties’ actual intention towards a certain contractual provision.

The Superior Court of Justice has considered as valid:

a) a reduction in the obligation content as a result of the lapse of a long period without a certain right being exercised or a certain obligation being enforced by the parties; and

b) an increase in the obligation content owing to the creation of a right that has not been originally agreed to.

Emails, proposals, preliminary documents and deposition of witnesses are examples of pieces of evidence to be produced in this regard.

Still based on the principle of good faith, the contract should be construed as to best ensure its concrete performance and the harmed party may even claim indemnification for the loss of a chance.

In adhesion contracts – those in which the contractual clauses are standardised and mostly established by one of the contracting parties – ambiguous or contradictory clauses should be construed in the manner most favourable to the adhering party. In addition, clauses providing for the adhering party’s waiver of rights linked to the nature of the deal will be deemed as void. This rule is absolute when dealing with adhesion contracts imposed on consumers.
IV DISPUTE RESOLUTION

The dispute resolution methods available in Brazil are court litigation, arbitration, conciliation and mediation. When it comes to commercial contract claims, the vast majority of the disputes are submitted to the courts or to arbitration, with predominance to court claims – exception is made for highly complex contracts, where the parties generally elect arbitration.

Lawsuits discussing breaches of commercial contracts are generally tried in state courts, under the procedural provisions of the Code of Civil Procedure and material provisions of the Civil Code. Exceptionally, the jurisdiction will be incumbent upon the federal courts should a public entity be a party to the proceeding or request to join the proceeding as an interested third party.

There is no minimum amount in dispute or threshold requirement for a party to litigate a commercial contract claim before Brazilian courts. Cases of any amount in dispute and any level of complexity may be submitted to the Brazilian courts, both in state and federal courts.

As a rule, lawsuits at state and federal courts are tried publicly. The court may order the case to be conducted under secrecy in certain circumstances to preserve the parties’ privacy or in view of public interests. The Federal Constitution and applicable legislation do not contemplate trial by jury in commercial and civil cases.

Several states in Brazil, such as São Paulo and Rio de Janeiro, have lower courts and chambers at the court of appeals that specialise in commercial and corporate matters, which intend to render to the litigating parties a more technical decision on the matter under dispute.

In Brazil, the parties have at their disposal several procedural means to enforce a contract, depending on its nature and on the fulfilment of certain legal requirements. The contract may generally be enforced through:

a. an enforcement proceeding, in which the judge grants a prompt order for the fulfilment of the defaulted obligation, the payment of the defaulted debt or the foreclosure of collaterals (if any), should the contract be deemed as an extrajudicial enforcement instrument privately constituted by the parties (e.g., promissory note; instrument executed by the debtor and two witnesses; contracts guaranteed by a bond, mortgage, pledge or other security) and if the defaulted obligation is liquid, certain and demandable;

b. a monition action, that may be filed by the creditor when the instrument does not fulfil all the legal requirements to be considered as an extrajudicial enforcement instrument, but represents a written document issued by the debtor or guarantor acknowledging a certain debt or obligation. The monition action is similar to an enforcement proceeding if the debtor or guarantor fails to file a defence and is similar to an ordinary collection action if the guarantor does file such a defence; and

c. an ordinary collection action, to be filed by the creditor in case it does not hold an extrajudicial enforcement instrument or if the title held by the creditor does not fulfil the requirements of liquidity, certainty and demandability. In this ordinary collection proceeding, the creditor will have to first constitute a judicial executive instrument to then be allowed to initiate the enforcement proceeding against the debtor (which may take from three to 10 years to occur, depending on the complexity of the underlying transaction).
Depending on the matter, contracts should set forth the forum selection, indicating the court with jurisdiction to rule any dispute arising out of the contract, including breaches and its enforcement. The parties may also set forth that the jurisdiction will be exclusive upon a certain court, excluding any other court.

In most contractual matters, parties are free to agree on alternative dispute resolution methods such as mediation, conciliation or arbitration (Law Nos. 13,140/2015 and 9,307/1996). Arbitration is the most usual alternative dispute resolution method for commercial contracts.

Arbitration clauses are binding. If the substantive claim is filed in court, the defendant may raise the lack of court jurisdiction for case dismissal and its remittance to the arbitration court. However, urgent precautionary measures may be addressed to courts until the formation of the arbitration panel. Upon formation of the arbitration panel, the precautionary measure and the merits will be subject to arbitrators’ jurisdiction.

In addition to setting forth the dispute resolution by court or arbitration, the recently enacted Code of Civil Procedure introduced the possibility of the parties to contractually agree on procedural aspects to be complied with in case of a dispute, for instance, the possibility to regulate the general steps to be followed to select the expert and to conduct the expert examination to assess damages arising out of the contract. Even if the contract is silent on this topic, the Code of Civil Procedure allows the parties to agree on certain proceedings after the commencement of a lawsuit. The possibility of agreeing on procedural aspects of a dispute may enable the adoption of some useful, tailor-made provisions for commercial litigation that, ultimately, may result in a faster, cheaper and more effective dispute resolution proceeding at the Brazilian courts.

V  BREACH OF CONTRACT CLAIMS

In the case of a breach of contract, the non-breaching party may file a lawsuit requesting the specific performance of the defaulted obligations or, alternatively, if the specific performance is no longer possible or if the non-breaching party is no longer interested in it, it may claim for damages, including substantial damages and loss of profits.

In such a commercial contract claim, the plaintiff must prove that the counterparty has breached a certain provision set forth in the contract, that it has not given cause to the breach, that such a breach has not been cured and has caused, or is causing, damage to the plaintiff, and that this breach must be remediated by the counterparty through its specific performance or by means of an indemnification. Specifically, if the plaintiff files an enforcement proceeding to immediately demand the specific performance of the obligation or the payment of any amount set forth in the contract (e.g., a penalty), the plaintiff must also prove that the contract fulfils the legal requirements of an extrajudicial executive title, and that the obligation or amount is certain, liquid and demandable.

The breach of contract may also derive from tortious interference, which is considered as a violation of the duty of good faith and grants the harmed or threatened party the right to claim protection against it.

In addition to contractual breaches, disputes concerning commercial contracts may frequently address requests for rebalancing or reviewing provisions and obligations set forth in the contract if the plaintiff is able to prove:

a the supervening occurrence of an unforeseeable and extraordinary situation responsible for changing the original assumptions of the agreement; and
the extreme disadvantage to one of the parties, which compromises the financial obligations undertaken under the contract.

This rebalancing possibility ends up mitigating the strength of the *pacta sunt servanda* clause in exceptional circumstances.

The plaintiff has the burden to prove that:

- the commercial contract was breached by the counterparty and that it is legally entitled to demand its specific performance or claim damages arising out of the breach; or
- there were supervening, unforeseeable, disadvantageous events justifying the need to rebalance the contract.

This proof is generally made by the disclosure of the contract in court. If it is written in any language other than Portuguese, the document must be translated into Portuguese by an accredited translator in Brazil. If the document was executed abroad, it must also be notarised and the signature of the notary public must be legalised by a competent authority, in the case of appostilation, or authenticated by a Brazilian consulate, if the document emanated from a country that is not signatory to the Hague Convention of 5 October 1961, Abolishing the Requirement of Legalisation for Foreign Public Documents. If demanded by law, the plaintiff must also register the contract with the relevant office of the Registry of Deeds and Documents in Brazil.

If the plaintiff alleges that it is entitled to receive an indemnification as a result of the counterparty's contractual breach, the plaintiff will have the burden to evidence not only the losses it has suffered, but also to quantify its extension. Depending on the nature of the damage, an expert may be appointed to conduct an expert examination not only to confirm the losses and their link to the counterparty's undue conduct, but also to assess how much the breaching party must pay as indemnification.

The defendant also has the burden to prove its allegations raised in the defence, meaning the existence of facts that prevent, extinguish or modify the plaintiff's rights and allegations. For instance, the defendant may prove that it stayed the performance of contract because the plaintiff had failed to comply with its obligations in the first place (the exception of a non-performed contract).

In any circumstances, the use of evidence obtained by illicit methods is prohibited, pursuant to the Federal Constitution.

Although both plaintiffs and defendants have the burden to prove their own allegations and claims raised in the complaint and in the defence, in exceptional cases, the court may impose on the counterparty the burden to produce certain pieces of evidence important for the matter under scrutiny, dynamically allocating the burden of proof among the parties. For instance, in view of the peculiarities of the lawsuit, this inversion on the burden of proof may occur when the party originally obliged to produce the evidence in court cannot do so, or when one of the parties has more ready access to the evidence.

The dynamic distribution of the burden of proof may also be agreed by the parties, before or during the lawsuit, as the Code of Civil Procedures allows the parties to allocate the burden of proof by themselves, provided that such an allocation does not impact an inalienable right or renders the exercise of a right by one of the parties extremely difficult. This provision is especially useful for domestic and transnational commercial agreements, improving legal certainty and avoiding the risks inherent to leaving that allocation at the court's discretion.
The Brazilian system does not provide for a full disclosure of documents. Normally, the parties must rely on their own pieces of evidence, use them to substantiate the claims raised in the lawsuit and, then, submit such evidence to scrutiny by the counterparty and by the court (the adversarial principle). Once discovery is complete, including the holding of trial hearings, the court may render its decision, which is appealable at the respective court of appeals. Unlike US proceedings, Brazilian legislation does not provide for a broad discovery allowing the party to oblige its opponent to disclose a vast number of documents and information as evidence in the litigation. The Code of Civil Procedure puts at the parties’ disposal a more limited proceeding, in which the plaintiff must satisfy certain legal requirements – such as to prove that it does not have access to all relevant documents needed to prove its injury, to prove with high level of certainty that the documents exist, are in possession of the counterparty or third-party, as well as the purpose of the document and their relevance for the matter under scrutiny – to be granted the command obliging the opponent to disclose the specific documents in court.

VI DEFENCES TO ENFORCEMENT

Defendants in a commercial contract dispute may raise a broad defence against the claim – regardless of whether it is made through an enforcement proceeding, monition action or ordinary collection lawsuit – not only addressing the merits of the case (e.g., exception of a non-performed contract; defect in legal business by means of wilful misconduct, error, coercion, fraud or sham; substantial performance; or non-occurrence of unforeseeable events justifying the rebalancing of the contract), but also discussing preliminary topics, such as jurisdiction, compliance with arbitration clause, extinguishment of right by peremption, statute of limitation, *lis pendens* and *res judicata*. In the case of an enforcement proceeding, the immediate enforcement acts against the defendant will only be stayed if the defendant provides a guarantee in court in an amount sufficient to cover the amount under dispute plus court costs and attorneys’ fees, and if the party evidences immediate risk of damage to its defence and rights.

As a rule, the defendant should provide pieces of evidence on all facts and arguments raised in defence, especially facts intended to extinguish, impair or modify the plaintiff’s right.

Specifically with regard to statute of limitations, the period will depend on the nature of the obligation, for example:

- *a* a three-year period to claim for indemnification arising out a civil liability;
- *b* a five-year period to collect a debt under a private instrument (even if it is not an extrajudicial enforcement instrument); and
- *c* a 10-year period to discuss the validity of a contractual clause and the recognition of civil liability (the case law, however, is hesitant in this regard and there are cases applying a three-year limitation period).

The defendant may argue the impossibility to perform the defaulted obligation. However, this allegation does not entail defendant’s full release. In this case, the performance of the obligation may be converted into the obligation to indemnify.

The allegation of fortuitous event or *force majeure* is also possible. However, only events that were unforeseeable can serve as grounds to refute the party’s liability.
Although the law authorises the submission of any defence, the parties should act based on good faith and ethics, and the filing of a defence that is against existing evidence and legal provisions is prohibited, and the party may be fined for abuse of process.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

Breach of contract claims may include breach of the principle of good faith. In addition to that, tort and error are defects that may cause the annulment of a contract. Thus, cases of fraud, misrepresentation or any other tortious conduct may give rise to a claim for annulment of a contract or for damages.

In order to request the annulment of the contract, the non-breaching party must demonstrate that the defect is substantial to the extent that, if it were known beforehand, it would not have given its consent to the contract.

The breaching party will only be subject to the duty to indemnify if the non-breaching party actually suffered damages or loss of profit as a result of such conduct. In other words, the non-breaching party must prove that it has suffered damages arising out of the fraudulent or tortious conduct in order to be entitled to receive any indemnification.

However, if the contract imposes a fine for the party that incurs in one or more of the aforementioned conducts, that fine may be enforced without the need to demonstrate the occurrence of damage.

Finally, fraud may be qualified as a criminal offence and, therefore, may be also subject to criminal prosecution.

VIII REMEDIES

In the case of a breach of a commercial contract, the non-breaching party has at its disposal the possibility of using a variety of legal remedies, notably the possibility of:

a requesting the specific performance of the defaulted obligation;
b enforcing penalties set forth in the contract, if any;
c terminating the contract as a result of other parties’ default; and
d claiming for indemnification to remediate the damage caused by counterparties’ default.

The non-breaching party may file an enforcement proceeding to oblige the counterparty to specifically perform the defaulted obligation. As discussed in a previous topic of this analysis, in order to file this enforcement proceeding, the non-breaching party must evidence that the contract is deemed as an extrajudicial executive title and that the defaulted obligation is certain, liquid and demandable. If the document does not fulfil all legal requirements of an extrajudicial executive title, the non-breaching party may file an ordinary lawsuit with an injunctive request in order to obtain an order for the counterparty to comply with the contract.

The request of specific performance may be coupled with a request to the court to fix a periodical penalty to ensure that the counterparty will perform the defaulted obligation as set forth in the contract. The setting forth of a periodical penalty has shown high levels of effectiveness throughout the years, especially in cases where the counterparty is in good financial condition. The court may fix the penalty amount, increase or reduce it throughout the time or change its periodicity (daily, weekly, monthly) in order to entitle the injunctive order with the highest possible level of effectiveness. The figures of a periodical penalty,
however, are not unlimited – the case law has confirmed that the amount of the penalty cannot be higher than the value of the obligation under dispute, otherwise it might cause undue enrichment of the non-breaching party. Depending on the value of the underlying obligation, this limitation may be viewed as a hurdle to the full compliance of the obligation, as the non-breaching party would not be under the necessary pressure to do so.

The non-breaching party may also enforce any penalty set forth in the contract concerning the defaulted obligation. There is no impediment for the plaintiff to couple the enforcement of a contractual penalty with the periodical penalty to be fixed by the court aiming at obliging the specific performance of the obligation. They are independent and have different natures: while the former is a contractual consequence of the contractual breach, the latter is not set forth in the contract, but originates from a court order to ensure the effectiveness of the injunctive order.

The breaching of a contract may also give grounds for its termination. In this case, instead of requesting the specific performance of the obligation, the non-breaching party may request its termination together with any contractual penalty and any damages arising out of the breach.

When it comes to claims for damage, any sort of damages may be claimed by the non-breaching party, such as moral damages and compensatory damages (e.g., reasonable earnings that the fulfilment of the contract would grant to the non-breaching party and loss of profit). The non-breaching party must not only evidence that the breach has caused concrete losses to it, but also assess the amount of such losses that will be indemnified by the breaching party. An expert examination may be conducted during the litigation in order to evidence the damages and their figures – although confirming the breach, there will be no indemnification if the expert examination confirms that the breach has caused no concrete damage with financial consequences to the party.

Unlike the periodical penalty, there is no legal limitation for compensation of concrete damages arising out of the breach – the breaching party will be condemned to indemnify any concrete damage assessed in court, even if its amount is considerably higher than the underlying obligation. The amount of the indemnification for compensatory damages is assessed by the exact extension of the injury and is quantified by the court through an expert examination. Determining the amount of the indemnification for compensatory damages depends on the ability of the plaintiff to evidence the losses deriving from the alleged wrongful act. Otherwise, the indemnification would cause the undue enrichment of the plaintiff, which is forbidden by law.

Under Brazilian law, only direct damage is subject to indemnification – the plaintiff must provide a grounded direct chain of causation between the breaching conduct and the losses arising out of such conduct. Any indirect damage is not indemnifiable, as only the party directly affected would have standing to sue.

There is no law authorising punitive damages due to a contractual breach – the amount to be indemnified must correspond to the actual losses suffered by the non-breaching party. Nevertheless, doctrine has developed a threefold function for the condemnation of moral damages, which should: concomitantly compensate the victim for the wrongful act that injured its moral; punish the aggressor; and prevent the wrongful act from happening again. To some extent, although it is still considerably far from the US standards regarding punitive damages, this interpretation by the Brazilian doctrine ends up functioning as a sort of ‘punitive damages’ encompassed by the moral damage category.
Parties usually contractually define monetary adjustment and interest rates in the case of default. In court, if the contract is silent about it, from the date when the defendant is served with process the amount of indemnification is ordinarily accrued with the Special Clearance and Escrow System (SELIC) (the Brazilian prime rate) or with monetary inflation plus interest amounting to 1 per cent per month.

IX CONCLUSIONS

Brazil has a civil law system with solid legislation and relatively predictable case law concerning complex commercial relationships, with remedies and rights against breach of contracts. In the next few years, the market is expecting legislative developments towards the enactment of a new rules on commercial law, with relevant changes for commercial contracts and corporate daily activities. In addition, the current federal government in office as from 2019 has been (1) working to pass structural reforms at the Congress, especially public pension and tax reforms, (2) enacting legislation and regulation to fuel the economy and reduce the bureaucracy over the companies and individuals doing business in Brazil, such as the Provisional Measure No. 881, known as the ‘Provisional Measure on Economic Freedom’, which introduces guidelines for interpretation of civil contracts, strengthens the *pacta sunt servanda* in business-to-business transactions and narrows the possibilities for the piercing of the corporate veil by requiring evidence of malice and not merely the existence of default, among others, and (3) conducting intense efforts to privatise companies in important sectors of the economy, which is expected to attract investors to Brazil.

In parallel to these efforts, political turmoil linked to corruption investigations in the recent past have impacted several important sectors of the market. These elements may play an important role in the increase of commercial disputes in the coming years, not only involving contractual breaches (e.g., requests for specific enforcement or indemnification), but also addressing claims for rebalancing obligations because of supervening, unforeseeable, disadvantageous events.
Chapter 4

CALIFORNIA

Rollin Ransom and Kevin Rubino

I OVERVIEW

California’s gross domestic product has surpassed that of India and the United Kingdom to become the fifth largest in the world. It is home to the world’s leading technology sector in Silicon Valley and its premier entertainment capital in Hollywood. Given the volume and variety of economic activity in California, understanding its commercial laws has become increasingly important.

Each of the 50 states has its own court system and commercial laws, but most of these regimes grew out of the same legal tradition and have looked to each other for insights and guidance throughout their evolution. As a result, the substance of California contract law is generally consistent with that of New York and other major commercial centers in the U.S. One formal difference is that California has codified much of its contract law and related rules of evidence. Codification makes the rules less flexible but also more easily accessible and predictable. There are some notable substantive variations as well, which are highlighted in this chapter, but they are the exceptions to the general rule of consistency in commercial law across the United States.

II CONTRACT FORMATION

i Basic elements

A contract is nothing more than an agreement to exchange things of value. In California, an enforceable contract requires reasonably certain terms, mutual assent to those terms, and something of value for both parties.\(^2\) To be ‘reasonably certain’, a contract’s terms must be sufficiently definite that they provide a basis for later determining whether the parties have complied with their obligations and what remedy they would expect for a breach.\(^3\) An enforceable agreement must also have a lawful purpose and both parties must have the legal capacity to enter into a contractual relationship – children generally cannot enter into binding agreements, for example.\(^4\)

\(^1\) Rollin Ransom and Kevin Rubino are partners at Sidley Austin LLP. The authors would like to acknowledge the assistance of their colleagues Tyler Wolfe, Mohindra Rupram and Chelsea Davis in the preparation of this chapter.


If an offer meets these requirements, it becomes a contract the moment it is accepted, provided the offeree accepts the terms without changes or preconditions.\(^5\) Acceptance does not have to be explicit. It can be communicated by beginning performance or by taking the consideration offered.\(^6\) Silence in the face of an offer is not acceptance unless there is a relationship between the parties that would indicate to a reasonable person that silence means acceptance.\(^7\) An offer may be revoked any time prior to acceptance, provided there was no binding agreement to leave the offer open for longer.\(^8\) An offeror can assign an expiration date to its offer, at which time the offer will automatically expire if not accepted.\(^9\) If no time period is specified, an offer will lapse after a ‘reasonable time’ an amount which varies based on the circumstances.\(^10\)

Consideration is an essential element of any contract, but offering most any benefit, or agreeing to suffer most any prejudice, is generally enough.\(^11\) Although little is required, a recommitment to perform a preexisting obligation has no value and therefore cannot constitute consideration.\(^12\) Parties should be aware, however, that consideration can be so inadequate in comparison to the benefit received that it raises questions about whether the contract was obtained by fraud or duress and is therefore unenforceable. These issues are addressed elsewhere in this chapter.\(^13\)

ii Oral contracts

California does not require that parties set down their agreement in writing except under specific circumstance identified in a rule known as the statute of frauds.\(^14\) While there are others, the primary circumstances in which the statute of frauds requires that an agreement be in writing is when an obligation is not intended to be performed within a year or within the promisor’s lifetime, or when an agreement involves the sale of real property or an interest therein.\(^15\) Even when the statute of frauds requires that an agreement be in writing, emails and electronic signatures are sufficient.\(^16\)

iii Modifications

Except in those circumstances where the statute of frauds applies, parties to a contract in California do not need a new written agreement to modify an existing one. It is enough that both parties perform in a manner that is consistent with the new understanding or that it is supported by additional consideration.\(^17\) However, if a contract has a term requiring that all

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\(^10\) id.
\(^12\) Auerbach v. Great W. Bank, 74 Cal. App. 4th 1172, 1185 (1999).
\(^13\) See Sections V.D., V.E, and VI.
\(^15\) id. §§ 1624(a)(1), 1624(a)(3).
\(^17\) Cal. Civ. Code § 1698(b).
modifications be made in writing, California will generally enforce it. But a court may also find that the parties’ consistent divergence from the agreements’ terms, without objection from either side, effectively modifies the agreement, notwithstanding a contractual provision forbidding oral modifications. For example, one California court addressed a provision in a written shareholder agreement requiring that shareholders approve all billing contracts in writing. According to the court, by repeatedly approving billing contracts orally, the shareholders ‘orally amended’ the agreement to allow ‘oral approval’.

III CONTRACT INTERPRETATION

Fundamentals of contract interpretation

California law requires that unambiguous contractual terms be applied as they are written. If, however, a contractual term is ambiguous, meaning it is capable of more than one reasonable interpretation, a California court will attempt to determine the parties’ intent at the time they entered into the contract, taking into account the surrounding circumstances. The subjective state of mind of a party entering into a contract is generally irrelevant; however. What matters is what they said or did, and what those words or actions would lead a reasonable person to believe about their intentions.

As an initial matter, the judge, not the jury, will decide whether a contract’s terms are clear or need clarification. To make this determination, a California court may look to evidence outside the plain language of the contract, including prior drafts of the agreement and communications exchanged by the parties during the drafting process. This extrinsic evidence, which is called parol evidence, is not admitted formally until the court determines that the contractual term is ambiguous. But a California court will provisionally consider parol evidence in the course of deciding whether the contract’s meaning is ‘reasonably susceptible’ to the interpretation being urged. This is unlike some other jurisdictions in the U.S., which decide whether a term is ambiguous with reference to the contractual language alone.

When construing the language of an agreement, California courts are guided by several principles of construction. For example, they will assume words have their ‘ordinary and

19 id.
20 id.
29 See, e.g., Davis v. G.N. Mortg. Corp., 244 F. Supp. 2d 950, 956 (N.D. Ill. 2003) (‘Illinois courts have embraced the parol evidence rule in its more conservative approach, which has been termed the ‘four corners’ rule’).
popular’ meaning, unless they are used in a special or technical sense,\textsuperscript{30} in which case those terms will be interpreted as understood by persons in the relevant field.\textsuperscript{31} Moreover, the contractual language will be interpreted in the context of the whole agreement, including other contracts executed by the same parties as part of the same transaction.\textsuperscript{32} California law also prefers that courts interpret contracts in a manner that gives each term effect, rather than rendering it superfluous or void.\textsuperscript{33} So, for example, if a term has two reasonable interpretations, and one would render the term unenforceable, the court will generally adopt the other interpretation.\textsuperscript{34} In addition, as a general matter, if the court determines that one party is responsible for creating an ambiguity during the drafting process, it will interpret the ambiguity against that party.\textsuperscript{35} A California court may also consider how the parties acted after the agreement was executed, but before a dispute arose, to determine what was meant by an ambiguous term.\textsuperscript{36}

If the judge concludes the contract is unambiguous, after construing the relevant language in light of the extrinsic evidence, he or she will instruct the jury on what the contract means. But if ascertaining the intent of the parties at the time the contract was executed turns on the credibility of the parol evidence, the jury will weigh that evidence and determine for itself what the parties meant.\textsuperscript{37}

IV DISPUTE RESOLUTION

i Contractual provisions regarding forum selection

Forum selection clauses can be permissive or mandatory. California courts find forum selection clauses to be mandatory when they ‘expressly mandate litigation exclusively in a particular forum,’ rather than merely providing for ‘submission to a jurisdiction’.\textsuperscript{38} For example, a California court upheld a forum selection clause as mandatory because it specified ‘Hamburg as ’the’ place where litigation should be conducted, indicating a single place’.\textsuperscript{39} When a forum selection clause is mandatory, it will be enforced unless the unwilling party can show that enforcement would be unreasonable.\textsuperscript{40}

A forum selection clause is permissive if the parties merely agreed to submit to the jurisdiction of a named court – for example, when a clause states that a particular court

\textsuperscript{30} Cal. Civ. Code § 1644; \textit{Apra v. Aureguy}, 55 Cal. 2d 827, 830 (1961) (‘It is a general rule governing the construction of contracts that unless a contract is ambiguous, its meaning must be determined from the words used; and courts will not, because a more equitable result might be reached thereby, construe into the contract provisions that are not therein.’) (citations omitted).


\textsuperscript{33} Cal. Civ. Code § 3541.


\textsuperscript{39} id. at 197.

\textsuperscript{40} id. at 198.
'shall have jurisdiction over the parties'. In such instances, California courts have held that the parties ‘had not ruled out other jurisdictions’. Such a clause will not automatically be enforced, but is subject to a *forum non conveniens* analysis. Under that analysis, a court must (1) ‘determine whether the alternate forum is a ‘suitable’ place for trial’; (2) ‘consider the private interests of the litigants’; and (3) consider ‘the interests of the public in retaining the action for trial in California’.

**ii Contractual agreements to resolve disputes through alternative dispute resolution**

California courts generally refuse to enforce a waiver of the right to a jury trial before a dispute has arisen. But California law has codified at least two exceptions to this principle: arbitration and judicial reference.

** Arbitration**

Under California law, courts will generally honor provisions calling for a non-judicial means for resolving disputes arising out of or relating to an agreement. Arbitrations are generally subject to limited discovery rules, and awards provided for in contractual arbitration are governed by rules of the parties’ own selection. Interpretation of an arbitration clause in a contract — including which, if any, of the disputed issues are arbitrable — is subject to standard rules of contract interpretation and defense. Due to the public policy favoring arbitration, however, such clauses are to be read broadly so as to resolve any doubt in favor of arbitration. This presumption in favor of arbitrability is stronger when the arbitration clause uses broad language, such as a clause covering ‘any dispute regarding the contract’. An arbitrator’s award is subject to judicial review only on narrow grounds set forth by statute.

Moreover, under the California Arbitration Act, a party to an agreement to arbitrate can avoid arbitration only under limited circumstances. An unwilling party may challenge

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41 Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F. 2d 75, 76 (9th Cir. 1987); see also *Intershop Commc’ns*, 104 Cal. App. 4th at 197.
42 *Intershop Commc’ns*, 10 Cal. App. 4th at 197.
43 id. at 196.
46 In addition to the formal alternative dispute mechanisms discussed below, California courts (both state and federal) strongly promote mediation of disputes, typically requiring that litigating parties engage in some form of non-binding dispute resolution procedure before they may proceed to trial. See, e.g., Ventura Superior Court Rules, rule 3.24; C.D. Cal. L.R., rule 16-15.1.
53 id. § 1281.2.
an arbitration agreement by arguing that fraud ‘permeates it’, that the compelling party waived the right to arbitrate, or that there are grounds that would justify non-enforcement of any type of contract.

If an agreement concerns interstate commerce (as opposed to commerce entirely within the state of California), the defences to the enforceability of other contracts will not apply to an arbitration clause to the extent those defences facially discriminate against arbitration by interfering with its fundamental attributes, such as lower costs, greater speed, and the ability to choose experts to adjudicate specialised disputes. For example, in one California case, a court found unconscionable a contract of adhesion requiring consumers to waive the right to bring a class action and arbitrate all disputes. The United States Supreme Court held that this ruling categorically disfavored agreements to arbitrate, which are not typically conducted on a class-wide basis, and required that the arbitration agreement be enforced.

A party opposing the enforcement of an arbitration agreement is not entitled to a jury trial on that issue in California. A dispute on arbitrability will be submitted to a judge for decision.

Judicial reference

Like contractual arbitration, general judicial reference is a process whereby the parties contractually agree to submit their dispute to an appointed third-party neutral, usually chosen by the parties, who renders a binding decision. The main distinction between arbitration and judicial reference is that judicial reference proceedings are conducted much like nonjury trials. For example, referees are bound to follow applicable substantive law rather than more abstract notions of ‘equity’ or ‘fairness’. A judicial referee’s statement of decisions must be prepared within 20 days, and upon its filing, ‘judgment may be entered thereon in the same manner as if the action had been tried by the court’. Moreover, unlike an arbitral award, which is only reviewable in a narrow set of pre-determined circumstances, parties have the right to full appellate review of a referee’s decision, as well as the ability to file a motion for a new trial or a motion to vacate.

55 Engalla, 15 Cal. 4th at 982.
56 Cal. Civ. Proc. Code §§ 1281, 1281.2(b); see supra § V.
59 AT&T Mobility LLC, 563 U.S. 333.
V BREACH OF CONTRACT CLAIMS

The elements of a cause of action for breach of contract are: (1) the existence of an enforceable contract, (2) plaintiff’s performance (or excuse for nonperformance), (3) defendant’s failure to perform, and (4) resulting damages to the plaintiff.67 The required harm or damages may be modest; even when a breach ‘has caused no appreciable detriment’, the non-breaching party may recover nominal damages or seek an order of enforcement.68

In addition to an award of damages, parties claiming breach of contract may seek an order terminating the agreement and relieving them of their obligation to perform. But not just any breach of contract warrants termination.69 For that, the breach must be ‘material’, a designation that depends on the circumstances of the breach.70 A material breach generally refers to a situation where a party is substantially deprived of the benefit for which it bargained, but it could also include a less serious breach that indicates the likelihood of a future failure to perform.71 For instance, a minor breach ‘prior to or at the outset of performance’ may permit a termination, despite that the same breach would not be material if it had occurred after considerable performance.72

If a party communicates that it will not perform under the contract, even before performance is due, that can be enough to justify termination.73 This is called anticipatory repudiation, and it does not have to be expressly communicated. It may be implied from the circumstances when, for example, one party to a contract takes steps that make it impossible for it to perform.74 In the face of an anticipatory repudiation, the non-breaching party does not have an obligation to act.75 He or she is permitted to seek relief immediately, but may also wait until the time of performance to initiate legal action.76

In addition to the express terms of the agreement, every contract in California includes an implied covenant of good faith and fair dealing.77 While the implied covenant does not impose obligations to which the parties did not agree, it does require that the parties carry out their obligations in good faith and without attempts to thwart the other party from

70 See Brown v. Grimes, 192 Cal. App. 4th 265, 277 (2011) (‘When a party’s failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract.’) (quotations omitted).
72 Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc., 135 Cal. App. 2d 40, 50 (1955) (‘Where the failure is at the outset, a very slight failure is often sufficient to discharge the injured party.’) (quotations omitted); Karz v. Dep’t of Prof’l Vocational Standards, 11 Cal. App. 2d 554, 557 (1936).
73 See Gold Mining & Water Co. v. Swinerton, 23 Cal. 2d 19, 29 (1943).
75 id. at 703.
76 id.
receiving the benefit of its bargain.\textsuperscript{78} The application of this doctrine does not require that a party act with malicious intent. It is enough that a breaching party's conduct was ‘objectively unreasonable’ and prevented its counter-party from receiving that for which it contracted.\textsuperscript{79}

\section{DEFENCES TO ENFORCEMENT}

Parties sued for breach of contract in California have several available defences. In the first instance, they can establish that they in fact did perform their obligations under the agreement, or that no enforceable agreement was formed in the first place. But there are also several bases on which a California court might refuse to enforce a valid contract that has admittedly been breached. These are known as affirmative defences, and the burden is typically on the defendant to show that they apply in a particular case.

\textbf{i} No enforceable contract was formed

As noted above, to be enforceable, a contract requires ‘reasonably certain’ terms.\textsuperscript{80} If the parties leave essential elements to be worked out later, their understanding might be deemed a mere ‘agreement to agree’, which is typically not enforceable.\textsuperscript{81} Parties in California can, however, execute enforceable agreements to negotiate in good faith. Unlike some European jurisdictions, California does not impose a default obligation of fair dealing on parties to a negotiation.\textsuperscript{82} But an agreement to negotiate in good faith allows parties to create such an obligation by contract.

\textbf{ii} Limitation period unenforceable

The statute of limitations to assert a breach of contract claim in California is four years for written contracts and two years for oral contracts.\textsuperscript{83} The limitations period begins when the contract has been breached and the non-breaching party knows or has reason to know of the breach.\textsuperscript{84}

California permits parties to shorten or lengthen the time period for asserting a breach in their contract.\textsuperscript{85} If the parties agree to lengthen the limitations period, their agreement

\textsuperscript{78} id.
\textsuperscript{82} E. Allan Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum. L. Rev. 217, 239 (1987) (‘European courts have been more willing than American ones to accept scholarly proposals for precontractual liability based on a general obligation of fair dealing.’); see Copeland, 96 Cal. App. 4th at 1259–60 (noting that California has rejected such a theory of liability).
must be in writing and cannot extend the deadline for more than four years at a time.\textsuperscript{86} The parties may then make ‘any number of successive, separately executed agreements for additional four-year’ extensions.\textsuperscript{87} If the parties agree to shorten the limitations period, the cutoff date must still provide a reasonable period for the non-breaching party to raise a claim, a standard that varies based on the circumstances of the agreement.\textsuperscript{88}

\textbf{iii Enforcement contrary to public policy}

A contract with an illegal purpose is unenforceable as a matter of public policy.\textsuperscript{89} California takes a strict approach to illegal contracts, stating that an entire contract is void if any part of its consideration is unlawful.\textsuperscript{90} There are rare exceptions, however. California may uphold a contract with an illegal object if the nature of the contract’s illegality is not ‘grounded in common standards of morality’, and the party seeking enforcement is ‘less morally blameworthy’ than its adversary.\textsuperscript{91}

\textbf{iv Unconscionability}

A contract is unconscionable if it is so grossly unfair that it should not be enforced. Unconscionability has two components, one procedural and the other substantive, both of which must be present to find a contract unenforceable.\textsuperscript{92} Contracts that are substantively unconscionable have been described in a variety of ways, including ‘overly-harsh’,\textsuperscript{93} ‘unfairly one-sided’,\textsuperscript{94} ‘unduly oppressive’,\textsuperscript{95} or ‘so one-sided as to ‘shock the conscience’.\textsuperscript{96} The California Supreme Court held that all of these terms ‘mean the same thing’, which it characterised as ‘a substantial degree of unfairness beyond ‘a simple old-fashioned bad bargain’’.\textsuperscript{97}

Procedural unconscionability refers to some element of ‘surprise’ or ‘oppression’ in the process of negotiating or executing the agreement.\textsuperscript{98} For example, a material term may

\begin{footnotesize}
\textsuperscript{88} Hambrecht, 38 Cal. App. 4th at 1548; Capehart v. Heady, 206 Cal. App. 2d 386, 388–89 (1962); William L. Lyon & Assoc., Inc. v. Superior Court, 204 Cal. App. 4th 1294, 1307 (2012) (‘Reasonable in this context means the shortened period nevertheless provides sufficient time to effectively pursue a judicial remedy.’) (internal quotations omitted).
\textsuperscript{91} McIntosh, 121 Cal. App. 4th at 347, n.10; Cain v. Burns, 131 Cal. App. 2d 439, 441–42, 444 (1955).
\textsuperscript{95} Perdue v. Crocker Nat’l Bank, 38 Cal. 3d 913, 925 (1985).
\textsuperscript{96} Pinnacle Museum Tower Ass’n v. Pinnacle Market Dev., 55 Cal. 4th 223, 246 (2012) (citation omitted); Sanchez, 61 Cal. 4th at 910–11.
\textsuperscript{97} Sanchez, 61 Cal. 4th at 911 (quoting Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109, 1145 (2013)).
\textsuperscript{98} Patterson, 14 Cal. App. 4th at 1664; A & M Produce, 135 Cal. App. 3d at 486.
\end{footnotesize}
have been hidden by the party seeking to enforce it (i.e., surprise), or there may be such a disparity in bargaining power that the weaker party is not given a meaningful choice (i.e., oppression).

Adhesion contracts, which are the standardised agreements offered on a ‘take it or leave it’ basis by parties with superior bargaining power, all contain an element of procedural unconscionability. But the surrounding circumstances may mitigate that unfairness. For example, the weaker party may have had other counter-parties with whom he could have contracted. And even an adhesion contract that is procedurally unconscionable will be enforced, provided it is not substantively unconscionable and complies with the ‘reasonable expectations’ of the adhering party.

In evaluating unconscionability, courts consider the totality of circumstances, in which a high degree of substantive unconscionability can be counteracted by a low degree of procedural unconscionability, and vice versa. For example, the presence of one-sided terms could be offset by the fact that the parties had relatively equal bargaining power.

v Duress

California will allow a party to rescind a contract if it was ‘under duress’ when it agreed to the terms. Traditionally, duress refers to circumstances where a person or his property were unlawfully confined or threatened. California courts have extended the doctrine to cover economic duress, but that defence is generally only available to a party who had no choice but to agree or face financial ruin. For example, in one case, the fact that a party would merely have lost a job if he did not agree to the contract was not enough to show economic duress.

vi Impossibility or impracticality

California law provides a defence to the enforcement of a contract when, through some intervening event, performance becomes physically impossible or so excessively expensive or difficult that it is no longer practical. A merely unforeseen expense, even a sizeable one, is not enough to excuse performance. But if the difficulty of performance becomes so great that the parties could not have expected compliance under the new circumstances, the defence of impracticality is available. For example, in one case, a builder agreed to buy his gravel from

99 Patterson, 14 Cal. App. 4th at 1664 (citing A & M Produce, 135 Cal. App. 3d at 486).
100 A & M Produce, 135 Cal. App. 3d at 486 (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (1965)).
106 Hicks, 897 F.3d at 1119–20.
the operator of a particular gravel pit. Unknown to the parties at the time, most of the gravel was under water and would cost ten times the anticipated amount to extract. The builder was excused from performance on the ground of impracticality.

vii Frustration of purpose

The doctrine of frustration of purpose is similar to the doctrines of impracticality and impossibility in that some development after the execution of the contract changes the basic expectations on which the agreement was reached. But, unlike those other defences, frustration of purpose applies to situations where performance is still feasible but would not accomplish the purpose of the agreement. For example, in one case, a hotel company agreed to pay a monthly fee to a golf club to allow access to the course for its guests, but the hotel later burned down. Payment of the fee was still possible, but achieving the underlying purpose of the agreement was not, and the agreement was not enforced.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

If one party to an agreement obtained the other party’s assent through a fraudulent misrepresentation, the agreement may not be enforceable. A party invoking a fraudulent inducement defence must prove that its counter-party made the misrepresentation knowing it was false and with the intention that it be relied upon. California, unlike New York, does not require the misled party to show that its ignorance was ‘excusable’. As one court put it, California ‘protect[s] the ignorant and credulous no less than the well-informed and analytical’. Courts in California may hold sophisticated parties to a higher standard, however. If a defrauded party’s reliance was not reasonable ‘in the light of his own intelligence and information’, he will not succeed on this defence.

A party cannot exculpate itself from a fraudulent inducement defence with a contractual provision. Even when a contract says that neither party relied on any extrinsic representations, for example, the court will still consider extrinsic evidence of fraudulent misrepresentation.

109 id. at 291, 293.
110 id. at 293.
112 id. at 425–26.
117 See Seeger v. Odell, 18 Cal. 2d 409, 415 (1941).
VIII REMEDIES

Damages for breach of a contract are generally intended ‘to approximate the agreed-upon performance’ by putting the plaintiff in ‘as good a position as he or she would have occupied if the defendant had not breached the contract’. To prevail on a breach of contract claim, a plaintiff generally must show damage caused by or likely to result from the breach.

i Compensatory damages

In an action for breach of contract, the non-breaching party can recover monetary payments for actual, provable, and foreseeable losses resulting from the other party’s failure to perform according to the agreement’s terms. A prevailing party is entitled to money damages whenever the party can show damages of a certain amount with reasonable certainty. Compensatory damages must also be reasonable, may not be unconscionable or oppressive, and cannot be greater than the benefit of full performance.

California recognises two primary types of compensatory damages for breach of contract: general damages and special damages. General damages are those that ‘would be likely to result’ from the breach and, as such, are deemed within the parties’ contemplation at time of the agreement. These are the most common types of damages.

Special damages, also known as consequential damages, do not necessarily follow directly from the breach, but sometimes occur as a consequence. For example, profits lost by a business as an indirect result of the breach are typically considered special or consequential damages. Special damages must have been within the contemplation of the parties at the time they entered into the contract. If the breaching party did not have advance notice that this special harm might result from a breach, this category of damages is not recoverable.

ii Punitive damages

In California, punitive damages, also known as exemplary damages, are ordinarily not recoverable in a contract action, even if the defendant’s breach was willful. Punitive damages may be available, however, if – in addition to the breach of contract – an independent tort

121 Cal. Civ. Code § 3300 (damage must have been ‘proximately caused’ by the breach).
125 Lewis Jorge Constr. Mgmt., 34 Cal. 4th at 968.
127 Lewis Jorge Constr. Mgmt., 34 Cal. 4th at 968.
128 id. at 967.
is involved.\textsuperscript{132} Even in such cases, however, a defendant must act with ‘oppression, fraud, or malice’ toward the plaintiff.\textsuperscript{133} Mere negligence, even gross negligence, is not sufficient to justify an award of punitive damages.\textsuperscript{134}

### iii Specific performance

Specific performance is an equitable remedy that compels the breaching party to live up to his contractual obligations.\textsuperscript{135} A court will not order specific performance where monetary damages will make a plaintiff whole.\textsuperscript{136} Specific performance is available only where: (1) the contract’s terms are sufficiently definite; (2) consideration is adequate; (3) substantial similarity exists between the requested performance and the contract’s terms; (4) there is mutuality of remedies; and (5) plaintiff’s legal remedy is inadequate.\textsuperscript{137}

The availability of specific performance typically depends on the uniqueness of the goods or services being exchanged.\textsuperscript{138} The classic example of a suit for specific performance seeks to compel the seller of real property to transfer the property to the buyer.\textsuperscript{139} Since each piece of real property is considered unique, money damages are considered inadequate.\textsuperscript{140} Specific performance is never available in certain specific circumstances defined by statute, such as contracts for employment or personal services.\textsuperscript{141} That is because the law generally views requiring performance in those circumstances as akin to involuntary servitude.

### iv Rescission

Rescission restores the parties to the position that they would have been in had they not entered the contract.\textsuperscript{142} Following an order of rescission, the parties no longer need to comply with their obligations and must restore any consideration exchanged.\textsuperscript{143} When a contract is induced by fraud, negligent misrepresentation, or duress, rescission is an appropriate remedy.\textsuperscript{144} California courts may award both damages and rescission (so long as the relief does not include duplicate or inconsistent recovery), and they may also require the party to whom such relief is granted to compensate its counter-party or otherwise adjust the equities between them.\textsuperscript{145}

\textsuperscript{132} Cates Constr., Inc. v Talbot Partners, 21 Cal. 4th 28, 61 (1999).
\textsuperscript{133} Cal. Civ. Code § 3294(a).
\textsuperscript{138} See, e.g., Wilkinson, 101 Cal. App. 4th at 833.
\textsuperscript{140} id.
\textsuperscript{141} Cal. Civ. Code § 3390.
\textsuperscript{144} Cal. Civ. Code § 1689(b)(1).
\textsuperscript{145} Cal. Civ. Code § 1692.
v Limitations of liability

Contractual terms limiting the parties’ liability in the event of breach will generally be upheld, so long as no statute expressly prohibits it and no public interest is involved.146 The public interest may be involved where, for example, the limitation provision concerns a regulated business or an important public service.147 No matter what the contract says, however, it cannot exempt the parties from liability for intentional wrongs, gross negligence, or a violation of law.148

vi liquidated damages

California law allows for liquidated damages, in which the parties specify in the contract the amount that must be paid in the event of breach.149 Liquidated damages control regardless of the amount of actual damages incurred, thereby limiting the breaching parties’ exposure and relieving the nonbreaching party of having to prove an amount of damages.150 Liquidated damages agreements are enforceable unless another statute expressly controls damages or the liquidated damages provision was unreasonable.151 To avoid invalidation as an unlawful penalty, a liquidated damages provision must have a reasonable relationship to actual damages.152 Otherwise, it risks being deemed unconscionable and reduced by the court.153

IX CONCLUSIONS

While California imposes some narrow restrictions on the freedom to contract as a matter of public policy, parties who choose California law to govern their agreement can generally expect judicial decisions that respect and enforce unambiguous language as written. They can also expect a reliable set of governing principles that are stable over time. Because of the codification of California contract law, significant changes require legislative action, which is generally less frequent than judicial developments. Moreover, as home to the world’s leading tech and entertainment sectors, California is often where disputes related to cutting edge technologies and intellectual property are heard. As a result, parties who choose a California forum can benefit from sophisticated judges who are often more conversant in these emerging legal issues than those in other jurisdictions.

146 Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92 (1963).
147 id. at 98–100.
150 id.
151 Cal. Civ. Code § 1671(a), (b).
I  OVERVIEW

As a forum, Canada is well-suited to the adjudication of complex commercial disputes. Parties are generally free to bring contract claims as they see fit, with frivolous suits discouraged by a costs regime which typically requires the losing party to pay a certain percentage of legal fees to the winning party.

Canadian law is subject to a distribution of legislative powers and responsibilities between the two main levels of government: federal and provincial. Contract law, as a matter of civil rights, is under provincial jurisdiction. There are ten Canadian provinces, each with its own court system and jurisprudential history. Although there are some differences between them, the laws of each province are informed by British common law, and generally the applicable principles align (with the exception of Quebec, a civil law jurisdiction that is not the subject of this chapter). Decisions of the Supreme Court of Canada are binding on all lower courts, further adding to the consistency of the Canadian scheme.

II  CONTRACT FORMATION

Contract formation in Canada is governed by the general common law rules of consideration and offer and acceptance, which provide a framework for determining whether the parties have formed a mutual intention to enter into a bargain with each other and on what terms. Canadian courts do not inquire as to the sufficiency of the consideration given, and will merely seek to confirm that some consideration flow from each contracting party. With respect to offer and acceptance, the general principle is this: a valid contract requires the
certainty of an acceptance that is the ‘mirror image’ of the offer. Also further to the need for certainty, an acceptance must be unequivocal and affirmatively communicated to the offeror in order to be effective. In all respects, contract formation is assessed objectively.

The rules of offer and acceptance are meant to bring certainty and finality to the contracting process. Once a valid agreement is made, however, subsequent negotiations by the contracting parties will not necessarily vitiate that agreement. Indeed, the existence of subsequent negotiations has been held in certain commercial cases to confirm the parties’ underlying agreement; especially where the parties have concluded a broad commercial framework (or ‘umbrella’) agreement under which they will operate and then proceed to negotiate certain ancillary details.

Sometimes, parties to a contract will negotiate ‘unilateral’ modifications thereto, that is, alterations to the existing agreement where only one party gives fresh consideration. Generally in Canadian law, the ‘pre-existing duty’ rule provides that such modifications are void for lack of consideration. Canadian commentators have criticised the strict applicability of this rule, however, especially in commercial contexts, and Canadian courts appear to be slowly following suit. In 2008, the New Brunswick Court of Appeal held that a unilateral modification may be enforceable as necessary to give effect to the parties’ consensual bargain so long as the variation was not procured under economic duress. In 2018, the British Columbia Court of Appeal agreed and held that, to do justice to the legitimate expectations of parties, unilateral modifications should be enforceable ‘in the absence of duress, unconscionability or other proper policy considerations’.

The same practical, fairness-oriented approach governs scenarios where parties make an agreement to engage in further negotiations. While Canadian courts will not deviate from the rules of offer and acceptance and enforce an uncertain bargain, they may recognise a
quasi-contractual relationship (even in the absence of a valid contract) as necessary to protect
good faith reliance. 16 Agreements to agree are therefore generally not enforceable, but can
create a duty to negotiate in good faith (which can manifest, for example, as an obligation
to give the other party a right of first refusal) where the parties are already in a relationship
of reliance. 17 Similarly, letters of intent will not bind parties to a particular deal structure but
will be binding in respect of establishing the terms on which the buyer’s due diligence will
be conducted. 18

As a general matter of law, contracts need not be in writing in order to be valid. 19
Note, however, that provincial legislation requires certain types of contract to be in writing,
including agreements that convey interests in land and certain agreements relating to trusts. 20

Where agreements are in writing, Canadian courts are generally agnostic with respect
to the method of communication used by the parties (mail, telex, fax, email, etc.) and take a
pragmatic, flexible approach which treats the method of communication as merely a means
to the parties’ ends and recognises that the intricacies of a given technology should not be
allowed to overwhelm the true intent of the parties. 21 Provincial legislation also exists to ensure
that the regular rules of contract are adapted as seamlessly as possible to new technological
realities. 22

16 Swan on Contracts, supra note 9 at 4.165.
17 Swan on Contracts, supra note 9 at 4.156 and 4.162-4.164. For example, in a case where the parties
are already in a landlord-lessee relationship and agree to renew such arrangement at ‘the market rate
18 Swan on Contracts, supra note 9 at 4.148.
19 Obviously, this is not the general commercial practice.
20 See, for example, the legislation in Ontario: Statute of Frauds, R.S.O. 1990, Chapter S.19; in British
Columbia: Law and Equity Act, [RSBC 1996] Chapter 253 at 59(1).
21 Guided by Lord Wilberforce of the United Kingdom House of Lords, who noted that ‘[n]o universal
rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound
business practice and in some cases by a judgment where the risks should lie.’ Barry B. Sookman, Computer,
Internet and Electronic Commerce Law, Chapter 10.7 — Time And Place Of Contract Formation, citing
See also, citing Brinkibon, Swan on Contracts, supra note 9.
For example, the Ontario Court of Appeal recently overturned the finding of a trial judge that the exchange
and signing of a term sheet over several weeks via email constituted ‘two unique offers’ (notwithstanding
that the parties ultimately signed the same document, albeit weeks apart): applying good business sense,
the Court found that the parties had simply executed the same contract in counterpart. Cana International
4 C.T.C. 2016 (T.C.C. [Informal Procedure]) at 32: ‘Agreements signed in counterpart are a part of
commercial life.’
22 See, for example, the Electronic Commerce Act, 2000, S.O. 2000, c. 17. This statute codifies, among many
other things, that contract is not invalid or unenforceable by reason only of being in electronic form.
III  CONTRACT INTERPRETATION

Contractual interpretation in Canada is an exercise in giving effect to the objective intentions of the parties at the time they entered into the contract. 23 To determine the parties’ objective intentions, courts look foremost to the plain meaning of the language expressed in the contract, 24 reading the contract as a whole (while giving meaning to every word that is used) and in the context of the circumstances as they existed when the agreement was created. 25 Canadian courts avoid rigid constructions or findings of ambiguity 26 in favour of treating the words as flexible instruments meant to achieve a particular purpose, that is, they will seek to reconcile disputes by adopting an interpretation that accords with the overall business purpose of the provision(s) in question. 27

In Canada, the circumstances that surround the formation of the contract are referred to as the ‘factual matrix’. The factual matrix is relevant in every case, even where the contract is unambiguous on its face, 28 and probative to the extent that considering it deepens the analysis by providing context and does not inform an interpretation which contradicts the express language of the contract. As a further limitation, the factual matrix only comprises that which reasonably ought to have been known by the parties at the time of contract formation. 29

As the interpretive exercise is objective, the subjective intentions of parties are not relevant. 30 Similarly, extrinsic evidence as to the parties’ intentions is barred as a general proposition by the ‘parol evidence rule’, which precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a

23 Creston Moly Corp. v Sattva Capital Corp. 2014 SCC 53 (‘Sattva’) at 49. The Supreme Court of Canada has mandated a ‘practical, common-sense approach not dominated by technical rules of construction’. Sattva at 47.
24 There is a ‘cardinal presumption’ that parties intended what they said in the contract: Ventas Inc. v Sunrise Senior Living Real Estate Investment Trust, 2007 ONCA 205 at 24; Petry v Telus Corp., 2002 BCCA 135 at 14, citing Chitty on Contracts (28th ed) (London: Street & Maxwell 1999); University Hill Holdings Inc. (Formerly 589918 B.C. Ltd.) v. Canada, 2017 FCA 232 at 57, affirming lower court’s reasoning.
25 Nortel Networks Corp., Re, 2016 ONCA 332 at 58.
26 Pursuant to a ‘practical, common-sense’ approach mandated by the Supreme Court of Canada: Sattva, supra note 23 at 47.
27 The typology of evidence that may be considered in this context is discussed at footnote 46, below. Note that the purpose of a contract is not viewed statically, but can evolve with time; in a recent decision, for example, the Ontario Court of Appeal interpreted the word ‘vehicle’ in an agreement from 1906 as including automobiles, notwithstanding that automobiles had not yet been invented at the time of contract formation: Thunder Bay (City) v. Canadian National Railway Company, 2018 ONCA 919 at 44.
29 Sattva, supra note 23 at 58. This is a question of fact. Subsequent conduct is not part of the factual matrix (and can only be resorted to in cases of ambiguity): Shewchuk v. Blackmont Capital Inc., 2016 ONCA 912 at 46-50.
contract that has been wholly reduced to writing. This rule, however, is subject to myriad exceptions. Notably, moreover, the rule does not preclude evidence adduced as part of the factual matrix.

Another relevant principle of interpretation is that Canadian courts will seek to promote commercial efficacy. Interpretations which make ‘no commercial sense’ or result in a commercial absurdity will be strenuously avoided, while interpretations that ‘allow the contract to function and meet the commercial objective in view’ will be preferred. Note, however, the following two limits to the doctrine. First, as with the factual matrix, commercial reasonableness is to be assessed objectively, from the perspective of both contracting parties (and not according to one party’s subjective intention or desires). Second, the principle of commercial reasonableness will not save a party from a bargain that, while commercially sensible at the time of contract, has proven to be improvident or disadvantageous.

Where commercial reasonableness has conflicted with a plain reading of the words of a contract, courts have taken inconsistent approaches. The correct approach in Ontario appears to be that, in such cases, commercial efficacy will only overwhelm the written words where the words lead to a result that is ‘clearly’ commercially absurd. In Manitoba, by contrast, the Court of Appeal has ruled that where ‘a tension which exists between the literal meaning of a contract and an interpretation based upon its commercial purpose’, the latter interpretation may prevail where dictated by ‘business common sense’. The Alberta Court of Appeal has phrased the test differently yet again, holding that an interpretation that ‘defeats

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31 Sattva, *supra* note 23 at 58.
32 Swan on Contracts, *supra* note 9 at 3.1.2. The exceptions include evidence adduced to: (a) show that the contract was invalid due to fraud, misrepresentation, incapacity, lack of consideration or lack of contracting intention; (b) dispel ambiguities in the written text; (c) support a claim for rectification; (d) establish a condition precedent; (e) establish a collateral agreement; (f) support an allegation that the contract does not constitute the entire agreement between the parties; (g) support a claim for an equitable remedy; and (h) support a claim in tort that an oral statement was in breach of the duty of care.
33 Sattva, *supra* note 23 at 59-60.
34 *Salah v Timothy’s Coffees of the World Inc.*, 2010 ONCA 673 at 16; *Kentucky Fried Chicken Canada v Scott’s Food Services Inc.*, [1998] O.J. No. 4368 (CA) at 27. This is in keeping with the ‘practical, common-sense’ approach mandated by the Supreme Court in Sattva; see, for example, *Brompton Corp. v. Tuickamore Holdings LP*, 2017 ONCA 594 at 11-13.
39 See, for example, *Northrock Resources v. ExxonMobil Canada Energy*, 2017 SKCA 60 at 22.
41 As noted by Hall on Interpretation, *supra* note 40 at 65, citing *SimEx Inc. v IMAX Corp.*, [2005] O.J. No. 5389 (CA) at 20-23. See, more recently, *Thunder Bay (City) v. Canadian National Railway*, 2016 ONSC 469 at 43.
the intention of the parties and their objective in entering into a commercial transaction in the first place should be discarded in favour of the interpretation which promotes a sensible commercial result'.

Further to the assessment of commercial reasonableness, regardless of which of the approaches described in the preceding paragraph is adopted, the objective evidence that is admissible in the interpretive exercise will include accepted business practice in the field. Note that, in order to be admissible, the evidence in this regard must be reasonably certain and generally known and accepted by those operating in the relevant field. Similarly relevant is objective evidence regarding the context of the transaction, which, together with evidence of trade practices, forms a vital part of the factual matrix as it better permits judges to construe the parties’ commercial purpose.

Canadian courts will only imply a term into a contract in limited circumstances: based on custom or usage; if legally incident to the particular class or kind of contract at issue; and based on the presumed intention of the parties where the implied term is necessary ‘to give business efficacy to a contract or as otherwise meeting the ‘officious bystander’ test as a term which the parties would say, if questioned, that they had obviously assumed’.

Generally, provisions that prescribe a governing law are effective. Where a contract is silent on the law that governs it, the general rule is that substantive disputes will be governed by the local laws of the jurisdiction where the contract was entered into (referred to as the lex loci contractus). Procedural disputes, by contrast, are governed by the laws of the local adjudicating forum. In this regard, Canadian courts aim to distinguish between those rules that ‘make the machinery of the forum court run smoothly’ (e.g., a procedural requirement that a limitations defence be pleaded) and those rules that are ‘determinative of the rights of both the parties’ (e.g., the specific substantive requirements that must be met for a limitations defence to be successful).

43 Bearspear Petroleum Ltd. v. EnCana Corp., 2011 ABCA 7 at 24, citing Mannai and Nickel Developments.
45 Hall On Interpretation, supra note 40 at 122. Generally this will need to be established by expert evidence.
46 This includes consideration of objective evidence regarding the genesis of the transaction, the background and the market in which the parties are operating: Sattva, at 47, citing Reardon Smith Line Ltd. v. Hansen-Tangen, [1976] 3 All E.R. 570.
47 Sattva, supra note 23 at 47.
48 Which, as with custom and usage, must generally be proven by expert opinion evidence.
49 M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619, [1999] 7 W.W.R. 681 at paras. 27 and 29; Pacific National Investments Ltd. v. Victoria (City), 2000 SCC 64, 2000 CSC 64 at paras. 30-31. See also, Hall on Interpretation, supra note 40 at 180-181. Courts will not imply a term simply because it is reasonable to do so, but only when it is necessary, and will only imply those terms that (a) the contracting parties clearly and objectively intended and (b) do not contradict the written words of the contract. The ‘implication of the term must have a certain degree of obviousness to it…if there is evidence of a contrary intention, on the part of either party, an implied term may not be found.’ Double N Earthmovers Ltd. v Edmonton (City), 2007 SCC 3 at 31-32.
50 See, for example, Thyssen Canada Ltd. v. Mariana Maritime S.A., [2000] 3 F.C. 398, 254 N.R. 346 (C.A.) at 22-23.
IV DISPUTE RESOLUTION

In Canada, there are typically three levels of court for complex commercial litigation: a provincial court of first instance, a provincial appellate court and the Supreme Court of Canada. Since 1991, Toronto has also housed the ‘Commercial List’, which acts as a specialised court of first instance for commercial disputes that meet certain criteria or are sufficiently complex (and subject to the Commercial List’s ultimate discretion).53 One other common law province, Alberta, houses its own Commercial List.54 The expert commercial judges who staff these courts are generally pragmatic and business-oriented and will, where appropriate, facilitate an expedited timetable so that matters can be resolved in ‘real time’.

As a general matter, final decisions of Canadian trial courts can be appealed as of right. The standard that applies to the appellate review of judicial findings depends on the question(s) at issue. On a pure question of law, the basic rule is that an appellate court is free to replace the opinion of the trial judge with its own if the trial judge’s decision is not correct.55 On a question of mixed fact and law, such as a question of contractual interpretation, the trial judge’s findings will be upheld as long as they are reasonable.56 A purely factual finding will be upheld absent a ‘palpable and overriding error’.57 Where a principle of natural justice is involved, however, no deference is owed to the judge below.58

Notwithstanding the foregoing rubric, in limited cases it is possible to identify an extricable question of law from within what was initially characterised as a question of mixed fact and law; legal errors made in the course of contractual interpretation include ‘the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor’.59

The jurisdiction of the provincial courts is plenary in respect of all commercial disputes that occur in the province. With respect to assuming jurisdiction over extra-provincial disputes, Canadian courts will generally enforce forum selection clauses in commercial contexts so long as the clause is valid and enforceable, exclusive60 and there is no ‘strong cause’ for why it should not be enforced.61 This approach should continue in light of the recent decision of the Supreme Court of Canada in Douez v. Facebook, where three judges...

53 The Commercial List has issued a ‘Practice Direction’ which sets out the type of matters which may be listed on the Commercial List. This provision contains a ‘basket clause’ which permits for listing any ‘such other commercial matters as the judge presiding over the Commercial List may direct to be listed’. Consolidated Practice Direction Concerning the Commercial List, effective July 1, 2014 at Part II(1).
54 There is also the ‘Commercial Division’ of the Quebec courts.
55 Housen v. Nikolaisen, 2002 SCC 33 at 8. This is referred to as the ‘correctness’ standard.
56 Sattva, supra note 23 at 50. That another contractual interpretation might reasonably be available does not provide a basis for appellate intervention: Atos IT Solutions v. Sapient Canada Inc., 2018 ONCA 374 (leave to appeal refused, 2019 CarswellOnt 4343) at 86.
58 See, recently, Union Building Corporation of Canada v. Markham Woodmills Development Inc., 2018 ONCA 401, where the application judge was asked to decide a narrow issue but disposed of the application on a basis not advanced by the parties.
60 That is, a clause that explicitly precludes the applicability of laws of other jurisdictions. See, recently, Forbes Energy Group Inc. v. Parsian Energy Rad Gas, 2019 ONCA 372 at 5-7.
61 Douez v. Facebook, Inc., 2017 SCC 33 at 28-29. This requires a court to consider ‘all the circumstances…including the convenience of the parties, fairness between the parties and the interests of justice’.
of the Court noted that, in commercial interactions between sophisticated parties, forum selection clauses are generally enforceable ‘and to be encouraged’ as providing stability and foreseeability to parties that are justifiably deemed to have informed themselves of the risks of agreeing to the clause.62

Another ‘forum’ that parties may select is arbitration, the use of which has significantly increased in popularity in Canada in recent years. Unlike civil litigation generally, arbitration can be private (subject to the parties’ agreement); and with the number of sophisticated counsel and former judges in the ranks of Canadian arbitrators,63 arbitration is far from a ‘second-class’ method of dispute resolution in Canada.64 This trend has been encouraged by Canadian courts and legislatures.65 As noted by the Supreme Court of Canada, arbitration furthers the interests of justice;66 and in an era of backlog, Canadian courts are (justifiably) eager to have arbitrators act as decision-makers of first instance and undertake the review of voluminous factual evidence.67

For these reasons, and animated by some of the same principles discussed above in respect of forum selection clauses, arbitration agreements between sophisticated commercial parties will usually be enforceable by Canadian courts. The general rule is that challenges to an arbitrator’s jurisdiction must first be resolved by the arbitrator,68 which is known as the ‘competence-competence principle’.69 Canadian courts will generally not allow parties to circumvent contractual arbitration clauses simply by, for example, pleading in tort,70 arguing that a certain dispute is not covered by the arbitration agreement because it is not explicitly referred to therein71 or becoming a party to a parallel claim brought by other parties.72 To

63 Including, as of recently, former Chief Justice of the Supreme Court of Canada, Her Honour Justice McLachlin.
65 ‘The law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence.’ Haas v. Gunasekaran, 2016 ONCA 744 at 10.
67 See, for example, Greer v. Babey, 2016 SKCA 45 at 30, citing Union des consommateurs c. Dell Computer Corp., 2007 SCC 34, [2007] 2 S.C.R. 801 at 74: ‘if the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration.’
68 Except where the challenge is solely on a question of law or a question of mixed fact of law that requires only a superficial consideration of the documentary evidence in the record.
69 Union des consommateurs c. Dell Computer Corp., 2007 SCC 34, [2007] 2 S.C.R. 801 at 84-86; Seidel v. Telus Communications Inc., 2011 SCC 15, [2011] 1 S.C.R. 531 at 29. To be clear, the ‘competence-competence principle’ is no more than an attempt to properly manifest the parties’ intentions, that is, sophisticated parties can contract whatever variation of the principle suits their needs; see, for example, Enmax Energy Corp. v. TransAlta Generation Partnership, 2015 ABCA 383 at 23.
71 See Harrison v. UBS Holding Canada Ltd., 2014 NBCA 26 at 30; noting also that even claims of fraud and misrepresentation may be determined by arbitration.
72 TELUS Communications Inc. v. Wellman, 2019 SCC 19. In this case, the Court enforced the parties’ agreement to arbitrate notwithstanding the existence of a parallel class action and general rule prohibiting a multiplicity of proceedings.
facilitate the use of arbitration, each province has enacted domestic and international\(^{73}\) arbitration legislation that permits defendants in court-initiated litigation to apply for a stay of proceedings on the basis of the parties having previously agreed to an arbitration agreement that addresses some or all of the matters before the court.\(^{74}\)

The review of arbitral awards by Canadian courts is limited by statute and common law. As a general proposition, parties’ selection of arbitration as a forum is said to imply ‘both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum’.\(^{75}\) The domestic arbitration acts discussed above do not permit appeals on questions of fact or mixed fact and law, and only permit appeals on questions of law where leave is granted by the appellate court.\(^{76}\) The international arbitration acts do not permit appeals of arbitral awards on questions of fact or law whatsoever, but only on questions of jurisdiction, procedural fairness and public policy.\(^{77}\) These grounds are enforced narrowly.\(^{78}\) A similar deference to the decisions of arbitrators is applied with respect to the recognition and enforcement of arbitral awards.\(^{79}\)

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\(^{73}\) The international statutes are based, in full or in part, on the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006 (‘Model Law’). See *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19 at 11, noting that the Model Law is a ‘codification of best practices’ that ‘has been adopted, subject to some modifications, by every jurisdiction in Canada.’

\(^{74}\) The domestic Arbitration Act of British Columbia is arguably the most restrictive of these statutes, requiring a stay to be ordered unless the parties’ arbitration agreement is ‘void, inoperative or incapable of being performed’: see *McMillan v. McMillan*, 2016 BCCA 441 at 31, citing R.S.B.C. 1996, c. 55 at 15(2). Other provincial legislation is similar, albeit somewhat less restrictive; see for example the Arbitration Act of Ontario, which permits court proceedings to continue where the matter is a ‘proper one for default or summary judgment’; Arbitration Act, 1991, S.O. 1991, c. 17 at 7.

With respect to partial stays, certain of the domestic acts (the Arbitration Act of Ontario, for example), provide explicitly that a court may stay a proceeding with respect to certain matters dealt with in the arbitration agreement and allow it to continue with respect to other matters, provided that the parties thusly agreed and it is not unreasonable to do so: Arbitration Act, 1991, S.O. 1991, c. 17 at 7(5). Other of the domestic acts provide more generally that a stay may be granted in respect of ‘a matter agreed to be submitted to arbitration’, which has been interpreted as allowing for partial stays; see, for example, *Strata Plan BCS 3165 v. 1100 Georgia Partnership*, 2013 BCSC 1708 at para. 12.


\(^{76}\) The parties can preclude the possibility of such appeals in the arbitration agreement, or, by contrast, can explicitly provide for broader appeal rights. See, for example, the Manitoba Arbitration Act, CCSM c. A120 at 44(2).

\(^{77}\) Model Law at Chapter VII, Article 34.

\(^{78}\) Importantly, as recently clarified by the Ontario Court of Appeal in context of the domestic Ontario Arbitration Act, a wrongful interpretation by the arbitrator of the governing agreement does not constitute a jurisdictional error that is subject to curial review: *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254 at paras. 42-44.

V BREACH OF CONTRACT CLAIMS

To make out a claim for breach of contract, a party must show evidence of the following that is sufficiently clear, convincing and cogent:

a the existence of a valid contract;
b a breach of that contract; and
c damages flowing as a consequence of that breach.80

This test is assessed on a balance of probabilities.81

To determine the severity of a breach and the remedies that flow therefrom, Canadian law distinguishes between two types of contractual terms: conditions and warranties. A ‘condition’ is a term ‘of such vital importance that it goes to the root of the transaction’;82 warranties are important but non-fundamental terms.83 The general rule is that a breach of a warranty entitles the innocent party to sue for damages only, whereas a breach of a condition constitutes a ‘repudiation’ of the contract that the innocent party may elect to accept (and thereby, to treat its obligations under the contract as at an end) in addition to claiming damages.84 The lexical distinction between conditions and warranties does not dominate the repudiation analysis, however,85 which asks holistically whether there has been a breach of a ‘sufficiently important term of the contract so that there is a substantial failure of performance’,86 that is, has the innocent party been deprived of something fundamental that it bargained for.

The same framework governs the doctrine of anticipatory breach; an innocent party may accept a repudiation of the contract where the other party, whether by express language or conduct, ‘evinces an intention not to be bound by the contract before performance is due’.87 This question is assessed objectively, querying what a reasonable person would conclude from the breaching party’s conduct, and with reference to the overarching question of whether the putative breach would deprive the innocent party of substantially the whole benefit of the contract.88

However and whenever an innocent party elects to accept a repudiation, it must promptly, clearly and unequivocally communicate that decision to the breaching party89 (the general Canadian practice in such cases is for the innocent party to clearly reserve its right

80 Where damages cannot be proven, courts may award nominal damages.
81 As noted by the Supreme Court of Canada, ‘there is only one civil standard of proof at common law and that is proof on a balance of probabilities’: C. (R.) v. McDougall, 2008 SCC 53 at 40 and 46. Note that this same standard of proof applies to the defences to breach of contract discussed in Part VI, below.
83 Usually in sophisticated commercial contracts, conditions are express; courts may imply additional conditions but the test to do so is high. See Swan on Contracts, supra note 9 at 7.3.
84 Potter v. New Brunswick (Legal Aid Services Commission), 2015 SCC 10 at 145-149.
85 See Swan on Contracts, supra note 9 at 7.5.
86 Potter v. New Brunswick (Legal Aid Services Commission), 2015 SCC 10 at 145.
89 Miller, Canfield, Paddock and Stone, LLP v. BDO Dunwoody LLP, 2016 ONCA 281 at 6, citing McCamus on Contracts at p. 641. See also: Gulston v. Aldred, 2011 BCCA 147 at 50.
to claim damages). Where an innocent party does not wish to terminate the contract, by contrast, it may waive its rights to do so. Two cautions must be noted for commercial parties in respect of such waivers, however. First: they often cannot be effectively retracted, in that, where the breaching party proceeds to act in reliance on a clear and unequivocal waiver, Canadian courts will generally protect that reliance. Second: where a party has a right to invoke a contractual termination provision but chooses not to do so, that party will oftentimes be held liable for the consequences of their non-action.

In limited circumstances, a prospective commercial claimant may seek third party financing to fund its legal costs. The Supreme Court of Canada has yet to provide guidance on this emerging trend but may do so this year.

VI DEFENCES TO ENFORCEMENT

A common defence to contractual claims is that there was never a valid contract to begin with; that is, that there was no valid offer and acceptance or that the contract is void for uncertainty. Canadian courts, however, are highly reluctant to invalidate written agreements made between two sophisticated entities or void provisions of a contract ab initio. Rather,

90 Although technically, there may not be a specific legal requirement to do so. As noted by one judge, ‘the right to sue for damages for breach of contract is an implied term of any contract provided...that there is no provision to the contrary’: 1399418 Ontario Ltd. v. 1310210 Ontario Inc., [2001] O.J. No. 334, 103 A.C.W.S. (3d) 293 (High Ct.) (affirmed [2002] O.J. No. 18, 110 A.C.W.S. (3d) 1041 (C.A.)).


92 Swan on Contracts, supra note 9 at 2.239-2.240.

93 See, for example, Dinicola v. Huang & Danczay Properties, 1998, 111 O.A.C. 147, 163 D.L.R. (4th) 286 (C.A.) at 7. In that case, a party elected not to invoke their right to terminate an ongoing construction project, and thereby became liable for losses suffered by the project subsequently. See, similarly although not directly related to the doctrine of waiver, the recent decision of the British Columbia Court of Appeal in Cellular Baby Cell Phones Accessories Specialist Ltd. v. Fido Solutions Inc., 2017 BCCA 50. In that case, a party was found liable for failing to promptly exercise a right of immediate termination under the contract.

94 See, for example, Seedling Life Science Ventures LLC v. Pfizer Canada Inc., 2017 FC 826. In this case, the plaintiff sought the Federal Court's approval of a litigation funding agreement ('LFA') with a third party funder. The court found that it had no jurisdiction to approve the LFA, but also found that no such approval was necessary.


96 See Part II, above, for a detailed discussion of the rules of offer and acceptance.

97 See, for example, Kirchner v. Diehlmann Holdings Ltd., 2014 MBCA 21 at 8-9; Vandal v. Cousineau, 2015 ABCA 408 at 13.

Canadian courts apply the old English maxim that ‘a deed shall never be void where the words may be applied to any extent to make it good’ and seek to resolve contractual disputes and apparent ambiguities through the interpretive process.

Another common defence to contractual liability is the expiry of the limitations period. The limitation period in Canada for commercial claims is generally two years as established by statute, subject to the discoverability principle and a 15-year absolute limitation period (i.e., regardless of discoverability). The discoverability principle asks when the plaintiff knew or reasonably ought to have known about their claim and that commencing a legal proceeding would be the appropriate means of obtaining a remedy. A recent decision of the Ontario Court of Appeal highlights the latter aspect of the rule; in that case, the limitation period did not begin to run while the parties were engaged in mediation provided for under their contract. Note, however, that simply engaging in settlement negotiations is insufficient to pause the timer; per statute, parties must actually engage an independent third party (such as a mediator) to assist them in resolving their dispute in order for the limitation period to toll.

Where there is an intervening event that frustrates the parties’ contract such that performance becomes impossible, a party may invoke the common-law doctrine of frustration as a defence to excuse itself from performing its outstanding contractual obligations. In certain provinces legislation has codified this rule and the remedies that may be applicable where frustration is made out. Note, however, that frustration of contract is a difficult standard to meet (its contractual cousin is the force majeure clause typically advisable in long-term framework agreements) and parties should be wary of invoking the doctrine.


100 Although Quebec law is not the subject of this article, we note that the limitation period in Quebec is three years.

101 407 ETR Concession Co. v. Day, 2016 ONCA 709, 133 O.R. (3d) 762 (Ont. C.A.) (leave to appeal refused, 2017), [2016] S.C.C.A. No. 509 (S.C.C.) at 40. For a further discussion of the discoverability principle in Canada, see: Zapfe v. Barnes, [2003] O.J. No. 2856 (C.A.), citing Central & Eastern Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 at 224. Note that the old common-law ‘special circumstances’ doctrine (which permits parties to escape limitation periods where, for example, their lawyer missed the deadline) has been eroded in recent years, and no longer exists in certain provinces; see, for example, the decision of the Ontario Court of Appeal in Abrahamsen v. Berens, 2018 ONCA 252 at 24-27, citing Joseph v. Paramount Canada’s Wonderland, 2008 ONCA 469 (‘Joseph’) at 25-27. See also the decision of the Saskatchewan Court of Appeal in Global Aerospace Inc. v. Insurance Co. of State of Pennsylvania, 2010 SKCA 96 at 132-137. The Court in Joseph recognised the harshness of this approach, but held that to construe the law otherwise would be ‘contrary to the purpose of the new [Ontario Limitations] Act by removing the certainty of its limitation scheme’.

102 See PQ Licensing S.A. v. LPQ Central Canada Inc., 2018 ONCA 331 at 47-53. It was only when one of the parties formally filed a notice to arbitrate that the limitation period began to run.


104 The standard of impossibility is elusive, perhaps best defined as an event that makes performance ‘radically different’ or ‘so significantly changes’ the nature of the parties’ rights and obligations from what could have reasonably been anticipated in the circumstances as known at the time of contract, such that it is now unjust to hold them to the literal text of the contract: Swan on Contracts, supra note 9 at 8.303, citing various decisions.

105 See, for example, Frustrated Contracts Act, R.S.O. 1990, Chapter F.34.
With respect to the equitable defences of undue influence and unconscionability, the law is, generally speaking, as set out by the Supreme Court of Canada in its 2017 decision in *Douez v. Facebook, Inc.* (‘*Douez*’), where the Court confirmed that the following two elements are required for such doctrines to apply: inequality of bargaining power (at the time of contract) and meaningful unfairness (at the time of breach).\(^{106}\)

Notably, Canadian courts have taken to applying the unconscionability standard to contractual defences in respect of which it is not historically linked; namely, limitation of liability clauses and the rule against penalties.\(^{107}\) Therefore, and as a result of the focus on inequality of bargaining power in the analysis, penalty clauses and limitation of liability clauses agreed to by sophisticated commercial parties are generally enforced in Canada;\(^{108}\) even where the outcome visits an unfairness on one of the parties.\(^{109}\) Highlighting this jurisprudential reality is a recent decision of the Ontario Court of Appeal, where a party that failed to act reasonably in terminating a contract (notwithstanding being contractually obligated to do so) was still able to fully rely on the limitation of liability clause contained therein.\(^{110}\) The equitable jurisdiction that permits courts to decline to enforce limitation of liability and penalty clauses is grounded in public policy, and in Canadian law the promotion of freedom of contract and judicial non-interference is generally a dominant policy concern; especially where sophisticated commercial parties are involved. For similar reasons, equitable defences other than unconscionability are also generally inaccessible to sophisticated commercial parties.\(^{111}\)

Ultimately, Canadian courts apply the foregoing rules in a practical manner that seeks to protect parties’ reasonable reliance. In a recent decision, for example, the Ontario

\(^{106}\) *Douez v. Facebook, Inc.*, 2017 SCC 33 (‘*Douez’*) at 115. Provincial appellate courts have similarly held; see, for example, Downer v. Pitcher, 2017 NLCA 13 at 7-54.

\(^{107}\) It is not clear how to reconcile *Douez* with the 1976 decision of the Supreme Court of Canada in *H.F. Clarke Ltd. v. Thermidaire Corp.*, where, notwithstanding a relative equality of bargaining power, the Court declined to enforce payment of a sum owing under the contract that was ‘extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach’: [1976] 1 S.C.R. 319 at 15 and 28.

\(^{108}\) See *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 at p. 464: ‘I have no doubt that unconscionability is not an issue in this case. Both [parties] are large and commercially sophisticated companies. Both knew or should have known what they were doing and what they had bargained for when they entered into the contract.’

\(^{109}\) Notably, however, a party that itself acts unconscionably may not be permitted to rely on a limitation of liability clause. For example, a company knowingly supplying defective product without disclosing such; ‘a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause’. *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309 (C.A.) (affirmed on this point: *Tercon Contractors Ltd. v. British Columbia* (Minister of Transportation & Highways), 2010 SCC 4 at 119).

\(^{110}\) *Chuang v. Toyota Canada Inc.*, 2016 ONCA 584 (leave to appeal refused, 2017 CarswellOnt 4671) at 22 and 31-34 and 49.

\(^{111}\) An example of this is rectification, which allows courts to correct errors made in the recording of written legal instruments. As noted by the Supreme Court of Canada, a ‘relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts’: *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 at 13, citing *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19 at 31.
Court of Appeal upheld a decision of a Toronto Commercial List judge who held that a contractual provision purporting to exclude liability for ‘loss of profits’ did not, in fact, apply to profits lost as a direct result of the breach, but rather applied only to indirect lost profits (that is, other business opportunities forgone as a result of the breach, sometimes referred to as ‘consequential damages’).

In reaching this conclusion, the court below did not consider the enforceability of the exclusion clause (and the corresponding requirement of unconscionability discussed above) but instead focused on its interpretation, ultimately finding that the clause simply did not apply to profits lost as a direct result of the breach.

VII  FRAUD, MISREPRESENTATION AND OTHER CLAIMS

Parties to a contract may sue for negligent or fraudulent misrepresentation. The elements of negligent misrepresentation are:

a  a duty of care based on a special relationship;
b  a representation that is untrue, inaccurate or misleading;
c  that the representor acted negligently in making the misrepresentation;
d  that the representee acted reasonably in relying on the misrepresentation; and

e  damages caused by the reliance.

The elements of fraudulent misrepresentation are:

a  the making of a false representation to the party alleging the wrong;
b  the misrepresentation is made either,

• knowing it to be untrue;
• without belief in its truth; or
• reckless as to whether it be true or false; and

c  the false representation caused the complaining party to act and to suffer a corresponding loss.

Where misrepresentation is made out, rescission of the contract is often an appropriate remedy (although damages may also be available).

In 2014, the Supreme Court of Canada recognised an ‘organising principle of good faith’ in contractual performance and the corresponding duty to act honestly

113  *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374 at 72, leave to appeal refused, 2019 CarswellOnt 4343. Notably, the court came to this conclusion with explicit reference to the parties’ relationship of contractual reliance and the need to compensate the non-breaching party for the total ‘loss of bargain’ suffered.
117  See, for example, *Ragin v. Ven-Cor Vending Distributors Ltd.*, 2001 CarswellOnt 2511, 106 A.C.W.S. (3d) 642 (S.C.J.) at 23.
in performance. In doing so, the Court made clear that it was not imposing a duty of fiduciary loyalty or disclosure or establishing a rule requiring parties to forego advantages flowing from the contract out of some ‘ad hoc moralism’, but rather ‘a simple requirement not to lie or mislead the other party about one’s contractual performance’. The parameters of the duty of good faith and the contexts where it might appear are still being developed in the jurisprudence.

VIII REMEDIES

The general remedy for breach of contract is damages. Damages are meant to be compensatory; the basic rule is that the innocent party be placed, so far as money can, in the same situation as if the contract had been performed. This approach (which asks what would have happened ‘but for’ the breach) is referred to as providing ‘expectation’ damages. Where expectation damages cannot be ordered, courts will endeavour to at least protect the reliance of the innocent party wherever possible, which generally means repaying out-of-pocket expenses wasted as a result of the breach. Note, however, that the ability of a plaintiff to seek reliance damages is limited by the expectancy principle; a plaintiff will not, for example, recover its expenses when the evidence shows that it would have lost money on a net basis had the contract actually been performed.

Expectation is assessed objectively and governed by the principle of remoteness, which excludes liability for losses that were not reasonably foreseeable when the contract was made. Foreseeability in this regard has two branches: what the breaching party reasonably ought to have known at the time of contract, and what special circumstances (if any) the breaching party was actually told about prior to entering into the contract. As highlighted

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119 Bhasin v. Hrynew, 2014 SCC 71 at 73.
120 Illustratively, in a recent case the Ontario Court of Appeal declined to sanction a plaintiff that actively deceived the defendant as to their intentions with respect to whether a contract would be terminated. The Court found that this ‘failure to act honorably’ did not rise ‘to the high level required to establish a breach of the duty of honest performance’: CM Callow Inc. v. Zollinger, 2018 ONCA 896 at 15-16.
121 Bhasin v. Hrynew, 2014 SCC 71 at 70, 73 and 86.
122 In 2017, the Supreme Court of Canada refused leave to appeal a decision of the Alberta Court of Appeal, which held that the duty of good faith does not require that discretionary powers granted under a contract be exercised fairly and reasonably (but only that such powers not be exercised in a manner that is ‘capricious’ or ‘arbitrary’): Styles v. Alberta Investment Management Corp., 2017 ABCA 1 (leave to appeal refused, 2017 CarswellAlta 949) at 49-53. More recently, the Supreme Court granted leave to appeal a decision of the British Columbia Court of Appeal, which held that a breach of the duty of good faith requires a finding of subjective dishonesty or improper motive: Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd., 2019 BCCA 66 (leave to appeal granted, 2019 CarswellAlta 871) at 71 and 74.
123 Swan on Contracts, supra note 9 at 6.11.
124 McCamus on Contracts at p. 890.
125 McCamus on Contracts at p. 894.
by a recent decision of the British Columbia Court of Appeal, knowledge under the second branch cannot be presumed; there must be an evidentiary basis that the knowledge was ‘brought home to the defendant at the time of the contract’.

Expectation damages are also circumscribed by the doctrine of mitigation, which requires that a plaintiff take all reasonable steps to mitigate its losses at its earliest opportunity. The doctrine of mitigation is based on fairness, and applies in all cases; as recently confirmed by the Supreme Court of Canada, claiming a relief in the alternative to damages in litigation (for example specific performance of the contract, which is discussed further below) does not in and of itself relieve a plaintiff of its obligation to mitigate – in all cases the question is what steps the plaintiff ought reasonably to have taken to reduce its damages.

Expectation damages in Canada are further delimited by the ‘minimum performance’ principle, which provides that, where a defaulting party had alternative modes of performing the contract, damages are calculated on the basis of the mode of performance least burdensome to the defaulting party. A recent decision of the Ontario Court of Appeal highlights this principle, where the Court awarded damages to a party who terminated a contract for cause to rely on the (less onerous) termination for convenience provisions therein (on which the party could have relied, but did not).

As noted above, the general rule is that damages must be proven. Where there has been a clear breach of contract but a strict application of the ‘but for’ approach to damages would limit or altogether preclude meaningful recovery, however, Canadian courts are to follow the old common-law approach and apply ‘sound imagination and the practice of the broad axe’ to the damages analysis to ensure, as best as possible, that the innocent party is fully and fairly compensated for the breach.

Where damages cannot be proven in the sense that money is not a complete answer to the plaintiff’s claim (namely, where the thing contracted for is unique in that a substitute cannot be readily purchased on the market), specific performance of the contract can be warranted. This arises most often in the real estate context; the test is whether the putative acquirer can show a ‘fair, real, and substantial justification’ or a ‘substantial and legitimate’ interest in the land such that damages are insufficient to cure the default. Note that, while the common law of Canada previously presumed uniqueness in land, the Supreme Court of Canada recently overturned this presumption.

130 Open Window Bakery, 2004 SCC 9 at 11 and 20.
131 Atos IT Solutions v. Sapient Canada Inc., 2018 ONCA 374 (leave to appeal refused, 2019 CarswellOnt 4343). This case clarifies that the minimum performance principle does not depend on good faith conduct by the breaching party.
There is a strong presumption that expectation damages will be assessed as of the date of the breach, with this presumption displaced only in (the rare) circumstances where that result would be fundamentally unfair to the innocent party. The rationale for assessing damages as at the day of breach is related to the doctrine of mitigation discussed above, which requires that a party take steps to crystallise its losses at its earliest opportunity. Thus, the cases where the presumption is displaced are generally only those in which it would be fundamentally unfair to impose a requirement that the innocent party have crystallised its damages (notionally or actually) on or about the date of breach.

Claims for lost opportunity (i.e., loss of chance), although based on the hypothetical value of a future event, are also assessed as of the date of breach. This is done on a probabilistic basis. To secure a remedy for lost opportunity, a plaintiff must show that:

a but for the defendant’s wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss;

b the chance lost was sufficiently real and significant to rise above mere speculation;

c whether the plaintiff would have avoided the loss or made the gain depended on someone or something other than the plaintiff himself or herself; and

d the lost chance had some practical value.


‘An early crystallisation of the plaintiff’s damages promotes efficient behaviour: the litigants become as free as possible to conduct their affairs as they see fit. Early crystallisation also avoids speculation: the plaintiff is precluded from speculating at the defendant’s expense by reaping the benefits of an increase in the value of the goods in question without bearing any risk of loss’.

For example, in a share transaction where the market for the shares is volatile or non-existent, it would not accord with a commercial party’s expectations to sell such shares into the market on the exact day of breach absent some assurance that it would not be more profitable to sell the shares a day, week, month or year later. See, for example: Kinbauri Gold Corp. v. IAMGOLD International African Mining Gold Corp., [2004] O.J. No. 4568, 135 A.C.W.S. (3d) 70 (C.A.) (per Laskin, J.A., concurring) at 126, citing Johnson v. Agnew (1979), [1980] A.C. 367 (U.K.H.L)., Baud Corp., N.V. v. Brook, [1978] 6 W.W.R. 301, [1978] S.C.J. No. 106, [1979] 1 S.C.R. 633 at 61, citing Atiyah, Sale of Goods, 4th ed. (1971), p. 294: ‘In particular it is unrealistic to suppose that a buyer will in practice be able to buy goods on the market on the very day on which the seller fails to deliver.’

That is, courts will award damages equal to the probability of securing the lost benefit (or avoiding the loss) multiplied by the value of the lost benefit (or the loss sustained): Berry v. Pulley, 2015 ONCA 449 at 72.

Liquidated damages awards for breach of contract will generally include pre-judgment interest, assessed from the date of breach at a simple rate prescribed by the Bank of Canada. This presumption can be displaced by the parties’ prior agreement. Unless an award (or settlement agreement) provides otherwise, it is deemed to be inclusive of tax.

140 This is provided for variously by provincial legislation. See, for example, the Ontario Courts of Justice Act, RSO 1990, c C.43 at 127; Court Order Interest Act, RSBC c C. 43 at Part 1.

141 This is provided for explicitly in certain provincial legislation; see, for example, Court Order Interest Act, RSBC c C. 43 at 2(c). In other provinces (e.g. Ontario) the legislation is not explicit but courts nevertheless have discretion to award prejudgment interest at a rate and method of calculation (simple or compound) that accords with the expectancy principle and in restitution: Bank of America Canada v Mutual Trust Co., 2002 SCC 43.

142 With respect to judicial awards, see: THD Inc. v. The Queen, 2018 TCC 147, citing Excise Tax Act, RSC 1985, c E-15. With respect to settlement agreements, see: Automodular Corporation v. General Motors of Canada Limited, 2018 ONSC 1640 at paras. 35-40.
As a civil law country, the legal system of China is mostly derived from that of Germany and Japan. ‘Civil law’ in China has a wide-ranging meaning, including laws governing both civil and commercial activities. In other words, commercial contractual activity is considered as a part of civil activities. Correspondingly, the General Principles of the Civil Law of the People’s Republic of China, revised in 2009 (the General Principles of the Civil Law) and General Rules of the Civil Law of the People’s Republic of China (2017) (the General Rules of the Civil Law) stipulate the general principles and rules of commercial activities, such as the capacity of parties, the elements and validity of civil juristic acts, etc., while the Contract Law of the People’s Republic of China (1999) (the PRC Contract Law) is the core and specific law that governs commercial contracts and commercial disputes.

The Contract Law was promulgated by the National People’s Congress of China (NPCC) on 15 March 1999 and came into effect on 1 October 1999. During the past 20 years, the Supreme People’s Court (SPC) has promulgated two interpretations on the issues concerning the application of PRC Contract Law, and several interpretations on commercial contracts dispute resolutions.

The General Principles of the Civil Law, General Rules of the Civil Law, the PRC Contract Law, the interpretations by the SPC and the opinions of SPC on some specific contracts or cases constitute the whole hierarchy of substantive governing laws and policies regarding commercial contracts and commercial litigation, while the Civil Procedure Law of the People’s Republic of China, revised in 2017 (the PRC Civil Procedure Law) defines the procedures. The PRC Civil Procedure Law introduces settlement, mediation, litigation and arbitration as the main four ways of dispute resolution. It also sets out the litigation procedure, from jurisdiction, first instance, second instance and trial supervision to execution procedures. With the increase in financial disputes in recent years, China is trying to set up specific courts, the financial courts, to promote the professional resolution of financial disputes.
II CONTRACT FORMATION

According to the PRC Contract Law, capable parties are free to enter into a contract in written, oral or other forms by themselves or through authorised agents. Commercial contracts are usually made in writing.

i Key clauses of a contract

Generally, a contract contains the following clauses:

1. titles or names, and domiciles of the parties;
2. subject matter;
3. quantity;
4. quality;
5. price or remuneration;
6. time limit, place, and method of performance;
7. liability for breach of contract;
8. methods of dispute resolution.

Depending on the transaction habits and the legal knowledge of parties, not all contracts contain all of the aforementioned clauses. Interpretation of the Supreme Court on Certain Issues Concerning the Application of the PRC Contract Law (II) (Interpretation II) further clarifies the essential clauses of contracts. Where disputes arise over whether the parties have concluded a contract, the contract shall be deemed concluded if the name of the parties, the subject matter and quantity of the contract can be recognised.

ii Invitation to offer, offer and acceptance

Where there is an offer and an acceptance, there is a contract. An offer is an expression of intent to contract with others. The contents of an offer must be specific and definite and it shall be indicated in the offer that the offeror will be bound once they have accepted. In order to increase the ratio of contracting, a party may take some measures to invite others to make an offer to them, such as commercial advertisements. If the content of a commercial advertisement is so specific and definite as to comply with the offer, the commercial advertisement will be deemed as an offer. An acceptance must be made by the offeree within the given time of the offer. The content shall be consistent with the offer. If the content of an acceptance substantively modifies the contents of the offer (for example, the subject matter, the quantity or price, etc.), or the acceptance reaches the offeror after the time limit, it will be deemed a new offer. A contract is established when the acceptance becomes effective.

iii Effectiveness

Generally, a legally established contract becomes effective upon the establishment of that contract. Sometimes a legally established contract does not take effect simultaneously, mainly in the following situations.

a Where it is provided by the laws or regulations that a contract shall only take effect upon approval or registration, these provisions shall govern. For example, if it is provided that a contract established in the establishing or altering of a foreign-invested
enterprise shall be effective only upon the completion of approval by authorities, the contract shall take effect upon the date of approval. Without approval, the court shall uphold that such contract has not come into effect through the process of litigation.4

b Parties may attach conditions to the effectiveness of a contract. Regarding conditions for its entry into effect, the contract shall become effective upon the satisfaction of such conditions, before which, the contract is established, but is not deemed to have taken effect.

c Parties may attach a time limit for the contract’s entry into effect. The contract shall take effect upon the expiration of such time limit.

iv Valid, revocable and void contracts

A legally valid contract shall meet the following requirements:

a the parties are of full capacity while contracting;

b the intent and content expressed are genuine and out of the free will of parties; and

c the contract does not violate any mandatory provisions of laws, regulations or public policies.

In commercial transactions, if the contract is reached in the name of the principal by a person with no power of agency, overstepping the power of agency or an individual whose power of agency has expired, the contract may be valid and binding on the principal, if it is ratified by the principal.

If the contracting expression is not genuine or not out of the free will of parties, the contract might be revocable in the following situations:

a the contract was reached due to serious misunderstandings;

b the contents of the contract are obviously unfair to one party; or

c the contract was reached by fraud, coercion or by taking advantage of the other party’s unfavourable position.

The right to revoke a contract shall be exercised through a court or an arbitration institution within one year from the date that the cause of revocation is known or ought to be known.

A contract shall be void under any of the following circumstances:

a the contract is concluded by fraud or coercion by one party, and damages the interests of the state;

b the contract is concluded by malicious collusion to damage the interests of the state, a collective group or a third party;

c an illegitimate purpose is covered up;

d the contract damages public interests; or

e the contract violates mandatory provisions of laws and regulations.

If one part of a contract is void yet does not affect the other parts, the other parts shall remain valid.

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4 See Article 1 of Provisions of the Supreme People’s Court on Several Issues Concerning the Hearing of Cases about Disputes Involving Foreign-funded Enterprises (I).
v Negligence in contracting
If one party acts against the principle of good faith and causes the losses of the other party while contracting, the party might be held liable under any of the following circumstances:
   a negotiating in bad faith in the name of contracting;
   b deliberately concealing important facts or providing false information of contracting; or
   c acting in other ways against the principle of good faith.

III CONTRACT INTERPRETATION
i Choice-of-law principles
Domestic contracts shall be governed by PRC laws. Unless explicitly provided, parties are not allowed to choose the governing laws of domestic contracts. According to Article 6 of Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the Law of the People’s Republic of China on Foreign-Related Civil Relations (I), where it is not explicitly provided that parties may choose applicable laws for foreign-related civil relation, the choice of such laws by the parties shall be deemed as invalid.

For foreign-related contracts, the parties may expressly select the law applicable in accordance with laws. Once selected, the court shall not support the claim that the choice of law is invalid on the grounds that the law chosen by the parties in the contract has no actual connection with the foreign-related civil relation in dispute. Where the application of foreign laws may harm the social and public interests of China, the relevant Chinese laws shall apply. Detailed rules are mainly provided in the PRC Contract law, the People’s Republic of China on Application of Law in Foreign-related Civil Relations, and Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the Law of the People’s Republic of China on Foreign-Related Civil Relations (I).

ii Contract interpretation
Article 125 of the PRC Contract provides the basic principle of contract interpretation. Where disputes arose between the parties on the understanding of any clause of the contract, the meaning of the clause shall be determined according to the words and terms used, the relevant clauses, the purpose of the contract, commercial practices and the principle of good faith.

If a dispute arose over the understanding of a standard term, the term shall be interpreted based on general understanding. Where there are two or more interpretations for such term, the interpretation unfavorable to the party providing such term shall prevail. Where the standard terms are inconsistent with non-standard terms, the latter shall be adopted. Where there are no clauses or no explicit clauses on the quality, price or remuneration or place of performance in an effective contract, the parties may reach a supplementary

5 See Article 7 of Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the Law of the People’s Republic of China on Foreign-Related Civil Relations (I).
6 See Article 5 of Law of the People’s Republic of China on Application of Law in Foreign-related Civil Relations.
agreement. If the parties failed to reach a supplementary agreement, the content shall be determined in accordance with the relevant clauses of the contract or commercial practices. Article 62 of the PRC Contract Law provides rules on clarifying these clauses.

Based on the principle provided by the PRC Contract Law, the courts have developed some rule in interpreting contracts.

a. Where parties dispute on the clauses of a contract, the true meaning of the parties shall be explored, the first of which is to explore the meaning of the words and terms used. This is the contextual interpretation. Other methods of interpretation might be used only when the contextual interpretation fails to determine the explicit and real meaning of the parties.7

b. The interpretation of a contract shall never go against the true meaning of the parties. It is the basis and an important source for judgements to respect to the agreement of the parties and the original intention.8

c. The interpretation of a contract may provide a criterion for the court the determine whether one party has breached the contract. Considering the purpose of private lending, if the borrower refuses to provide financial statements and relevant materials, the lender will not be able to supervise the use of the loan. Therefore, such behaviors of the borrowers constitute a breach of contract.9

IV DISPUTE RESOLUTION

There is no such requirement like minimum amounts for litigation in China. Once the conditions set in Article 119 of the PRC Civil Procedure Law are satisfied, the parties may litigate the contract disputes to the court.

a. The plaintiff must be a citizen, a legal person or other entity with direct interests in the case.

b. The defendant must be identifiable.

c. The claim must be specific and clear supported by specific facts and grounds.

d. The dispute should fall into the range of civil actions and the jurisdiction of the court.

Though there is no requirement of minimum amounts, the SPC and the higher courts in various provinces have released some information regarding adjusting the criteria for the jurisdiction of higher courts, intermediate courts and primary courts over civil and commercial cases of the first instance. On 30 April 2019 the SPC released a new circular, which came into effect on 1 May 2019 and, according to which, if the amount disputed is less than billion yuan, the case shall fall in the jurisdiction of intermediate courts.

In recent years, some special courts and tribunals have been founded to handle certain types of disputes more efficiently, mainly the intellectual courts and tribunals and the financial courts and tribunals. Intellectual courts have been founded in Beijing, Shanghai, and Guangzhou, while intellectual tribunals have been established in some provinces, such as Tianjin, Jilin, and Henan, etc. On 1 January 2019, the SPC intellectual tribunal was founded.


China

founded. With the emerging of financial disputes, Shanghai Financial Court was founded on 20 August 2018 to handle all the financial civil cases and financial-related administrative cases. Later, the first two cross-regional financial tribunals in Jiangxi were established in Nanchang on 8 October 2018. Though specific financial courts and tribunals have not been established in Beijing, according to the Announcement\(^\text{10}\) of the Beijing Higher Court, the Beijing No. 4 Intermediate Court shall exercise jurisdiction over all the cases involving financial loan contracts disputes and insurances disputes.

Though some special courts and tribunals were founded to handle certain types of disputes, the traditional division of duties among different tribunals within the same court is being broken. Previously, commercial disputes are usually distributed to the No. 2 tribunal or a certain fixed tribunal, now with the reform of extensive civil trial, a commercial dispute might be randomly distributed to any tribunal.

Besides litigation, the PRC Civil Procedure Law also introduces settlement, mediation, and arbitration as alternative dispute resolutions. It is important to note that on 29 June 2018, the China International Commercial Court (CICC) is established by the SPC to adjudicate international commercial cases. The Fourth Civil Division of SPC is responsible for coordinating and guiding the two international commercial courts. The aim of CICC is to promote connectivity of litigation, mediation and arbitration to form a convenient, expeditious and low-cost ‘one-stop’ dispute resolution platform. The CICC practices the ‘first instance being final’. The judgments and rulings made by the CICC are final and binding on the parties and with legal effect.\(^\text{11}\) On 29 May 2019, the Second International Commercial Court heard its very first case in an open hearing for a shareholder qualification conformation case among the plaintiff Ruoychai International Group Co Ltd and the defendant Red Bull Vitamin Drink Co Ltd and the third party Inter-Biopharm Holding Ltd. There were some innovations in this case, for example, the opinion of the minority was recorded in the judgment. It is believed to be a good start for parties to resolve international commercial disputes through litigation in China.

Settlement and mediation do not conflict with litigation. Parties can resolve their disputes through settlement and mediation before and during litigation. Mediation by the court is considered as part of the litigation procedure. A mediation statement issued by the court is legally binding to both parties. If one party fails to exercise the duties in such a statement, the other party can apply to the court for enforcement. However, if the parties want to resolve their disputes through arbitration, there shall be a clear and valid arbitration agreement, which might be included in the primary contract or be reached during dispute resolution. The arbitration agreement will exclude litigation from the dispute resolution. Some arbitration institutions are also trying to introduce settlement and mediation into arbitration. According to the rules of the Beijing Arbitration Committee (BAC), parties can resort to mediation before and during arbitration as well. This is a trend that may develop and explore diversified dispute resolutions in the next few years.

\(^{10}\) See the Announcement of the Beijing High People's Court on Performance of Duties by the Beijing No. 4 Intermediate People's Court.

V BREACH OF CONTRACT CLAIMS

The parties shall fully perform their obligations in good faith. The liability for breach of contract applies the principle of strict liability. The fault or negligence is not a basic element of a claim for breach of contract. Where a party fails to perform the contractual obligations or the performance does not comply with the terms of the contract, the other party shall file a claim for breach of contract. The plaintiff bears the burden of proof. To file a claim for breach of contract, the plaintiff shall submit preliminary proofs along with the complaint to prove that: (1) there is a valid contract; and (2) the other party has breached the contract. The plaintiff does not have to have a ‘clean hand’. If the plaintiff breaches the contract as well, the defendant may file a counterclaim.

The rules of proof in complex commercial litigation is the same as that in other civil litigations, which are specified in Several Provisions of the Supreme People’s Court on Evidences in Civil Litigation. Evidence shall comprise the following categories: statements of the parties, documentary evidence, physical evidence, audiovisual materials, electronic data, the testimony of witnesses, expert opinions and records of inspections and examinations. Evidence shall be verified before it can be admitted and taken as a basis of facts. Evidence formed out of China should be notarised and legalised to become qualified evidence in litigation. It is worth noting that in the very first case of CICC, there are some innovations in rules of proofs of international dispute resolution. For example, notarisation and authentication was not taken as a compulsory requirement for evidence formed out of China. Generally evidence in English shall be translated into Chinese. However, if both parties agree that the evidence in English may not be translated into Chinese, the court might accept evidence in English. If these innovations can become new rules of evidence, the proceedings of international disputes resolution will be greatly simplified.

VI DEFENCES TO ENFORCEMENT

The most common ways parties seek to avoid enforcement of contractual obligations or challenge claims of breach of contract are as follows.

a There is no contract or the contract is void or revocable. The definitions of Void contracts and revocable contracts in PRC Contract Laws can be found above in section II. To seek the defence that the contract is revocable, a party shall request the court or an arbitration institution to first revoke the contract. The right to revoke a contract shall be extinguished if the party fails to exercise their right within one year from the date the cause for revocation is known or shall be known.

b The limitation period has expired. The limitation of action for commercial contract litigation is three years in China. A limitation of action shall run from the date when an obligee knows or should have known that his or her rights have been infringed and who the obligor is.

c The contract may be rescinded as provided in the contract or in PRC Contract Law. According to Article 94 of PRC Contract Law, even if it is not agreed in the contract, a party may rescind the contract under any of the following circumstances: (1) the

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12 See Article 63 of Civil Procedure Law of the People’s Republic of China (Revised in 2017).
13 See ‘CICC Has Completed These Things in The Last Year’, Sun Hang, the public WeChat account of SPC.
The obligations of both parties shall be performed simultaneously. Where both parties have obligations towards each other and there is no order of priority in respect of the performance of the obligations, the parties shall perform the obligations simultaneously. One party has the right to reject the other party’s request for performance before the other party’s performance of the obligations, or if the other party’s performance does not comply with the terms of the contract.

d The defence of unease. The party who shall perform its obligations first may suspend the performance if there is conclusive evidence that the other party falls under any of the following circumstances: (1) the other party's business conditions are seriously deteriorating; (2) the other party has transferred its property and taken out its capital secretly to evade debts; (3) the other party loses its business creditworthiness; or (4) other circumstances showing that the other party loses or will possibly lose its capability to perform its obligations. If a party suspends their performance without conclusive evidence, they shall be liable for breach of contract.

e The party who shall perform its obligations first has not rendered the performance. Where both parties have obligations towards each other and there is an order of priority in respect of the performance of the obligations, if the party who shall perform its obligations first (the former) has not rendered the performance, the other party has the right to reject the former’s request for performance. If the former’s performance does not comply with the terms of the contract, the other party has the right to reject the corresponding request for performance.

VII FRAUD, MISREPRESENTATION, AND OTHER CLAIMS

There is no such concept as ‘quasi-contract claims’ in China, yet it might be recognised by the court in the name of other claims. According to Article 35 of the PRC Contract Law, where a contract is required to be concluded in written form as provided for by the laws and administrative regulations or as agreed by the parties, and the parties fail to conclude the contract in written form but one party has performed its principal obligations which have been accepted by the other party, the contract shall be deemed as established. In this case, since there is no contract or terms agreed by both parties, if one party fails to perform its obligations, the other party shall seek remedies provided by the PRC Contract Law.

Fraud, misrepresentation and obviously unfair situations are all causes provided by the PRC Contract Law to revoke the contract, as discussed above. Sometimes, the fraud, misrepresentation or other wrongdoings of one party might constitute a tort. The claim of tort and the claim of breach of contract are not allowed to be brought up at the same time. In the event that the breach of contract by one party infringes upon the personal or property interests of the other party, the injured party is entitled to request the breaching party to assume liabilities for breach of contract in accordance with the Law, or to request the
breaching party to assume liabilities for infringement in accordance with other laws.\(^{15}\) The elements, rules of proofs, compensations, and limitation of actions of the tort claim diversify from that of breach of contract claims. One party may choose one claim to file based on the facts of the case.

\section*{VIII REMEDIES}

Where a party to a contract fails to perform the contractual obligations or the performance does not comply with the terms of the contract, the party shall bear liabilities for breach of contract, such as continuing its performance of the obligations, taking remedial measures or compensation for losses. If it falls into the situations of revocable contracts or terminable contracts, one party can also request to revoke or terminate the contract.

\begin{enumerate}[i]
\item **Continue to perform**

To seek for continue to performance, the following requirements shall be met: (1) one party breaches the contract; (2) it is possible for the defaulting party to continue to perform its obligations; and (3) the observant has requested the defaulting party to continue to perform.

\item **Taking remedial measures**

There may be various forms of remedial measure for different types of contracts. For example, if the terms in relation to quality are not met and there is no agreement in the contract on the liability for breach of contract or such agreement is unclear, the injured party may, in light of the nature of the subject matter and the degree of loss suffered, select in a reasonable manner to request the other party to bear liabilities for breach of contract in such form as repair, replacement, reworking, return of the goods, and reduction in price or remuneration.\(^{16}\)

\item **Compensation for losses (damages)**

Based on different types of default performance, there are damages for alternative performance, damages for delay of performance and ‘simple’ damages. If one party fails to perform the contractual obligations or the performance does not comply with the terms of the contract, thereby causing losses to the other party, the amount of damages shall be equal to the losses caused by breach of contract, including benefits receivable after the performance of the contract, provided that it shall not exceed the probable losses caused by breach of contract which was foreseen or ought to have been foreseen by the breaching party at the time of conclusion of the contract. The clause of damages is a basic clause in a commercial contract. The parties may agree that the defaulting party shall pay liquidated damages of a certain amount based on the extent of the default acts or may agree upon the method for calculating damages.\(^{17}\)

The remedies above do not conflict with each other. The observant may seek for both continuing to perform and damages as well. Where one party fails to perform the contractual obligations or the performance fails to comply with the contract, if the other party still suffer from other losses after continuing performance, the party shall compensate for such losses.

\begin{flushright}
\footnotesize
15 \textit{See Article 122 of the PRC Contract Law.}

16 \textit{See Article 111 of the PRC Contract Law.}

17 \textit{See Articles 113 and 114 of the PRC Contract Law.}
\end{flushright}
IX CONCLUSIONS

As a civil law country, the general principles and framework of commercial contracts and commercial dispute resolution are relatively stable and foreseeable in China. The rule that ‘the intentions of the parties prevail’ has won more attention and respect of the court in litigation. The scope of void contracts has been narrowed by the General Rules of the Civil Law. The contract concluded by means of fraud or coercion by one party, thereby damaging the interests of the State, is deemed as revocable contract instead of void contract.

China is currently working on the coding of civil laws. As mentioned above, the General Rules of the Civil Law took effect in 2017, yet the special rules are still being drafted, of which the contract laws shall be a part. Once drafting is completed, the current PRC Contract Law will no longer be applied. Since the General Rules of the Civil Law have some differences from the general provisions of the PRC Contract Law, the SPC has made some explanations to coordinate their relation and application. Where the relevant provisions of the General Rules of the Civil Law are inconsistent with the general provisions of the PRC Contract Law, the provisions of the General Rules of the Civil Law shall apply. Where the relevant provisions of the General Rules of the Civil Law are inconsistent with the special provisions of the PRC Contract Law, the specific rules of the two shall apply.\(^\text{18}\)

On 7 August 2019, Mr Li Chenggang, the Assistant Minister of Commerce of China, signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) on behalf of China. The lack of a cross-border mechanism for the enforcement of mediated settlement agreements had long been considered a significant obstacle against the development of mediation in international commercial dispute resolution. It is anticipated that mediation may play a more important role in international commercial dispute resolution in China in the future.

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\(^{18}\) Liu Guixiang, Speeches at the National Civil and Commercial Trial Work Conference. © 2019 Law Business Research Ltd
I  OVERVIEW

Cyprus is a common law jurisdiction country and its justice system is based on the adversarial model. Most of Cypriot law has been modelled after the English Common Law and Equity, the basic principles of which are directly applied by Cyprus courts, under Section 29 of the Courts of Justice Law.

The general contract law of Cyprus is codified by the Contract Law, Cap. 149 (Cap. 149), which is identical in some respects to the Indian Contract Act 1872. The Cyprus courts may therefore also seek guidance from decisions of the English Courts as well as the principles of Indian case law in relation to contract law as well as recognised academic textbooks thereon.

The courts are bound by the doctrine of precedent, according to which the superior courts’ (second instance) decisions bind subordinate courts. The Supreme Court has unlimited subject matter jurisdiction and its decisions when operating as an appeal court are final, unless overturned by the European Court of Human Rights or the European Court of Justice. In Cyprus, the courts follow and apply the procedural rules adopted for each type of court. The Civil Procedure Rules (CPR) apply to all district court civil procedures and in civil procedures before other Courts, in some instances mutatis mutandis.

II  CONTRACT FORMATION

Section 10 of Cap. 149 provides that a contract is an agreement which is concluded with the free consent of parties competent to contract for a lawful consideration and with a lawful object, and which is not expressly declared by the law to be void, and may, subject to the provisions of this Law, be made in writing, orally or partly in writing and partly orally or may be implied by the parties’ conduct.

In a few words, a contract under Cyprus law is an agreement between two or more people regarding a certain matter, which creates specific obligations and rights and which is legally valid and enforceable. A contract need not necessarily be in writing, except where specifically provided so by law.

The fundamentals for the existence of a valid and enforceable contract are outlined in the following sections.

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1 Stavros Pavlou is the senior and managing partner, Katerina Philippidou and Andria Antoniou are senior associates and Athina Patsalidou is an associate at Patrikios Pavlou & Associates LLC.
Offer and acceptance

It is a basic rule of contract law that for a contract to be valid and enforceable there must have been an offer by one of the parties which was accepted by the other one.

An offer exists when one person signifies to another his or her willingness to do or to abstain from doing something, with a view to obtaining the assent of that other person to such act or abstinence.\(^2\)

When the person to whom the proposal is made signifies his or her assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

An offer should be distinguished from an invitation to treat or an invitation to negotiate because the latter cannot be accepted as such and leads to promise. The answer to such an invitation is in essence an offer.\(^3\) For instance, a price list constitutes an invitation to treat or an invitation to negotiate and an order is an offer which must be accepted so as to create a binding contract.

Acceptance is an absolute and unqualified approval of the terms of an offer with any terms that may be attached.

It must be communicated to the offeror and can be in a variety of forms as follows: (1) in writing, (2) orally, (3) may be inferred by the conduct of the parties, or (4) a stipulated method of acceptance followed.

It has to be noted that silence cannot be considered as acceptance with exception of the case in which the parties have agreed to be so.

Consideration

Valuable consideration is necessary to make a contract enforceable; consideration need not be adequate, but must be of some value and sufficient.\(^4\) However, there are some exceptions,\(^5\) including the cases where a party provides a gratuitous assurance by a deed, or gives a gratuitous promise. Past consideration is also considered to be valid consideration. Lastly, the contract is void when the consideration is illegal.

Intention to create legal relations

Mutual intention of the parties to create legal relations constitutes a significant factor in considering the validity and enforceability of a contract. Such intention is presumed to exist for commercial contracts, which is generally not the case for family, social and friendly settlements.

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\(^2\) Section 2(2)(a) of Cap. 149.
\(^5\) Section 25 of Cap. 149.
iv  **Capacity to contract**

As a general rule, every person is deemed capable of entering into an agreement, except persons of unsound mind and those disqualified from contracting by any law. For parties who have not attained the age of 18 years at the time of formation of a contract, the law in force in England at the time is applicable.6

v  **Law formalities**

An agreement can be made in writing or orally or partly in writing and partly orally or may be implied by the conduct of the parties.7 Nevertheless, there are specific provisions stipulated that certain formalities must be met. For example, in the case of leasing an immovable property for a period exceeding one year, the contract must be in writing and signed at the end thereof by each contracting party, in the presence of at least two witnesses who are competent to contract.8

vi  **Certainty of terms**

Section 29 of Cap. 149 provides that ‘agreements, the meaning of which is not certain, or capable of being made certain, are void’. The courts should try to consider a contract as valid when the uncertainty of a term does not affect the general clarity of the rest of the contract or the conditions of the contract are clear.9

vii  **Third-party beneficiaries**

Applying the contractual doctrine of ‘privity of contract’ to contracts to benefit third parties, a ‘legal laguna’ is created. More precisely, the third party who has suffered loss from the breach of contract has no claim and thus, they are not allowed to seek remedy. A specific legislative instrument has not been adopted in the Cypriot legal system. Despite this fact, a third party is entitled to have the right to enforce a contract to which he is not a party in some circumstances, such as in a contract concluded by his or her agent, in cases of assignment or in cases of insurance claims.

These are not necessarily exhaustive but should be restricted to similar subjects that raise threshold questions about whether an agreement has been formed, in a commercial context. Readers should be given an idea of the common features of commercial contracts under your jurisdiction’s law. Where a formal contract has not been formed, authors may wish to refer to an alternative framework that may establish commercial rights and obligations, for example, implied in law or implied in fact contract, quasi-contract, promissory estoppel and quantum meruit.

III  **CONTRACT INTERPRETATION**

i  **Choice of law principles**

The parties to a contract are free to choose the law to govern the whole or part of their contract, even where the chosen law has no connection, or no apparent connection, with the

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6  Section 11 of Cap. 149.
7  Section 10 of Cap. 149.
8  Section 77 of Cap. 149.
transaction in issue. Where the parties to a contract choose the governing law of the contract, then the Cyprus courts will almost invariably respect such a provision, provided that that was clearly the intention of the parties.

This principle is also specifically embodied in the 1980 Rome Convention on the law applicable to contractual obligations, which provides that the choice of law must be either expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. However, Article 3(3) of the Rome Convention provides that in cases where all other elements relevant to the situation at the time of the choice are connected with one country only, then a choice of a foreign law shall not prejudice the application of rules of the law at the country which cannot be derogated by contract (i.e., the so-called ‘mandatory rules’).

Additionally, the Cyprus courts can restrict the application of a foreign law if it is incompatible with public policy. A foreign law must be pleaded and proved as a fact. Therefore, the parties bear the burden to prove the applicable foreign law. If they fail to do so, the foreign law is presumed to be similar to Cyprus law and the courts will apply domestic law.10

### ii Rules of construction

There are two approaches regarding contractual interpretation, namely literal and purposive. According to the first one, the interpretation process focuses firstly on the wording of the contract and only if there is a kind of ambiguity resorts to the context of the contract in order to interpret it based on the intention of the parties. In contrast, the second one promotes a commercially sensible construction based on the commercial reality.

The Supreme’s Court judgment in the case of Theologou a.o. v. Ktimatikis Etaireias Nemesis Ltd (1998) 1 C.L.R 407 explains the approach Cyprus courts follow:

> We should note that, there is a continuous tendency to harmonise the principles of interpretation of contract with the reality of everyday life. The criterion is the meaning which the text of the contract would convey to the average reasonable person. To this end, the knowledge may be enriched by revealing the background of the agreement, with the exception of negotiations, as well as unilateral declarations and subjective intentions of the parties. Evidence referring to subjective factors can only be admitted in actions for rectification. (See ICS v. West Bromwich BS [1998] 1 All ER 98 (HL)). The object of interpretation, of course, remains to be the meaning of the terms of the agreement according to the average reasonable person. The meaning, which is conveyed to him, for the agreed.

Moreover, another significant interpretation rule is the contra proferentem rule, which provides that in a case of ambiguity of a term, this term must be interpreted against the party who has proposed or drafted it.11

### iii Exclusion and limitation clauses

Although specific exclusion and limitation clauses are accepted, they are strictly interpreted. With regard to consumer contracts where terms, which were not individually negotiated,
create a significant imbalance to the rights and obligation of the parties against the consumer, they may be considered unfair, taking into account the principle of good faith. A test of reasonableness or unfairness is applicable to all contracts apart from consumer contracts and where a clause is unreasonable as such or in the facts of the case, it can be voided.

iv  Implied terms
Terms in a contract may be either express or implied and can be established by custom, statute or the courts. Construction contracts constitute a prime example of contracts encompassing implied terms. The following are examples of terms that may be implied in construction contracts (even though it is not specifically expressed therein): that the work will be done in a good and workmanlike manner; that he will supply good and proper materials; and that the house will be reasonably fit for human habitation when built or completed.

v  Extrinsic evidence rule
As a general rule, extrinsic evidence cannot be taken into consideration for interpretation of a contract in way that they ‘contradict, modify, remove or add to the content of the terms of the document’. However, it has been established that extrinsic evidence may be accepted to prove the validity of a contract (Mavrou v. Theodorou (1984) 1 CLR 635) the true nature of the contract (Kypio (I.T.H.) Company v. Kassapi [1980] 2 J.S.C. 259) and the ambiguous capacity of the parties (Loizidou v. Georgiou [1973] 9 J.S.C. 1219).

IV  DISPUTE RESOLUTION
A party to a commercial contract having any monetary or specific performance claim against another party, may initiate legal proceedings in order to recover any money due thereunder or obtain an order for specific performance, as there are no threshold requirements as to the amount claimed in order to be able to do so. A party may even sue solely for the purpose of obtaining a declaratory judgment on the rights of the respective parties.

i  Jurisdiction
In Cyprus the most common method of resolving large commercial disputes is by way of litigation, most often in the highest level of the district (first instance) courts where the judges (court presidents) have jurisdiction to try claims above €500,000. Apart from the presidents, a district court also offers senior district court Judges with jurisdiction to try claims between €100,000 and €500,000, and district judges with jurisdiction to try claims below €100,000.

Up to now there is no separate commercial court, however on 6 May 2019 the Council of Ministers approved a draft bill providing for its establishment. The Commercial Court will be handling solely high-value commercial disputes and adopt fast track procedures.

As pointed out above, the Cyprus courts will respect and insist on the application of a jurisdiction clause contained in a contract, unless either party proves that Cyprus is not the appropriate forum (e.g., where the subject matter is an immovable property situated abroad).

12  Agisilaou Tsiali v. Donas K. X Andreou (Tsiali mentally ill, dated 17/7/00 Civil Appeal 10174.
Moreover, Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) applies in contracts where the contracting parties are members of the European Union.

ii Alternative dispute resolution methods

Arbitration

Arbitration has long been used as a means of dispute resolution, among others for construction or building contract disputes and its use is mandatory in cases of disputes relating to cooperative institutions. Arbitration clauses have increasingly been used in all forms of contracts as the means of resolving disputes arising out of such contracts. A dispute submitted to arbitration may be resolved quicker and more cost-effectively than one submitted to litigation.

Arbitration is a private and out of court dispute resolution method based on the agreement of the parties. The dispute is resolved by an impartial arbitrator or arbitral tribunal and the decision is final and binding.

Mediation

Mediation is an alternative, out of court and voluntary dispute resolution mechanism. Mediation in Cyprus is not a compulsory step prior to resorting to court. It is a non-binding, private, confidential and low-cost procedure via which the parties attempt with the help of a mediator to reach an agreement by which to settle their dispute in a binding manner.

It is a rather new concept in Cyprus and, according to the Cyprus Mediation Association, ‘there is strong opposition from legal circles, who loathe mediation because it bypasses legal proceedings’. This is one of the least preferred methods of ADR, since the parties may feel somewhat insecure about resorting to it as its outcome depends on the parties’ personal and business interests, and common sense rather than the relevant law.

On the other hand, it may be argued that parties have little to lose by choosing mediation since, even if a settlement is not reached, the process facilitates the designation of the facts and issues of the dispute, thus preparing the ground for any potential court proceedings.

V BREACH OF CONTRACT CLAIMS

Where a contracting party breaches terms of the contract, the burden for proving such a breach lies on the plaintiff on the balance of probabilities.

i Termination

The innocent party in some cases has the right to either insist on the performance of the contract that has been breached or accept the breach and affirm the termination of the contract. It should be noted that if the innocent party fails to terminate the contract within a reasonable time, it may be considered as having waived its right to terminate, especially if it continues to perform its obligations according to the contract or act in a manner incompatible with an intention to terminate thereof.

Not every breach of a contract entitles the innocent party to terminate a contract. If a party breaches a condition, i.e., a term of significance and essential importance going to the root of the agreement of the parties, the innocent party may terminate the contract and seek
damages. But in cases where a party breaches a warranty (i.e., a term of lesser importance and collateral to the basic scope of the contract), the innocent party cannot terminate the contract, but can only seek compensation. In the case of innominate terms, the non-breaching party is entitled to terminate the contract when the effect of the breach is sufficiently serious; in fact, its right to terminate depends on the consequences of the breach.\(^{15}\)

The filing of an action itself can be considered as a termination of a contract.\(^{16}\)

**ii  Anticipatory breach**

Where a party reveals with his or her behaviour or statements that it will not fulfil its obligations arising from the contract, the innocent party can consider itself as discharged and terminate the contract before performance is due or insist on performance thereof and sue for specific performance.\(^{17}\)

The Supreme Court in *Neophytou Neophytos a.o. v. Elma Holdings Ltd (previously named Portfolio Investment Company Hra Limited)* (2013) 1 A.A.D. 1807 held that it was not necessary for the respondent to prove her readiness and willingness to fulfil her obligation due to a prior breach conducted by the appellants.

### VI  DEFENCES TO ENFORCEMENT

**i  Void and voidable contracts**

The parties to a contract may avoid enforcement thereof, if the prerequisites for the formation of a valid contract are not met, and more specifically if the parties do not enter into the agreement by their free consent. Cap. 149 exhaustively provides the cases where the consent of the parties entering into a contract is not given under their free will.\(^{18}\) Specifically, the parties do not enter into a contract under their free will if their consent is given due to the following reasons.

**Coercion**

If someone, with the intention to force another to enter into a contract, commits or threatens to commit any act forbidden by the Penal Code or unlawfully detains or threatens to unlawfully detain any property, to the prejudice of any person.\(^{19}\)

**Undue influence**

A contract is deemed to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. A person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other or he stands in a fiduciary relation to the other or he makes a contract with a

\(^{15}\) *Hong Kong Fir Shipping Ltd v. Kisen Kaisha Ltd* (1962) EWCA Civ 7.


\(^{17}\) *Hochster v. De La Tour* (1853) 2 E & B 678.

\(^{18}\) Sections 14–22 of Cap. 149.

\(^{19}\) Section 15 of Cap. 149.
person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. The burden for proving that a contract was not entered into with undue influence lies upon the party who is in a position to dominate the will of the other.20

**Fraud**

Any of the following acts committed by a party to a contract or by his or her agent, with the intent to deceive another party thereto or his or her agent or to induce him or her to enter into the contract:

* a the suggestion, as to a fact, which is not true by one who does not believe it to be true;
* b the active concealment of a fact by one having knowledge or belief of that fact;
* c a promise made without any intention of performing it;
* d any other act fitted to deceive; and
* e any such act or omission as the law specifically declares to be fraudulent.

However, mere silence as to facts which are likely to affect the willingness of a person to enter into the contract is not fraud, unless the person keeping silence has a duty to speak or unless his or her silence is equivalent to making a representation.21

**Misrepresentation**22

Misrepresentation includes the following:

* a the positive assertion, in a manner not warranted by the information of the person making it, which is not true, though he believes it to be true;
* b any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him or her, by misleading another to his or her prejudice or to the prejudice of anyone claiming under him or her; and
* c causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject to the agreement.

Where a person entered into a contract under the above circumstances, the said contract is voidable at the option of the party whose consent was so induced.23 The said party may insist that the contract must be performed and that he shall be put in the position in which he would have been if the representations made had been true.24

**Mistake**

Mistake refers to cases where both parties entered into the agreement under a mistake as to a matter of fact essential to the agreement. In that case, the agreement is void.25

20 Section 20 of the Law on Contracts, Cap. 149.
21 Section 17 of Cap. 149.
22 Section 18 of Cap. 149.
23 Sections 16 and 19 of Cap. 149.
24 Section 19(2) of Cap. 149.
25 Section 21(1) of Cap. 149.
The parties are not competent to contract

A person is considered competent to contract if he is not disqualified from contracting by any law and if he is of sound mind, namely if at the time of making the contract he is capable of understanding it and of forming a rational judgment as to its effect upon his or her interests. It is irrelevant if he is occasionally of unsound mind, as long as he was of sound mind at the time he made the contract.

The consideration and the purpose or object are not lawful

An agreement with unlawful consideration or object is void and cannot be enforced by Cyprus courts. Sections 23 and 24 of Cap. 149 provide that the consideration or object of an agreement is deemed be unlawful where:

- it is forbidden by law;
- it is of such a nature that if permitted it would defeat the provisions of any law;
- it is fraudulent;
- it involves or implies injury to the person or property of another; and
- the court regards it immoral, or opposed to the public policy.

As a general rule, an agreement without consideration is void, unless it is:

- expressed in writing and signed by the party to be charged therewith and is made on account of natural love and affection between parties standing in near relation to each other;
- a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do; or
- a promise made in writing and signed by the party to be charged therewith, to pay wholly or in part a debt of which the creditor might have enforced payment but for any law for the time being in force relating to prescription or the limitation of actions.

Limitation periods

The parties to a contract may also argue that the claim is statute-barred, namely that the time within which the parties could have initiated legal proceedings in relation to the breach of contract has elapsed. Since 1964 and until 1 January 2016, the limitation periods in Cyprus were suspended, therefore no limitation periods applied.

The law that currently regulates the matter of limitation periods is the Limitation of Actions Law 66(I)/2012, which came into force on 1 July 2012, with a transition period of one year.

Pursuant to the provisions of Law 66(I)/2012 the limitation period begins to run from the creation of the claim or cause of action. However, the limitation period for causes of action that arose prior to 1 January 2016 begins to run therefrom.

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26 Sections 11 and 12 of Cap. 149
27 Section 25 of Cap. 149.
28 Law on Suspension of Limitation of Actions, No. 57/1964.
29 Law on Limitation of Actions No. 66(I)/2012.
The general limitation period provided is 10 years from the date the cause of action was perfected. The limitation period is different depending on the nature of the cause of action. Common contract claims are statute-barred six years from the creation of the cause of action, namely from the breach of contract, while claims brought in relation to contracts or quasi-contracts for an agreed or reasonable fee for the services rendered by a lawyer, doctor, dentist, architect, civil engineer, contractor or any other independent professional are statute-barred after three years from the creation of the cause of action. Also, claims in respect of a mortgage or pledge are statute-barred after 12 years from the breach of obligation contained in the mortgage or pledge, while claims in relation to loan agreements are statute-barred after six years from the perfection of the cause of action.

ii Frustration of contract
Further to the above, the parties to a contract may invoke the doctrine of frustration so as to resist the enforcement thereof. This doctrine is applied by the Cyprus courts when a contract after its conclusion becomes, without the fault of either party, impossible or unlawful to perform due to circumstances that are beyond the control of the contracting parties or due to a change of circumstances which makes the performance of the contract impossible or unlawful. A defendant cannot avail himself or herself of the doctrine of frustration when the non-performance of the contract is clearly attributable to his or her own default. When frustration of a contract occurs, the contract is automatically terminated and the parties do not have an option as to whether the contract will be performed.

The element of what the parties had foreseen at the time of the contract plays a key role in whether the doctrine of frustration will be applied. Specifically, if the parties, at the time of concluding the contract, have foreseen the event that could have led the contract to be frustrated, but they did not include any relevant provision to the contract as to that event, the doctrine of frustration cannot be invoked. On the other hand, the doctrine of frustration may be invoked and applied if the event could have been foreseen by the parties (but was not actually foreseen) at the time the contract was concluded.

iii Force majeure
Force majeure occurs when a random event occurs that could not have been foreseen and which is beyond the control of the parties (for example, war, strike, hurricanes, earthquakes, government or legislative action etc). The occurrence of these events cannot be prevented by the parties, even if they exercise reasonable diligence and therefore the parties can invoke force majeure circumstances to avoid enforcement of the contract.

Even though Cap. 149 does not explicitly provide for these instances, contracting parties may choose to include in their contract a clause providing for force majeure instances which may lead to the non-performance of a contract. Even if they do not include this in the contract it will be implied by operation of law, under the principles of common law and equity.

30 Section 4 of Law on Limitation of Actions No.66(I)/2012
31 Sections 5 and 7 of the Law on Limitation of Actions No.66(I)/2012.
32 Section 56(2) of Cap. 149 and KIER (Cyprus) Ltd v. Trenco Construction (1981) 1 CLR 30.
VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Fraud and deceit

A plaintiff alleging the commission of fraud should generally prove that the defendant has acted with dishonesty or provided false statements or false representations. Due to the serious nature of the offence of fraud, and the fact that it contains criminal characteristics, the evidence to be provided must be precise and clear and general allegations will not suffice.\(^{34}\)

The following are the essential elements of the civil wrong of fraud:

\[ \begin{align*}
\text{a} & \quad \text{a representation of fact, either orally or by conduct; an expression of opinion or intention does not constitute a representation, unless such opinion or intention were never held;}
\text{b} & \quad \text{the person making the representation must be aware that the representation is false;}
\text{c} & \quad \text{the person making the representation intends the plaintiff to rely at the said representation and to suffer damage due to the said reliance;}
\text{d} & \quad \text{the plaintiff actually relied on and acted in accordance to the said false representation;}
\text{e} & \quad \text{the plaintiff actually suffered loss, because he acted in accordance to the said false representation.}
\end{align*} \]

On the other hand, a person commits the fraud of deceit if he presents a false fact as true, knowing that it is false and it includes any other action which intends to deceive another person. If the other person relies upon the said representation and due to the said reliance, he suffers damage or loss, then the defendant is liable for the said damage or loss.

The burden for proving that the tort of fraud or deceit were committed lies on the plaintiff, who must provide and prove the details of the fraud and deceit respectively.

ii Procuring breach of contract

The following are essential elements for proving that the civil wrong of procurement of breach of contract has been committed:\(^{35}\)

\[ \begin{align*}
\text{a} & \quad \text{the defendant caused the breach of contract between two other parties. The plaintiff must show a causal link between the conduct of the defendant and the breach of the contract;}
\text{b} & \quad \text{the plaintiff must prove he suffered damage because of the procured breach of contract;}
\text{c} & \quad \text{the defendant had an intention when procuring or inducing the said breach, namely the defendant must have known the existence of the contract and without any reasonable justification he procured the parties to breach the said contract.}
\end{align*} \]

It should be noted that in order for the said civil wrong to be committed, the contract must be legally binding, as it is a violation of legal right to interfere with contractual relations.

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\(^{34}\) Jonesco v. Beard (1930) A.C. 298.

\(^{35}\) Section 34 of the Law on Civil Wrongs, Cap.148
recognised by law if there is no sufficient justification for the said interference. A defendant who was reckless or shut his or her eyes to facts may be held liable for procuring breach of the contract.36

iii Unlawful means conspiracy
The tort of unlawful means conspiracy is not expressly provided for in the law but it forms a common law tort, recognised by the Cyprus courts.37 The essential elements of the aforementioned tort are the following:

\[ a \] the existence of an agreement between two or more parties; and
\[ b \] either, where the means are lawful, an agreement the real and predominant purpose of which is to injure the claimant or, where the means are unlawful, an agreement, the purpose of which is to injure the claimant; and
\[ c \] acts done in execution of that agreement resulted in damage to the claimant.

VIII REMEDIES
Breach of contract gives the right to the innocent party to claim a number of remedies against the party who breached the contract. The innocent party may seek most of the remedies usually available under common law and the principles of equity, while the Cyprus courts have discretion in awarding such remedies to the successful claimant. The remedies may be either monetary or non-monetary. The following are the most typical remedies awarded by the Cyprus courts, within the context of claims for breach of contract.

i Compensatory damages
The primary remedy awarded by Cyprus courts within the context of claims for breach of contract are compensatory damages, namely special and general damages. The damages awarded in these cases aim to compensate the innocent party for the loss it suffered and put him or her in the position he or she would have been, had the breach not occurred or had the contract been performed. These damages are calculated in accordance to the extent and type of loss suffered by the injured party. The party who rightly rescinds a contract is also entitled to compensation for any damage he or she has sustained because of the non-fulfilment of the contract.38 However, the innocent party should not be placed, through the award of damages, in a better position than the position he or she would have been placed had the contract not been breached.

Prior to awarding this type of damages, Cyprus courts take into consideration the following factors.

36 British Industrial Plastics Ltd v. Ferguson (1940) 1 All E.R. 479, pp.482-483.
Cyprus

Causation
The claimant or innocent party must prove a causal link between the breach of contract and the loss suffered, namely the loss or damage naturally arose in the usual course of things from such breach, or the parties could reasonably contemplate, when they made the contract that such loss was likely to result from the breach thereof.39

Remoteness
Cyprus Courts will not award damages if the loss or damage suffered is too remote to the breach of contract or for any indirect loss or damage caused due to the breach of the contract.40

Mitigation
The plaintiff will not be entitled to compensation for damages he or she suffered due to the breach of the contract to the extent that he could take any reasonable steps for mitigating the said damage or loss.41

Amount of damages
The measure for estimating the amount of damages that will be awarded by the courts for the breach of contract is the amount required to put the innocent party in the position it would have been, had the breach not occurred or had the contract been performed and the time for determining this loss is the time the contract was breached, namely the time the actionable right arose.42

It is essential for the plaintiff not only to satisfy the court as to the fact of damage, but also as to its amount. If the plaintiff fails to thus satisfy the court, his or her action will be dismissed, or he will be awarded nominal damages for the right that was infringed.43

ii  Restitutionary damages
Cyprus courts have the power to award restitutionary damages in favour of the innocent party, so as to prevent unjust enrichment of the party liable for the breach of the contract. Such damages may be awarded when the plaintiff did not suffer any loss or damage because of the breach of contract, but the defendant has gained some type of profit or benefit due to the said breach. In this case, the Court has power to award restitutionary damages in favour of the plaintiff thereby receiving any profit the party liable for the breach of contract received, because of the said breach.

39  Section 73(1) of Cap. 149.
40  Section 73(1) of Cap. 149.
iii Punitive or exemplary damages
Cyprus courts do not have any power to award punitive or exemplary damages within the context of claims for breach of contract, punishing the behaviour of the party liable for the breach. Exemplary damages may be awarded mainly within the context of civil wrongs, including cases for procuring breach of contract, but not for the breach of contract itself.\footnote{Constantinides v. Pitsillou and Another (1980) J.S.C. 279.}

iv Orders for specific performance
Cyprus courts have discretion to order the party liable for the breach of contract to comply with his or her obligations pursuant to the contract. Only the following contracts are capable of being specifically enforced:\footnote{Section 76 of Cap. 149 and ALPAN (Adelfoi Taki) Ltd a.o. v. Trifonidou (1996) 1 A.A.D. 679.}
\begin{enumerate}
\item if the contract is not void;
\item if the contract is expressed in writing;
\item if the contract is signed at the end thereof by the party to be charged therewith; and
\item the court considers, having regard to all the circumstances, that the enforcement of specific performance of the contract would not be unreasonable or otherwise inequitable or impracticable.
\end{enumerate}

v Interim orders
Apart from the final orders, Cyprus courts have jurisdiction to issue interim orders within the context of claims filed with the court, according to Section 32 of the Courts of Justice Law, No. 14/1960. Such interim orders aim to preserve the status quo until the final adjudication of the case or to prevent one of the parties to act in a specific way, alienating the object of the claim.

IX CONCLUSIONS
It is notable that the Cyprus legal system is not particularly complex, in the sense that it does not impose any strict requirements for the initiation of legal proceedings by an aggrieved party for breach of contract, including any minimum amounts in dispute.

One of the most remarkable changes in the sector of commercial litigation that is to be effected soon is the establishment of a separate commercial court which will be handling only high-value commercial disputes. Such a court will enhance the faster and more efficient adjudication of such claims brought before the Cyprus courts by a specialised bench.

In complex commercial litigation, it is somewhat usual for the plaintiff to seek from the court interim relief, including freezing injunctions against the defendant's assets, until full and final hearing of his or her case, in order to ensure that in the event he or she succeeds he or she will be able to recover the damages to be awarded in his or her favour. The courts are reluctant to issue such orders on an \textit{ex parte} basis, unless certain requirements set out by the law and case law apply, such as full and frank disclosure of all relevant matters, the existence of urgency or of other exceptional circumstances. Even in the case where interim relief is granted on an \textit{ex parte} basis, subsequently a full \textit{inter partes} hearing will take place where the court, after having heard both sides, will decide as to whether it is just and reasonable under the circumstances to render the orders issued absolute or to dismiss them.
DENMARK

Dan Terkildsen and Emil H Winstrøm

I OVERVIEW

Denmark has a very high degree of contractual freedom, meaning that, as a general rule, parties are freely permitted to enter into contracts. This is a cornerstone in Danish contract law. Exceptions to the principle of contractual freedom are, as in many other jurisdictions, found in relation to employment law, and consumer contracts with mandatory rules protecting the consumer and employee.

Denmark is often wrongly described as a civil law jurisdiction; in truth, the Danish legal system is a hybrid with a mixture of both civil law and common law characteristics. Denmark has no civil code, but has instead divided the most important legislation into specific commercial acts that separately govern fundamental private law topics such as law on contracts and sale of goods.

Denmark is a party to the United Nations Convention on Contracts for the International Sale of Goods (CISG), but has made a reservation to the CISG, with the effect that the CISG choice of law rules shall not apply if either the buyer or seller have their place of business in the Nordic countries (Denmark, Finland, Iceland, Norway or Sweden). Historically, this was because the Nordic countries in the early 1900s enacted, among other things, very similar sales of goods acts in order to produce uniformity among the countries; however, with the recent updates to the Swedish and Norwegian sales of goods acts, the reasoning behind the reservation seems somewhat less relevant today.

The absence of a civil code has the implication that commercial contract disputes in general are decided by court precedent and with reference to legal theory.

The three types of ordinary courts in Denmark – the district courts, the high courts and the Supreme Court – all hear both commercial and public cases. The specialised Maritime and Commercial Court in Copenhagen deals with cases of commercial nature.

With respect to court proceedings in commercial cases, the process is based on an adversarial system very much in line with the common law approach, whereas the more active approach from a civil law judge is not the norm in Denmark.

Danish courts generally work very efficiently, and it is the norm that you could expect a decision in the first instance within a year from the filing of the complaint.

There are simplified rules for small commercial claims, that is claims with a value of up to 50,000 Danish kroner.

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In recent years, the Danish litigation process has been digitalised since early 2018. This means that all procedural documents and correspondence are uploaded to a digital portal and exchanged electronically.

II CONTRACT FORMATION

Danish contract law operates with one fundamental starting point, which penetrates all the aspects of formation, interpretation, dispute resolution remedies, etc. – that the contract stems from the parties’ mutual will or desire to perform obligations in respect of each other.

In sales of goods, Danish contracts used to have a reservation on Part II of the CISG but that reservation has now been lifted. Part II of the CISG is now an integrated part of Danish law.

As previously mentioned, Danish contract law is based on the principle of freedom of contract in commercial dealings. An agreement or contract is defined as a legally enforceable promise or agreement between two or more legal or natural persons. The contract or agreement consists of an offer and an acceptance of said offer. Denmark does not apply the principle of consideration.

An offer is a declaration of will that sets out obligations under which the offeror intends to be bound. The declaration becomes binding when it is sufficiently clear that the offeror making the declaration intends to be bound by it.

It is important to distinguish between an offer and an invitation to tender. An invitation to tender will often take the form of advertisements in a catalogue. In these instances, the customer is making the offer to purchase the advertised product. However, case law in domestic cases has established that a price tag in a shop constitutes an offer and not an invitation to tender.

The offer becomes binding on the offeror when it becomes known to the offeree. Before this stage, the offeror can withdraw the offer. In order for the withdrawal to be effective, the notice of revocation must reach the offeree before or at the same time as the offer. As most commercial contracts in Denmark are done via email, it is, in practice, often impossible to have a relevant time slip between the dispatch of the offer and the offeree receiving the offer.

Outside the application of the CISG Part II, Danish law does not recognise a right to revoke an offer that has been received by the offeree.

In order for a contract or agreement to be formed, the offer must be accepted. The acceptance should be the ‘mirror image’ of the offer.

In absence of express terms of deadline for acceptance, Section 3 of the Danish Contract Act states that the offer must be accepted within a reasonable period of time. If the offer is made orally and without a deadline for acceptance, Section 3(2) presumes that the offer must be accepted immediately.

The acceptance must correspond with the offer made. If the offer states, for example, that a quantity of products is offered at x price, and the acceptance refers to a lower quantity than offered, it becomes unclear whether the offer has been rejected or accepted partially or fully. Such acceptance will be subjected to contract interpretation.

In a situation where there is a problem with the ‘battle of forms’ (typically conflicting provisions in standard terms), Danish law has a preference for a ‘knock-out approach’.

If an offer is accepted after the deadline or the acceptance does not match the offer, the offeror is not bound by the acceptance but the acceptance is considered a new offer.
There are no formal requirements in respect of contract formation. A contract or agreement does not need to be produced in writing; it can be created orally insofar as an offer was made and validly accepted. There is also no writing requirement with respect to subsequent alterations to an already existing contract.

Written and oral contracts and agreements are equally enforceable; however, for evidentiary purposes it is considered wise to obtain written confirmation of an oral agreement.

Agreements can be entered into without formal exchange of offer and acceptance. For instance, Danish case law has established that a legal obligation can be derived from the parties’ actions meaning that Danish law does acknowledge the existence of quasi-contractual obligations.

III CONTRACT INTERPRETATION

A binding agreement must be met in accordance with its content.

If it is necessary to interpret the agreement as a whole or through specific terms of the agreement, the courts will seek to interpret the term through either:

- a purposive approach;
- a contextual approach;
- the contra proferentem rule; or
- the least burdensome outcome test.

A purposive approach means the courts will give effect to what the parties must have intended. The courts will look into what was discussed and exchanged during the contract negotiations, unless this is in conflict with the content of the signed agreement. Applying this principle of interpretation has the effect that Danish law does not recognise the common law rule of parole evidence.

A contextual approach will seek to apply a more literal interpretation.

The contra proferentem rule will often be applied to ambiguous and burdensome terms. The rule requires an interpretation against the party who drafted the term. As most contracts are a result of negotiations between the parties (where both parties have contributed in the drafting), the application of the rule is in practice limited to interpretation of one party’s standard terms.

According to the least burdensome test, an ambiguous term will be interpreted in favour of the offeror. Where the contract, for instance, stipulates that the goods cost x kroner per pound, however, the contract is silent on whether this means an English pound (454g) or a Danish pound (500g). Applying the least burdensome test, the seller would be able to provide the goods in English pounds.

Courts favour a holistic approach in which all relevant facts are taken into consideration. As such, no one approach is favoured over the other. The applicable approach will depend on the specific facts of the dispute. The only overriding principle in contract interpretation is the principle of best practice, which leaves a wide scope for the courts to exercise discretion.

To the extent that the agreement does not regulate one or more issues, Danish law applies gap-filling rules.

The rules that govern the choice of law in contractual disputes are set out in the Rome Convention. Owing to its reservation on the legal cooperation within the EU, Denmark is not a party to the Rome I Regulation. As such, the law governing the contract will be that of the country that is most closely connected with the contract, cf. Article 4(1) Rome
Convention. The presumption is that the law governing the contract will be the law of
the place in which the contract is performed (cf. Article 4(2), or that of the seller’s, service
provider’s or franchisee’s habitual residence).

IV DISPUTE RESOLUTION

i Minimum amounts and thresholds
There is no minimum amount or threshold for initiating a commercial case at the Danish
courts. However, cases before district courts that have no economic value or have an
economic value of up to 50,000 Danish kroner are subject to the small claims procedure. In
such procedure, the courts play a significant role in preparing the case, including providing
instruction and assistance to the parties, if they are not represented by an attorney. The
preparation of the case is primarily performed by letters with minimal court hearings. The
purpose of the simpler small claims procedure is to allow parties to litigate smaller cases with
fewer litigation costs, while also allowing non-lawyers to take a case to court because of the
assistance provided by the courts.

However, the digitalisation of cases, which also comprises the small claims, could
have the effect that in the future it will become more difficult to conduct these small claims
without the assistance of a lawyer.

ii Specialised commercial courts
All three tiers in the Danish court system hear both civil and criminal matters, including
commercial cases. One of the two special courts, the Maritime and Commercial Court, hears
only commercial cases. Specifically, the Maritime and Commercial Court only deals with
cases concerning trademarks, marketing law, commercial maritime matters and international
disputes.

iii Provisions regarding submission to court jurisdiction
Choice of court agreements entered into by parties domiciled outside Denmark with the
intention of submitting a dispute to a specific or non-specific Danish court are regulated
by Hague Choice of Court Convention Article 3 and Brussels I Regulation Article 25. The
Hague convention entered into force in Denmark on 1 September 2018.

Two parties domiciled in Denmark can agree to submit their dispute to a specific Danish
district court, even though that court may not be the correct forum for the dispute. These
national jurisdiction agreements are regulated by Section 245 of the Danish Administration
of Justice Act. The parties are generally only allowed to choose which local district court will
hear the case and thus cannot agree that a dispute shall be brought before, inter alia, a high
court or the Maritime and Commercial Court, unless the specific requirements for doing so
are met.

iv Mediation
Mediation has not yet gained wide application and the traditional mediation style in Denmark
is a facilitative mediation style.
Arbitration


Denmark is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and has been since 1972.

The Danish Arbitration Act does not contain formal requirements regarding arbitration agreements or clauses (no writing requirement applies to arbitration agreements).

Danish courts take a pro-arbitration approach and accept arbitration agreements on the conditions outlined in the Model Law and accepts the principle of kompetenz-kompetenz (the ability of the arbitral tribunal to rule on its own jurisdiction).

The doctrine of severability also exists in Danish law, meaning that an arbitration agreement is not, for instance, affected by the invalidity of the main contract establishing the legal relationship between two parties.

BREACH OF CONTRACT CLAIMS

A breach of contract arises when a party does not perform its obligations as enshrined in the contract. Whether there is a breach of contract depends primarily on an interpretation of the performance of the contract, supplemented by the gap-filling rules in Danish law. Furthermore, industry-specific common practice will also be a significant factor when assessing the breach of a contract.

In Danish contract law, a breach can arise through either late performance, actual defects or legal defects.

In commercial dealings there is, in Danish law, a general principle of ‘time is of the essence’, which leads to late performance in general being viewed as a material breach with the possibility of the party not in breach to avoid the contract.

A performance suffers from an actual defect if its physical condition, quality or quantity is inconsistent with the demands set forth in the contract and by applying the gap-filling rules in Danish law.

Legal defects concern situations where one of the parties to a contract does not obtain the rights to a service or item, which he or she was entitled to under the agreement, usually because the offeror did not originally have a right to provide the specific service or sell a given item.

The liability with respect to legal defects is, under Danish law, a strict liability on an objective basis.

In cases of breach of contract, a distinction must be drawn between main and ancillary commitments. This is relevant when assessing the possibility of terminating an agreement. If there is a breach of the main obligation of an agreement, the disappointed party will have the possibility of avoiding the contract. However, if there is only breach of an ancillary commitment, this will only warrant an avoidance of the contract if honouring the ancillary commitment was necessary in order to perform the main obligation of the agreement. Breaching an ancillary commitment will otherwise be sanctioned in another way, typically by awarding damages. Whether performance is defective and thus constitutes a breach of contract must be established at the time of the transfer of the risk between the parties.

The burden of proof lies with the creditor, who must prove that:

- the performance is defective; and
- that the defect was present at the time of the transfer of risk between the parties.
Where performance comes in the form of a product, proving that a product was defective will often be accompanied by expert reports from one or more court-appointed experts.

Although Denmark is moving towards a more flexible standard where party-appointed experts play a greater role, the main rule continues to be that the court appointed expert will render the decisive expert evidence for the dispute.

The theoretical starting point when awarding damages is full compensation. However, in awarding damages for breach, especially in respect of indirect losses, Danish courts award smaller sums of reduced damages compared to many other jurisdictions in order to avoid overcompensating the injured party or claimant in a situation where that party does not have the commercial risk related to performance.

VI DEFENCES TO ENFORCEMENT

i Unreasonable contracts
The Danish Contracts Act contains a ‘general clause’ that is used to annul a contract partly or in full, if enforcing the contract would be considered unreasonable. When determining whether enforcing a contract is unreasonable, courts will review the conditions under which the contract was drafted and the contents of the contract. Defences to enforcement by reference to the general clause are, as a starting point, rarely followed or applied by the courts in commercial dealings. This starting point is, however, modified if the bargaining power of the parties is very different.

ii Limitation periods
Limitation periods for a breach of a contract claim are regulated by the Danish Limitation Act. Breach of contract claims are subject to a limitation period of three years from the date when the claim falls due. If the creditor is unaware of the debtor or of the existence of a claim, this may postpone the onset of the limitation period. If the debtor has acknowledged the existence and amount of the creditor’s claim in writing, the limitation period is 10 years.

The limitation period can be interrupted in a variety of ways, most commonly by the creditor initiating legal action regarding his or her claim against the debtor.

The limitation period rules are mandatory, and a shorter limitation period cannot be agreed.

iii Contracts against public policy
According to Danish law, contracts that in nature are contrary to public policy are void. Specifically, these are contracts that concern illegal matters or are inconsistent with the common morality of Danish society. The most common example of contracts that are against public policy include agreements to perform work where the income has not been reported to the Danish tax authorities.

iv Limitation of liability
Parties to a contract can validly agree to limit their liability in commercial contracts because limitation of liability is not regulated in the Danish Contracts Act. Limitation of liability is often stipulated in Danish commercial contracts in order to exclude, for instance, indirect losses. Even though limitation of liability clauses are generally valid, they risk being set
aside by the courts if the clauses are deemed to be too extensive and thus unjust. However, when entered into by two professional contracting parties, the threshold for setting aside a limitation of liability clause is very high.

However, such clauses are often interpreted in Danish case law not to apply in situations where the party seeking to rely on the limitation of liability clause has acted with intent or with gross negligence.

v Force majeure

Danish courts recognise the principle of *force majeure*. The performing party will be exempt from liability where the performing party cannot perform its obligations owing to circumstances that were unforeseeable by the said party. Typical *force majeure* circumstances include, as in other jurisdictions, strikes, crime, acts of God, riots, etc.

Danish courts do not, in general, accept 'economic *force majeure*' where the performance is possible, in principle, but will put a financial burden on the performing party that materially deviates from what was expected by that party.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

In Danish law, it is accepted that an aggrieved party could have courses of action (tort-based) in addition to arguing contract-based claims.

Good faith in commercial dealings is a part of Danish contractual law, but it is rare that breaching the principle of good faith will lead to avoiding a contract. Good faith is more often applied to support, for instance, a specific interpretation of an agreement.

The competing courses of action would typically be concepts that could invalidate the agreement, for example, fraud.

A contract can also be declared invalid on the grounds of failure of basic assumptions, which covers all cases of misunderstanding or misrepresentation and changed circumstances.

There are generally three conditions that must be fulfilled. First, the assumption must have been determined for the promisor's act or representation. Secondly, it must have been known or discoverable for the promisee. The third condition signifies a consideration of who the risk of the failing assumption should rest with. To claim a failure of assumption, the risk must fairly rest with the promisee.

These competing courses of action are often applied in situations where a party could have lost the right to present a contractually based claim owing to late notice regarding said claim.

If a contract is declared invalid, the entire contract, or parts of the contract, can be annulled. If a contract is annulled, the parties to the contract must return or restore any services provided in consequence of the contract.

If a contract is invalid, neither the promisor or promisee is entitled to claim damages. However, if the promisee has acted culpably as a result of tortious conduct, the promisor may claim compensation for expenses incurred by the promisor while acting under the impression that the contract was valid.
VIII REMEDIES

i Specific performance

As a fundamental principle in Danish contract law, where a contract is breached, the party not in breach is entitled to the full satisfaction of the contract. As a result, a creditor is generally always entitled to specific performance, which means that the party in breach of contract is ordered to perform their contractual duty.

However, the rule is not often used in practice, at least not in situations where the product to be delivered is generic.

A party applying for specific performance could lose a right to claim damages, if that party has not sought to mitigate its loss, for example, by contracting with a different supplier for an alternative product.

No one is obligated to perform the impossible, and as such, a creditor cannot demand specific performance if the contractual duty is impossible to perform.

If the subject matter of the contract (i.e., service or product) no longer exists or is impossible to provide, it is meaningless to enforce performance, and therefore, the remedy is either damages or rescission.

There is no right to specific performance if the cause of the breach of contract was an incident of force majeure; nor is there a right to specific performance if the contract is void, either because of the circumstances when entered into or the content of the contract, or if the contract is unenforceable.

Finally, it should be noted that specific performance is not available in cases where the delivery is based on a personal performance by the other party. This will generally be the case where services are to be provided. In these cases, the other party must resort to damages as the relevant remedy.

ii Avoidance

Avoidance is an extensive remedy and is often viewed as a ‘last resort’ to redress a breach of contract. It is not sufficient that the contract is merely breached by the contracting party; there must be another qualifying factor that can justify the rescission of the contract, and the restitution of any delivered product or service.

A contracting party can avoid the contract if:

a the contract specifies an explicit right to rescission;

b a statutory provision, which covers the contract in question, provides a right of recession in certain circumstances; or

c in circumstances where there is no defined basis for avoidance, the breach of the contract qualifies as a fundamental breach.

iii Damages

A mere breach of contract is not always sufficient to justify that the party in breach must pay damages to the injured party.

Outside the CISG and the Danish domestic Sales of Goods Act, the party in breach must have acted in a culpable manner. Danish law applies the generally well-known concept that the loss must be foreseeable. Denmark does not apply a principle of punitive damages but awards compensatory damages only. The burden of proof regarding damages in contract is on the injured party.
Damages in contract can be divided into two subcategories: expectancy damages and reliance damages. The aim of expectancy damages is to position the injured party as if the contract had not been breached and the contractual duties were performed in accordance with the contract. As a general rule, the injured party is entitled to full compensation for any provable loss. Reliance damages, on the other hand, aims to set the parties as if the contract was never entered into by either of the parties.

Most often, the injured party sets forth a claim of expectancy damages, as the damages will include any provable loss of profits. However, as mentioned above, Danish courts award a comparably lower amount of damages, taking into consideration the commercial risk that the injured party no longer suffers.

Contract provisions on limitation of liability on damages are, as a general rule, always valid. This brings us back the principle of contractual freedom; the provision has been subject to negotiation between the parties and should therefore be upheld.

Especially with respect to such provisions being a part of a standardised contract, these are, as previously mentioned, interpreted in such a way that they do not apply in cases where the defaulting party has acted with intent or grossly negligent.

Other exceptions to the general rule are made if any doubts can be raised regarding either the validity of the provision, or whether the provision was actually agreed. The requirements for validity differs based on whether the provision can be said to be unusual if the provision concerns direct or indirect damages, whether any consumer protective legislation applies, etc.

Neither case law nor legislation dictate which remedy a creditor is obligated to apply for. Therefore, a creditor might just as well avoid the contract if the criteria are met rather than demand specific performance. However, parties often agree upon accessible remedies in the case of a breach of contract.

IX CONCLUSIONS

With its high level of contractual freedom, limited only by essential safeguards against abusive and illegal contractual relationships, Denmark is a liberal venue for entering into business relationships.

This well-maintained balance between freedom and limitation in contractual relationships is coupled with an efficient judicial system in which claims can easily be brought regarding commercial claims. Danish courts value efficiency, transparency and fairness and are not biased against foreign parties.

A significant development in commercial litigation is, as briefly mentioned above, the recent development and implementation of a new digital portal for handling civil cases, which has been implemented by all Danish courts.

This digitalisation of Danish courts represents an important technological and administrative shift in Danish commercial litigation procedure, as all communication between the parties and courts must be performed via the digital portal. All commercial litigation cases and taking of evidence cases are initiated and processed through the digital case portal. Civil litigation cases are processed digitally only and as such do not exist on paper. Cases must be filed, documents must be uploaded and messages to the courts must be sent using the digital case portal.

The digital case portal is also the only place where parties to a case can receive and read messages from the courts and other parties. Further, the digital case portal also has a notification system that automatically notifies the parties of approaching deadlines for submission of documents or payment of court fees.

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I OVERVIEW

The courts of England\(^1\) are some of the most established fora for dealing with complex commercial litigation. The Civil Procedure Rules (CPR) that apply to civil litigation are robust and provide a clear framework for the cost-effective resolution of disputes – governing every aspect of cases from pleadings to evidence, witnesses and costs. Models of alternative dispute resolution are also well established. England boasts experienced professionals and practitioners and the courts operate specialist courts, such as the Commercial Court and the Technology and Construction Court, where judges have particular expertise.

Following an extensive review of the civil court system in England and Wales, which culminated in the publication of the Briggs Report in July 2016, the courts are undergoing a series of transitions in an attempt to modernise. The emphasis is on encouraging greater efficiency with a particular focus on the use of digital technology.\(^3\)

When deciding on matters involving contracts, the courts have always sought to uphold the terms of valid contracts, particularly in situations where the contracting parties were involved in the negotiation of terms. There has always been a focus on the need for certainty when looking at contracts, so that each party understands the entirety of its obligations. It is for this reason that the courts have repeatedly rejected an implied term of good faith in commercial contracts. Much of the law governing commercial disputes has evolved through case law rather than through statute, with the Misrepresentation Act 1967, Unfair Contract Terms Act 1977, Limitation Act 1980 and the Contracts (Rights of Third Parties) Act 1999 being notable exceptions.

In addition to breach of contract claims, alternative causes of action are available, including economic torts, which offer claimants the opportunity, in some instances, to seek remedies beyond the terms of the contract.

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1 Oliver Browne and Ian Felstead are partners, and Mair Williams is an associate, at Latham & Watkins. The authors would like to acknowledge the kind assistance of their colleagues Katie Henshall, Tom Watret, Ciara Faughnan-Moncrieff, Faris Shoubber, Rachel Kwong and William Price in the preparation of this chapter.

2 References in this chapter to ‘the courts of England’ and ‘the courts’ are references to the courts of England and Wales. References to ‘English law’ are references to the law of England and Wales.

Commercial litigation in England will be affected by the British exit (Brexit) from the European Union. The Law Society has recently released a publication emphasising the role that prioritising the UK’s justice and legal system should take in Brexit negotiations as well the need to maintain the attractiveness of the UK as a global commercial legal centre post-Brexit.4

Brexit will have a limited impact on English contract law itself;5 however its impact on the substantive obligations of each party under existing contracts may be more significant. Key legal issues are likely to concern references to EU law or EU institutions within existing contracts and the effect on contractual governing law and jurisdiction clauses when legal systems other than the English legal system are involved. One of the most pressing legal issues is likely to be the extent to which judgments of the English courts will be enforced in other member states.

II CONTRACT FORMATION

Under English law, most contracts can be formed simply, without specified formality, and contracts do not have to be written to be enforceable. Parties can create even complex contracts merely by satisfying the following criteria:

- **offer**;
- **acceptance**;
- **consideration**;
- an intention to create legal relations; and
- **certainty of terms**.

A contract can be made orally, and by conduct, provided that these criteria are met. It is, however, often more difficult to evidence oral contracts – and the terms of any alleged agreement – without a document in writing.

i Offer and acceptance

The parties must have reached an agreement, objectively assessed. This is ordinarily done when an offer from one party is accepted by the other.

In order for there to be an offer, it must be communicated to the offeree, specific, complete, capable of acceptance and made with the intention of being bound by that offer. As such, an offer is distinguishable from an invitation to negotiate or an ‘invitation to treat’, such as an advertisement, where a seller of goods is inviting a buyer to contract but it is the buyer that makes the offer. An offer may be terminated by withdrawal, rejection6 or lapse of time.

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5 Lord Goldsmith QC, for example, described Brexit as resulting in the ‘decontamination of English law’ in a keynote address to an LCIA Symposium in Washington DC on 18 September 2016. See file:///C:/Users/obrowne/Downloads/501343265v1_PG_Speech_to_LCIA_Washington_conformed.pdf.

6 A counter-offer is also considered to be a rejection of the original offer (Hyde v. Wrench (1840) 3 Beav 334).
Acceptance is a final and unqualified expression of assent to the terms of an offer. It must be communicated to the offeror and, to be effective, it must correspond exactly with the terms of the offer with no variation. Acceptance can take place by conduct, but it must be clear that the offeree did the act in question with the intention of accepting the offer.

ii Consideration

Consideration is an essential component of a contract. Though consideration does not have to be proportionate or adequate, it must have some value in the eyes of the law. An agreement without consideration is merely an agreement to make a gift.

As a general rule, past consideration will not constitute good consideration. If a party is simply satisfying a pre-existing obligation, it cannot rely upon that as consideration for new obligations being assumed by the other party. Some doubt was cast upon this rule by the decision of the Court of Appeal in *Williams v. Roffey Bros.* In that case, a party came into financial difficulties and sought additional payment to perform the contract without delay. The Court of Appeal found that good consideration had been given for a promised additional payment as the promisee receives a benefit in continuing the contract and avoiding delay. Many subsequent judgments have been critical of this decision.

The case law on this was reviewed by the High Court in 2017 in *Blue v. Ashley.* In that case, Leggat J provided clarification, asserting that, although some might be concerned that *Williams v. Roffey Bros* opens the window for a party to seek extra payment while threatening to renege on a contract, parties can take comfort that they are protected from this potential mischief by other doctrines such as economic duress and public policy. Further, it remains the case that something that has already been done is not good consideration.

iii Intention to create legal relations

Without a mutual intention to create legal relations, a contract is not formed. When assessing whether there is such an intention, the court will consider the ‘objective conduct of the parties as a whole’ rather than the ‘subjective states of mind’ of the parties.

iv Certainty of terms

There must be no ambiguity to the material terms of an alleged contract. Unless all the material terms are agreed with certainty, a contract is not binding.

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7 Unless the contract is made by way of a deed, the requirements of which are outside the scope of this chapter.
8 *Stilk v. Myrick* (1809) 2 Camp 317.
10 See, for example, *South Caribbean Trading Ltd v. Trafigura Beheer BV* [2004] EWHC 2676; *Adam Opel GmbH, Renault SA v. Mitras Automotive (UK) Ltd* [2008] EWHC 3205 (QB)).
v Conditions precedent and subsequent

Parties entering into a contract may wish for certain requirements to be satisfied first, known as conditions precedent. Conditions precedent do not need to be labelled as such, but the wording must be clear that the performance of all or part of the contract is reliant on the conditions precedent being satisfied.

Conditions subsequent are conditions that provide for a binding contract to be terminated (or no longer binding on one or both of the parties) if specified future events do or do not happen.

vi Third-party beneficiaries

Under the Contracts (Rights of Third Parties) Act 1999, any contract made after 11 May 2000, with a few exceptions, may confer an enforceable benefit on a third party, but no contract can impose a duty on a third party. In order for a third party to obtain rights it must be expressly identified in the contract by name, description or as a member of a class.

The beneficiary cannot be implied. However, in the 2017 case of Chudley v. Clydesdale Bank plc (t/a Yorkshire Bank),15 the High Court held that a third party beneficiary might be identified by analysis of the construction of the express terms of the agreement, provided that the process of the construction did not involve implied identification.

vii Other ways of establishing commercial rights and obligations

In the event that no binding contract exists, it is still possible for the putative parties to that alleged contract to enforce their rights in certain circumstances. Examples are given below.

Quantum meruit

A supplier of goods or services who has not been compensated by the recipient of those goods or services may be able to bring a claim of quantum meruit (‘as much as he has earned’) in order to be paid for the goods or services provided, so long as it is able to show that the goods or services were either expressly or impliedly requested or freely accepted by the recipient.

Promissory estoppel

In circumstances where, notwithstanding that no consideration has been provided for a promise, the courts consider that it would be unjust to refuse to enforce the promise, the equitable doctrine of promissory estoppel can be relied upon. There are three key elements to promissory estoppel:

\[ a \quad \text{a promise by one party that it will not enforce its strict legal rights against the other;} \]
\[ b \quad \text{an intention on the promisor’s part that the other will rely on that promise; and} \]
\[ c \quad \text{actual reliance by the promisee on that promise.} \]

The doctrine of promissory estoppel is available for use as ‘a shield not a sword’ and can only be used as a defence to an action brought by parties wishing to enforce their legal rights.16

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15 Chudley v. Clydesdale Bank plc (t/a Yorkshire Bank) [2017] EWHC 2177 (Comm).
III CONTRACT INTERPRETATION

In English law, contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. Notwithstanding this apparent simplicity, there have been a number of changes to the English courts’ approach in recent years.

In Arnold v. Britton, Lord Neuberger summarised and clarified the approach that the English courts will now take. He explained that the courts will focus on the meaning of the relevant words used by the parties ‘in their documentary, factual and commercial context’, in the light of the following considerations:

(i) the natural and ordinary meaning of the clause;
(ii) any other relevant provisions of the [contract];
(iii) the overall purpose of the clause and the [contract];
(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and
(v) commercial common sense; but
(vi) disregarding subjective evidence of any party’s intentions.

This decision is seen by many commentators as a move away from the more ‘purposive’ approach set out (primarily by Lord Hoffmann) in previous Supreme Court (and House of Lords) decisions. Although two Supreme Court decisions in 2017 suggest that all of these cases ‘were saying the same thing’ in relation to contractual interpretation, and though there has never been an entirely literal or purposive approach to contractual interpretation, there does appear to be a greater emphasis at present on the primacy of the language used by the parties in their agreement and consideration of the contract as whole.

Indeed, in a 2017 extrajudicial speech, Lord Sumption suggests that those older cases did adopt a different approach and that they failed to attach sufficient weight to the language of the contract. Later that year, the Court of Appeal ruled in Teva Pharma – Productos Farmaceuticos LDA v. Astrazeneca – Productos Farmaceuticos LAD that the judge in the lower court had failed to have regard to the principles in Arnold v. Briton and had erred by subverting the natural meaning of the contractual provisions in favour of commercial common sense.

The courts have established that in order to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible and typically ruled that they will adopt a broad test for establishing the admissible background. A

recent ruling provided clarification that the ‘background’ to a contract includes ‘knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating.’

Other important points to note regarding the courts’ approach to contractual interpretation include the following:

- the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law; and
- where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the contra proferentem rule).

Finally, the Supreme Court recently found that it was not appropriate for the courts or anyone else to use hindsight to assess whether a contractual provision made good commercial sense or was inconveniently inflexible.

**Implied terms**

Under English law, the courts have the power to imply a term into a contract. The test for doing so is laid out in *Marks & Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd.* A term may be implied if:

- it is necessary to give the contract commercial or practical coherence;
- it can be clearly expressed;
- it does not contradict an express term;
- reasonable parties would have agreed the term was needed; and
- it passes the ‘officious bystander’ test.

The 2018 case of *Bou-Simon v. BGC Brokers LP* reiterated the narrow approach that the courts take when implying terms, finding that an implied term could not be read in to a contract simply because it appears fair. This was followed by a 2019 Supreme Court case that emphasised the court’s reluctance to find that an agreement is too vague or uncertain to be enforced where the parties intended to be bound and have acted on their agreement.

**IV DISPUTE RESOLUTION**

Dispute resolution in England is largely conducted through the court system.
i Jurisdiction

The court must have jurisdiction to hear a dispute. Whether a court has jurisdiction may be decided by the courts, although contracting parties may include a jurisdiction clause in their agreement that allows them to choose which court has jurisdiction and such provisions will be given effect by the English courts.

There are three principal types of jurisdiction clauses:

a An exclusive jurisdiction clause specifies a jurisdiction in respect of disputes, and prevents either party from bringing proceedings against the other in the courts of any jurisdiction other than the one specified in the contract.

b A non-exclusive jurisdiction clause enables either party to bring proceedings against the other, either in the courts of the chosen jurisdiction or in the courts of any other jurisdiction (provided that court has jurisdiction over the dispute under its own rules).

c An asymmetrical jurisdiction clause permits one of the parties (party A) to sue the other party (party B) in any competent jurisdiction, but restricts party B to bringing proceedings in only one jurisdiction.

There have been a number of recent decisions regarding jurisdiction clauses in the courts. In particular:

a In *China Export & Credit Insurance Corp v. Emerald Energy Resources*, 30 it was held that although a non-exclusive jurisdiction clause allows for a choice of jurisdictions, once proceedings are issued in the courts that are stated in the contract to have non-exclusive jurisdiction in relation to disputes, the parties are bound to submit to the jurisdiction of that court.

b In *AMT Futures Limited v. Karim Boural*, 31 it was held that breach of an exclusive jurisdiction clause is not a ‘once and for all’ breach, but a continuing breach or series of breaches, meaning that any claim for relief in relation to such a breach is unlikely to be dismissed on the basis that those claims are statute-barred under the Limitation Act 1980.

c *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*, 32 examined the growing trend of contractual language requiring steps to be taken before resorting to formal dispute resolution proceedings. The court held that a clause requiring the parties to mediate was an effective ‘condition precedent’ (even though those words had not been used) to court litigation, and ordered a stay of court proceedings until the mediation had been completed.

Brexit will impact the approach to non-exclusive and asymmetric jurisdiction clauses (arbitration clauses and proceedings are totally unaffected by Brexit).

Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) regulates jurisdiction and the recognition and enforcement of judgments between EU Member States. This will not apply in the UK post-Brexit. This is an issue for the enforceability of jurisdiction clauses and the enforcement of judgments across the EU.

As to jurisdiction clauses: the UK Government took steps in December 2018 to accede to the Hague Convention on Choice of Court Agreements 2005. Courts of the

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32 *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC).
parties to the Hague Convention, including the EU Member States, will respect exclusive jurisdiction clauses. The Hague Convention does not cover non-exclusive jurisdiction clauses or asymmetric jurisdiction clauses. These clauses may not be respected by the Courts of EU Member States post-Brexit (and that will remain the position until the UK signs up to the Lugano Convention).

As to enforcement: English judgments may, in practical terms, be enforced with relative ease in EU Member States, even absent the Recast Brussels Regulation. That is either because there is a reciprocal relationship with the relevant country or that country generally allows enforcement without significant hurdles.

ii Threshold requirements
When bringing a claim in the courts, a claimant must have regard to any threshold requirements litigating such a dispute. These will dictate whether a claim can be brought, and, if so, which court it should be brought in.33

Specialist courts in England may have further threshold requirements. For example, the Technology and Construction Court can only hear claims that are ‘technically complex’. Despite this, a number of the specialist courts have a wide scope, and will hear a range of disputes.34

iii Alternative dispute resolution
There are a number of alternative dispute resolution (ADR) mechanisms, which allow parties to avoid court litigation completely or that aim to achieve an early settlement. ADR can be prescribed as part of a contract and the English courts will give effect to such an agreement.

The CPR encourage parties to consider settlement at all times, or risk costs sanctions being imposed against them. In the preliminary stages of litigation, parties will be asked by the court whether or not they have considered ADR and, if they have not, adverse costs consequences may follow.35

The principal methods of ADR used in England are detailed below.

Negotiation
Settlement negotiations can take place on a ‘without prejudice’ basis (meaning that the court cannot be informed of the content of those negotiations) or ‘without prejudice, save as to costs’ (meaning that the court cannot be informed of the content of those negotiations until after substantive determination of the dispute, and then only for the purposes of deciding the appropriate order as to the costs of the court proceedings).

Mediation
Settlement negotiations facilitated by an independent third party mediator.

33 For example, proceedings may not be started in the High Court unless the value of the claim is more than £100,000 and claims for £100,000 or less must be commenced in the County Court.
34 This has recently been confirmed in Mezvinsky and another (acting through their litigation friends) v. Associated Newspapers Ltd [2018] EWHC 1261 (Ch).
35 In the recent case of Thakkar and another v. Patel and another [2017] EWCA Civ 117, the Court of Appeal reaffirmed this view, finding that where one party had frustrated the mediation process, a costs sanction against them was merited.
**Early neutral evaluation**

A relatively recent development in English litigation is early neutral evaluation (ENE). ENE is where a neutral person, appointed either through the courts or through a private provider by the parties, is invited to evaluate and opine on the case (or issues within it) on a non-binding basis. Both parties can then consider the evaluation, with a view to facilitating more constructive negotiations. The Chancery Division, Commercial Court and the Technology and Construction Court each make provision for ENE.

**Arbitration**

A private and binding dispute resolution process before an impartial tribunal, which is contract-based, but which is regulated and enforced by the state (under, in England, the Arbitration Act 1996, as supplemented by any institutional rules chosen by the parties). Choosing arbitration means that the role of the English courts is limited to supervising the proceedings (rather than deciding on the dispute).

**V  BREACH OF CONTRACT CLAIMS**

When one party to a valid contract is not complying with a particular term, its conduct may amount to a breach. When a breach of contract occurs, the innocent party is entitled to bring a claim in relation to the breach and seek compensation – usually in the form of damages.

The burden is on the claimant to show, on the balance of probabilities, that there has been a breach of contract that has caused loss. Before bringing a breach of contract claim, the claimant should comply with the applicable pre-action protocols, annexed to the CPR.

**i  Termination for breach**

Under English law, a breach of contract does not automatically entitle the non-breaching party to terminate the contract. A repudiatory breach, however, is a breach of contract that allows the non-breaching party to treat the contract as being at an end. Parties are also entitled to explicitly state that breach of a term results in termination, even if that right would not be provided under common law.

It is for the non-breaching party to elect whether it will accept the breach and treat the contract as terminated or affirm the contract and require continued performance. Although the right to terminate a contract is not generally subject to a duty of good faith, the courts have recently indicated that it may be arguable in the right case that a termination right is subject to such an implied limit. In *Bates v Post Office Ltd (No.3)* [2019] EWHC 606 (QB) it was held that a commercial contract for services that governed a relationship akin to employment was subject to an implied general duty of good faith, which affected the exercise of all termination rights.

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36 The most common example of a repudiatory breach is a breach of condition (although a fundamental breach of an innominate term may also be a repudiatory breach) that allows the non-breaching party to terminate the contract and claim damages, regardless of what the consequences of the breach are. Breaches of warranties do not terminate contracts and the correct remedy in that situation is damages.


ii  Anticipatory breach
An anticipatory breach is where one party indicates, either by words or conduct, that it will not perform all or some of its obligations under the contract, such that the result of its performance will be substantially different from the requirements of the contract. If the anticipated breach would be a repudiatory breach (and it would be for the claimant to prove this), the non-breaching party is immediately entitled to terminate – without waiting for actual performance or breach. The aggrieved party does not automatically have to terminate the contract, they are also entitled to wait until the time fixed for performance in the hope that the other party will perform their contractual obligations or affirm the contract, if possible performing their own part of the contract and claiming the contract price.

iii  Causation
In order to bring a breach of contract claim, the non-breaching party must show that there is sufficient causation between the breach and the loss it has suffered. The breach must be the effective or dominant cause of a loss.39

Causation may be complicated by a third party’s intervening act or other event. If there is such an act or event between the breach of contract and the harm suffered that ‘breaks the chain of causation’, then the court may hold the party in breach not to be liable for the loss.

VI  DEFENCES TO ENFORCEMENT
There are several ways in which parties may seek to avoid enforcement of contractual obligations or challenge claims of breach of contract in England.

If a party is able to argue that a purported contract is invalid, it may have a complete defence to any attempted enforcement of that contract. A party’s challenge to the validity of a contract may render that contract void (i.e., immediately ineffective) or voidable (valid and effective, unless and until rescinded).

A contract that lacks any key element required for the formation of a valid contract is void. For example, a party who has not provided any consideration under a contract will be unable to enforce that contract’s terms against another party. Other common instances that render a contract void include when a party lacks capacity or authority to enter that contract (such as an individual purporting to contract on behalf of a corporate entity without requisite authorisation).

i  Force majeure and frustration
Contracting parties may choose to include a force majeure clause, which excuses performance of a contract following certain events that are beyond the control of the parties. Force majeure clauses must be certain in order to be effective and so must include reference to specific events (such as natural disasters, acts of war and acts of terrorism) or be specific enough as to be certain. Wording equivalent to ‘usual force majeure clauses shall apply’ will be considered void.40

If there is not an explicit force majeure clause then parties may be able to rely on the common law principle of frustration, although this is very narrowly construed by the courts.

Frustration is the principle that a contract may be set aside if the performance of the contract becomes impossible, illegal or pointless by virtue of an unexpected event that is beyond the control of the contracting parties. The courts have been slow to find that contracts have been frustrated, and have been clear that changes to market conditions that mean that the performance of the contract is more onerous do not amount to frustration.41

The High Court recently rejected an argument that a lease of premises at Canary Wharf will be frustrated as a result of the UK’s withdrawal from the European Union. The European Medicines Agency (EMA) attempted to argue that, as a result of Brexit, the organisation would be unable to use the London premises over which it had a lease for its proper purpose, due to needing to be situated within an EU Member State. The court rejected this argument on the basis that the EMA has powers to assign or sub-let the lease and in any event any frustration would have been self-induced by the EMA. Further, the court found that, even if the EMA could not assign or sub-let the lease under EU law, this would make no difference to the English law analysis. The court has subsequently granted the EMA permission to appeal and, in principle at least, the High Court decision leaves open the possibility of establishing frustration where a party is able to show that, as a result of Brexit, it will be deprived of all or substantially all of the benefit of a contract.42

ii Illegality

An illegal contract is void and will not be enforced by the courts as a matter of public policy, in accordance with the courts’ duty to uphold the law. As such, in contrast to other defences, courts may invoke a defence of illegality even when no party has raised it. Illegality is well established as a defence, and reflects the principle elucidated by Lord Mansfield that ‘no Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.’43 However, more recently the law on illegality of contracts was criticised as being unnecessarily complex, uncertain and arbitrary.44 In 2016, the Supreme Court evaluated the law in this area in Patel v. Mirza.45 Although consensus was not reached, the majority of the Supreme Court deemed the key issue to be whether upholding the relevant contract would ‘produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system’. In 2018, the Court of Appeal found in the case of Singularis Holdings Ltd (in liquidation) v. Daiwa Capital Markets Europe Ltd46 that the defence of illegality was not available to a bank to defeat a claim brought by a customer in negligence and breach of contract. In that case, the bank had made payments to an individual shareholder of the corporate client who was acting fraudulently, but the Court of Appeal found that the actions of that individual could not be attributed to Singularis as an entity and so the defence of illegality was dismissed.

iii Limitation and exclusion

Even if a contract is valid, a party may seek to avoid enforcement on other grounds. A complete defence is available if the claimant does not commence his or her claim within the

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42 Canary Wharf (BP4) T1 Ltd and others v European Medicines Agency [2019] EWHC 335 (Ch).
relevant limitation period. If a defendant raises this defence, the claimant has the burden of proving that the relevant limitation period has not expired. The limitation period for contract claims is six years. This limitation period commences from the date on which the cause of action occurred.

Commercial parties are also likely to limit their potential liability under a contract when negotiating and drafting its terms. For example, parties may protect themselves by excluding liability in certain respects, imposing financial limits on liability, restricting terms implied into contracts by statute and alleviating the parties’ obligations of performance if prevented by forces outside of their control. English courts will generally uphold such provisions, and so they will serve as a defence, as long as they are not prohibited by legislation or common law principles such as illegality.

iv Other defences
A party who is induced into entering or varying a contract by threats or other illegitimate means may rely on duress or undue influence, and the contract will be voidable by that party. For instance, a party may be subject to physical duress (such as actual or threatened violence against the party or to its property) or economic duress (e.g., threats to terminate the contract).

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Fraud and misrepresentation
In England, fraud associated with breach of contract is claimed as either fraudulent misrepresentation or as a claim in the tort of deceit.

The tort of deceit has four elements:

- a false representation (of fact or law);
- the defendant knows the representation is false (or is reckless);
- the defendant intends that the claimant acts in reliance on the representation; and
- the claimant acts in reliance on the representation and, as a consequence, suffers loss.

If the tort of deceit is made out, then the claimant is entitled to damages in tort (with no remoteness limitation) and to rescission of the contract.

Misrepresentation is governed by the Misrepresentation Act 1967. A claim of misrepresentation requires the claimant to show that a statement made by the defendant was false (either dishonestly made for fraudulent misrepresentation or negligently made for negligent misrepresentation); that they entered into the contract as a result of that statement and that damage was suffered as a result. The issue of reliance is a question of fact and all issues regarding reliance are fact sensitive. It is a defence for the defendant to show that it

47 In particular, the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015.

48 Eco 3 Capital Ltd and others v. Ludsin Overseas Ltd [2013] EWCA Civ 413.

had a reasonable belief in the truth of its statement, although this may still give rise to a claim of innocent misrepresentation. In successful claims, the court may award damages in tort and rescission of the contract (or damages in lieu of rescission).

Note, it is not possible for either party to a contract to attempt to exclude or restrict liability for fraudulent misrepresentation and any purported attempt to exclude liability for fraudulent misrepresentation will be deemed unreasonable by the courts.

ii Inducing a breach of contract
The economic tort of inducing a breach of contract involves the claimant suffering loss as a result of a party being knowingly induced to breach a contract by the defendant. A claim for inducing a breach of contract requires that the contract actually be breached; mere interference with the performance of a contract will not be enough. The only other element required is intention, which is usually shown by the defendant having knowledge of the existence of the contract and its specific terms.

iii Good faith
Historically, the courts have refrained from implying obligations of good faith in commercial contracts, on the basis that such an implied term would interfere with the certainty of the contract. The courts take a more favourable view of express terms requiring the parties to act in good faith in commercial contracts, provided such clauses are certain enough to be enforceable.

In 2013, the High Court appeared to move towards the idea of a more pervasive implied term of good faith in the cases of Yam Seng Pte Ltd v. International Trade Corporation Ltd and MSC Mediterranean Shipping Company SA v. Cottonex Anstalt, but the Court of Appeal overturned the first instance decision and Moore-Bick LJ noted ‘there is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.’ The courts are, however, more willing to find an implied duty of good faith in certain types of contractual relationships, such as employer/employee contracts, insurance contracts and most recently in joint ventures.

VIII REMEDIES
When a contract has been breached, there are various remedies that may be available to the injured party in England.

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50 Innocent misrepresentation (also governed by the Misrepresentation Act 1967) is where the representor is without fault because they had reasonable grounds to believe in the truth of its statement and, if a claim is successful, the claimant is entitled to rescission or damages in lieu of recession.
i Compensatory damages
The primary remedy for breach of contract is an award of monetary damages, which is generally awarded to compensate for the injured party’s loss, and put it in the position it would have been in had the contract been properly performed.57

The burden of proof lies on the claimant to prove factual causation of its loss (i.e., it must prove that but for the breach, the loss complained of would not have occurred). Accordingly, when the court assesses the extent of any loss, it will consider the claimant’s position compared to the position it would have been in but for the breach. This analysis may account for profits that would otherwise have been earned, costs that would otherwise have been avoided, and non-financial benefits that might have been received, while also acknowledging any benefits which otherwise would not have been received by the claimant.

ii Limitations to recovery of damages
A key restriction on the recovery of damages for breach of contract is remoteness.58 Only losses that are ‘in the contemplation of both parties’59 will be recoverable by the claimant. This principle can be summarised as follows:60

*A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach.*

The innocent party must also ensure that it has taken reasonable steps to mitigate its loss, and the court will apportion damages between the parties if they result partly from the claimant’s own fault and partly from the fault of any other person.61

iii Other potential damages
Aside from the general compensatory function of damages, in certain circumstances damages may be awarded on other grounds. For example, restitutionary damages may be recoverable if the claimant has not suffered any loss, but the defendant has derived a benefit from breaching the contract.

Separately, though in similar instances, a claimant may be able to recover ‘negotiating damages’, being the hypothetical sum the defendant would have paid the claimant, had the defendant negotiated a release of his or her obligations before breaching the contract. This principle was established in *Wrotham Park Estate Ltd v. Parkside Homes Ltd*,62 but has recently been reconsidered in *Morris-Garner and another v. One Step (Support) Ltd*,63 where the

57 Robinson v. Harman (1848) 1 Ex 850.
61 Section 1, Law Reform (Contributory Negligence) Act 1945.
62 Wrotham Park Estate Ltd v. Parkside Homes Ltd 1 WLR 798.
Supreme Court found that negotiating damages may be a tool for determining the economic value of a right that has been breached, and applied in *Brocket Hall (Jersey) Limited v Kruger and Barry*.  

Punitive damages, intended to penalise the defendant, almost certainly cannot be awarded or recovered for breach of contract.  

In addition, ‘penalty’ clauses (clauses that specify an amount to be paid where there is a breach of contract) are rarely enforceable save where they are not punitive or exorbitant. In the 2015 case of *Cavendish Square Holding BV v. Talal El Makdessi (El Makdessi)* and *ParkingEye Ltd v. Beavis*, the Supreme Court held that the test for whether or not a penalty clause was enforceable was as follows: ‘whether the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation’.

**iv** Indemnification

A party to a contract that includes indemnities may have an alternative remedy available for breach of the contract, which may provide quicker and easier recovery than a contractual claim for damages. Under an indemnity, one party promises to compensate another party on the occurrence of a specified event. The contract needs to be explicit about what events may trigger the indemnity and the extent of any recovery available under it.

**v** Non-monetary remedies

In some cases, the courts have discretion to award non-monetary remedies where this would be more appropriate. For example, an order for specific performance requires a party to perform his or her positive obligations under the relevant contract. Specific performance may only be ordered where damages are inadequate as a remedy. Although, the courts have demonstrated a willingness to take a broad approach to the requirement that damages must be an inadequate remedy.

**IX** CONCLUSIONS

As noted above, the English courts are some of the most established fora for dealing with complex commercial litigation and they continue to modernise and evolve to meet the demands of litigation. And, from the discussion above, it should be clear that English law is a sensible and commercial choice of governing law. The combination of the two – English courts and English law – is one of the best ways for contract drafters to ensure that what is contained in their contracts will be upheld.

Going forward, and despite the impact of Brexit on the United Kingdom in political and economic terms, it is very likely indeed that the English courts will retain their reputation for delivering high quality justice in the context of complex commercial litigation.

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64 *Brocket Hall (Jersey) Limited v Kruger and Barry* [2019] EWHC 1352.
65 *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd* [2013] EWHC 1414 (Ch).
With well-trained and respected judges (often specialists in their fields) and the efficiencies delivered by the CPR, English courts are among the world’s pre-eminent courts for complex commercial disputes.

With a Supreme Court currently in the ascendancy, addressing the remaining grey areas of English law with clear and detailed judgments, the future looks bright for the English courts and English law. Parties can expect few dramatic changes, but, rather, further consistency and placing party autonomy and freedom of contract centre stage, particularly as the courts deal with the complexities around the UK’s departure from the EU. As indicated above, however, one important change to keep an eye on over the next decade is whether English law will embrace more wholeheartedly the concept of good faith to match other major international legal systems. In the end, that seems more likely than not, although it is a development that will be heralded no doubt by a very clear judgment.
I OVERVIEW

Complex commercial litigation often stems from disputes arising out of the conclusion, interpretation or performance of a contract, leading the litigants to refer to the contractual provisions and to statutory law supplemented by case law.

French contract law is mostly set forth in the French Civil Code, which was substantially amended by Ordinance No. 2016-131 of 10 February 2016, ratified by Law No. 2018-287 of 20 April 2018. The purpose of this reform was to modernise French contract law and to increase its readability by codifying the landmark cases of the past two centuries. Barring minor exceptions, contracts entered into force and court proceedings commenced before 1 October 2016 remain subject to the former provisions of the French Civil Code. Contracts entered into force after 1 October 2016 are governed by the provisions created by the Ordinance, as clarified by Law No. 2018-287. However, certain formal amendments resulting from Law No. 2018-287 only apply to contracts entered into force after 1 October 2018.

Among the provisions of the French Civil Code are a number of default provisions, leaving parties with the possibility to expressly stipulate a clause to the contrary. By way of exception, certain provisions are mandatory (i.e., cannot be derogated by agreement).

Provisions relevant for commercial litigation may be found in the French Civil Code (such as the rules specific to sales contracts or contracts of mandate), but also in other bodies of texts, and for instance in the French Commercial Code (such as the rules applicable to commercial loan contracts).
II CONTRACT FORMATION

A contract is defined as ‘a concurrence of wills between two or more persons to create, modify, assign or terminate obligations’. French contract law is based on the freedom of contract principle, according to which parties have the freedom to contract with the person and the content they choose to the extent permitted by the law.

i Contract conclusion

Negotiations

The initiative, conduct and termination of negotiations are free but must be conducted in good faith.

Any misconduct carried out in the course of negotiations may trigger a claim for compensation by the alleged victim. However, the amount of damages may not include the loss of benefits expected from the aborted contract nor the loss of opportunity to get these benefits. Only damages such as the costs incurred for the negotiations can be retrieved.

A duty of good faith implies a duty of information. Parties must communicate to each other the information unknown by the other that is relevant for the latter’s consent unless said information concerns the value of the consideration offered. Breaching this duty may result in the nullity of the contract and the allocation of damages by the breaching party. It is thus crucial to respect this duty, especially for significant operations such as mergers and acquisitions.

Offer and acceptance

The offer must contain all the essential elements of the contract. It must express the will of its author to be bound in case of acceptance; otherwise, it only qualifies as an invitation to negotiate. An offer may only be withdrawn after the expiration of the time period stipulated or after the expiration of a reasonable time.

The reunion of both an offer and an acceptance whereby parties express their will to contract forms the contract. Consent can either be drawn from parties’ statements or by their unequivocal behaviours. Silence is not construed as acceptance unless otherwise implied by law, customs, business relationships or specific circumstances.

Preliminary contracts

The 2016 reform introduced two preliminary contracts, already vastly used in practice:

8 Article 1101, French Civil Code.
9 Article 1102, French Civil Code.
10 Article 1112 (Section 1), French Civil Code.
11 Article 1112 (Section 2), French Civil Code.
12 Article 1112-1 (Sections 1 and 2), French Civil Code.
13 Article 1112-1 (Section 6), French Civil Code.
14 Article 1114, French Civil Code.
15 Article 1116, French Civil Code.
16 Article 1113 (Section 1), French Civil Code.
17 Article 1113 (Section 2), French Civil Code.
18 Article 1120, French Civil Code.
the pre-emption agreement, whereby a party commits to offering to negotiate firstly with the beneficiary of the preliminary contract if this party wishes to contract; and
the unilateral promise, whereby a party gives the other the right to unilaterally trigger the conclusion of a contract whose essential elements are stated in the preliminary contract.

ii Conditions of validity of a contract
Three requirements must be satisfied to conclude a valid contract:

a consent of all parties;
b parties’ capacity to contract; and
c defined and lawful subject matter of the contract.

Capacity and representation
Any natural person over 18 has the capacity to contract unless he or she is under protection, as per Article 425 of the Civil Code. As for legal persons, their capacity to contract is limited by the specific provisions that govern each of them. Contracts are signed by the company’s legal representative or by any person to whom such powers have been delegated.

Validity of consent
Parties’ consents are not valid when given only by error, obtained by violence or induced by dol.

Indeed, if a party’s error concerned an essential component of the contract, that party cannot have understood its real implications. Consent is also void when a party only agreed under an illegitimate moral, physical or even pecuniary threat. As per the dol, a civil law concept, it can be defined as a fraud committed to induce another party into entering into a contract.

Defined and lawful subject matter of the contract
A contract’s content must not breach public order and must be based on a present or future obligation that must be both possible and determined or determinable.

In a bilateral contract, the fact that the obligations are unbalanced is not a cause of nullity. However, the onerous contract is null if the consideration provided to a party was illusory or derisory at the time of the conclusion of the contract.

19 Article 1123 (Section 1), French Civil Code.
20 Article 1124 (Section 1), French Civil Code.
21 Article 1128, French Civil Code.
22 Articles 1145 and 1146, French Civil Code.
23 Article 1145 (Section 2), French Civil Code.
24 Articles 1153–1161, French Civil Code.
25 Article 1130, French Civil Code.
26 The consequences of such invalid consent are examined in Section VI ‘Defences to enforcement’.
27 Article 1162, French Civil Code.
28 Article 1163, French Civil Code.
29 Article 1168, French Civil Code.
30 Article 1169, French Civil Code.
iii  Form of the contract

As a principle, contracts are consensual.\(^3\) Consensualism is a principle of French contract law according to which a contract is legally binding whether concluded orally or in writing. Nevertheless, some types of contracts must be formalised in writing and might even require an authenticated deed (land transfers, marriage contracts, etc.) or specific handwriting mentions.

iv  Enforcement of the contract

Contracts are binding for their parties.\(^3\) Not only must they comply with their explicit provisions, but also with all other terms implied by equity, customs or the law.\(^3\)

Contracts can only be modified or revoked if both parties consent to it, unless otherwise specified by law.\(^3\) However, a contract may be renegotiated if some unpredictable events occur.\(^3\)

Regarding the transfer of ownership, unless parties have decided otherwise, the transfer occurs upon conclusion of the contract.\(^3\) After that, the seller must deliver the good as promised and preserve it until delivery.\(^3\)

As a general rule, one may only bind oneself in one’s own name and for oneself.\(^3\) However, some contracts have third-party beneficiaries (third-party provision, third-party performance promise, mandate, commissioning agents, etc.).

III  CONTRACT INTERPRETATION

i  Law governing contract interpretation

Choice of law provisions willingly inserted in a contract are, in principle, upheld by French courts, for parties are free to determine which law will govern the substance of their contract (*lex contractus*). Said law will also govern its interpretation.

However, parties may not choose a foreign law solely out of convenience, in order to escape imperative provisions of the law that would otherwise have been naturally applicable. In such cases, a court may apply these imperative provisions regardless of the choice of law clause. In addition, a court may set aside the *lex contractus* when the results of its application would manifestly contradict the public order of the forum.

Where parties fail to expressly provide for a choice of law clause, courts can either:

a  discover an implied choice of law in parties’ behaviours; or

\(^3\) Article 1172, French Civil Code.
\(^3\) Article 1199, French Civil Code.
\(^3\) Article 1194, French Civil Code.
\(^3\) Article 1193, French Civil Code.
\(^3\) Article 1195, French Civil Code.
\(^3\) Article 1196, French Civil Code.
\(^3\) Article 1167, French Civil Code.
\(^3\) Article 1203, French Civil Code.
\(^3\) Article 1205, French Civil Code.
\(^3\) Article 1204, French Civil Code.
\(^3\) Articles 1984 et seq. French Civil Code.
\(^3\) Article L. 132-1, French Commercial Code.
apply the rules set forth in Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I).

For instance, a contract for the sale of goods shall be governed by the law of the country where the seller has his or her habitual residence.43

ii Participants to contract interpretation

Agreements lawfully entered into have the force of law for those who have made them.44 Both the parties to a contract and the courts seized of a dispute related to said contract will be bound by its terms.

Parties may anticipate disputes by inserting in their contract certain provisions circumscribing the court’s margin of manoeuvre in its interpretative task. For instance, a clause of entire agreement will prevent the court from interpreting a contract off other exchanges between the parties or their behaviours. Parties may also conclude an interpretative agreement to guide further interpretations of the terms of the main contract.

When deciding a dispute, a court ruling on the merits of a case may sovereignly interpret all the obscure and ambiguous terms of a contract. However, judges cannot interpret provisions that are clear and precise,45 although refusing to interpret a contractual clause potentially affecting the outcome of a trial because of its ambiguous character would be tantamount to a denial of justice.

iii Rules of construction

Courts must seek the common intent of the contracting parties rather than stop at the literal meaning of the words.46 In doing so, they may take into account the behaviours of the parties, both before and after the conclusion of the contract, as well as the context of the operation. If judges cannot detect the intention of the parties, they must interpret the clauses according to the meaning a reasonable person placed in a similar situation would give to these clauses.47

All the clauses of an agreement are interpreted with reference to one another by giving to each one the meaning that results from the whole act.48 When several contracts partake in a given operation, courts may give meaning to a provision in one of these contracts in accordance with the intention of the parties as set out in the other contracts.

In addition, when a clause is susceptible of two meanings, it shall be understood to mean that which may produce some effect, rather than according to the meaning that would produce none.49

When none of the aforementioned rules of construction are enough to discover the meaning of a clause, said clause must be interpreted:

43 Article 4.1.(a), Regulation (EC) 593/2008 of the European parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
44 Article 1103, French Civil Code.
45 Article 1192, French Civil Code.
46 Article 1188, French Civil Code.
47 ibid.
48 Article 1189, French Civil Code.
49 Article 1191, French Civil Code.
in favour of the consumer, when the contract governs the relation between a professional and a consumer; 50
in favour of the debtor, when the contract was freely negotiated; 51 and
in favour of the party who did not draft the contract, for standard form agreements. 52

Finally, as a general principle, parties must not only comply with the express provisions of their contract but also with all the terms implied in it by equity, customs or the law. 53 Therefore, judges may discover obligations that were not expressly incorporated in the contract, such as an obligation to ensure the security of the passengers in an agreement related to the provision of transportation services. 54

iv Hierarchy of evidence regarding contractual meaning

Parties may insert a clause of priority organising the hierarchy within the contractual documents, so as to determine which texts shall prevail in case of contradiction. Otherwise, courts are bound only by the rules set out in Section III.iii and not by an obligation to follow a given hierarchy of evidence.

IV DISPUTE RESOLUTION

i Court litigation

Court structure

The French court structure follows a division between the public law courts, which deal with most disputes involving administrative bodies, the criminal courts, which deal with criminal complaints and prosecutions in relation with a criminal offence, and the private law courts, which deal with commercial, employment and civil matters.

Within the private law court system, a three-tier structure is observed whereby litigants can submit their dispute to a court of appeals when at least one of them is unsatisfied with the decision of the first instance court, provided the disputed amount exceeds €4,000. Access to the highest court, the Cour de Cassation, is only granted to parties claiming that the lower courts have rendered a ruling grounded on errors in law.

Once a conflict has arisen, parties may agree that their dispute will be judged without appeal even if the disputed amount exceeds €4,000, provided the case only involves rights over which they have an unrestricted power of disposition. 55

On February 2018, international chambers were created within the Paris commercial court Paris (first instance court) and the Paris court of appeal. These chambers have jurisdiction to decide over disputes that involve international commercial interest (e.g., commercial

50 Article L. 211-1, French Consumer Code.
51 Article 1190, French Civil Code.
52 Article 1190, French Civil Code.
53 Article 1194, French Civil Code.
54 Cour de Cassation, First Civil Chamber, 21 November 1911, Compagnie Générale Transatlantique.
55 Article 41, French Code of Civil Procedure.
contracts, unfair competition, transportation, operations on financial instruments, claims for compensation following anti-competitive commercial practices). 56 These chambers’ main particularities are as follows:

- they are composed of English speaking judges meaning that the English can be used both in the document production (with no French translation required) and during hearings;
- parties, witnesses and experts may be heard in English; and
- decisions from these courts are enforceable in all EU member states.

**Rules of substantive jurisdiction**

By default, the competent first instance courts for civil matters are the high courts, provided the disputed amount exceeds €10,000, or the district courts, when the disputed amount is inferior to that threshold. 57 Parties may agree, after a conflict has arisen, that their dispute will be heard either by a high court or a district court irrespective of the disputed amount. 58

The law also grants exclusive jurisdiction to specialised tribunals. For instance, commercial courts have exclusive jurisdiction over disputes involving:

- commercial companies;
- obligations among traders, credit institutions and financing companies; or
- commercial deeds. 59

Judges sitting in commercial courts are not career judges but lay magistrates, elected by delegates – themselves elected among the commercial community. 60 The procedure before commercial courts is oral, meaning that parties must present their respective claims and pleas orally at the hearing while retaining the possibility of referring to what they included in their written submissions. 61

**Rules of territorial jurisdiction**

By default, a claimant must seize the competent court of the jurisdiction where the respondent resides (*actor sequitur forum rei*). 62 When the plaintiff brings an action against a legal person, the territorially competent court is that of the registered office of the defendant.

However, imperative rules may apply, giving exclusive jurisdiction to a single court or a limited number of courts. For instance:

- in matters relating to rights *in rem* in immovable property, the court of the place where the property is located has sole jurisdiction; 63

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56 Article 1 of the Protocol relating to procedural rules applicable to the International Chamber of Paris Commercial Court and Article 1 of the Protocol relating to procedural rules applicable to the International Chamber of the Court of Appeal of Paris.


58 Article 41, French Code of Civil Procedure.


60 Articles L. 723-1 et seq. and Article L. 713-7, French Commercial Code.

61 Article 860-1, French Code of Civil Procedure.


63 Article 145, French Code of Civil Procedure.
claims regarding the sudden termination of established commercial relations may only be brought before one of eight specialised commercial courts and appealed before the Paris Court of Appeal; and
certain claims regarding, among others, literary and artistic property, designs and models, patents and trademarks, as well as associated claims of unfair competition practices, may only be brought before a limited number of courts.

Furthermore, for certain types of actions, the claimant may seize the court of his or her choice between the court of the jurisdiction where the defendant resides and another court. In contractual matters, this other court is that of the place of actual delivery of the goods or of the place of performance of the service. For claims based on extra-contractual liability (tort), this other court is that of the place where the harmful event occurred or the court within whose jurisdiction the damage was suffered.

Parties may only derogate from the rules of territorial jurisdiction by convention if they all contract in their capacity as businesses. In addition, the choice of forum clause must be stated very distinctly in the undertaking of the party to whom it is opposed as, otherwise, it is deemed unwritten.

ii Court proceedings

Procedural fees

Carrying legal proceedings in France is supposedly free, as justice is a public service financed by taxes.

In civil and commercial courts, each litigant initially bears his or her own costs. However, those costs that are directly linked to the proceedings, such as bailiff’s fees, are eventually borne by the losing party. Other expenses such as attorneys’ fees may be apportioned between the parties by the judge on the basis of equity.

Confidentiality

Court proceedings are public, meaning that physical access to the courtroom is not restricted. However, the public nature of the proceedings may be adjusted in light of considerations relating to the general interest (such as national security) or the private interests of the parties (such as the protection of minors). As for the ruling, it is either published online or at least made available on demand at the court clerk. A recent law transposing a European directive

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64 Article D. 442-3, French Commercial Code; Annex 4-2-1, Regulatory Section of the French Commercial Code.
68 Article 700, French Code of Civil Procedure.
69 Articles 433 et seq. French Code of Civil Procedure.
on the protection of trade secrets now enables litigants and interested third parties to request the application of appropriate confidentiality measures to prevent the divulgation of trade secrets in the course of legal proceedings.70

Parties’ written submissions and disclosed evidence are not made available to the public. However, no legal obligation of confidentiality is attached to these elements or to the proceedings themselves. Consequently, litigants may discuss the existence and content of the claim with those concerned, such as their commercial partners or insurers. Yet, a company sued by a competitor must be careful with public declarations on the ongoing procedure, for derogatory comments might trigger a liability claim for commercial disparagement.

Class actions

The mechanism of the class action was introduced in France in 2014 and progressively extended. By default, proceedings may only be initiated by accredited associations or associations regularly declared for at least five years and whose statutory purpose includes the defence of those interests that have been violated by the defendant. They may seek recovery for the individual damages sustained by members of the class action or an injunction to put an end to the cause of their damages. Class actions are only available for violations of certain sectoral regulations related to healthcare, anti-discrimination, environment protection, consumer law, anticompetitive practices and personal data protection.

Alternative dispute resolution

French courts generally uphold provisions whereby parties agree to submit their dispute to prior mediation or conciliation proceedings. Three conditions must be met:
\[
a. \quad \text{the clause must have been expressly established as a mandatory prerequisite to the referral of the dispute to a court;}
\]
\[
b. \quad \text{parties must have given their express consent to that effect; and}
\]
\[
c. \quad \text{the practical details of its implementation must have been specified in the agreement.}^{72}
\]

A claimant referring the matter to a court directly will expose himself to a ruling of inadmissible of the proceedings.73

The French legal system is extremely arbitration-friendly, partly owing to the presence of the International Chamber of Commerce in Paris. Arbitral awards are binding and easily enforced in France.

Parties to a dispute may also, at their initiative and under certain conditions, attempt to resolve the issue amicably with the assistance of a mediator, a conciliator or their lawyers.74 To encourage these alternative dispute resolution mechanisms, the limitation period on the

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72 Cour de Cassation, Commercial Chamber, 29 April 2014, No. 15-25.928.

73 Cour de Cassation, Mixed Chamber, 14 April 2003, No. 00-19.423.

74 Article 1528, French Code of Civil Procedure.
associated claim is suspended from the day on which the parties agree to resort to mediation or conciliation. All summons must also specify the steps taken by the claimant to reach an amicable settlement of the dispute.\textsuperscript{75}

\section*{V \hspace{1em} BREACH OF CONTRACT CLAIMS}

\subsection*{Contractual liability}
Sectoral laws may specify parties’ particular obligations, as is for instance the case for sales contracts. Indeed, a buyer benefits from protective provisions such as a warranty against eviction,\textsuperscript{76} a warranty against hidden defects,\textsuperscript{77} an obligation of proper delivery\textsuperscript{78} and a product liability claim.\textsuperscript{79}

In any case, to incur the contractual liability of one party, a co-contractor must demonstrate a breach of contract that caused damage to him or her.

\textit{Breach of contract}
A contract is deemed breached if at least one obligation was not performed or was delayed, unless it was owing to an external cause that cannot be imputed to the party.\textsuperscript{80}

The requirements regarding the performance of a contract differ depending on whether the obligation was results-based or best-efforts-based. In the first case, the claimant only has to prove that the obligation was not achieved. In the second case, the claimant has to prove that his or her co-contractor did not perform the contract as well as possible or was negligent or not diligent enough.

\textit{Damage}
The breach of contract must have harmed the co-contractor. French courts can order the compensation of different damages such as material injuries, non-pecuniary damages or bodily harms.

However, a debtor is liable only for damages that were foreseen or that could be foreseen at the time of the contract, unless the debtor’s failure is owing to his or her own gross negligence or fraud.\textsuperscript{81}

\textit{Causal link}
A causal link must be demonstrated between the breach of contract and the damages, that is to say that the damages must be the immediate and direct consequences of the non-performance of the agreement.\textsuperscript{82}

\begin{itemize}
\item\textsuperscript{75} Article 56, French Code of Civil Procedure
\item\textsuperscript{76} Articles 1626 et seq. French Civil Code.
\item\textsuperscript{77} Articles 1641 et seq. French Civil Code.
\item\textsuperscript{78} Articles 1604 et seq. French Civil Code.
\item\textsuperscript{79} Articles 1245 et seq. French Civil Code.
\item\textsuperscript{80} Article 1231-1, French Civil Code.
\item\textsuperscript{81} Article 1231-3, French Civil Code.
\item\textsuperscript{82} Article 1231-4, French Civil Code.
\end{itemize}
ii  Burden of proof

Each party must prove, according to the law, the facts necessary for the success of the claim.83

Proceedings pertaining to the production of evidence

There is no procedure of discovery under French law.

Nevertheless, a participatory procedure, partly inspired by the discovery model, was introduced in 2010.84 Per this scheme, parties may agree not to seize a court, at least for the duration of their agreement, and instead to work together, with their counsels, in order to find an amicable settlement of their dispute. In such contexts, parties must contractually organise the terms of their exchange of evidence.85

In anticipation of a proceeding, a court may also order legally permissible preparatory inquiries at the request of any interested party, by way of a petition or by way of a summary procedure, if there is a legitimate reason to preserve or to establish, before any legal proceedings, the evidence of the facts upon which the resolution of the dispute depends.86

This scheme is the most common mean to obtain evidence.

International litigants should also pay attention to the restrictions set forth in Law No. 68-678 of 26 July 1968 (known as the ‘Blocking Statute’). In particular, it prohibits any person from requesting, seeking or communicating, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature with a view to gathering evidence in or in connection with foreign judicial or administrative proceedings outside of the mechanisms provided by international treaties or agreements (e.g., the Hague Evidence Convention of 18 March 1970).87 Failure to comply with the Blocking Statute provisions is sanctioned with a maximum six-month imprisonment or a criminal fine amounting to €18,000, or both, for natural persons and €90,000 for legal persons.88 Rarely enforced, the Blocking Statute was recently back in the spotlight when the Gauvain report suggested increasing the sanctions with a maximum two-year imprisonment or criminal fine amounting to €2 million for natural persons and €10 million for legal persons, or both.89

Rules of evidence

A claimant requesting the performance of an obligation must prove it.90 Similarly, a person claiming to be released from an obligation must prove the payment or the fact that caused the extinction of his or her obligation.91

83 Article 9, French Code of Civil Procedure.
84 Law No. 2010-1609 of 22 December 2010.
85 Article 2063, French Civil Code.
87 Article 1 bis of Law No. 68-678 of 26 July 1968 (the “Blocking Statute”).
88 Article 3 of Law No. 68-678 of 26 July 1968 (the “Blocking Statute”).
89 Report to “Restore the sovereignty of France and Europe and protect our companies from laws and measures with extraterritorial scope” submitted to the French Prime Minister on 26 June 2019 by Raphaël Gauvain (member of the French National Assembly).
90 Article 1353 (Section 1), French Civil Code.
91 Article 1353 (Section 2), French Civil Code.
Unless the law states otherwise, evidence may be brought by any means. Nonetheless, any contract obligation exceeding €1,500 must be proved by a private or authentic act unless:

- it is materially or morally impossible to obtain the written proof;
- it is common under the customs not to write the contract down; or
- the written proof was lost owing to a force majeure.

A confession, a decisive oath or prima facie evidence may be substitutions for a required written proof.

The law may establish presumptions related to some acts or facts. These presumptions are said to be simple, mixed or irrefutable. It is possible to prove the contrary of a simple presumption by any means. However, a mixed presumption can only be rebutted by the means of proof stated by the law, and the irrefutable presumption cannot be rebutted.

VI DEFENCES TO ENFORCEMENT

i Extinctive limitation period

In general, personal actions or movable rights of action apply for five years from the day the holder of a right knew or should have known the facts enabling him or her to exercise the right.

The time limitation may, in certain cases, be either suspended or interrupted. For instance, the time limitation period is suspended when a judge grants an investigative measure submitted prior to any trial. Any legal action, even summary proceedings, interrupts the prescription.

However, parties may decide, by mutual agreement, to modify the prescription by shortening or extending its time limit.

ii Legal compensation

Compensation is defined as the simultaneous extinction of mutual obligations between two persons. For compensation to operate, several conditions must be met: the obligations must be fungible, certain, liquid and due.
iii Nullity of a contract

In principle, a contract that does not fulfil the conditions required for its validity is void and deemed never to have existed, which raises the question of the restitution of performances that have already taken place.\(^{104}\)

**Defects of consent**

Defects of consent, which have already been presented in Part II 'Contract formation', are a cause of nullity of the contract\(^ {105}\) if and only if they have been decisive. In other words, the error, dol or violence must be of such a nature that without them one of the parties would have not entered the contract or would have but under substantially different conditions.\(^ {106}\) To be a ground for nullity, the error must not be inexcusable and must relate to the essential qualities of one of the performances.\(^ {107}\) Therefore, errors on the value resulting from an erroneous economic assessment are excluded,\(^ {108}\) whereas errors resulting from a dol are always excusable and a cause of nullity even if when relating to the value.\(^ {109}\) With regard to violence, it may be a ground for nullity whether exercised by a co-contractor or by a third party.\(^ {110}\)

**Incapacity and defaults in representation**

Capacity is a condition of validity of contracts\(^ {111}\) and, therefore, incapacity a ground for relative nullity.\(^ {112}\)

It is also possible to raise the nullity of an act for defaults in representation. The third party, having contracted with an agent, may invoke the nullity of the act if he or she was unaware that this act was accomplished by an agent without power or acting beyond his or her powers.\(^ {113}\) This option is also available to the principal where the agent misuses his or her powers to the detriment of the principal, and where the third party was aware of the misuse or could not have been unaware of it.\(^ {114}\) Finally, a contract may be declared void if the agent has acted on behalf of several parties to the contract who are natural persons with divergent interests or has contracted on his or her own behalf with the principal.\(^ {115}\)

**Illicit contracts**

Contracts are only valid insofar as they include a defined and lawful subject matter.\(^ {116}\) Indeed, contracts cannot derogate from laws that relate to public order, either by their stipulations or by their purpose, whether or not the latter was known by all the parties.\(^ {117}\)

\(^{104}\) Article 1178 (Sections 1 and 2), French Civil Code.
\(^{105}\) Article 1131, French Civil Code.
\(^{106}\) Article 1130, French Civil Code.
\(^{107}\) Article 1132, French Civil Code.
\(^{108}\) Article 1136, French Civil Code.
\(^{109}\) Article 1139, French Civil Code.
\(^{110}\) Article 1142, French Civil Code.
\(^{111}\) Article 1128, French Civil Code.
\(^{112}\) Article 1147, French Civil Code.
\(^{113}\) Article 1156 (Section 2), French Civil Code.
\(^{114}\) Article 1157, French Civil Code.
\(^{115}\) Article 1161, French Civil Code.
\(^{116}\) Article 1128, French Civil Code.
\(^{117}\) Article 1162, French Civil Code.
The sanction of an illicit or indefinite subject matter is the nullity of the contract.118

**Nullity exception**
The nullity exception is a defence to enforcement that may be raised by the party to a contract who is being asked to perform a voidable contract on grounds of nullity. The nullity exception is imprescriptible (i.e., can still be raised even where the limitation period is expired) as long as it relates to a contract that has not received any performance.119

iv  **Illusory or derisory consideration in onerous contracts**
As mentioned in Section II.ii, an onerous contract is null and void if, at the time of its formation, the consideration provided to a party is illusory or derisory.120 However, in a bilateral contract, the lack of equivalence between two obligations is not a ground for nullity.121

v  **Exclusion or limitation of liability clauses**
Parties may validly include in their contracts exclusion or limitation of liability clauses in order to adapt their contractual relations, or to limit their mutual obligations. However, any clause that would deprive the essential obligation of the debtor of its substance is deemed unwritten, that is to say null and void.122 Such provisions are also unenforceable if the damage suffered is the result of an intentional act (or omission) or gross negligence of the other party.123

vi  **Significant imbalance**
In standard form agreements, where clauses and general conditions are determined in advance by one of the parties, any non-negotiable clause, unilaterally determined by one of the parties, and which creates a significant imbalance between the respective rights and obligations of the parties to the contract shall be deemed unwritten.124

vii  **Lapse of the contract**
A party may use the lapse of the contract as a defence to its enforcement. A validly formed contract lapses if one of its essential elements disappears.125

viii  **Force majeure**
In contractual matters, force majeure occurs when an event beyond the debtor's control, which could not reasonably have been foreseen at the time the contract was concluded and whose effects cannot be avoided by appropriate measures, prevents the debtor from

118 Article 1178, French Civil Code.
119 Article 1185, French Civil Code.
120 Article 1169, French Civil Code.
121 Article 1168, French Civil Code.
122 Article 1170, French Civil Code.
123 Article 1231-3, French Civil Code.
124 Article 1171, French Civil Code.
125 Article 1186, French Civil Code.
performing his or her obligation. If the impediment is only temporary, performance of the obligation is only suspended. However, if the impediment is definitive, the contract is automatically terminated and parties are released from their obligations.

A party to a contract may use force majeure as a defence to enforcement, by claiming that force majeure makes it impossible for the party to perform his or her obligation and that this impossibility is definitive.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Breach of the duty of good faith

Contracts must be negotiated, formed and executed in good faith. This provision is imperative.

Any breach of the duty of good faith will result in contractual or extra-contractual liability on the part of its author, depending on whether the parties have entered into a contract or are still negotiating the terms of their agreement.

ii Revision of the contract for unforeseen circumstances

The 2016 reform enshrines the principle of revision for unforeseen circumstances after the Cour de Cassation had refused to do so for many years. Three cumulative conditions are required: (1) a change in circumstances unforeseeable at the time the contract was concluded, (2) which makes the performance of the contract excessively onerous for a party (3) who had not accepted the risk.

When these conditions are met, a party may request the renegotiation of the contract to his or her co-contractor. Parties may also agree to terminate it or ask the judge for an adaptation of the contract. If they fail to reach an agreement, a party may still request the revision or termination of the contract.

iii Quasi-contractual claims

Quasi-contracts are purely voluntary acts resulting in a commitment by the person who benefits from them without being entitled to it, and sometimes a commitment by their author towards others. The Civil Code identifies three quasi-contracts: the management of affairs, the undue payment and the unjustified enrichment. They give rise to the

126 Article 1218, French Civil Code.
127 Article 1351, French Civil Code.
128 Article 1104 (Section 1), French Civil Code.
129 Article 1104 (Section 2), French Civil Code.
130 Article 1195, French Civil Code.
131 ibid.
132 Article 1300, French Civil Code.
133 Articles 1301–1301-5, French Civil Code.
134 Articles 1302–1302-3, French Civil Code.
135 Articles 1303–1303-4, French Civil Code.
obligation to compensate for the unfair advantage received from others. Therefore, the person impoverished has a legal action against the person enriched on the basis of one of these three quasi-contracts.136

iv Fraud

Fraud is a case law concept characterised by a desire to circumvent a mandatory law by using artifice or machination. Under the adage *fraus omnia corrumpit*, in other words, ‘fraud corrupts everything’, a judge may declare the contract void or deprive the scheme of its fraudulent effect.

Moreover, a fraudulent act directed against a third party will be declared unenforceable against that third party. The specific scheme that is the Paulian action enables a creditor to protect himself or herself from fraud by having the acts committed by his or her debtor in fraud of his or her rights declared unenforceable against him or her inasmuch as the debtor arranges his or her insolvency in order to avoid performing his or her obligation.137

VIII REMEDIES

i Remedies available for breach of contract

The French Civil Code sets out five remedies that are available to the creditor, victim of a non-performance or an improper performance:138

a non-performance exception: a party may either refuse to perform his or her own obligation if the non-performance of the co-contracting party is serious enough,139 or suspend the performance of his or her obligation when it is obvious that the other party will not execute his own obligation;140

b forced performance: the creditor of an obligation may obtain the forced performance of said obligation or take it upon himself or herself to have the obligation executed, after a formal notice;141

c price reduction: the creditor may accept, after a formal notice, a partial performance of the contract and seek for a proportional price reduction;142

d termination for breach: termination for breach may be obtained on three grounds: application of a termination clause, judicial resolution or unilateral termination.143 The latter is a major innovation of the 2016 reform whereby creditors can terminate contracts by notice to their debtors, and after a formal notice;144 and

136 Article 1301-2 Paragraph 2, French Civil Code for the management of affairs; Articles 1302, French Civil Code et seq. for the undue payment and Article 1303, French Civil Code for the unjustified enrichment.

137 Article 1341-2, French Civil Code.

138 Article 1217, French Civil Code.

139 Article 1219, French Civil Code.

140 Article 1220, French Civil Code.

141 Articles 1221 and 1222, French Civil Code.

142 Article 1223, French Civil Code.

143 Articles 1224–1229, French Civil Code.

144 Article 1226, French Civil Code.
Damages: the creditor may obtain compensation for the damage caused.145 Damages will be awarded provided that the non-performance is final or that a formal notice has been issued.

Parties may also include a penalty clause in their contract, providing that the party who fails to fulfil his or her obligations will pay a certain amount of damages.146

These remedies are cumulative, provided they are not incompatible. Punitive or exemplary damages do not exist as such. Finally, the choice of remedy is at the sole discretion of the debtor.

ii Conditions for the award of damages

The cornerstone principle is that of full indemnification: damages granted to the victim shall allow the complete repair of the damage, no more and no less, in such a way as to restore the victim to the same situation in which he or she would have been had the damage not occurred.

However, in French contract law, the award of damages is subject to certain conditions. First and foremost, the damage must be certain, even if it exists in the future. Indeed, one can get compensation for the loss of a chance, as long as it really exists. Secondly, the damage must be direct; namely, the immediate and direct result of the breach of contract.147 Finally, compensation is limited to the damage foreseeable at the time the contract is concluded, except in the event of gross negligence or fraud.148

Judges may still use their sovereign power to assess the damage in order to moderate the quantum of damages. Additionally, both default interests and compensatory damages may be awarded.149 With regard to the latter, the breach of contract by the bad faith debtor must have caused an additional damage, distinct from the delay, to the creditor.

iii Extra-contractual claims (tort)

Under French law, contractual liability applies between co-contracting parties for any damage resulting from the non-performance of a contractual obligation. Consequently, if these conditions are not met, the liability is necessarily extra-contractual.150 Also, pursuant to the principle of non-cumulation of contractual and extra-contractual liabilities, where the conditions for contractual liability are met, extra-contractual liability can no longer be enforced by a party to the contract. Nonetheless, case law acknowledges that litigants can seek compensation for the damage suffered on the basis of both a contractual claim based on non-performance of the contract and an extra-contractual claim based on a sudden termination of established commercial relations, even though these claims are grounded on the same factual background.151

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145 Article 1231, French Civil Code et seq.
146 Article 1231-5, French Civil Code.
147 Article 1231-4, French Civil Code.
148 Article 1231-3, French Civil Code.
149 Article 1231-6, French Civil Code.
150 Article 1240, French Civil Code et seq.
151 Cour de Cassation, Commercial Chamber, 24 October 2018, No. 17-25672.
As regards third parties, a landmark ruling by the Plenary Assembly of the Cour de Cassation\textsuperscript{152} enshrined the principle whereby a third party to a contract may invoke, on the basis of extra-contractual liability, a breach of contract if such breach has caused him or her damage. In other words, the sole breach of contract by a co-contracting party is sufficient for a third party to engage the latter’s extra-contractual liability. Nevertheless, several recent decisions of the Cour de Cassation as well as the Civil Liability Bill of 13 March 2017\textsuperscript{153} have tempered this principle.

\textsuperscript{152} Cour de Cassation, Plenary Assembly, 6 October 2006, Myr’ho, No. 05-13.255.

\textsuperscript{153} Article 1234, Civil Liability Bill of 13 March 2017.
Chapter 11

GERMANY

Maximilian F Sattler

I OVERVIEW

Germany is a civil law jurisdiction whose main private law codifications are the Civil Code (Bürgerliches Gesetzbuch, or BGB) and the Commercial Code (Handelsgesetzbuch, or HGB). Business contracts are governed by the BGB to the extent that the HGB does not contain special rules. Both the BGB and the HGB are available in English language as official convenience translations.

Both these codifications originate from imperial times (1900 and 1897, respectively) and have been largely unaffected by political turmoil and upheavals. Although both the BGB and the HGB have been amended several times, many of the core principles remain the same, especially those that can be traced back to Roman law.

Germany has a well-established court system providing easy access to legal recourse, especially in private law disputes. B2B disputes may be resolved at special chambers for commercial matters. This court system works very well, although the high caseload remains an issue (in 2017 alone, more than 1.2 million new cases were filed). Attempts to reduce this caseload include the recently introduced collective action for declaratory relief.

For private law disputes, the highest court is the Federal Court of Justice (Bundesgerichtshof, or BGH) in Karlsruhe, which – just like its predecessor, the Imperial Court (Reichsgericht, or RG) – has played a fundamental role in refining and developing German law. While lower courts are technically not bound by the BGH’s legal opinions, they usually consider them to be persuasive authority, and follow them regardless.

In addition to statutory and case law, German law can also draw from a rich body of legal literature, including several commentaries on the BGB and the HGB. A commentary on the BGB in English language is currently in the works.

II CONTRACT FORMATION

The basics of contract formation under German law have largely remained unchanged over time, with case law being settled and statutory law undergoing only a few reforms.

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3 See https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Tabellen/gerichtsverfahren.html (in German).

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i  Freedom of contract
The fundamental principle in German contract law is the principle of freedom of contract, which is part of the broader concept of ‘private autonomy’ and thus protected by the Constitution. Freedom of contract means that as a rule, parties can shape their legal relationships as they see fit. They can choose whether or not to conclude a contract at all, and they can choose whatever content they like (with some exceptions).

The BGB provides the user with a legal framework for the most common standard types of contracts. These include sales contracts, works contracts, service contracts, lease agreements, and loan agreements. In B2B relationships, parties have broad discretion to deviate from this framework, and to adapt it according to their wishes. In B2C relationships, this discretion is considerably limited.

ii  How to conclude a contract
Unless specified otherwise, contracts do not have to be in writing, nor do they have to be notarised (exceptions include sales contracts for real estate). They can be concluded orally, and courts will not hesitate to enforce such contracts if their existence can be proven. For practical reasons though, parties may be well advised to document their agreement in writing – both to obtain clarity about the exact content of their relationship, and to serve as evidence in a potential dispute.

Contracts are concluded by two concurring statements of intent – offer and acceptance. These statements have to contain the essential terms and conditions of an agreement, in particular the key performance obligations. A party can declare its intent either expressly or by implied conduct. For example, case law has confirmed that a contract between a real estate business and a utility can be concluded by the former sending a purchase offer and the latter providing the requested amounts of electricity and water.

In general, mere silence (as reaction to an offer) will not qualify as a statement of intent. It can qualify as such, however, when there is a business practice to that effect, as is the case with the so-called ‘commercial letter of confirmation’ in B2B relationships. Broadly speaking, if a party to such a relationship sends a written summary of previous negotiations to the other party as an offer, then the other party is deemed to have accepted this offer unless it explicitly rejects it.

iii  Relativity of contractual obligations
As a rule, contracts are only effective between the contracting parties themselves, and have no effect on third parties. The contracting parties may agree though that a third party obtains certain rights (but not certain obligations) by virtue of the contract.

In some cases, third parties may obtain rights even if the contract does not explicitly say so. One example are freight contracts between a sender and a freight forwarder, for which the HGB stipulates that the recipient – albeit not party to the contract – has certain rights against the freight forwarder. Other examples include life insurance or casualty insurance.

iv  Standard terms and conditions
Famously (or notoriously), German law submits standard terms and conditions to legal review. As a result, clauses from standard terms and conditions can be invalid if they unreasonably disadvantage the other party. This applies not only in B2C relationships (where the purpose
is to protect the consumer as the presumably ‘weaker’, less sophisticated party), but also in B2B relationships. Examples for invalid clauses would include a stipulation which excludes all liability for gross negligence by a party’s directors.

To exacerbate the issue, standard terms and conditions are interpreted against the drafter. This leads to an interesting mechanism: As the most disadvantageous outcome for the drafter would be the invalidity of the clause, courts will first check whether there is any interpretation of the clause that could make the clause invalid. Usually, this is a hypothetical interpretation that is extremely favorable for the drafter. Only if there is no such interpretation, then – as a second step – the clause is interpreted to the benefit of the drafter’s counterparty.

While this review generally leads to reasonable results, it adds a certain unpredictability in the drafting stage. For this reason, opponents of the review mechanism frequently argue that it discourages parties from choosing German law to govern their contracts.

III CONTRACT INTERPRETATION

The basics of contract interpretation, too, have mostly remained unchanged over time. International private law has become largely determined by its EU framework though. Within this framework – especially Article 3 (3) of the Rome I Regulation – commercial parties are free to choose the substantive law that shall govern their contractual relationship.

Germany has adopted the Convention for the International Sale of Goods (CISG) as national German law. Hence, where a sales contract between, for example, a German and a Russian company calls for ‘German law’, this will be the CISG unless the parties agree otherwise.

Under German law, interpretation of contracts starts with the wording. In this context, the parties’ statements of intent are – to use a common phrase – interpreted in the way the recipient had to understand them on the basis of good faith and common usage. German law does not use the contra proferentem rule, except when interpreting standard terms and conditions (see above). Courts will also consider the history of the parties’ negotiations, pre-contractual statements, and practice from existing business relationships when interpreting contracts, as well as the purpose of the contract.

If the parties have a mutual concurring understanding which deviates from the wording, this understanding takes precedence – falsa demonstratio non nocet. If the parties have inadvertently omitted to cover an essential point in their agreement, courts can apply a supplementary interpretation. Broadly speaking, they will ask what the parties would have agreed, had they been aware of the gap.

IV DISPUTE RESOLUTION

Dispute resolution in Germany is, to a large part, governed by the Code of Civil Procedure (ZPO), which provides a well-established framework for disputes between two or a handful of parties. Arbitration is reasonably common as a way to resolve B2B disputes, while collective redress is still in its infancy.

i Litigation

Germany has a large number of courts, providing easy access to legal recourse. Private law disputes will either have District Courts (for disputes up to and including €5,000) or Regional
Courts as courts of first instance, with Regional Courts and High Regional Courts serving as courts of appeal, respectively. The highest court for private law matters is the aforementioned Federal Court of Justice.

**General course of the proceedings**

There is no minimum value for cases. Parties can (and do) file claims for payment of a few Euro or less, if they are so inclined. Lawsuits are commenced by submitting a statement of claim in writing, and paying an advance on the court fees. Once the advance has been paid, the court will take care of serving the claim to the defendant. Court fees can be recovered if and to the extent that the claimant succeeds.

The court language is German. Recently, English-speaking chambers have been set up for commercial disputes in some courts (e.g., in Hamburg, Frankfurt and Bonn) to encourage parties to such disputes to make use of the German state court system, rather than resorting to arbitration.

Litigation is still predominantly paper-based. As case files are not open to the public – only hearings are – there was and is no need for the courts to have electronic files. In fact, until recently, lawsuits and other submissions could not be filed electronically, but had to be submitted as hardcopies (or by fax). This has changed now, but although the respective IT infrastructure has been set up and is working well, it will take some time for lawyers to break away from old customs.

**Jurisdiction**

The ZPO’s rules on jurisdiction are largely aligned with the respective EU rules (Regulation 1215/2012 – ‘Brussels Ia’). In general, parties can be sued at their seat of business. Unlike EU law though, the ZPO does not provide for general jurisdiction at the seat of one of several joint debtors.

If an action is brought before a court that does not have jurisdiction, the court may still become competent if the defendant does not challenge the lack of jurisdiction in due time.

Commercial parties may conclude choice of forum agreements, selecting a particular court to have exclusive or non-exclusive jurisdiction over their dispute. In cases where the Brussels Ia Regulation applies, the agreement must meet the formal requirements stipulated therein though, as the BGH has recently confirmed. At the Regional Courts, B2B disputes may be referred to the special commercial chambers; this is not a matter of choice of forum though.

**Costs**

For any dispute or dispute stage above the District Courts, parties must be represented by lawyers. Their fees, too, can be recovered if the claimant succeeds; however, the recoverable amounts is limited to the statutory fees. While the statutory fees are tied to the amount in dispute, they will often end up lower than fee arrangements where lawyers are paid by the hour. In such cases, the respective party will have to pay a part of the fees from its own pocket, even if its case succeeds in court. Contingency fees (and *quota litis* arrangements) are only allowed under exceptional circumstances, which will rarely if ever apply in B2B disputes.
**Enforcement**

German court judgments can be enforced throughout the EU. Since the introduction of the Brussels Ia Regulation in early 2015, no formal recognition procedure is necessary any more for such enforcement. The same applies *vice versa* (i.e., to the enforcement of foreign EU judgments in Germany). Enforcement may only be refused if the judgment is manifestly contrary to the public policy of the country in which enforcement is sought. Judgments from non-EU countries can be enforced in Germany (and *vice versa*) if there is some treaty to that effect, or if reciprocity is guaranteed through other means. This is the case, for example, for Japan, but not for Russia.

**ii Alternative dispute resolution**

Arbitration is common as a way to resolve B2B disputes. Germany is a signatory to the New York Convention, and has adopted the UNCITRAL Model Law. German courts take an arbitration-friendly approach when it comes to recognising and enforcing arbitral awards, both national and foreign. In addition, court support of arbitration proceedings (e.g., with regard to interim measures) is provided efficiently and with high quality.

In fact, in some areas, especially post-M&A disputes, arbitration has become so popular that practitioners are beginning to feel a certain dearth of precedence from the BGH. This will be somewhat remedied by increased publication of (redacted) awards addressing these areas.

As an interesting addendum to the UNCITRAL Model Law, the ZPO provides a special type of legal recourse where the parties can request a binding decision on whether a particular dispute is covered by an arbitration agreement or not. This allows the parties to swiftly obtain clarity about the scope of such agreement without having to commence a full-fledged litigation (or arbitration).

Recent legal developments in arbitration include the question whether cartel damage claims are covered by boilerplate arbitration clauses. While this was answered in the positive by a court of first instance, this answer may have to be reassessed in light of recent case law by the European Court of Justice. The BGH has not yet addressed this particular matter.

German law is equally open for other ways of alternative dispute resolution. Mediation and adjudication are both in use, also for B2B disputes (legislation aimed at further promoting mediation was introduced in July 2012). In fact, even in pending litigation, judges are supposed to seek for opportunities for amicable solutions, at any stage of the proceedings. This practice permeates into arbitration as well: German arbitrators will usually see no issue with sharing their preliminary assessment of the case (at the parties’ request), and with providing suggestions as to how a settlement could look like.

**iii Collective redress**

While collective redress has been extensively discussed at the EU level for years, the German legislator – to general approval of legal scholars – has shown little ambition to take action. Any opt-out mechanism would arguably be at odds with the German constitution, which guarantees access to justice for everybody; an opt-out mechanism could potentially lead to a party having its claims litigated without getting a chance to participate in the proceeding.

Still, in November 2018, the German legislator introduced a new type of claim: the ‘model claim for declaratory relief’. With this type of claim, large groups of consumers can opt in to certain lawsuits (brought by qualified organisations) whose goal is to determine, for
example, whether a car manufacturer breached the law with regard to emissions data. The outcome of this lawsuit is then binding for follow-on damage claims, but consumers who have opted in must still file such claims themselves.

While there is no tangible outcome yet, the model claim has turned out to be fairly popular in terms of numbers, with several hundred thousand consumers participating in the various proceedings.

In addition, parties may bundle their claims by transferring and assigning them to dedicated claims vehicles. This approach can be efficient if several parties have been affected by the same or similar infringements. Accordingly, it has become quite popular for cartel damage claims.

V BREACH OF CONTRACT CLAIMS

Breach of contract means non-compliance with a contractual obligation.

Contractual obligations come in different types: (1) main performance obligations, which determine what kind of contract the parties have agreed (e.g., to deliver and hand over a steam turbine in a sales contract); (2) ancillary performance obligations (e.g., to provide instructions on how to operate the turbine); and (3) ancillary obligations to take account of the rights, legal interests and other interests of the other party (e.g., to inform the purchaser about possible health issues from turbine operation). Breach of any type of these obligations can give rise to claims.

When determining breach, German law does not distinguish between material and non-material breaches. Even minor breaches may give rise to damage claims (if the injured party can prove causation). Some remedies, however, require that the breach crosses a certain materiality threshold. This may be true, for example, with the right to terminate a joint venture agreement for cause.

The burden of proof for breach is largely on the claimant’s side. As a rule, the claimant must prove and establish breach, damage, and causality. If breach is established, however, it is upon the defendant to prove absence of fault. In addition, depending on the specific issue at hand, claimants may be able to rely on various types of *prima facie* evidence or factual presumptions which case law has developed over the years, for example when they seek to establish that specific purchases of theirs were affected by cartel infringements.

VI DEFENCES TO ENFORCEMENT

German law provides numerous possible defences against breach of contract claims. A few are discussed below by way of example. Some of these defences will be considered by courts *ex officio*; others must be explicitly raised by the defending party.

i Prescription

The latter is true for the assertion that a claim is time-barred. The general limitation period is three years and begins at the end of the year in which the claim arose and the obligor became aware of the facts giving rise to the claim. Even if the obligor does not become aware of these facts, claims become time-barred ten years after arising.

As a result, limitation periods will often end on 31 December. Shorter limitation periods may follow from statutory law in some cases (e.g., buyers’ claims resulting from
defective goods: two years as a rule) or from agreements to that effect. Unlike the Principles of European Contract Law, German statutory law does not prescribe a general minimum limitation period.

Limitation periods can be suspended in particular if the parties are negotiating about the respective claim, or if one party has commenced court proceedings (whether at the state courts or in arbitration). For cartel damage claims, the limitation period is suspended as long as antitrust authorities are investigating the matter.

To avoid unnecessary disputes about what actions constitute negotiations, parties can explicitly agree on extending limitation periods to find time for amicable solutions. Otherwise, as a party cannot be forced to negotiate, taking the dispute to court will usually be the only way to guarantee suspension of the limitation period.

ii  No valid contract
When claiming for breach, claimants must establish (and, if necessary, prove) that there is a contract. Defendants may then argue that the contract is invalid as a matter of law. There are several reasons why this could be the case – including lack of proper representation of one party at contract formation, breach of formal requirements, or breach of public policy.

Defendants may also try to declare their statement of intent void. They may be entitled to do so if they had erred with regard to the meaning of their declaration, with regard to essential characteristics of the product, or in cases of deceit, or in cases of duress.

iii  Impossibility
For performance obligations, defendants may argue that performance is impossible – objectively or subjectively, legally or factually. Relatedly, defendants may also argue that performance requires an effort that would be grossly disproportionate to the claimant’s interest in performance (a common example from textbooks is a jeweler’s obligation to deliver a wedding ring that fell into the ocean).

If argued successfully, impossibility will free defendants from their performance obligation. Whether they are liable for damages is a different matter, and a question of contractual risk allocation. Damage claims for monetary compensation are not affected by the impossibility defense. In other words: a party may not escape damage claims by arguing that it has no money, unless it is ready to file for insolvency.

VII  FRAUD, MISREPRESENTATION AND OTHER CLAIMS
German case law has long accepted that parties can claim damages for breach of a pre-contractual duty (culpa in contrahendo). Since the early 2000s, this notion has also been reflected in statutory law, which now explicitly states that even mere negotiations for a contract create a pre-contractual relationship obliging the parties to respect each other’s legitimate interests. For example, where a franchisor negotiates with a potential franchisee, he must inform his potential partner if the revenues he is communicating are only estimates rather than established fact, otherwise he is in breach.

In practice, claims for culpa in contrahendo frequently involve breaches (or assertions thereof) of obligations to inform the other party about relevant circumstances. As a rule, each party is responsible for conducting its own research. On the other hand, case law acknowledges that there must be some limit to that rule, like when there are ‘unknown unknowns’ which are accessible to the other party only – as is the case with undisclosed
conflicts of interest. Among the most numerous examples from practice are cases where advisors mediated financial investments without informing their customers that they received kick-back payments.

Some breaches may also give right to tort claims, for example, if a product causes harm to the purchaser's property. Mere pecuniary loss can be recovered in tort only under specific circumstances, for example, where the breach qualifies as a criminal offense (like fraud). Pecuniary loss can also be recovered in tort if the breach qualifies as intentional damage contrary to public policy, but the threshold for such claims is high. In practice, claimants will usually put their emphasis on contractual claims, as these are easier to establish.

VIII REMEDIES

Parties have a number of remedies for breaches of contract.

i Performance
The most basic remedy is a claim for performance. In sales contracts and works contracts, the purchaser or client generally has to grant the seller or contractor an opportunity to remedy the defect. This does not bar the purchaser or client to claim compensation for the damage that has occurred because of the defect, like property damage (e.g., a defective steam boiler in a power plant damaging adjacent piping systems).

ii Rescission or termination
Depending on the severity of the breach, a party may rescind or terminate a contract for cause. For example, a purchaser may terminate a sales contract inter alia if the seller fails to remedy the defect, or refuses to remedy the defect, or if the circumstances are such that the purchaser cannot be reasonably held to be bound by the contract any more. This is the case even if the seller did not act culpably.

iii Damage claims
German law on damages demands that the injured party is put in the position it would be in if not for the damaging event. This has a number of ramifications.

Full compensation
Injured parties are entitled to full compensation. This means, inter alia, that obligees of monetary damage claims can be entitled to interest, which compensates them for the disadvantage that the respective monies were not provided to them earlier. The BGB provides for default interest at a rate of five percentage points above the base interest rate, although the obligee may be entitled to even higher interest.

Damages include lost profit. In practice, the difficulty for the injured party lies not in establishing that profit was lost at all, but in establishing the amount – for which the injured party bears the burden of proof. The BGB eases this burden somewhat by permitting an abstract calculation, under which those profits are considered to be lost that, in the normal course of events or the particular circumstances of the individual case, could be expected with reasonable probability.

Even besides and beyond lost profit, the exact amount of damage claims can be difficult to establish. Examples may include cartel damage claims, where it may be difficult
to determine the exact amount by which market prices were increased by the cartels. In this respect, injured parties find help in the ZPO, which allows courts to rule – at their discretion and conviction, based on an evaluation of all circumstances – whether and in what amount damage has arisen. In a recent decision, the BGH has confirmed that this principle also applies to cartel damage claims.

**No enrichment through damages**

The flipside of the abovementioned principle is that the injured party must obtain no enrichment through damage claims. Under German law, damage claims are not meant to punish or sanction parties in breach.

As a result, German courts will not grant punitive damages. In fact, some legal authorities argue that punitive damages are at odds with German *ordre public*, and German courts will not declare foreign judgments enforceable to the extent that such judgments contain punitive damages. The German Supreme Court – which, unlike the BGH, exclusively deals with constitutional matters – has reserved its judgment on the question of *ordre public*, and has decided that claims for punitive damages can at least be served to defendants in Germany.

In addition, injured parties cannot request damages to the extent that they have already obtained an advantage from the damaging event, and have been compensated for the loss. For example, some businesses harmed by cartel infringements may be able to pass on the price increases to their customers. In this case, they cannot claim the respective amounts as damages from the cartel infringers. The burden of proof rests on the defendant though.

**Limitation of liability**

Somewhat deviating from the principle of full compensation, parties can agree on a limitation or exclusion of liabilities. For example, joint venture contracts frequently exclude lost profit from the scope of damages.

Parties cannot exclude liability for intentional misconduct in advance though. In addition, limitation clauses that are contained in standard terms and conditions will be subject to the legal review explained above. If such a clause excludes all liability for gross negligence by a party's directors, it will be invalid – possibly toppling the entire limitation of liability, and bringing the parties back to the default rules.

**Repairs**

If goods under a sales contract or works under a works contract are defective, the purchaser or client is entitled to repairs. As the default rule, the party in breach may undertake these repairs itself (or hire appropriate agents to do so). Under specific circumstances, the purchaser or client party may request monetary compensation.

While this general rule is clear, there is some debate about how the amount of this monetary compensation is to be calculated. The purchaser or client will usually claim the amount that is necessary to pay for the respective repairs. Until recently, they could do so even if they had no intention of actually undertaking these repairs. In a judgment from early 2018, however, the BGH ruled that at least in works contracts, this is not an option. Instead, the purchaser or client can only claim the difference in monetary value (i.e., between the value as it is and the value as it would be but for the defect). While there is no corresponding case law for sales contracts yet, there is no discernible reason why these should be treated any different.
IX CONCLUSIONS

Germany has a highly developed and refined legal system where claims can be enforced through efficient courts, complemented by a thriving and well-supported arbitration scene. Challenges include the questions of how to maintain a supply of precedents throughout all areas of law, and of how to properly serve the demand for collective redress. Concerning the latter, the upcoming months will provide valuable insights as to how the new model proceeding fares in practice.
I OVERVIEW

The well-developed legal system in Hong Kong plays a crucial role in maintaining Hong Kong as a prominent commercial and financial centre.

i Court structure in Hong Kong

The basic court structure (in ascending order) in Hong Kong for the purpose of commercial litigation is as follows:2

a the District Court;
b the Court of First Instance (of the High Court);
c the Court of Appeal (of the High Court); and
d the Court of Final Appeal.

ii Minimum amount in disputes

The majority of commercial litigation in Hong Kong is commenced in District Court (the amount of the claim must be over HK$75,000 but not more than HK$3 million) or the Court of First Instance (which has unlimited jurisdiction over all civil matters). Since 3 December 2018, the civil jurisdiction limits of the District Court and the Small Claims Tribunal have been increased as follows:3

<table>
<thead>
<tr>
<th>Previous limit</th>
<th>Existing limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>General financial limit of the civil jurisdiction of the District Court</td>
<td>HK$1 million</td>
</tr>
<tr>
<td>Financial limit for land matters of the District Court (in terms of the annual rent or the rateable value or the annual value of the land)</td>
<td>HK$240,000</td>
</tr>
<tr>
<td>Limit for the equity jurisdiction of the District Court where the proceedings do not involve or relate to land</td>
<td>HK$1 million</td>
</tr>
<tr>
<td>Limit for the equity jurisdiction of the District Court where the proceedings wholly involve or relate to land</td>
<td>HK$3 million</td>
</tr>
<tr>
<td>Limit for the Small Claims Tribunal</td>
<td>HK$50,000</td>
</tr>
</tbody>
</table>

1 Athena Hiu Hung Wong and Moses Wanki Park are barristers-at-law at Liberty Chambers.
2 The list does not encompass various other courts and tribunals in Hong Kong.
iii Time limit in bringing a claim

The time limit for starting a civil claim in Hong Kong is prescribed in the Limitation Ordinance, Cap 347. A civil action for breach of a commercial contract generally must be instituted within six years from the date on which the breach of contract happened. The limitation is 12 years for contracts under seal (specialty). In commercial cases, it is not uncommon for a contractual provision to impose a time limit shorter than the time allowed under the Limitation Ordinance.

iv Bringing proceedings in the commercial list

Complex commercial cases involving substantial amounts will be directed by the court to the Commercial List, often referred to as the Hong Kong Commercial Court, for prompt and efficient resolution of commercial disputes.

II CONTRACT FORMATION

A contract is the major medium through which commercial transactions are effected.

i Elements of contract

To be legally enforceable, a contract must contain the following elements:

- An agreement;
- The intention to create legally binding relations;
- The capacity to enter into the agreement;
- Consideration (unless the agreement is contained in a deed); and
- Certainty of terms.

Agreement reached

An agreement is normally reached when an offer made by a party (the offerer or promisor) is accepted by the other party (the offeree or promisee). An offer is an indication to enter into a contract on specified terms, made in such a way that it is to become binding once it is accepted by the offeree. Acceptance is the unequivocal acceptance to all the terms specified in the offer. An agreement is thus reached as soon as the offeree accepts the offer.

An offer must be distinguished from an invitation to treat. An invitation to treat is only a display of willingness to receive offers, such as a display of goods on shelves in a self-service store. Both offer and acceptance can be made by words or conduct. The courts normally apply the objective approach, in other words, how a reasonable person would interpret a party’s intention from his or her conduct in all the circumstances, in deciding whether the

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4 Section 4(1)(a) of the Limitation Ordinance.
5 Section 4(1)(3) of the Limitation Ordinance.
6 Cases showed that ‘the court always gave effect to such a clause and did not regard the same as against public policy’: Kanson Crane Service v. Bank of China Group Insurance HCA 4246/2002 (Unreported, 1 August 2003), at Section 14.
7 The Commercial List contains claims arising out of trade and commercial transactions.
8 Commercial contracts are presumed to be legally binding: Gibson v. Manchester City Council [1979] 1 WLR 294.
parties have reached an agreement. An offer may be terminated by various means. The most common methods include rejection by the offeree, revocation by the offerer and lapse of time. Once an offer has been rejected by the offeree, it cannot be accepted at a later stage.\footnote{Lee Siu Fong Mary v. Ngai Yee Chai [2006] 1 HKC 157, at Paragraph 15.}

**Consideration given**

Consideration, in essence, means ‘something of value in the eye of the law’\footnote{For instance, the payment of a mere £1 per year by a widow and her keeping the house in good repair were good consideration for her being allowed to live there for the rest of her life: see Thomas v. Thomas (1842) 2 QB 851.} (sufficiency).\footnote{Lush J in Currie v. Misa (1874–75) LR 10 Ex 153, 162 defined it as ‘A valuable consideration, in the sense of the law, may consist in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.’} An agreement is not binding unless consideration is given by the parties or it is made in a deed. However, consideration need not be ‘adequate’, in other words, the court will not concern itself with whether the value of consideration is equivalent to that which is promised in return.\footnote{Thomas v. Thomas (1842) 2 QB 851.}

Although the offeree must generally supply the consideration, it is not necessary that the consideration should be intended to benefit the promisor. Past consideration alone is generally not valid support for a promise.\footnote{For instance, a promise to reimburse a person’s expenditure on home improvements made after such expenditure and improvement had occurred, was not enforceable: see Re McArdle [1951] Ch 669.} However, there are exceptions to this general rule. One exception is where the promisor requested the act to be carried out.\footnote{The exception will only apply upon the fulfilment of the following three conditions: ‘An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. [a] The act must have been done at the promisors’ request; [b] the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit and [c] payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance’, per Lord Scarman in Pao On v. Lau Yiu Long [1979] HKLR 225, at p.234.} This exception could apply in resolving commercial disputes where the parties must have understood that the act was to be remunerated.

**Terms of contract certain**

An agreement may be held to fail for uncertainty, ‘where the parties have expressed themselves in language that is too uncertain, vague or unintelligible’.\footnote{New World Development Co Ltd v. Sun Hung Kai Securities Ltd (2006) 9 HKCFAR 403, [31], per Ribeiro PJ.} The courts will endeavour to find practical meaning in commercial contracts and are reluctant to strike down as too vague and uncertain agreements that businessmen have made and acted upon.\footnote{New World Development Co Ltd v. Sun Hung Kai Securities Ltd (2006) 9 HKCFAR 403, [32], per Ribeiro PJ.} The court also has the power to sever a meaningless term, leaving the rest of the contract enforceable in law.\footnote{Gee Tai Trading Co Ltd v. Sun Wah Oil & Cereal Ltd [1994] 1 HKLR 50.
ii  Third-party beneficiaries

In common law, the doctrine of privity of contract dictates that a third party cannot sue on a contract intended by the parties to be for his or her benefit. 19 A way of circumventing the injustice or commercial inconvenience placed by the privity doctrine could be by finding a collateral contract between the contracting party and a third party. 20

The doctrine of privity of contract was modified by the Contracts (Rights of Third Parties) Ordinance (Cap 623), which came into effect on 1 January 2016. The Ordinance (Cap 623) allows a third party to enforce a term of a contract (including a term that excludes or limits liability) if ‘(a) the contract expressly provides that the third party may do so; or ‘(b) the term purports to confer a benefit on the third party’. 21 Notably, classes of contract set out in Section 3(2) are excluded from the Ordinance.

iii  Promissory estoppel

A party (the promisee) may invoke the doctrine of promissory estoppel to prevent the other party (the promisor) from enforcing his or her strict legal rights under a contract. It occurs where it would be unjust or unconscionable for the promisor to go back on his or her promise not to enforce his or her contractual rights after detrimental reliance was placed by the promisee on such promise. Waiver is analogous to promissory estoppel. 22 A promissory estoppel might arise where: 23

[T]he parties are in a relationship involving enforceable or exercisable rights, duties or powers;

or

[O]ne party (the promisor) by words or conduct, conveys or is reasonably understood to convey a clear and unequivocal promise or assurance to the other (the promisee) that the promisor will not enforce or exercise some of those rights, duties or powers;

or

[T]he promisee reasonably relies upon that promise and is induced to alter his position on the faith of it, so that it would be inequitable or unconscionable for the promisor to act inconsistently with the promise.

Nonetheless, as a general rule, promissory estoppel is suspensory, not extinctive. It does not permanently alter the legal relationship between the parties; in other words, the promisor

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20 Shanklin Pier Ltd v. Detel Products Ltd [1951] 2 KB 854.
21 Section 4(1) of the Ordinance (Cap. 623).
22 Chitty on Contracts, Sweet & Maxwell, 32nd edn., Section 3-104.
may resile from his or her promise on (1) giving reasonable notice and (2) providing to the promisee a reasonable chance to resume his or her position.\(^{24}\) The promise will only become final and irrevocable if the promisee cannot resume his or her position.\(^{25}\)

**iv  Quantum meruit**

If the court takes the view that the contract is too uncertain to be enforced, the court may order that a reasonable sum of money be paid for services rendered or work done.\(^{26}\)

### III  **CONTRACT INTERPRETATION**

**i  Interpretation of contract terms**

Interpretation of a document or a contract is the ascertainment of the meaning that the document would convey to a reasonable person having all the background knowledge (factual matrix) that would reasonably have been available to the parties in the situation in which they were at the time of the contract.\(^{27}\)

The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.\(^{28}\) Equally, the parties’ subsequent conduct is not normally admissible.\(^{29}\) The court interprets terms in their context in both statutory and constitutional interpretation.\(^{30}\)

In resolving the ambiguity of language in a contractual term, it is relevant to consider whether a particular construal leads to a very unreasonable result, since the ‘more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear’.\(^{31}\) In commercial litigation, the court construes terms in light of business common sense, namely, ‘in the way in which a reasonable commercial person would construe them’.\(^{32}\)

**ii  Conflict of law**

In commercial litigation, it is uncommon for a contract to cover more than one jurisdiction. In those circumstances, there is a need to determine which law governs the contract or any part of it. In Hong Kong, conflict of law is regulated by common law, which recognises the parties’ freedom to contract. Thus, first, the court looks at the express terms of the contract to

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28 ibid.
30 Ma CJ observed in Fully Profit (Asia) Ltd v. Secretary for Justice (2013) 16 HKCFAR 351, at Paragraph 15, that ‘it is context that is key; context is the starting point (together with purpose) rather than looking at what may be the natural and ordinary meaning of words’.
31 L Schuler AG v. Wickman Machine Tool Sales Ltd [1974] AC 235, per Lord Reid at p.251E.
see whether the proper law was expressly provided for. In the absence of an express choice, the court considers whether, from the terms and nature of the contract, and from the general circumstances of the case, there are any other indications of the parties’ intention.

If there is no indication of the parties’ intention, the court goes on to consider the system of law with which the contract has its closest and most real connection. In practice, in the absence of an express choice of law clause, since the tests of inferred intention and close connection merge into one another, the courts tend to move straight to the test of close connection.

IV DISPUTE RESOLUTION

There are various alternative dispute resolutions available in Hong Kong, including arbitration and mediation. Parties in commercial transactions should include in their contracts terms of dispute resolution. In many commercial contracts, such as those in the area of construction or insurance, there will be an arbitration clause requiring the parties to arbitrate before commencing legal proceedings.

Arbitration is founded on consent and may offer the advantages of speed, privacy, informality and flexibility. The parties may select an arbitral tribunal with experience in the subject matter of the dispute. Further, the arbitral award is enforceable by law, both locally and internationally. The Hong Kong Arbitration Ordinance (Cap 609) came into effect on 1 June 2011. It requires arbitration agreements to be in writing. The court may stay court proceedings in favour of arbitration and it has limited power to assist and supervise in arbitral proceedings, such as by granting interim measures. Crucially, the parties may seek the court’s assistance in enforcing arbitral awards, whether made in or outside Hong Kong. In all civil proceedings in Hong Kong, there is a voluntary mediation procedure made available to the parties, which is normally deployed in the early stage of the proceedings to encourage settlement. There may be cost implications if a party unreasonably refuses to participate in mediation.

V BREACH OF CONTRACT CLAIMS

A breach of contract may arise in the following circumstances:

- failure to perform contractual obligations (an actual breach);
- defective performance of contractual obligations (an actual breach); or

35 ibid.
36 York Airconditioning & Refrigeration Inc v. Lam Kwai Hung trading as North Sea A/C Elect Eng Co.
37 An arbitration agreement ‘is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement: see Section 19, paragraph (1), Arbitration Ordinance (Cap. 609).
38 Section 20, Arbitration Ordinance (Cap. 609).
39 Section 45, Arbitration Ordinance (Cap. 609).
40 Section 84, Arbitration Ordinance (Cap. 609).
41 Practice Direction (PD31).
42 Lee Mason, Contract Law in Hong Kong, Sweet & Maxwell, 2011, 19-001.
refusal or inability to fulfil contractual obligations due in the future (an anticipatory breach).\(^{43}\)

Broadly speaking, there are two types of breaches: one that allows a party to sue for damages and another that discharges a party from further performance under the contract (in addition to a claim for damages).

**i Materiality of breach**

The following events allow the innocent party to terminate the contract and treat himself or herself as discharged from further liability under the contract:

\(a\) the guilty party has shown a clear unwillingness to satisfy the contract (‘renunciation’);\(^{44}\)

\(b\) performance has been rendered impossible by the guilty party’s breach;\(^ {45}\)

\(c\) there has been a breach of an important term of the contract (‘condition’); or

\(d\) there has been a breach of an intermediate (or innominate) term that ‘[goes] to the root of the contract’.

A contractual term may be classified as a condition if it has been so categorised by statute\(^ {46}\) or by judicial decision,\(^ {47}\) or if the parties have so agreed in their contract.\(^ {48}\) Where the failure of performance is a breach of a term classified as a warranty (i.e., a non-essential term), it will merely entitle the non-breaching party a right to damages.\(^ {49}\) In contrast, where the failure of performance is a breach of an intermediate term, the non-breaching party will only be entitled to terminate the contract (in addition to claiming damages) if the breach in question deprived him or her of ‘substantially the whole benefit’ of the contract.\(^ {50}51\) Notably, the effect of the breach will only be determined after the breach.

\(^{43}\) ‘If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfill his part, this constitutes an ‘anticipatory breach’ of the contract...’, per Cheung JA in *Chao Keh Lung Bill v. Don Xia* ([2003] 4 HKC 660, [2004] 2 HKLRD 11 (CA), Paragraph 26.

\(^{44}\) *Heyman v. Darwins Ltd* [1942] AC 356, 397.

\(^{45}\) See footnote 45.

\(^{46}\) For instance, Section 16(2) of the Sale of Goods Ordinance (Cap. 26) provides that ‘Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality...’.

\(^{47}\) For instance, a ‘time is of the essence’ clause in commercial contracts to ensure timely performance is normally classified as a condition for the purpose of commercial certainty: *Union Eagle Ltd v. Golden Achievement Ltd* [1997] HKLRD 366. Notably, the court will not lightly classify a term as ‘condition’ because of the serious consequences of a breach of a condition, namely, allowing the innocent party to terminate the contract, irrespective of the actual effects of the breach.

\(^{48}\) *Chitty on Contract, Volume 1 General Principles*, Sweet & Maxwell, 32 edn, 12-040.

\(^{49}\) Terms of a contract could be classified as ‘being either conditions (any breach of which entitled the innocent party to refuse further performance and treat himself as discharged) or warranties (which merely gave him a right to damages): *Chitty on Contract, Volume 1 General Principles*, Sweet & Maxwell, 32 edn, 24-039.

\(^{50}\) *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 66.
ii  **Right of election**

A repudiatory breach normally allows the innocent party the right to claim damages for the breach and the right to elect to:

- bring the contract to an end, in other words, terminate the contract; or
- accept the breach and treat the contract as continuing, in other words, affirm the contract.

If the innocent party elects to terminate the contract, he or she is discharged from further performance. For the defaulting party, his or her primary obligation to perform is replaced by a secondary obligation to pay damages to the innocent party for the loss resulting from his or her failure to perform the primary obligation.\(^{51}\)

Where a repudiatory breach takes place, in order to terminate the contract, ‘the innocent party must clearly and unequivocally accept the repudiation.’\(^{52}\) The burden of proof of repudiation is on the party who alleges it.\(^{53}\)

VI  **DEFENCES TO ENFORCEMENT**

There are a number of defences available to enforcement of a contract. Most notably, a contract cannot be enforced unless all its essential terms are established with reasonable certainty. In this section, the most notable defences are discussed, specifically, uncertainty of essential terms, duress and undue influence, and unconscionable contracts.

i  **Uncertainty of essential terms**

Parties to a contract sometimes fail to reach an agreement because their agreed terms are too uncertain or some of the essential terms are simply missing.\(^{54}\) An objective standard is used when determining whether terms are too uncertain. The objective standard is that of a reasonable person in the position of the contracting parties. When the parties have failed to agree on essential terms because some of them were missing or because some were unclear, Hong Kong courts will not make the contract for the contracting parties. If any unclear term is essential in the pertinent way, the entire contract will be void for uncertainty even if the parties intended it to be contractually binding.\(^{55}\)

Lack of consideration is a defence to enforcement of a contract as the consideration or price of the deal is always an essential term in any contract. A contract that fails to clearly

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51 *Moschi v. Lep Air Services Ltd* [1973] AC 331 at 345, 346.

52 If the party does not do so, they will run the risk of being in breach themselves were they not to perform their side of the bargain. The basis for this conclusion (often ignored in the business world) is that unless a contract is terminated, it remains in existence for the benefit of the wrongdoer as well as the innocent party: see *Chao Keh Lung Bill v. Don Xia* [2003] 4 HKC 660, [2004] 2 HKLRD 11 (CA), paragraph 73.


55 Although Hong Kong courts would exercise power to strike down contracts for uncertainty in essential terms, non-essential terms in the context of an ‘agreement to agree’ are permissible and do not render the contract uncertain as long as the parties intend to enter into a binding contract by their provisional agreement. See, LexisNexis Butterworths Hong Kong Contract Law Handbook, Third Edition, [68] Non-essential terms.
establish consideration with sufficient certainty will be void. When the parties fail to agree on the price to be paid (in monetary terms or otherwise) for any obligations to be performed, a contract may fail for uncertainty of consideration.

However, failure to reach any agreement as to consideration in a contract for the sale of goods or the supply of services will not cause the contract to be void for lack of certainty. Section 10 of Sale of Goods Ordinance (Cap 26) and Section 7 of Supply of Services (Implied Terms) Ordinance (Cap 457) provide that, in the absence of agreement between the parties, the consideration shall be a reasonable price or charge.

The general rule is that failure to settle all essential terms with reasonable certainty is adequate as a defence to enforcement of a contract as it can suggest a lack of intention between the parties to create legal relations.

ii Duress and undue influence

A contract may be voidable on the ground of duress or undue influence if it was entered into under some forms of threat or pressure. Duress is confined to violence or threats of violence or imprisonment by one contracting party to the other or others whereas undue influence consists of pressure by unfair persuasion.

Duress is categorised into different types. Duress to the person consists of ‘violence or threat of violence to the person or imprisonment or threat of imprisonment’. In order to rely on duress, one must show that the contract was entered into while he or she was subjected to the other party’s actual or threatened violence.

Duress to property (or goods) consists of unlawful seizure or detention or threat of seizure or detention of property. In Hong Kong, this form of duress involving unlawful damaging or destruction of a person’s properties extends to include land.

Economic duress is ‘illegitimate economic pressure in the form of threat to a person’s economic well-being, business or trade, with the result that a contract is entered or payments are made’. It is necessary to institute pressure amounting to coercion of the will of the victim or the absence of choice. In such a situation, the pressure exerted must be illegitimate and must constitute a significant cause inducing the victim to act.

Whereas duress deals with forced pressure directed against the victim’s life, property or economic interests such that his or her will is diverted and his or her practical alternative options are

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56 LexisNexis Ho & Hall’s Hong Kong Contract Law, Fourth Edition, [62] Uncertainty in Essential Terms. See, for example, Chan Man Tin v. Cheng Leeky [2008] 3 HKL RD 593. In Chan Man Tin, ‘in consideration of the plain loyalty and chastity’ of the defendant, the plaintiff promised to provide the defendant with accommodation, material support and to ‘cohabit … and live happily together.’ It was held that the plaintiff’s promise lacked enforceability for want of clarity and certainty because the terms ‘loyalty’, ‘live happily together’ were too abstract to constitute consideration.


62 ibid.
eliminated, undue influence deals with the more delicate situation where one party unfairly abuses his or her position of trust or influence over the other in order to obtain the other’s agreement to a contractual relationship.63

iii Unconscionable contracts

Hong Kong’s statutory models for unconscionable contracts are from Australia where unconscionability has gained more traction than in England. The Unconscionable Contracts Ordinance (Cap 458) came into force in October 1995.

A critically important limitation on the scope of the Ordinance is that it applies only to contracts for the sale of goods or supply of services, and only if one of the parties deals as a consumer. Commercial contracts and contracts for an interest in land, intellectual property and securities are outside the reach of the Ordinance.64

The onus of proof lies on the party asserting that a contract is unconscionable.65 Where a court finds that a contract, or any part of a contract, was unconscionable in the circumstances relating to the contract at the time it was made, the court has three powers: (1) refuse to enforce the contract; (2) enforce the remainder of the contract without the unconscionable part; (3) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result.66

Under the Ordinance, unless the party against whom the plea is raised knew or ought reasonably have known of any weakness, which impairs his or her ability to make a judgment as to his or her own interests, and has taken advantage of it, the weakness of the party pleading unconscionability is not a factor.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

Contracts may be unenforceable because of fraudulent inducement, or misstatement or misrepresentations. Misrepresentation is often categorised into three types: fraudulent, negligent and innocent. The significance of this categorisation is that different remedies are available for each type.

i Fraudulent misrepresentation

Given the possibly grave civil and criminal consequences, fraudulent misrepresentation is difficult to prove. Hong Kong follows the general principles set out in Derry v. Peek.67 Lord Herschell said, ‘fraud is proved when it is shown that a false representation has been made (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false.’68 The test to be applied is a subjective one.

65 Section 5(2) of Unconscionable Contracts Ordinance (Cap. 458).
66 Section 5(1) of Unconscionable Contracts Ordinance (Cap. 458).
67 Derry v. Peek (1889) LR 14 App Cas 337 (HL).
68 Derry v. Peek (1889) LR 14 App Cas 374 (HL).
In considering fraudulent misrepresentation made recklessly, the Hong Kong Court of Appeal has referred to Lord Herschell’s reasoning in Derry v. Peek and emphasised that the required absence of care exhibited by the representor is not a synonym for negligence.\(^69\)

Even if one makes a misrepresentation out of the most admirable rationale, he or she may still be liable for fraud.

Where a claim of fraudulent misrepresentation is made, the burden of proof remains the civil standard of balance of probabilities. Although the civil standard is applicable, greater evidential strength will be required to satisfy the burden of proof.\(^70\)

Following the English precedent, it is clear that a representor of a fraudulent misrepresentation is liable even if the representee was not in privity of contract with him or her. Since the House of Lords decision in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*, non-fraudulent but negligent misrepresentation is actionable even where there is no contract between the representor and representee.

An exemption clause in a contract will not release a person from liability for fraud implicated. Indeed, exemption clauses are under statutory rule in Hong Kong and inspection of the courts. An argument has been successfully made where an exemption clause could not exonerate the person making misrepresentation where the person induced the representee to enter into the contract in the first place.\(^71\)

### ii  Negligent misrepresentation

Prior to 1963, it was thought that there was no liability for negligent misrepresentation unless the representor owed a contractual duty of care to the representee. Since 1964, legal liability for negligent misrepresentation has been firmly established.\(^72\)

Then, in the context of commercial litigation the question is in the absence of any contractual relationship between a representor and representee whether a representor owes a duty of care to the representee. That is, tort of liability for economic loss can be invoked in such situation. In 1990, the House of Lords in *Caparo Industries plc v. Dickman*\(^73\) confirmed that liability for economic loss can be established where damage is foreseeable; there is a relationship of proximity between the plaintiff and defendant; and it is just and reasonable in the circumstances of the case to impose liability on the defendant.\(^74\)

Apart from common law principles, Hong Kong has the Misrepresentation Ordinance (Cap 284), which has created a wider cause of action for negligent misrepresentation. Where the representor and representee are in contractual privity, liability arises even when they are not in any special relationship. The burden of proof is shifted to the representor to prove that he or she had reasonable grounds to believe that the representation to be true. Under the Ordinance, the representee does not need to prove the negligence of the representor.

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\(^73\) *Caparo Industries plc v. Dickman* [1990] 2 AC 605 (HL).

\(^74\) ibid at 617–655.
VIII REMEDIES

In Hong Kong, as held by Steyn LJ in *Surrey County Council v. Bredero Homes Ltd*, there are largely three separate interests to protect: expectation interest; reliance losses; and restitutionary interests.

i. Expectation interest

The general common law rule dictates that where a party suffers a loss by the other party breaching the contract, he or she is to be placed in the same position as if the contract had been performed. Thus, the courts do whatever they can to place the suffered party in as good a situation financially as far as it can be done. The courts have found largely two different means of fulfilling the expectation. The first is to reinstate the financial position to that before the contract was made. The second is to compensate costs of curing the defects in performance.

ii. Reliance losses

Reliance interest is often claimed in speculative transactions. As held by Fletcher Moulton LJ in *Chaplin v. Hicks*:

> [B]y reason of the defendant’s breach of contract, she has lost all the advantage of being in the limited competition, and she is entitled to have loss estimated . . . They must of course give effect to the consideration that the plaintiff’s chance is only one out of four . . . But having considered all this they may well think that it is of considerable pecuniary value to have got into so small a class, and they must assess the damages accordingly.

In certain situations, a party has to choose the measure of damages for loss of profit or wasted expenditure.

iii. Restitutionary interest

Restitutionary interest is intended to deprive the defendant of the benefit gained under the contract; where no price was paid, the plaintiff can demand return of goods sold and delivered.

iv. Contributory negligence

Contributory negligence deals with the situation where the party suffering the damage contributed to his or her own loss through contributory negligence. In such situation, the suffering party would not be fully compensated.

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75 *Surrey County Council v. Bredero Homes Ltd* [1993] 3 All ER 705.
77 *Chaplin v. Hicks* [1911] 2 KB 786.
Equitable remedies

Under equitable remedies, there are two main kinds of remedies: specific performance and injunction. Specific performance is a method the court can use to require the performance of contractual obligations. It is an exceptional remedy as opposed to common law damages. In Hong Kong, specific performance cannot be ordered against the government of Hong Kong in accordance with Crown Proceedings Ordinance (Cap. 300).\(^7\) Under Sections 16 and 17 of High Court Ordinance (Cap. 4), the Hong Kong High Court has the power to grant an order for specific performance.\(^8\) An injunction is a court order requiring a person to do, or refrain from doing, a particular action.

Damages for misrepresentation

Common law damages may be available where the misrepresentation was fraudulent or negligent. Where fraud is established, the plaintiff may bring an action for damages in the tort of deceit. In addition to constituting a tort, fraudulent misrepresentation is encompassed by the crime of fraud, for which the maximum penalty is 14 years’ imprisonment.\(^8\)

The main purpose of the Misrepresentation Ordinance (Cap 284) was to reform the availability of rescission and damages as remedies for misrepresentation. Damages for consequential loss are also recoverable. Under Section 3(1) of the Ordinance, damages can be claimed even where the representee has completed the contract after knowing of the facts.

Section 3(2) of the Ordinance enables the courts to substitute damages ‘in lieu of rescission, if . . . it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contact were upheld, as well as to the loss that rescission would cause to the other party’.

CONCLUSIONS

Notable forthcoming changes to commercial litigation practice in Hong Kong is that the Law Reform Commission is considering whether to expand the scope of ‘representative proceedings by introducing a scheme of ‘class actions’ for consumer claims. As laws on third-party funding were passed in 2017, allowing arbitration cases to be funded by third parties, the Law Reform Commission is discussing whether existing prohibitions against the use of conditional fees should be lifted for certain types of civil litigation.

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\(^8\) Theft Ordinance (Cap. 210).
Chapter 13

ILLINOIS

Paul E Veith and Charles K Schafer

I OVERVIEW

As is true in many jurisdictions in the United States, Illinois contract law is largely composed of two sources of law: common law – that is, judge-made precedent – and statutes concerning certain types of contracts, such as the Illinois Uniform Commercial Code, which governs the sale of goods. Although not as specialised as courts in Delaware or New York, Illinois courts consider a large number of commercial cases each year and have produced a significant body of relevant case law. In general, Illinois courts have recognised a long tradition of upholding the right of parties to enter freely into contracts, especially when a case involves sophisticated parties on both sides of the transaction. But they also recognise a number of common law doctrines designed to protect parties of unequal bargaining power, and readily enforce statutes governing particular types of contracts that modify or supplement background common law principles. The following chapter presents an overview of key concepts under Illinois contract law, starting with the basics of contract formation.2

II CONTRACT FORMATION

i Basic elements: offer, acceptance, and consideration

Illinois courts define a contract as ‘an agreement between competent parties, upon a consideration sufficient in law, to do or not to do a particular thing’.3 To be a valid contract, there must be an ‘offer, acceptance, and consideration; to be enforceable, the agreement must also be sufficiently definite so that its terms are reasonably certain and able to be determined’.4 The party seeking to enforce a contract has the burden of proving that the contract was legally formed.5

1 Paul E Veith and Charles K Schafer are partners at Sidley Austin LLP. Assistance in completing this chapter was provided by Sidley associates Neil H Conrad, Kelsey Annu-Essuman, and Jessica R Bernhardt.

2 The focus of this chapter is on Illinois common law unless otherwise specified. Illinois’ codification of the Uniform Commercial Code, which governs the sale of goods, can be found at 810 ILCS 5/1 et seq. (West 2019).


An offer must contain sufficiently detailed material terms so that ‘the promises and performances to be rendered by each party are reasonably certain’. An acceptance occurs when the offeree communicates a ‘meeting of the minds’ or ‘mutual assent’. Illinois courts follow the common law rule that ‘it is not necessary that the parties share the same subjective understanding as to the terms of the contract’. A valid contract requires only an objective manifestation of mutual assent.

The acceptance ‘must comply strictly with’ the terms of the offer; if not, it will be construed as a rejection and counteroffer. An acceptance is invalid if the parties have ‘fail[ed] to agree upon an essential term of a contract,’ because ‘the mutual assent required to make a contract is lacking’. The test for determining whether a term is ‘essential’ or ‘material’ is whether ‘under proper rules of construction and principles of equity’, the court can ‘ascertain what the parties have agreed to do’ and find a ‘basis for deciding whether the agreement has been [breached]’. The price and nature of an item to be delivered are common examples of essential terms.

Illinois defines consideration as the ‘bargained-for exchange of promises or performances … [which] may consist of a promise, an act or a forbearance’. Illinois courts generally will not inquire into the adequacy of the consideration, which is ‘within the exclusive dominion of the parties where they contract freely and without fraud’ unless the sufficiency is ‘so grossly inadequate as to shock the conscience’ or the promise of one party is illusory—that

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7 Illinois courts use the terms ‘meeting of the minds’ and ‘mutual assent’ interchangeably; subjective understanding ‘is not required in order for there to be a meeting of the minds.’ Urban Sites of Chicago, LLC v. Crown Castle USA, 979 N.E.2d 480, 496 (Ill. App. Ct. 2012). Some Illinois courts also occasionally refer to this concept as ‘mutual consent.’ See Artoe v. Cap, 489 N.E.2d 420, 423 (Ill. App. Ct. 1986) (‘[M]utual consent [is] essential to the formation of a contract.’).
9 id.
10 Anand v. Marple, 522 N.E.2d 281, 283 (Ill. App. Ct. 1988) (handwritten addition to contract that offer was ‘subject to seller’s _______,’ even though the final word was illegible and unknown, nevertheless clearly added some new condition, such that acceptance did not match offer, and no valid contract was formed). A ‘conditional acceptance or one which introduces new terms that vary from those offered’ therefore ‘constitutes a rejection of the original offer and becomes a counterproposal which must be accepted by the original offeror before a valid contract is formed.’ Id.
12 Foley v. HIR, Inc., 2018 IL App (1st) 170584-U, ¶ 63 (first quoting Midland Hotel Corp. v. Reuben H. Donnelley Corp., 515 N.E.2d 61, 65 (Ill. 1987), then quoting Academy Chicago Publishers v. Cheever, 578 N.E.2d 981, 984 (Ill. 1991)). For example, one Illinois court found that the terms regarding duration, interest rate, and date of maturity were essential to form a contract to extend a line of credit. See McErlean v. Union Nat. Bank of Chicago, 414 N.E.2d 128, 132 (Ill. App. Ct. 1980).
15 id.
is, when ‘closer examination reveals that the promisor has not promised to do anything’.\textsuperscript{17} In Illinois, as in most jurisdictions, there is no valid contract if ‘the alleged consideration for a promise has been conferred prior to the promise upon which [the] alleged agreement is based’.\textsuperscript{18} In other words, past consideration is no consideration at all.

\section*{ii Modifications}
Illinois law generally supports the modification of contracts. ‘Ordinarily, parties are as free to change a contract after making it as they were to make it in the first place’ as long as the modification does not ‘violate the law or public policy’.\textsuperscript{19} A modification is defined as ‘a change in one or more aspects of [the contract] that introduces new elements into the details or cancels some [provisions] but leaves the general purpose and effect of the contract intact’.\textsuperscript{20} A modification is its own contract, and there must be a valid offer, acceptance, and consideration for it to be valid.\textsuperscript{21} In Illinois, ‘the terms of a written contract can be modified by a subsequent oral agreement even though . . . the contract precludes oral modifications’,\textsuperscript{22} but only if the parties agree that they actually intended to modify the contract.\textsuperscript{23}

\section*{iii Oral contracts and implied-in-fact contracts}
In general, oral contracts are ‘binding so long as there is an offer, an acceptance, and a meeting of the minds as to the terms of the agreement’.\textsuperscript{24} Similarly, courts can find that a contract is implied in fact if all of the elements of an express contract can be inferred from the facts and conduct of the parties, rather than from an oral or written agreement.\textsuperscript{25} However, Illinois has adopted the traditional statute of frauds, which requires a formal, written contract for

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\item \textsuperscript{17} Carter, 976 N.E.2d at 351 (quoting W.E. Erickson Construction, Inc. v. Chicago Title Insurance Co., 641 N.E.2d 861, 864 (Ill. App. Ct. 1994)).
\item \textsuperscript{18} A. Epstein & Sons Int’l, Inc. v. Eppestein Uhen Architects, Inc., 945 N.E.2d 18, 24 (Ill. App. Ct. 2011), as modified on denial of rehe’g (Mar. 8, 2011).
\item \textsuperscript{20} id.
\item \textsuperscript{21} id.
\item \textsuperscript{22} Tadros v. Kazmaz, 660 N.E.2d 162, 170 (1995); see also Hannafan & Hannafan, Ltd. v. Bloom, 959 N.E.2d 1280, 1286 (Ill. App. Ct. 2011) (‘Parties to a written contract may modify its terms by a subsequent oral agreement’). Note that this rule distinguishes between oral agreements allegedly reached prior to the signing of a written contract, which are merged into the written agreement and generally inadmissible, and oral agreements reached after the written agreement is executed, which are generally admissible. See A.W. Wendell & Sons, Inc. v. Qazi, 626 N.E.2d 280, 287 (Ill. App. Ct. 1993). ‘The issues of the existence of an oral modification, its terms and conditions, and the intent of the parties are questions of fact to be determined by the trier of fact.’ Id. at 288.
\item \textsuperscript{23} See Stevens v. Newman, 2015 IL App (5th) 130338-U, ¶ 29 (distinguishing Tadros and holding that the current case was not governed by the rule permitting oral modifications in the face of a written agreement that precluded oral modifications because ‘the record before us is devoid of any insinuation [that] an agreement to orally modify the contract after it was signed [actually existed]’).
\item \textsuperscript{24} K4 Enterprises, Inc. v. Grater, Inc., 914 N.E.2d 617, 624 (Ill. App. Ct. 2009); see also Mannion v. Stailings & Co., 561 N.E.2d 1134, 1138–39 (Ill. App. Ct. 1990) (using the terms ‘meeting of the minds’ and ‘mutual assent’ interchangeably). In Illinois, whether there is a ‘meeting of the minds’ or ‘mutual assent’ is measured using objective standards. Urban Sites of Chicago, 979 N.E.2d at 496.
\end{itemize}
specific subjects. Although Illinois is one of three states that have not adopted the Uniform Electronic Transactions Act, it has provided by statute that ‘[i]nformation, records, and signatures shall not be denied legal effect, validity, or enforceability solely on the grounds that they are in electronic form’. It is important to note, however, that these electronic signatures are not valid for negotiable instruments.

### Third-party beneficiaries

Illinois courts recognise third-party beneficiaries to a contract, but only under certain circumstances. In general, ‘Illinois follows the ‘intent to benefit’ rule; that is, [determining] third-party beneficiary status is a matter of divining whether the contracting parties intended to confer a benefit upon a nonparty to their agreement’. Under this approach, ‘there is a strong presumption that parties to a contract intend that the contract’s provisions apply to only them and not to third parties. In order to overcome that presumption, the implication that the contract applies to third parties must be so strong as to be practically an express declaration’. To determine whether this presumption has been overcome, courts consider the contract’s language and surrounding circumstances at the time of the agreement’s execution; circumstances after the execution of the contract are generally irrelevant. In addition, many Illinois courts have said that there must be ‘an express provision in the contract identifying the third-party beneficiary by name or by description of a class to which the third party belongs’. If a recognised third-party beneficiary is intended to benefit directly from the performance of the contract, then the beneficiary may sue to enforce the agreement.

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26 740 ILCS 80/1, 80/2 (West 2019) (agreement to pay the debt of another, to sell an interest in land, to marry, an agreement made by the executor/administrator of an estate, and an agreement that cannot be performed within one year from its making); 810 ILCS 5/2-201 (West 2019) (sale of goods for $500 or more under the Uniform Commercial Code).

27 5 ILCS 175/5-110 (West 2019).

28 See 5 ILCS 175/5-120(c) (West 2019) (excluding the validity of an electronic signature to ‘any record that serves as a unique and transferable instrument of rights and obligations including, without limitation, negotiable instruments and other instruments of title wherein possession of the instrument is deemed to confer title, unless an electronic version of such record is created, stored, and transferred in a manner that allows for the existence of only one unique, identifiable, and unalterable original with the functional attributes of an equivalent physical instrument, that can be possessed by only one person, and which cannot be copied except in a form that is readily identifiable as a copy’ as well as ‘to any record of law governing the creation or execution of a will or trust’ and ‘when its application would involve a construction of a rule of law that is clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law, provided that the mere requirement of a ‘signature’ or that a record be ‘signed’ shall not by itself be sufficient to establish such intent’).


33 Carlson, 50 N.E.3d 1250 at 1255–56.
v Alternative frameworks for relief

Illinois, like many jurisdictions, recognises a number of situations where a party can seek relief even if there is no express or implied-in-fact contract. The four most common claims under these circumstances are unjust enrichment (also known as an ‘implied-in-law contract’ or ‘quasi-contract’ claim),\(^{34}\) quantum meruit,\(^{35}\) promissory estoppel,\(^{36}\) and equitable estoppel.\(^{37}\)

Unjust enrichment and quantum meruit claims are similar, but have different measures of damages. Under both theories, ‘the plaintiff must show that valuable services or materials were furnished by the plaintiff [and] received by the defendant, under circumstances which would make it unjust for the defendant to retain the benefit without paying’.\(^{38}\) But in a ‘quantum meruit’ action, the measure of recovery is the reasonable value of work and material provided, whereas in an unjust enrichment action, the inquiry focuses on the benefit received and retained by the defendant.\(^{39}\)

Promissory estoppel and equitable estoppel are also similar. Under both theories, one party ‘reasonably induces [the other] to rely on his representations, and leads [the other], as a result of that reliance, to change his position to his injury.’\(^{40}\) The key distinction is that ‘promissory estoppel requires proof of an unambiguous promise, [while] equitable estoppel does not.’\(^{41}\)

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38 *Hayes Mech., Inc. v. First Indus., L.P.*, 812 N.E.2d 419, 426 (Ill. App. Ct. 2004). It is important that ‘even when a person has received a benefit from another, he is liable for payment ‘only if the circumstances of its receipt or retention are such that . . . it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.’ Id. (internal citations omitted).


40 *Gold v. Dubish*, 549 N.E.2d 660, 664 (Ill. App. Ct. 1989). Specifically, to recover under a promissory estoppel theory, ‘the plaintiff must prove that (1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff’s reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment.’ *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 906 N.E.2d 520, 523–24 (Ill. 2009). ‘To establish equitable estoppel, the party claiming estoppel must demonstrate that: (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof.’ *Steinmetz v. Wolgamot*, 995 N.E.2d 338, 349–50 (Ill. App. Ct. 2013) (holding that defendants were not estopped from raising a statute of limitations defence).

41 *Gold*, 549 N.E.2d at 664.
All of these claims may be pleaded in the alternative to claims that the defendant breached an express or implied-in-fact contract. But plaintiffs must take great care in how they structure their pleadings. Some Illinois courts have dismissed claims for alternative forms of relief because the complaint incorporated by reference allegations that there was an express or implied-in-fact contract. In one case, for example, the plaintiff incorporated by reference the allegations it used to support a claim for breach of an express oral contract into its claim for unjust enrichment. The court held that it was appropriate to dismiss the unjust enrichment claim under these circumstances because unjust enrichment is available only where there is no express contract (either written or oral). Practitioners in Illinois therefore should think carefully about whether and to what extent a claim should incorporate by reference allegations set forth earlier in the pleading.

III CONTRACT INTERPRETATION

The ‘principal objective’ of contract interpretation in Illinois is ‘to determine and give effect to the intention of the parties at the time they entered into the agreement’. When the parties dispute the meaning of a contractual provision, ‘the threshold issue is whether the contract is ambiguous’. If a contract is not ambiguous, the court will give its terms their ‘plain, ordinary and popular meaning’, and extrinsic evidence about the meaning of the agreement is inadmissible. In this situation, the court will ‘follow the ‘four corners’ rule’, which holds that ‘an agreement, when reduced to writing, . . . speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.’

On the other hand, if the contract’s language is ‘susceptible to more than one meaning,’ or ‘is obscure in meaning through indefiniteness of expression,’ then the contract is ambiguous. But ‘[a]n ambiguity is not created simply because the parties disagree about

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42 735 ILCS 5/2-613(b) (West 2019) (‘When a party is in doubt as to which of two or more statements of fact is true, he or she may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts or defences. A bad alternative does not affect a good one.’).
44 id.
45 *Urban Sites of Chicago*, 979 N.E.2d at 489–90.
46 id.
47 Initially, the court must consider only the language of the contract, but it must consider the contract as a whole, ‘viewing each part in light of the others’ and not ‘[viewing] any clause or provision standing by itself.’ *Gallagher v. Lenart*, 874 N.E.2d 43, 58 (Ill. 2007). ‘[I]nstruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are regarded as one contract and will be construed together.’ Id.
49 *Urban Sites of Chicago*, 979 N.E.2d at 489–90 (citations and internal quotation marks omitted); see also *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 463–64 & n.1 (Ill. 1999) (rejecting ‘provisional admission’ approach to extrinsic evidence, at least where contract contains explicit integration clause).
50 *Thompson*, 948 N.E.2d at 47.
the interpretation.’52 The question of ambiguity is a legal one for the court to decide.53 If a court determines that the contract is ambiguous, then it may use traditional ‘rules of construction’54 and ‘consider extrinsic evidence to determine the parties’ intent’.55 In efforts to resolve ambiguities, Illinois courts have considered the conduct of the parties,56 prior and contemporaneous transactions,57 the relationship of the parties, the facts and circumstances that existed when the parties entered the contract,58 established custom of the parties, and trade usage.59 If, after considering extrinsic evidence, ‘doubt still remains as to the meaning of the contract, then the question of interpretation must be left to the trier of fact’.60

Where there is a conflict between two provisions, they ‘will be reconciled if possible so as to give effect to [both]’,61 otherwise ‘the more specific provision relating to the same subject matter controls over the more general provision’.62 Additionally, ‘contract provisions and terms are to be interpreted as a whole and not in isolation,’63 so ‘as to give effect to all of the contract’s provisions’64 and not ‘nullify or render provisions meaningless’.65 This is because ‘it is presumed that all provisions were intended for a purpose’.66

IV DISPUTE RESOLUTION

i Contractual provisions regarding forum selection

A forum selection clause is *prima facie* valid under Illinois law,67 and it will be enforced ‘unless the opposing party demonstrates that enforcement ‘will be so gravely difficult and inconvenient that [the opposing party] will for all practical purposes be deprived of [its] day in court’.68 Courts will assess the validity of a forum-selection clause by evaluating six factors: ‘(1) the law governing the formation and construction of the contract; (2) residency of the parties; (3) location of execution and performance of the contract; (4) location of the parties and witnesses; (5) the inconvenience to the parties of any particular location; and (6) whether

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52 id.
55 *Thompson*, 948 N.E.2d at 47.
59 *Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co.*, 165 N.E. 793, 796 (1929).
60 *Countryman*, 686 N.E.2d at 64.
62 *Countryman*, 686 N.E.2d at 64.
63 id.
65 id. (quoting *Thompson*, 948 N.E.2d at 47).
the parties bargained for the clause’.69 The sixth factor is weighed heavily, because courts are ‘particularly reluctant to void a forum-selection clause on inconvenience grounds where both parties freely entered the agreement contemplating such inconvenience’.70 If the contract was reached through ‘arm’s-length negotiation between experienced and sophisticated businesspeople’,71 courts will enforce the clause ‘absent some compelling and countervailing reason’ to the contrary.72

One exception to Illinois courts’ general practice of enforcing forum-selection clauses is a construction contract that is performed in Illinois. As a matter of public policy, the Illinois Construction Act invalidates any forum-selection or choice-of-law provision in such a contract if it requires dispute resolution to take place in another state.73

Subject to that exception, it is otherwise difficult to invalidate a forum-selection clause under Illinois law. A plaintiff cannot avoid the selected forum by pleading ‘alternative non-contractual theories of liability’ if the claims arise out of the parties’ contractual relationship.74 Additionally, a mere allegation of fraud is insufficient ‘to invalidate [a forum-selection clause]’; the fraud alleged ‘must be specific to the forum-selection clause itself’.75

ii Contractual agreements to waive defences or to resolve disputes through alternative dispute resolution

In addition to forum-selection clauses, Illinois courts will enforce contractual provisions that waive defences in litigation,76 as well as agreements that require alternative dispute resolution, like arbitration.77 In particular, Illinois law provides that a written agreement to submit a dispute to arbitration ‘is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract’.78 Whether the parties in fact agreed to arbitrate their dispute


74 Solargenix Energy, LLC, 17 N.E.3d at 182.

75 IFC Credit Corp., 881 N.E.2d at 395.

76 Bank of Am., N.A. v. 108 N. State Retail LLC, 928 N.E.2d 42, 55 (Ill. App. Ct. 2010) (holding that ‘a decision by a party to contractually agree to waive all defenses is permitted’ and collecting cases).

77 Ramonas v. Kereli, 243 N.E.2d 711, 715 (Ill. App. Ct. 1968) (holding that contractual provisions agreeing to arbitrate disputes arising from the contract were enforceable if they were entered into after Illinois adopted the Uniform Arbitration Act); see also Fuqua v. SVOX AG, 13 N.E.3d 68, 80 (Ill. App. Ct. 2014) (upholding arbitration agreement in the employment context and noting that ‘arbitration agreements are evaluated under the same standards as any other contract’).

78 710 ILCS 5/1-1 (West 2019).
is determined by ordinary principles of contract law. Illinois courts recognise there is a strong policy (at both the state and federal level) favouring arbitration, and they generally enforce arbitration clauses. In fact, in Cook County, where Chicago is located, even without a contract term, the local court rules require arbitration for certain commercial claims seeking less than US$75,000 in damages.

V BREACH OF CONTRACT CLAIMS

To prove a breach of contract claim in Illinois, a party must show that a valid and enforceable contract exists, that the contract was breached by the defendant, that the non-breaching party performed its obligations, and that the breach caused an injury to the non-breaching party.

In general, a party seeking to recover for a breach of contract must show that it substantially performed its obligations under the contract or had a sufficient excuse for failure to perform. ‘What constitutes substantial performance is difficult to define, and whether substantial performance occurred will depend upon the relevant facts of each case.’ Illinois courts look to factors such as: whether there has been a ‘receipt and enjoyment’ of contractual benefits by one party, or whether one party has ‘honest[ly] and faithful[ly]’ upheld the material portions of an agreement with ‘no willful departure’ from those essential provisions.

Parties to a contract are held to an implied covenant of good faith and fair dealing. Under this duty, parties executing an agreement must use reasonable discretion and act with proper motive. Discretion cannot be employed arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. The obligation of good faith and fair dealing is applied across the board in all Illinois contract cases, regardless of whether or not it is specified in the disputed agreement.

Under Illinois law, anticipatory repudiation occurs when a party clearly indicates an intent not to fulfil its contractual obligations on the date of the agreed-upon performance. Illinois courts strongly emphasise that the repudiating party must be ‘definite and unequivocal’...
in manifesting non-performance of the agreement.\textsuperscript{92} Ambiguous statements do not suffice.\textsuperscript{93} As a response to the anticipatory breach, the non-repudiating party may stop performance of the contract or may continue to perform and subsequently sue for damages.\textsuperscript{94}

\textbf{VI} \hspace{2em} \textbf{DEFENCES TO ENFORCEMENT}

A party may defend against a breach of contract claim in Illinois on several grounds.

\textbf{i} \hspace{2em} \textbf{Statute of limitations period expired}

The statute of limitations period for a breach of contract claim in Illinois depends on the type of contract at issue. For a written contract (not involving the sale of goods), the limitations period is ten years.\textsuperscript{95} For an oral contract (not involving the sale of goods), the limitations period is five years.\textsuperscript{96} For a contract involving the sale of goods, the limitations period is four years, but the parties may agree to shorten the limitations period to not less than one year (they cannot extend it).\textsuperscript{97} A breach of contract claim begins accruing at the time of the breach, not when a party sustains damages.\textsuperscript{98} However, where one promises to render performance ‘on demand’ or at a specified time after demand, the statute of limitations does not begin to run until the demand is made.\textsuperscript{99}

\textbf{ii} \hspace{2em} \textbf{Lack of consideration}

As explained above, an enforceable contract requires consideration.\textsuperscript{100} In Illinois, sufficient consideration is ‘[a]ny act or promise which is of benefit to one party or disadvantage to the other’.\textsuperscript{101} Illinois courts generally will not inquire into the adequacy of consideration, only its existence.\textsuperscript{102} One exception to this rule is a non-compete agreement in the employment context. This exception is based on a recognition that ‘a promise of continued employment may be an illusory benefit where the employment is at will’.\textsuperscript{103} Illinois courts have generally held that two years or more of continued employment constitutes adequate consideration, but they nevertheless evaluate the adequacy of consideration on a case-by-case basis.\textsuperscript{104}

\begin{itemize}
\item \textsuperscript{92} Velasquez \textit{v.} Downer Place Holdings, LLC, 118 N.E.3d 659, 670 (Ill. App. Ct. 2018).
\item \textsuperscript{93} In \textit{re} Marriage of Olsen, 528 N.E.2d 684, 686 (Ill. 1988).
\item \textsuperscript{94} Tower Inv’rs, LLC \textit{v.} 111 E. Chestnut Consultants, Inc., 864 N.E.2d 927, 940 (Ill. App. Ct. 2007).
\item \textsuperscript{95} 735 ILCS 5/13-206 (West 2019).
\item \textsuperscript{96} 735 ILCS 5/13-205 (West 2019).
\item \textsuperscript{97} 810 ILCS 5/2-725 (West 2019).
\item \textsuperscript{98} id.; see also Hermitage Corp. \textit{v.} Contractors Adjustment Co., 651 N.E.2d 1132, 1135 (Ill. 1995) (‘For contract actions and torts arising out of contractual relationships, . . . the cause of action ordinarily accrues at the time of the breach of contract, not when a party sustains damages.’).
\item \textsuperscript{99} Schreiber \textit{v.} Hackett, 527 N.E.2d 412, 413 (Ill. App. Ct. 1988).
\item \textsuperscript{100} See supra Part II(i).
\item \textsuperscript{101} Doyle \textit{v.} Holy Cross Hosp., 186 Ill. 2d 104, 708 N.E.2d 1140, 1145 (Ill. 1999) (quoting Steinberg \textit{v.} Chicago Med. Sch., 371 N.E.2d 634, 639 (Ill. 1977)).
\item \textsuperscript{102} Prairie Rheumatology Assoc., S.C. \textit{v.} Francis, 24 N.E.3d 58, 62 (Ill. App. Ct. 2014).
\item \textsuperscript{103} id.
\item \textsuperscript{104} id. at 62–63.
\end{itemize}
iii Enforcement is contrary to public policy

A contract contrary to public policy can be voided. Illinois courts, however, have a ‘long tradition’ of protecting the interests of parties who ‘freely contract’ with one another, and thus rarely void contracts on public policy grounds. The burden rests on the party alleging the breach to show that the agreement is ‘clearly contrary to what the constitution, the statutes, or the decisions of the courts have declared to be the public policy’. Alternatively, the non-breaching party may prove that the agreement is ‘manifestly injurious to the public welfare’. Illinois courts have applied § 178 of the Restatement (Second) of Contracts when evaluating whether a contract contravenes public policy. Under the Restatement approach, a contract term may be unenforceable due to legislation that renders it unenforceable or due to it being ‘clearly outweighed in the circumstances by a public policy’.

iv Duress and undue influence

Illinois courts will not enforce agreements entered into by an individual under duress. Economic duress or ‘business compulsion’ occurs when one party compels another party to enter into a contract by using wrongful acts or threats. An act is wrongful when it is contrary to moral sensibilities or when it is ‘criminal, tortious, or in violation of a contract duty’. Economic duress goes beyond ‘mere hard bargaining or the pressure of financial circumstances’.

Illinois courts also will not enforce agreements entered into by parties subject to ‘undue influence’. Undue influence is a form of duress where one party presents ‘an improper urgency of persuasion’ to the extent that the other party is ‘induced to do or forbear an act’ that she otherwise would or would not do. The standard for undue influence is fact-dependent, and Illinois courts do not have a fixed threshold for determining whether a party was unduly influenced.

108 Mohanty, 866 N.E.2d 85 at 92.
110 1550 MP Rd., LLC v. Teamsters Local Union No. 700, 131 N.E.3d 99, 109 (Ill. 2019) (quoting Restatement (Second) of Contracts § 178 (1981)).
111 Colony BMO Funding, LLC v. Madan, 2016 IL App (1st) 141946-U, ¶ 30 (citing In re Marriage of Tabassum, 881 N.E.2d 396, 410 (Ill. App. Ct. 2007)).
115 id. (quoting Carlile, 648 N.E.2d at 322).
116 id.
117 id.
v Impossibility or impracticality

In general, Illinois courts will seek to uphold agreements ‘where parties, by their own contract and positive undertaking, create a duty or charge upon themselves’.119 ‘[C]ontingencies, not provided against in the contract, which render performance impossible, do not bring the contract to an end’.120 However, the parties’ contractual duties may be suspended when a condition, thing, or person necessary for the execution of the contract no longer exists.121 To invoke an impossibility defence, a party must have tried all practical alternatives and the cause of the impossibility cannot have been anticipated.122 The party also cannot have created the circumstances that gave rise to the impossibility.123 The contract must be objectively impossible to perform; subjective, ‘personal inability’ to perform does not absolve a party of its contractual obligations.124 Although Illinois courts recognise impossibility and impracticability as defences to the enforcement of a contract, there are few published cases in which the defences were successful.

vi Frustration of purpose

Frustration of purpose – or ‘commercial frustration’ – occurs when a change in circumstances undermines the reasons behind performing a contract.125 To prove frustration of purpose, a party must show that reasonably unforeseen circumstances made it impossible for the party to uphold the agreement or that the unforeseen circumstances destroyed the party’s expected contractual benefits.126 The parties must have entered into the contract knowing that performance of the contract was predicated on the existence of the circumstances that later changed.127 The party alleging frustration of purpose must also show that the unforeseen circumstance ‘totally or nearly totally destroyed [the value of counter-performance]’.128

vii Lack of capacity

To enter into a contract, parties must be competent. Parties are competent at the age of majority,129 which is 18 years in Illinois.130 However, a party experiencing ‘insane delusions

118 The Restatement of Contracts uses the term impracticability to define what courts would have described as impossibility. See Lowenschuss v. Kane, 520 F.2d 255, 265 (2d Cir. 1975) (citing Restatement (First) of Contracts § 454 (1932)). Therefore, the two terms are used interchangeably here.
120 id. at 479.
121 id. at 480.
123 id.
125 id. ¶ 30 (citing Illinois-American Water, 774 N.E.2d at 390).
126 id. ¶¶ 30–31.
127 id. ¶ 30; see also Illinois-American Water, 77 N.E.2d at 390–91.
or other mental illness’ is not competent when the party’s condition impairs its ability to understand the nature of the agreement.\textsuperscript{131} For agreements regarding necessities, the parties need not meet the capacity requirement.\textsuperscript{132}

\textbf{viii \hspace{1em} A material breach by contracting party}

A party may decline to perform its obligations under a contract if the other party has materially breached the contract by failing to perform its duties under the agreement.\textsuperscript{133} The breach must be ‘so material and important’ that it justifies ending the contract.\textsuperscript{134} Materiality is determined by whether a breach is ‘so substantial and fundamental as to defeat the objects of the parties in making the agreement, or whether the failure to perform renders performance of the rest of the contract different in substance from the original agreement’.\textsuperscript{135}

\section*{VII \hspace{1em} FRAUD, MISREPRESENTATION, AND OTHER CLAIMS}

A party in Illinois also may challenge the validity of an agreement on the ground that the agreement was the product of fraud or a mistake of fact. In addition, commercial disputes often involve tort-based claims that touch on contractual arrangements between the parties, such as a claim for tortious interference with a contract. If raised successfully, these claims can result in the reformation or rescission of an agreement and, in other cases, damages.

\textbf{i \hspace{1em} Fraudulent misrepresentation, concealment, and inducement}

Under Illinois law, a party can defend against the enforcement of a contract by raising a claim of fraudulent misrepresentation, inducement, or concealment. ‘Fraud can encompass an intentional misrepresentation or an intentional concealment’.\textsuperscript{136} The party alleging fraud must show that the other party made a false statement of material fact and intended to induce the party into action.\textsuperscript{137} A misrepresentation is ‘material’ if the party seeking rescission would have acted differently had [it] been aware of the fact or if it concerned the type of information upon which [it] would be expected to rely when making [its] decision to act’.\textsuperscript{138} The party who allegedly expressed the fact must have either known of its falsity or not believed in its truth.\textsuperscript{139}

\begin{thebibliography}{99}
\bibitem{132} \textit{Iverson}, 483 N.E.2d at 897.
\bibitem{133} Spanish Court Two Condo. As’n v. Carlson, 12 N.E.3d 1, 6 (Ill. 2014).
\bibitem{137} Isaac v. Peck Bloom, LLC, 2019 IL App (1st) 182602-U, ¶ 46.
\bibitem{139} Bank of Am. v. All About Drapes, Inc., 2017 IL App (1st) 162849-U, ¶ 35.
\end{thebibliography}
and the induced party must have justifiably relied on the misrepresentation.\textsuperscript{140} Illinois courts also recognise fraudulent concealment when a party does not speak about or disclose a fact while under the obligation to do so\textsuperscript{141} due to a special or fiduciary relationship.\textsuperscript{142}

When a contract is induced by fraud (often referred to as ‘fraud in the inducement’), the contract is voidable, and the non-breaching party has the option to ‘rescind the contract’ or ‘waive the defect, ratify the contract, and enforce it’.\textsuperscript{143} When there is a fraudulent misrepresentation about the contents or effect of the contract (provided the non-breaching party justifiably relied on the misrepresentation), then the non-breaching party may seek to reform the contract to express what it understood the agreement to be\textsuperscript{144} rather than completely rescind the agreement.

\textbf{ii} \hspace{1em} \textbf{Mistake of fact}

A mistake of fact can, under certain circumstances, serve as a defence to the enforcement of a contract. Illinois follows the Restatement (Second) of Contracts in defining a ‘mistake’ as ‘a[n] erroneous belief as to the contents of a writing that expresses the agreement’.\textsuperscript{145} A mistake of fact can be either mutual or unilateral. A mutual mistake occurs when a party can show that the mistake relates to a ‘material matter’ of the agreement.\textsuperscript{146} The mistake must be of ‘such grave consequence that enforcement of the contract would be unconscionable’.\textsuperscript{147} The parties also must have exercised reasonable care in forming the agreement.\textsuperscript{148} For contracts formed under mutual mistake of fact, the parties may seek equitable relief. Courts commonly employ the remedies of rescission\textsuperscript{149} or reformation\textsuperscript{150} for mutual mistakes of fact. To reform the contract, the party must show that a mutually understood agreement or ‘meeting of the minds’ existed, but ‘when the agreement was reduced to writing, some agreed-upon provision was omitted or one not agreed upon was inserted’.\textsuperscript{151} A contract entered into by mutual mistake cannot be voidable, however, where the affected party bears the risk of the mistake.\textsuperscript{152}

A unilateral mistake is one based on the fault of one party to the contract. In order for the agreement to be voidable on the basis of unilateral mistake, the mistake must be material and either ‘the other party [must have] had reason to know of the [innocent party’s] mistake’,
‘[the other party’s] fault caused the mistake,’ or the result must be unconscionable.\textsuperscript{153} A unilateral mistake may result in the rescission of a contract only if the party who made the mistake exercised reasonable care.\textsuperscript{154} In addition, Illinois courts allow rescission only when it can be executed ‘without doing injustice to the other party’.\textsuperscript{155} For both mutual and unilateral mistakes, Illinois courts will void a contract only if the parties can be placed ‘in status quo ante’ or in ‘[their] precontract position’.\textsuperscript{156}

iii  Tortious interference with a contract

Tortious interference with a contract occurs when a party can show that another party was aware of a valid and enforceable contract between both parties, and the other party intentionally and unjustifiably induced a breach of that contract by the third party, resulting in damages.\textsuperscript{157} The inducing party must have done more than ‘merely provid[e] information in a passive way’.\textsuperscript{158} Inducement ‘requires some active persuasion, encouragement, or inciting’ of the third party by the inducing party.\textsuperscript{159} Simply communicating with the third party is not enough; the plaintiff must show the defendant ‘actively solicited’ the third party’s business and caused the breach.\textsuperscript{160}

iv  Tortious interference with a prospective economic advantage

Tortious interference with a prospective economic advantage is similar to tortious interference with a contract but occurs when there is no contract between the plaintiff and another party. To prevail, the plaintiff must prove it had a ‘reasonable expectation of entering into a valid business relationship’ with the third party, the defendant’s knowledge of that expectancy, ‘purposeful interference by the defendant that prevents the plaintiff’s legitimate expectancy from ripening into a valid business relationship’, and damages resulting from the interference.\textsuperscript{161}

VIII REMEDIES

Parties can pursue a variety of remedies for breach of contract, depending on the circumstances. To recover monetary damages, a plaintiff alleging a breach of contract has the burden of

\textsuperscript{153} \textit{In re Marriage of Ardelean}, 2015 II App (2d) 140142-U, ¶ 28 (citing Restatement (Second) of Contracts § 153 (1981)).


\textsuperscript{156} id.


\textsuperscript{158} \textit{Peppercorn 1248, LLC v. Artemis DCLP LLP}, 2016 II App (1st) 143791-U, ¶ 113 (citing \textit{In re Estate of Albergo}, 656 N.E.2d 97, 103 (Ill. App. Ct. 1995)).

\textsuperscript{159} id. (citing \textit{Albergo}, 656 N.E.2d at 103).


\textsuperscript{161} \textit{Dowd & Dowd, Ltd. v. Gleason}, 693 N.E.2d 358, 370 (Ill. 1998).
proving that the breach caused damages, and must prove damages to a reasonable degree of certainty. A prevailing plaintiff is entitled to post-judgment interest, and under certain circumstances pre-judgment interest also may be available. If a legal, monetary remedy will be inadequate, Illinois courts can grant equitable remedies – such as specific performance. This section addresses the measurement of damages, contractual limits on remedies and liability, and certain forms of equitable relief.

**i Damages: expectation, consequential, reliance, and punitive**

Courts most typically award expectation damages, which aim to 'put the nonbreaching party into the position he or she would have been in had the contract been performed, but not in a better position'. Lost profits may be awarded as compensation if (1) 'the court is satisfied that the wrongful acts of [the] defendant caused the loss'; (2) 'the profits were reasonably within the contemplation of the defaulting party at the time [the] contract was entered into', and (3) the lost profits can be 'determined with reasonable certainty'.

Consequential damages also may be available. These damages comprise 'economic harm beyond the contract’s immediate scope', but often they are too speculative to recover. Notably, ‘lost profits can be categorised as either direct – compensatory – or indirect – consequential – depending on the situation. Thus, if a contract disclaims liability for consequential damages, lost profits may not be recovered unless they are part of the benefit of

162 1472 N. Milwaukee, Ltd. v. Feinerman, 996 N.E.2d 652, 658 (Ill. App. Ct. 2013) (‘Where a plaintiff demands damages, the plaintiff carries the burden of proof to show that he sustained damages resulting from the defendant’s breach... The plaintiff must also establish the correct measure of damages and the final computation of damages based upon that measurement’); see also Morse v. Donati, 2019 IL App (2d) 180328, ¶ 18 (‘Damages are an essential element of a breach of contract action and a claimant’s failure to prove damages entitles the defendant to judgment as a matter of law.’).

163 Kirkpatrick v. Strosberg, 894 N.E.2d 781, 792 (Ill. App. Ct. 2008) (noting that ‘the burden is on the plaintiff to establish a reasonable basis for computing damages’, and they ‘must be proved with reasonable certainty and cannot be based on conjecture or speculation’ even though ‘absolute certainty... is not required’).

164 735 ILCS 5/2-1303 (West 2019) (setting the standard post-judgment interest rate at 9%).


166 Schneider v. Austin Bank of Chicago, 809 N.E.2d 180, 195 (Ill. App. Ct. 2004) (‘The principle underlying the specific performance remedy is to grant equitable relief where the damage remedy at law is inadequate’).

167 For damages under the Uniform Commercial Code, see 810 ILCS 5/2-701 et seq. (West 2019) (titled ‘Remedies’).


173 See, e.g., Barton Chem. Corp. v. Pennwalt Corp., 436 N.E.2d 51, 54 (Ill. App. Ct. 1982) (finding that an award of lost profits was improper where the business revenue ‘varied greatly from year to year’).

174 Westlake Fin. Grp., Inc., 25 N.E.3d at 1175 (internal quotation marks omitted).
the bargain that the party lost from the contract itself.\textsuperscript{175} For example, in \textit{Westlake Financial Group v. CDH-Delnor Health Systems}, the plaintiff sought lost profits for the final two years of a five-year contract that the defendant breached by terminating the agreement after three years.\textsuperscript{176} Although the contract prohibited the recovery of consequential damages, the court held that plaintiff could pursue its lost profits, even though they were not guaranteed, because the years of performance provided a ‘concrete basis’ that could be used to calculate the plaintiff’s expectancy.\textsuperscript{177}

If expectation damages are difficult to determine, the plaintiff may obtain ‘damages based on his reliance interest’.\textsuperscript{178} In contrast to expectation damages, which give the plaintiff the benefit of its bargain, the goal of reliance damages is to ‘put the injured party in as good a position as [it] would have been in had the contract not been made’.\textsuperscript{179} These damages may include ‘expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed’.\textsuperscript{180}

Punitive damages will ‘not be awarded for a breach of contract, even if the breach was willful.’\textsuperscript{181} They are available to a plaintiff only if ‘the breach amounts to an independent tort and there are proper allegations of malice, wantonness or oppression’.\textsuperscript{182}

\section*{ii Contractual provisions concerning remedies}

Illinois courts generally enforce contractual limits on remedies.\textsuperscript{183} For example, a remedy provision ‘will be deemed exclusive if the contract warrants this interpretation, even if the word ‘exclusive’ does not expressly appear within the contract’.\textsuperscript{184} Courts also uphold and enforce indemnity provisions,\textsuperscript{185} but they will be ‘strictly construed’.\textsuperscript{186} Attorneys’ fees, for example, ‘are only recoverable pursuant to an indemnity contract if such terms are specifically

\begin{footnotesize}
\textsuperscript{175} id.
\textsuperscript{176} id. at 1168–69.
\textsuperscript{177} id. at 1174–79; see also \textit{Aculocity, LLC v. Force Mktg. Holdings, LLC}, No. 17 CV 2868, 2019 WL 764040, at *3 (N.D. Ill. Feb. 21, 2019) (applying Illinois law and holding that plaintiff would not be denied the opportunity to pursue lost profits on defendant’s motion for summary judgment).
\textsuperscript{178} \textit{Merry Gentleman, LLC v. George & Leona Prods., Inc.}, 799 F.3d 827, 829 (7th Cir. 2015).
\textsuperscript{179} id. (citing \textit{MC Baldwin Fin. Co. v. DiMaggio, Rosario & Veraja}, LLC, 845 N.E.2d 22, 30 (Ill. App. Ct. 2006) (comparing expectation and reliance damages)).
\textsuperscript{182} \textit{Morrow v. L.A. Goldschmidt Assoc., Inc.}, 492 N.E.2d 181, 184 (Ill. 1986); see also \textit{Franz v. Calaco Des. Corp.}, 818 N.E.2d 357, 366 (Ill. App. Ct. 2004) (holding that punitive damages ‘are available only in cases where the wrongful act complained of is characterized by wantonness, malice, oppression, willfulness, or other circumstances of aggravation’).
\textsuperscript{183} \textit{O’Sheild v. Lakeside Bank}, 781 N.E.2d 1114, 1119 (Ill. App. Ct. 2002) (‘[P]arties’ rights under the contract are limited by the terms expressed therein’).
\textsuperscript{185} \textit{Lamp, Inc. v. Int’l Fid. Ins. Co.}, 493 N.E.2d 146, 149 (Ill. App. Ct. 1986) (enforcing indemnity agreement but noting that ‘[t]he indemnitee, however, is still required to establish, by competent evidence, its reasonable fees and costs’).
\end{footnotesize}
provided for within the contract’. Exculpatory clauses are disfavoured. In order to balance the two conflicting policy interests – that ‘a person should be liable for negligent breach of a duty that he owes another;’ and ‘a person should have the right to freely contract about his affairs’ – exculpatory agreements will also be ‘strictly construed against a benefitting party’.

Parties are free to include liquidated damages provisions in their agreements, which Illinois courts will evaluate on a case-by-case basis. Courts enforce liquidated-damages provisions ‘as long as (1) the parties intended to agree in advance to the settlement of damages that might arise from a breach, (2) the amount provided as liquidated damages was reasonable at the time of contracting and bore some relation to the damages which might be sustained, and (3) the actual damages would be uncertain in amount and difficult to prove’.

iii Equitable remedies: specific performance, rescission, and reformation

Under certain circumstances, courts will award an equitable remedy in lieu of money damages. Specific performance is the quintessential example. It will be awarded ‘where the damage remedy at law is inadequate’. Although specific performance ‘is not granted as an absolute right’, but as ‘a matter of sound judicial discretion controlled by established principles of equity and exercised upon a consideration of all the facts and circumstances of a particular case’, it generally will be granted for the breach of a valid contract for the sale of real property, ‘absent circumstances of oppression and fraud’.

As explained above, where fraud contaminates a contract, ‘rescission may be an appropriate remedy’. The fraud may consist of a misrepresentation made in order to induce the other party to act or the intentional concealment of a material fact, which, had the other party been aware of it, would have caused that party to act differently. The party seeking

187 id.
190 Rayner Covering Sys., Inc., 589 N.E.2d at 1037.
192 Dallas v. Chicago Teachers Union, 945 N.E.2d 1201, 1204–05 (Ill. App. Ct. 2011) (liquidated damages clause in confidentiality agreement enforced after breach of the contract); see also Karimi, 952 N.E.2d 1278 at 1285 (applying the same test in the real estate context).
196 Schneider, 809 N.E.2d at 195.
198 Clara Wonjung Lee, DDS, Ltd. v. Robles, 2014 Ill. App (1st) 122872-U, ¶ 25 (citing Peddinghaus v. Peddinghaus, 692 N.E.2d 1221, 1225 (Ill. App. Ct. 1998) (‘The elements of an equitable claim for rescission on the basis of fraud and misrepresentation are: a statement of material fact, made to induce the other party to act; the statement is false and known by the party making it to be false; and the party to whom the statement is made must reasonably believe it to be true and rely thereon to his damage’).
rescission must be able to ‘restore the other party to the status quo ante existing at the time the contract was made’. 199 The remedy of rescission ‘presumes that a valid contract exists; it does not negate that a contract ever existed’. 200

Similarly, to obtain a judicial reformation of a contract, the plaintiff must assert ‘(1) the existence and substance of an agreement between the parties and the identity of the parties to the agreement; (2) the parties’ agreement to reduce their agreement to writing; (3) the substance of the written agreement; (4) that a variance exists between the parties’ original agreement and the writing; and (5) mutual mistake or some other basis[,] [like fraud] for reformation’. 201 A plaintiff must prove the fourth and fifth elements by ‘clear and convincing evidence’ before a court will consider reforming a contract. 202

IX CONCLUSIONS

As illustrated above, there is a large body of commercial law in Illinois, which is a combination of common and statutory law. Although Illinois courts are not as specialised as courts in Delaware or New York, they decide a large number of commercial cases each year and offer a reasonably predictable forum for resolving contractual disputes. In general, they are influenced heavily by the common law tradition and rely on many years of judicial precedent from the Supreme Court of Illinois and the Illinois Appellate Court to resolve disputes. 203 This precedent generally recognises parties’ rights to freely enter into contracts, and Illinois courts generally enforce the terms of those contracts as written, especially when the parties are sophisticated. But, as is true in many jurisdictions in the United States, Illinois courts recognise a number of common law doctrines designed to protect parties with unequal bargaining power, and enforce statutes enacted by the Illinois legislature that do the same.

201 United City of Yorkville, 875 N.E.2d at 1195.
203 The Supreme Court of Illinois is the state’s highest court and has seven justices. The Illinois Appellate Court is the state’s intermediate appellate court, with at least 42 judges divided into five districts. (Additional judges can be assigned by the Supreme Court to the Appellate Court, temporarily, on a showing of need.) See http://www.illinoiscourts.gov/General/CourtsInIL.asp.
I OVERVIEW

Ireland is a common law jurisdiction in which the courts are bound by the decisions of superior courts in the court structure. Almost 227,000 civil law cases were commenced in the Irish courts during 2018, while some 178,000 were resolved in that time. Commercial disputes are predominantly dealt with in the Irish High Court. A party bringing a claim in respect of a commercial contract should be aware that a limitation period of six years applies from the date of breach (or 12 years if the contract is executed under seal).

The Commercial Court (a division of the High Court) judicially manages commercial disputes with a monetary value in excess of €1 million. Since the introduction of the Commercial Court in 2004, Ireland has been a forum of choice for commercial disputes and is recognised internationally as an efficient platform for the determination of substantial commercial disputes with approximately 90 per cent of cases decided within one year.

Although the courts remain the ultimate forum for the resolution of commercial disputes, there is a growing trend towards the use of alternative dispute resolution (ADR), in particular mediation and arbitration. The recently enacted Mediation Act 2017 regulates and promotes the settlement of disputes by way of mediation.

II CONTRACT FORMATION

In Ireland, there are four prerequisites that must be satisfied before a contract comes into being: offer, acceptance, consideration and an intention to create legal relations. Other factors that the courts will look at before enforcing a contract include the terms of the contract, the capacity and authority of the parties and whether the contract is illegal or contrary to public policy.

Generally, commercial contracts are in writing; however, the Irish courts also recognise oral contracts. In certain circumstances, statute requires contracts to be performed in a specific format: in the form of a deed in writing or evidenced in writing. By way of

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1 Julie Murphy-O’Connor, Claire McLoughlin and Karen Reynolds are partners at Matheson.
2 The court structure in Ireland is made up of the lower courts (the district and circuit courts) along with, in order of increasing supremacy, the High Court (which includes the Commercial Court), the Court of Appeal and the Supreme Court.
4 Section 11 of the Statute of Limitations 1957.
example, the Land and Conveyancing Law Reform Act 2009 requires commercial contracts transferring an interest or right in property be executed as a deed. The introduction of the Electronic Commerce Act 2000 allows for contracts to be formed via email and also allows for e-signatures.

i  **Offer**

An offer to contract, whether oral or written, must be unequivocal, unconditional, and express all terms and conditions. An offer expires on acceptance, the making of a counter-offer or rejection.

ii  **Acceptance or intention to create legal relations**

As acceptance of an offer constitutes the creation of legal relations, parties to commercial contracts often include expressions such as ‘subject to contract’, ‘agreement in principal’, ‘provisional agreement’ or ‘non-binding heads of terms’ during negotiations to distance themselves from this. In commercial contracts, it is presumed that the parties intend to create legally binding contracts unless otherwise stated.

An issue can arise in trading relations known as ‘battle of the forms’, with each party trying to incorporate its own terms and conditions into the contract. Disputes can arise as to whether the terms and conditions have been accepted by both parties or whether they constitute no more than a counter-offer.

In resolving disputes relating to battle of the forms, two approaches can be taken:

- there is no agreement between the parties as the offer has not been accepted; and
- there is an agreement whereby the terms of the last form apply.

The Supreme Court\(^5\) has held that a party cannot be bound by terms and conditions that are not contained in a signed contractual document or by terms and conditions that have not been provided to a party. Significantly, the Supreme Court also held that including a reference in a contractual document to terms and conditions being ‘available on request’ was not sufficient for such terms to be incorporated into the contract.

iii  **Consideration**

Where an offer is accepted and sufficient consideration has passed between the parties, a contract will be deemed to be in existence. Consideration can take any form once it has legal value and is not illegal, vague or impossible to perform. However, consideration in commercial contracts generally takes the form of payment.

iv  **Proof**

The creation of legal relations can be delayed or denied by the input of conditions precedent and conditions subsequent.

Conditions precedent suspend the coming into existence of a contract until a specific event has occurred. Examples include the renewal of leases, the production of documents or obtaining the relevant consents from a regulatory authority.

Conditions subsequent arise after a contract has been executed, but the contract is not enforceable until a specific event has occurred.

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v  Privity of contract

The effect of the doctrine of privity of contract is that only the parties to a contract can enforce its terms, even where a third party stands to benefit from the contract. Specifically, this means that:

a. a person is unable to enforce any rights under a contract to which such a person is not a party;

b. a person who is not a party to a contract will not have any contractual liabilities imposed on them; and

c. contractual remedies are only available to compensate parties to a contract and not third parties.

Certain exceptions to the rule have developed over time, to include agency, collateral contracts and assignments.

In 2008, the Law Reform Commission published a final report recommending reform in this area with the introduction of the Contract Law (Privity of Contract and Third Party Rights) Bill 2008. The Bill is similar to the United Kingdom's Contract (Rights of Third Parties) Act 1999 and provides for three instances where a third party should be entitled to enforce a contract:

a. where the intention of the parties was to give the third party a right to enforce;

b. where the contract expressly states that the third party has a right of enforcement; and

c. where the contract permits a third party to rely on exclusions or limitations on liability.

However, 10 years on from the Law Reform Commissions’ recommendation, the Bill has yet to be proposed by the government.

vi  Modifications to contracts

In certain circumstances, modifications to contracts are necessary (e.g., to extend the contract’s duration or to change terms such as payment, delivery or receipt of the product). Commercial contracts normally contain a variation clause that restricts amendments to the contract unless it is in writing and signed by all parties. The English Court of Appeal had found that parties were free to agree to vary the terms of a contract orally or by conduct and not solely by writing as per the variation clause included in the contract.6 However, most recently the UK Supreme Court declined to give effect to an oral modification to a contract and held that any amendments should be agreed in accordance with the terms of the terms of the contract.7 It was unanimously accepted that there was a limit on enforcement of variation clauses in certain circumstances, albeit that ‘something more’ would be required than reliance on an informal, oral promise. While this ambiguity allows future courts to consider the matter on a case by case basis, it remains to be seen whether this decision will be followed by the Irish courts.

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III CONTRACT INTERPRETATION

i Governing law principles

Generally, parties will include a governing law clause in their contracts. If not, if both parties are resident in Ireland, the governing law of the contract is Ireland, but may be changed with the consent of both parties.

However, disputes often arise where one party is not resident in Ireland. Where there is an express absence of a choice of law provision, the European Union regulation (EC) 593/2008 of June 2008 (Rome I) applies to contracts entered into on or after 17 December 2009.8 The governing law, according to Rome I, is the law of the country where the party who is to perform the contract has its habitual residence or its central administration. Rome I applies where one of the parties is Irish resident, regardless of where in the world the other party is resident.

ii Interpretation

Irish case law stresses that contract interpretation involves broad principles rather than strict rules. The test is an objective one and the classic approach is to construe the plain and ordinary meaning of the words contained in it. However, recent case law suggests that the courts will not only look at the plain and ordinary meaning of the words (textualism) but will also look at the factual matrix and the circumstances in which the contract was drafted (contextualism), particularly where contracts are ambiguous.9

The UK Supreme Court has recently confirmed that textualism and contextualism are not conflicting paradigms and should both be used as tools where appropriate in the circumstances of a particular contract to ascertain the objective meaning of the language used in the contract.10

Parol evidence may be admissible to explain the subject matter and construction or correct a mistake in commercial contracts. It will not, however, be used to explain or prove the validity of a contract.

The contra proferentem rule provides that where a contractual clause is ambiguous, it should be construed strictly against the party who provided the wording. The Supreme Court recently stressed that there must be an element of ambiguity in respect of the relevant clause for the rule to apply.11

iii Implied terms

Where a contract lacks any of the essential requirements such as offer, acceptance, consideration and intention to create legal relations, the courts, having regard to the overall context of the agreement, may imply terms into the contract. Implied terms are provided for by case law and certain statutes, such as the Sale of Goods Acts 1893–1980.

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8 Contracts that are entered into before 17 December 2009 are subject to the Contractual Obligations (Applicable Law) Act 1991. Under the Contractual Obligations Act 1991, the governing law of a contract is that of the country in which the principal place of the business of the party performing the contract is situated.
In a recent Court of Appeal decision, the court held that in implying terms into a commercial contract, the terms must:

\begin{enumerate}
    \item be necessary to give business efficacy;
    \item be so obvious that it is implied; and
    \item give effect to the parties intentions.\(^\text{12}\)
\end{enumerate}

This followed on from an earlier decision where the court found that an agreement was so imprecise and lacking in substance it fell short of business efficacy.\(^\text{13}\)

IV DISPUTE RESOLUTION

i Thresholds

When parties decide to litigate contractual disputes, they will typically commence proceedings in the High Court, which has jurisdiction to hear claims with a monetary value in excess of €75,000.\(^\text{14}\)

The Commercial Court is a division of the High Court and is a specialised court that deals with commercial disputes with a monetary value in excess of €1 million. The Commercial Court is designed to provide an efficient and effective mechanism through close case management for dealing with commercial litigation cases.

ii Jurisdiction

Irish courts will generally uphold an exclusive jurisdiction clause, where the clause is valid and has been freely entered into, unless there are compelling circumstances to the contrary. Ireland is bound by Article 25 of the Brussels I Recast Regulation\(^\text{15}\) and by the Hague Choice of Forum Convention implemented by the Choice of Court (Hague Convention) Act 2015. Exclusive jurisdiction clauses are generally also enforced at common law.

iii Arbitration

Arbitration clauses have become commonplace in commercial contracts. Irish arbitrations continue to be governed by the Arbitration Act 2010 (the 2010 Act), which applies Option 1 of Article 7 of the UNCITRAL Model Law to the requirements of a valid arbitration agreement. The 2010 Act strengthens the effectiveness of the arbitral mechanism by restricting the basis for appealing awards and decisions and reduces the potential for court intervention.\(^\text{16}\) Once the arbitrator has been appointed and the parties have agreed to refer their dispute for the arbitrator’s decision, their decision is binding on the parties involved. The main legal requirement for a valid clause or agreement is that it is in writing, and this requirement is interpreted broadly. As a result, electronic communications can satisfy this requirement. Arbitration is extensively used for commercial contracts disputes, particularly in the fields of construction, insurance and holding contracts.

\(^{13}\) Cadbury Ireland Ltd v. Kerry Co-operative Creameries Limited [1982] ILRM 77.
\(^{14}\) The Circuit Court has jurisdiction to hear claims with a monetary value of not more than €75,000. The District Court has jurisdiction hear claims with a monetary value of not more than €15,000.
\(^{16}\) The Insurance and Reinsurance Law Review 2019 – ‘Ireland’.
The Irish courts are very supportive of arbitration agreements. Under the 2010 Act, the possibility of appeal is limited (for instance, Article 34 of the 2010 Act sets out the very limited circumstances where a court can set aside an award) and the courts have displayed a strong policy of staying court proceedings in favour of agreements to arbitrate.

iv Mediation

Equally significant in terms of ADR is the recent enactment of the Mediation Act 2017 (the 2017 Act), which came into effect on 1 January 2018. Of particular importance for practitioners is the introduction of an obligation to advise clients to consider mediation as an alternative to court proceedings. Should a client elect not to proceed to mediation before litigating, a solicitor must give a statutory declaration confirming that the client has been advised as to the option of mediation.

Where parties elect to go to mediation, they will usually sign an agreement to mediate, which appoints the mediator and sets out the agreed framework for the mediation. Signing this agreement effectively stops the clock for bringing claims under the statute of limitations until 30 days after termination of the mediation.\(^{17}\)

As the 2017 Act only came into force at the beginning 2018, it remains to be seen whether it will lead to an increase in mediation and a reduction in litigation. Of note is that very little difference was seen in the number of civil claims commenced before the Irish courts in 2018, as compared to 2017\(^{18}\) (some 228,000 in 2017 as opposed to 226,000 in 2018). A comparison of the 2018 and 2019 figures (when available), may be telling in this regard.

V BREACH OF CONTRACT CLAIMS

i Breach of contract

A breach of a contract may occur if a party fails to perform as agreed, does something that it has agreed not to do, or if either party has prevented further performance of its obligations under the contract without legal excuse. The level of liability resulting from a breach of contract normally depends on the consequences of the breach.

ii Proof of breach

In order to permit recovery of damages from a defendant or equitable relief for breach of contract, three basic elements of the claim must be proven:

- the existence of a legally enforceable contract between the claimant and the defendant;
- a failure by the defendant to adhere to the requirements, terms and conditions of the contract; and
- the suffering of a loss by the plaintiff a result of the non-adherence.

The main element of a breach of contract cause of action is the non-fulfilment of one or more of the defendants’ obligations under the legally enforceable contract. This may occur through an action or an omission.

Whether a particular act or omission constitutes a breach and the entitlements flowing therefrom will depend on the terms of the contract and the nature of the obligations arising

\(^{17}\) Section 18 of the 2017 Act.
thereunder. The materiality of the breach will depend on the individual contract, with some contracts applying an obligation to exercise due care and skill and others a standard of absolute or strict liability.

### iii Specific performance

An order of specific performance is an equitable remedy to a breach of contract and compels a party to perform its obligations under the contract. As specific performance is based on the duty to perform a contract, a prior breach of contract is not required as a prerequisite to an order. Failure to obey an order for specific performance can result in the offending party being in contempt of court.

An order for specific performance is at the discretion of the court to grant it. Examples of where an order will not be granted include:

- **a** where damages are an adequate remedy;
- **b** contracts that require ongoing supervision; and
- **c** open contracts.

It is important that a plaintiff considers whether an order for specific performance is appropriate to a particular contract as compelling performance from an unwilling counterparty may increase the risk of defective performance. Additionally, where an order is not granted, damages may be awarded against the party seeking relief.

### iv Right to terminate in the event of a breach

A breach of an innominate or intermediate term does not automatically entitle the innocent party to terminate the contract.

A right to terminate arises where there has been:

- **a** a fundamental breach – a breach so serious that it terminates the rights and obligations of the innocent party;
- **b** a repudiatory breach – a breach so serious it terminates the contract immediately;
- **c** a statutory breach – a breach provided for under statute.

In order to rely on a statutory breach, any preconditions set in statute must be complied with. An example of this is the Sale of Goods Act 1893, which imports terms relating to title, description and merchantability into commercial contracts.

The most common form of breach in commercial contracts arises where there has been a fundamental breach, a principle that was developed by the courts with a view to limiting the operation of exemption clauses, the rationale being that no party could exclude or restrict his or her liability for such a breach.

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19 In the recent High Court case of *Kirby v. Friends First Life Assurance Company Limited* [2018] IEHC 796, the High Court held that an insurance company was entitled to repudiate an income protection policy entered into with the plaintiff where the plaintiff had failed to disclose certain of his medical history, which amounted to failing to disclose ‘material information’, which would have affected the mind of the reasonably prudent insurer.
VI DEFENCES TO ENFORCEMENT

Parties to commercial contracts continuously try to find ways to circumvent contractual obligations. The legal arguments advanced are broad and vary from arguments that no contract was formed to doctrines of impossibility or impractically. Common defences to enforcement include the following.

i Duress or undue influence

As agreements are based on consent, an agreement that is reached as a result of threats or undue influence (usually by the counterparty) is liable to be set aside. This argument has arisen in a number of cases involving the enforcement of guarantees. The principles in relation to what measures a bank should take in cases of undue influence previously outlined by the High Court\(^\text{20}\) are only relevant where actual undue influence has arisen. In a 2016 Court of Appeal decision,\(^\text{21}\) the court found that key factor for the court to consider in determining whether undue influence has occurred is whether the guarantor in question had any material interest or involvement in the business or derived a commercial benefit therefrom. In the High Court in 2018, in the case of *Barry v. Ennis Property Finance DAC and Others*, the court set out a useful list of the type of questions which claimants should address when seeking to establish whether undue influence has taken place, including the commercial experience possessed by the claimant, the relationship that it is alleged gave rise to the undue influence and the nature of the events which led to this influence being alleged.\(^\text{22}\)

ii Duty to ensure independent legal advice

As an ancillary argument to undue influence, parties to finance agreements frequently argue that lenders are under an obligation to ensure that they receive independent legal advice. The argument was recently considered by the Court of Appeal in a case that involved a father who guaranteed the debts of his son who subsequently defaulted and was subject to enforcement proceedings.\(^\text{23}\) The father argued that there was an arguable defence to the claim against him under the guarantee as the creditor had been on notice of the familial relationship between him and the debtor and the creditor was under a duty to ensure that he got independent legal advice. He had received advice from his son’s solicitor in this case, and not a separate solicitor. The court found that in circumstances where no evidence was presented by the guarantor to support an argument that he had been subject to undue influence, there was no positive duty on the lender to ensure that he obtained independent legal advice or otherwise ensured that he had freely entered into the guarantee.


\(^{\text{22}}\) *Barry v. Ennis Property Finance DAC and Others* [2018] IEHC 766.

iii Public policy and illegality

Contracts that are contrary to public policy are unenforceable. The Supreme Court\(^{24}\) has recently confirmed the modern criteria that the court will consider when deciding whether or not to enforce contracts tainted with a degree of illegality by virtue of statutory breaches.\(^{25}\) Members of the Quinn family and companies within the Quinn group had given guarantees in respect of loans by Irish Bank Resolution Corporation (IBRC) to other companies within the same group. The Quinn family argued that they should not be liable for the guarantees on the loans because of regulatory and statutory breaches on the part of IBRC. The court noted that in certain cases a finding of illegality may result in an unjust windfall for a party. The court considered whether or not the public policy aspect of an illegal activity should automatically render a contract unenforceable. In this instance, it was held that the contracts in question were enforceable notwithstanding issues of illegality affecting them.

iv Force majeure clause

Force majeure clauses exist to exclude liability where exceptional, unforeseen events beyond a party’s control prevent the performance of its obligations. As there is no doctrine of force majeure in Irish law, it is at the contractual parties’ discretion whether they wish to rely upon force majeure and can do so by inserting a provision in their contract.

v Frustration

The Supreme Court has held that frustration arises where a supervening event occurs without the default of either party, and for which the contract makes no provision.\(^{26}\) The event must so significantly change the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated, so as to make holding them to its stipulations unjust.

Frustration takes place only after a contract has been entered into, and means that the contract ceases to have effect from a particular date onwards. As such, it discharges an otherwise valid contract.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Misrepresentation

Misrepresentation claims are common in Ireland, particularly in relation to commercial contracts in the financial services industry. Much of the recent case law on this topic arises in the context of mis-selling of financial products, mismanagement of investment funds and allegations of reckless lending.

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\(^{24}\) Quinn v. IBRC Ltd [2015] IESC 29.

\(^{25}\) The statutory breaches in this instance were under Section 60 of the Companies Act 1963 (now section 82 of the Companies Act 2014) in relation to the prohibition of the giving of financial assistance by a company for the purpose of an acquisition of any shares of the company and the Market Abuse Regulations (Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse).

In order to be actionable, a misrepresentation must be a false statement of fact, not of opinion or future intention or law. A misrepresentation may be fraudulent, negligent or innocent. The plaintiff will not succeed unless he or she can show that the misrepresentation was made with the object and had the result of inducing him or her to enter the contract.

A fraudulent misrepresentation is established where it is found:

a that a party has made a representation knowing that it is not true or with reckless indifference as to whether it is true or not; and

b a counterparty relies on such representation in deciding to enter into a contract.

Notwithstanding carefully drafted contracts, it is not generally possible to exclude liability for fraudulent misrepresentation.

ii Covenant of good faith and fair dealing

Under Irish law, there is no implied covenant of good faith and fair dealing in the context of commercial contracts. A 2017 Court of Appeal decision confirmed this in a case concerning a dispute regarding the acquisition and sale of shares in a company and the contractual interpretation of a shareholders’ agreement. The court held that the shareholders’ agreement was not the type of contract to which a general duty of good faith applies in accordance with established Irish authority. The court did, however, accept that there could be certain types of commercial agreement to which such a duty applies, such as partnership agreements and insurance contracts.

In order to circumvent the common law position, parties to commercial contracts can insert clauses that expressly provide for a duty of good faith and such contracts are enforceable by virtue of the parties having deliberately contracted to include the duty.

iii Promissory estoppel

Promissory estoppel operates to prevent a party to a contract from relying on his or her strict legal rights where a representation has been made that they will not be relied upon and the counterparty relies upon the representation to his or her detriment. The High Court recently reaffirmed that the doctrine of promissory estoppel has no application to pre-contract negotiations in advance of the creation of any legal rights.

iv Duty to disclose

A duty to disclose requires the parties to a contract to make full disclosure of all material facts during contractual negotiations. The Court of Appeal, in recent months, confirmed that as a matter of ordinary contract law, there is no general duty to disclose. However, the court held that where a statement had been made containing an implied representation that no surcharge interest would be charged, the defendant was estopped from later charging surcharge interest on the basis of that implied representation.

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28 Allied Irish Banks plc v. Kennedy & Anor [2018] IEHC 381 (note: an appeal has been lodged in respect of this decision).
VIII REMEDIES

i Damages

The most common remedy awarded in breach of contract litigation is damages (monetary compensation). A contractual claim based on breach of a contractual term is aimed at putting the plaintiff in the position he or she would have occupied if the term had been properly adhered to. Punitive damages are generally regarded as inappropriate in contractual claims.

In terms of measuring damages, a court will consider the following:

a expectation interest – putting the plaintiff in the same situation as if the contract had been performed; and

b reliance interest – where the plaintiff may have changed his or her position in reliance on the defendant’s performance of the contract. Reliance damages are recoverable in cases where it is not possible to estimate the profit the plaintiff could have made had the contract been performed.

In deciding whether to award damages, the court will have regard to the remoteness of damages (i.e., whether the damages arise naturally as a result of the breach of contract) and whether they ought to have been reasonably foreseeable by the parties to the contract in contemplation of a breach of the contract. Only net losses are recoverable and there is a duty to mitigate loss. Reasonable costs incurred in mitigation are also recoverable.

The Supreme Court recently reaffirmed the general position that damages for breach of contract do not include damages for distress, upset and inconvenience subject to a limited number of exceptions where peace of mind is the object of the contract. However, where both a breach of contract and a tortious cause of action arise, punitive damages can be awarded in respect of the tortious element of the claim.

ii Limitation of liability

Exclusion clauses can act to limit liability and can operate through a financial cap on liability or exclude certain heads of liability completely. In considering an exemption clause contained in terms and conditions available to a party ‘on request’, the Supreme Court has held that the clause in question had not been successfully incorporated into the contract and therefore could not be relied upon.

iii Equitable remedies

Equitable remedies can be granted in circumstances where a breach of contract occurs and damages are not an appropriate remedy. The most common forms of relief in relation to commercial contracts are specific performance, rectification and injunctive relief.

An order for specific performance compels the party in breach to fulfil the terms of the contract. Because specific performance is a discretionary remedy, the court will bear in mind the broader justice of the case before granting it.

Rectification involves rectifying any error made in a written contract that does not reflect the intentions of what the parties agreed to. The party seeking rectification must establish a ‘common continuing intention’ in relation to a particular provision of the contract agreed between the parties up to the point of execution of the formal contract, which was

not subsequently reflected in the contract. A contract can also be rectified on the basis of unilateral mistake where there has been sharp practice on the part of one of the parties giving rise to that mistake.\footnote{Slattery v. Friends First [2015] IECA 149.}

Restitution (as an accompanying remedy to rescission – see below), in the sense of the restoration to the innocent party of benefits conferred under the contract, may be used where a contract has been performed in whole or in part by the innocent party, but has been rescinded \textit{ab initio}. Equally, the innocent party must also return what has been transferred under the contract that has been rescinded.

Rescission is a contractual and equitable remedy aimed at undoing the effects of the transaction and can be coupled with restitutionary remedies (see above).

Both mandatory and prohibitory injunctive relief can also be sought in respect of breaches of contract.

\section*{IX CONCLUSIONS}

The law of contract in the context of commercial contracts in this jurisdiction has been relatively well-settled in most areas, with little divergence between the law of contract in the United Kingdom and in Ireland. Ireland benefits from the Brussels Recast Regulation and Rome Regulation for cross-border contractual disputes in the European Union more generally. This provides a degree of certainty to contracting parties and lends itself to creating a hospitable environment for companies in Ireland, particularly those with trade links across the European Union.

Given the ongoing Brexit negotiations, companies are advised to take steps to ‘future-proof’ any new contracts during the course of drafting, particularly in choice of law or jurisdictional clauses.

Separately, and in line with the continued increase in the influence of technology within the area of commercial disputes, and in particular in the context of complex commercial litigation, the High Court recently conducted its first ever fully ‘paperless’ electronic trial for a large, complex financial services dispute utilising an electronic trial platform.\footnote{Defender Limited v. HSBC Institutional Trust Services (Ireland) Limited and Ors [2018] IEHC 706} During the trial, the court and parties worked from laptops, removing the need for volumes of paper, and any document referred to by counsel was immediately displayed onscreen in the courtroom. This trial demonstrates the willingness of the Irish courts to embrace technology and the Courts Service of Ireland has indicated its desire to develop and expand its digital offering in the near future.

Trading in, and profiting from, litigation currently falls foul of Ireland’s maintenance and champerty laws\footnote{Maintenance and Embracery Act 1634.} on the basis that it is contrary to public policy, a view upheld by the Supreme Court. There have been three significant Supreme Court decisions in the area of litigation funding in recent times.\footnote{In Persona Digital Telephony Ltd v. The Minister for Public Enterprise [2017] IESC 27, the Supreme Court upheld the decision of the High Court and Court of Appeal, finding that a litigation funding agreement between the plaintiff and a professional third party funder from the United Kingdom is unlawful by reason of the Maintenance and Embracery Act 1634. In a landmark judgment delivered in July 2018, the} However, the Supreme Court has said legislation needs to be urgently enacted to address mounting difficulties with securing access to justice in the civil

\begin{footnote}
\footnotetext{Slattery v. Friends First [2015] IECA 149.}
\footnotetext{Defender Limited v. HSBC Institutional Trust Services (Ireland) Limited and Ors [2018] IEHC 706}
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\footnotetext{In Persona Digital Telephony Ltd v. The Minister for Public Enterprise [2017] IESC 27, the Supreme Court upheld the decision of the High Court and Court of Appeal, finding that a litigation funding agreement between the plaintiff and a professional third party funder from the United Kingdom is unlawful by reason of the Maintenance and Embracery Act 1634. In a landmark judgment delivered in July 2018, the}
\end{footnote}
courts, particularly in the context of complex commercial litigation. The Chief Justice said that if a point is reached where it is clear the legislature is making ‘no real effort’ to address the problems, the courts may have to fashion a solution, ‘undesirable and all as unregulated change might be’. More recently, Moorview Development Limited & Ors v. First Active Plc & ors, a decision of the Supreme Court, delivered in late July of last year, clarified that the provision of funding by a third party funder with a legitimate interest in the litigation is lawful. However, third party funders with a legitimate interest may find themselves subject to a costs order, even if not a party to the proceedings, where the party to the litigation that they are funding is not a good mark for costs.
I OVERVIEW

The law relating to commercial contracts in the Isle of Man does not vastly differ to that of England and Wales and many other common law jurisdictions. In a dispute pertaining to a breach of a commercial contract, the claimant must, in most cases, issue a claim form with the Isle of Man Court within six years of the breach. The High Court of Justice of the Isle of Man is well used to determining commercial contract claims, and has considerable experience in relation to cross-border jurisdiction claims.

In the Isle of Man a contract is not required to be in writing, in most cases; however, there are some exceptions, although it is highly advisable to ensure that any agreement is reduced to writing, in case something goes wrong later. The lack of a written contract, however, does not prevent a claim being issued, although it is of course more difficult to prove the agreed terms. In most cases, the outcome will turn upon the deemster’s (High Court judge) assessment of the evidence before it, particularly where there is a lack of documentary evidence.

There is not a significant number of judgments issued by the Manx (Isle of Man) courts in relation to these types of dispute on an annual basis and, therefore, in order to get a proper understanding of the Manx legal position, a review of more historic cases is required.

II CONTRACT FORMATION

The law in relation to the formation of contracts in the Isle of Man is identical to that of England and Wales.

A contract is not required to be reduced to writing; however, for commercial contracts it is highly advisable to ensure certainty of the agreement reached between the parties. There are, however, certain contracts that must be in writing in order that they may be enforced, such as the transfer of shares, guarantees and assignments of contractual rights or intangible assets (for example, the goodwill in a company). When dealing with the transfer of land, the transfer agreement must not only be in writing but must be in the form of a deed.

The law governing commercial contracts in the Isle of Man will be reassuringly familiar to any practitioner acquainted with the laws of England and Wales. The courts consistently follow and apply case law from England and Wales concerning contract law and there is little,
if any, difficulty in supporting legal arguments with case law from the courts of England and Wales. Commentary from English legal textbooks such as *Chitty on Contracts* is regularly cited in judgments.

In *Gittins & Otrs v. Simpson* the court reaffirmed, by reference to *Chitty on Contracts*, that in Manx law the three basic essentials to the creation of a contract are agreement, contractual intention and consideration.

Manx law considers an agreement as having been reached when an offer made by one of the parties is accepted by the other.

In commercial agreements, there is a strong presumption in favour of the proposition that the parties intended to be legally bound.

The courts will look to case law from England and Wales when faced with a disagreement between parties as to whether there has been the requisite consideration provided. Consideration must not be past consideration. Consideration must move from the promisee to the promisor. Consideration need not be adequate but it must have some value. Performance of existing public or contractual duty is not sufficient consideration. Contracts by way of deed are an exception to the rule and do not require consideration.

Conditions precedent or subsequent are permitted and routinely found in commercial contracts governed by Manx law.

The general rule is that contracts cannot be enforced either by or against third parties unless certain conditions are met. The Isle of Man has enacted the Contracts (Rights of Third Parties) Act 2001, which closely resembles the Contracts (Rights of Third Parties) Act 1999 (an Act of Parliament). Owing to the similarities between the two Acts, decisions of the courts of England and Wales would be followed by the Manx courts. In the recent Staff of Government (Appeal Court) decision in *Excalibur & otrs v. Horie*, third-party rights were considered in the context of an anti-suit case.

In the recent case of *Auto-Cycle Union & otr v. Mercer* the court was concerned with an application for a declaration that the courts of the Isle of Man had jurisdiction to hear any claim issued by the respondent arising out of an incident which occurred on 30 May 2018 during the Isle of Man TT, a world famous motorcycle racing event. In order to participate in the races, the respondent had signed to confirm he had read the terms and conditions and agreed to be bound by them. Those terms and conditions contained an exclusive jurisdiction clause and the Court concluded that there were no sufficiently strong reasons, let alone exceptional circumstances, to displace the applicant’s entitlement to enforce the contractual term.

Integration clauses, merger clauses, no oral modification clauses and assignment-related clauses are permitted in contracts governed by Manx law. There has not been a decision in the Isle of Man in relation to no oral modification clauses; however, there is no reason to believe the courts would not find a no oral variation clause valid, in line with the Supreme Court of England and Wales decision in *Rock Advertising Ltd v. MWB Business Exchange Ltd* [2018].

The general rule in Manx law is that contracts can be made quite informally: no writing or other form is necessary in the vast majority of circumstances. The courts will enforce

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oral contracts. Proof that a contract has been formed can therefore be provided orally or by documentary evidence. The conduct of the parties may also be relevant in determining the terms of the contract.

There is no requirement for contracts over a certain value to be in writing, but statute does provide for certain types of contracts to be in writing. For example, Section 1(1) of the Law Reform (Enforcement of Contracts) Act 1956 provides that:

No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or upon any contract for the sale or other disposition of land or any interest in land; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

Where a person has been unduly enriched at the expense of another, the courts would treat that person as being required to make restitution to them as if a contract had been in place. In *Blackwood v. McCallion*,6 the court approved the claimant’s submissions that the law of restitution covers unjust enrichment and actions for money had and received. Quoted therein was the English Authority of *Fibrosa Spolka Akcjna v. Fairbairn Lawson Combe Barbour Ltd*,7 which states:

Such remedies in English law are generally different from remedies in contract or tort and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

The modern doctrine of promissory estoppel, as formulated in the English cases of *Central London Property Trust Ltd v. High Trees Ltd* (1947) and the House of Lords in *Tool Metal Manufacturing Co Ltd v. Tungsten Electric Co Ltd, HL* (1955), would be followed in the Isle of Man. At Paragraph 54 of *Campbell & otr v. Le-Roy Beck & otr*,8 it is stated that:

Promissory estoppel is a well-recognised equitable remedy under Manx common law; see Hanson v. Cowin 1952-60 MLR 376 and Peel Town Comms v. Irving 1987-89 MLR 16.

The doctrine of quantum meruit will be applied in the Isle of Man. An example of when it was applied can be found in *Bladon v. Shrigley-Feigl*,9 where at Paragraph 98 the High Bailiff states that:

The Defendant did not honour the Supply Contract. The value of the work that he did for the Claimant in my view falls to be judged on a quantum meruit basis taking into account the serious defects in that work. The purpose of the Court is to put the Claimant back into the position he would have been in had the contract been fully performed.

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6 ORD 2015/63 judgment dated 20 December 2017.
7 [1943] AC 32.
8 SUM 2012/6 judgment dated 4 December 2013.
9 DEF 2009/1432 judgment dated 21 April 2011.
III CONTRACT INTERPRETATION

Manx courts largely follow the common law of England and Wales when it comes to contract disputes and construction, including choice of law. The Isle of Man, however, is not party to and is not bound by any of the Rome Convention, the Luxembourg Convention or the Brussels Protocol. The Contracts (Applicable Law) Act 1992, which brings the above-mentioned Conventions and Protocol into Manx law, has not yet come fully into force. Therefore, there is some difference between the Isle of Man and England and Wales in that regard. That said, common law remains the leading authority in terms of determining these issues and this does not appear to cause the Isle of Man courts any difficulties.

The English case of *The Spiliada* sets out a seven-limb test for the courts to consider when seeking to assess the appropriate forum for dealing with a contract dispute. This seven-limb test and the principles expounded by Lord Goff in *The Spiliada* has been followed by the courts of the Isle of Man and now forms part of Manx law. Briefly, the seven-limb test requires the court to consider, when ascertaining the most appropriate forum for dealing with the dispute, the following:

- the forum with the most real and substantial connection to the case in point;
- which forum is the most convenient;
- which forum would be better in terms of cost;
- the availability of witnesses;
- the law governing the relevant transaction;
- the place where the parties carry on business; and
- would the parties obtain justice in another forum.

If the parties to a contract insert a choice of law clause or a court jurisdiction clause, then the courts in the Isle of Man will generally follow the same. Should there be no choice of law clause, the court will consider which jurisdiction the contract has the closest and most real connection to. This point has been considered by the Manx court in a number of cases including *Bryan v. Waterman*:

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[1] It has to be construed liberally, or generously, and consistently with the assumption that the parties, as rational business parties, intended any dispute arising out of their relationship to be decided by the same tribunal and that if they had wished to exclude any issues from its scope they would have said so.

54. As a matter of English law, where parties have agreed a contract providing for the non-exclusive jurisdiction of the English court, there is a strong prima facie case that English jurisdiction is the correct one and that although the court has a discretion to depart from it, the court will do so only where there are overwhelming, or at least very strong reasons for doing so and it is not open to one of the parties to argue about the relative merits of fighting the case in the unchosen, as opposed to the chosen, jurisdiction on the basis of any factor which was foreseeable at the time the clause was agreed. The fact that proceedings may have started in the unchosen jurisdiction first is irrelevant because a party cannot rely upon its own disregard of the clause. A number of English authorities were cited to me in support of these contentions, including Antec International Ltd v. Biosafety USA Inc [2006]

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10 [1986] 3 All ER 843.
11 AB v. CD CHP 2016/7 judgment dated 30 June 2016.
12 ORD 2011/82 judgment dated 14 March 2012.
EWHC 47 at paragraph 7 per Gloster J. I do not understand it to be said that the law in the Isle of Man differs in this regard and the decision of Deemster Corlett at first instance in Excalibur Almaz Ltd v. Horie (24 August 2017) (at paragraph 36) indicates that strong reasons are required to justify departure from the application of the clause.

The issue was considered in the case of Nectrus v. UCP & otrs, where the court determined that in light of the contract containing a non-exclusive jurisdiction clause of England and Wales, the Manx case would be stayed and it was not necessary to undertake a Spiliada analysis.

The issue was most recently considered, obiter, in Auto-Cycle Union & otr v. Mercer where the court, for completeness, considered the Spilida test and concluded that the Isle of Man had the most real and substantial connection to the case and would be the most convenient forum.

In the recent case of Kniveton v. Public Services Commission, the court was tasked with considering the interpretation of a settlement agreement and whether or not it excluded a pension claim being made or not. The court took into account the parties’ knowledge and experience of negotiating and drafting contracts when assessing how the contract should be interpreted. The court determined that in considering the interpretation of the contractual clause in question it was necessary to consider what a reasonable person in the position of the parties would have understood the words in the clause to mean, taking into account and including the factual matrix.

The starting point for the court is to establish what the intention of the parties entering into the contract at the time was. This is evidenced by considering not only the words of the contract itself but also the documentary, factual and commercial context of the agreement. Although the court must examine the full background, it cannot look at prior negotiations or the parties’ declarations of subjective intent. This means that the court cannot look to extrinsic evidence such as oral negotiations and exchanges of letters preceding the contract. This was confirmed in the case of DED v. DSC Limited. In the case of FPA Limited (in liquidation), deemster Doyle helpfully quoted Lord Neuberger’s summary of commercial contractual interpretation given in the UK Supreme Court in the case of Marley v. Rawlings. To paraphrase, Lord Neuberger stated that the Court needed to discern the intention of the parties from the meaning of the relevant words of the contract:

a. in light of:
   i. the natural and ordinary meaning of those words;
   ii. the overall purpose of the document;
   iii. any other provisions in the document;
   iv. the facts known or assumed by the parties at the time of the contract;
   v. common sense; and,

b. ignoring subjective evidence of any party’s intentions.

15 SUM 2015/49 judgment dated 26 October 2017.
IV DISPUTE RESOLUTION

Manx courts do not have tracks but have different procedures, determined by the value or nature of the case. All commercial contract cases are allocated to the High Court. The small claims procedure deals with any contractual dispute with a value of £10,000 or less, provided that any counterclaim does not exceed £10,000. There are some circumstances in which the Court may decide the small claims procedure is not appropriate notwithstanding the value of the claim, such as where fraud is in issue. The summary procedure deals with claims with a value between £10,001 and £100,000, and the ordinary procedure deals with claims with a value in excess of £100,001. The process followed between the different procedures is not vastly different, save that the small claims procedure is less formal and advocates’ costs are generally irrecoverable, beyond the fixed costs of issuance.

The chancery procedure deals with cases where there is no material factual dispute. Proceedings must be brought under the chancery procedure for those brought pursuant to certain legislation and in relation to claims relating to certain subjects, such as copyright, moral rights, passing off and trade marks. Insolvency matters are brought in the chancery procedure, as are claims brought pursuant to the Isle of Man’s company legislation.

The courts of the Isle of Man will enforce arbitration clauses contained within contracts and will stay proceedings should a party seek a stay in order to enforce an arbitration clause. In circumstances where all parties agree to litigate in place of arbitration, the court will hear the claim. Further, the court will also grant enforcement relief in relation to arbitration awards as considered and discussed in the case of Golar LNG NB13 Corporation v. Sahara Energy Resource.19

Manx courts further encourage mediation between the parties or other methods of alternative dispute resolution. The Rules of the High Court of Justice 2009 provide a procedure by which a party can seek a mediation direction from the court, and the court proceedings are ordinarily stayed to allow this to take place. The court will take into account any refusal by a party to enter into mediation or other alternative dispute resolution process when considering the matter of costs at the end of any claim. Notwithstanding a party succeeding before the court, it may refuse costs if it considers the winning party’s conduct to have been unreasonable in any such refusal.

V BREACH OF CONTRACT CLAIMS

A breach of contract claim can be brought where one party fails, or indicates they do not intend, to fulfil their obligations under the contract. The Rules of the High Court of Justice 2009 provide that where a claim is based on a written agreement, a copy of the contract or document constituting the agreement must be attached to or served with the particulars of claim. The Rules provide that where the claim is based upon an oral agreement, the particulars of the claim should set out the contractual words used and state by whom, when and where spoken. The Rules further provide that where the claim is based upon agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done.

Damages are ordinarily limited to placing the injured party in the same financial position as if the contract has been properly performed. There is a duty on the claimant to

take all reasonable steps to mitigate their losses caused by the breach. If there were reasonable steps the non-breaching party could have taken to avoid or mitigate their loss as a result of the breach, they cannot recover damages for such avoidable loss.

Courts will award damages for a breach if they arise naturally from the breach or if they should have been in the reasonable contemplation of the parties at the time of the contract, as being probable as a result of the breach. Should the breach be sufficiently serious, the other party to the contract may have sufficient grounds to cancel the contract entirely. The court can order specific performance or injunctions where damages would be an inadequate remedy.

The Supply of Goods and Services Act 1996 implies certain conditions into a contract. In relation to the supply of goods in the course of business, these are that:

\begin{itemize}
  \item \textit{a} the seller has title to sell;
  \item \textit{b} the goods correspond with the description;
  \item \textit{c} they are of satisfactory quality;
  \item \textit{d} they are reasonably fit for purpose (the buyer must expressly or impliedly make the seller aware of the purpose); and
  \item \textit{e} a sample provided will correspond with the bulk of the goods.
\end{itemize}

For supply of services in course of business, the implied terms are:

\begin{itemize}
  \item \textit{a} the supplier will use reasonable care and skill;
  \item \textit{b} the service will be carried out within a reasonable time; and
  \item \textit{c} if the contract is silent as to consideration, the contracting party will pay a reasonable charge.
\end{itemize}

The court also considered its powers to imply clauses into contracts in the case of \textit{Hodgson v. Tuck}\textsuperscript{20}

Evidence as to the intentions of the parties and the precise terms of the contract, especially when dealing with oral contracts, are the most common evidentiary issues that face the courts. Care should be taken to ensure that the contract accurately records the entirety of the agreement between the parties and that both parties understand their obligations.

A recent judgment, \textit{Carters & otr v. FCS & otrs}\textsuperscript{21}, highlights that a claimant must be careful and provide clear evidence of the losses claimed. The court will be reluctant to award the damages sought if not supported with clear evidence of the loss.

\section*{VI DEFENCES TO ENFORCEMENT}

The contract may lack an essential ingredient for the formation of a valid contract. For example, a contract may be ‘void for uncertainty’.

In \textit{Willers v. Nugent}\textsuperscript{22} the Staff of Government Division stated:

\begin{quote}
Mr Willers relied on one additional authority, decided since the Judgment: Openwork Limited v. Forte [2018] EWCA Civ 783. The parties there had entered into a written agreement with some standard terms. The dispute was whether a 'clawback provision' was sufficiently clear in specifying
\end{quote}

\textsuperscript{20} SUM 2015/80 judgment dated 25 August 2016.
\textsuperscript{21} ORD 2015/56 judgment dated 15 August 2018.
\textsuperscript{22} 2DS 2018/2 judgment dated 15 June 2018.
how it was to operate, when there was no express formula by which the relevant calculation was to be made. The trial judge, Mr Leslie Blohm QC, sitting as a judge of the High Court, had provided his own such formula based on the clear objective intention of the parties. The Court of Appeal dismissed the appeal because the parties had evinced a definite meaning, to be extracted from criteria expressed in the relevant clause, on which the court could safely act: per Simon LJ (with whom Arden and Newey LJJ agreed) at [30]. At [26] Simon LJ had referred to Scammell & Nephew Limited v. Ouston [1941] AC 251 where Lord Wright had stated at 268: 'The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found. At [29], Simon LJ referred to Lewison’s Interpretation of Contracts (6th Ed) at p473: ‘A provision in a contract will only be void for uncertainty if the court cannot reach a conclusion as to what was in the parties’ minds or where it is not safe for the court to prefer one possible meaning to other equally possible meanings.’

The Limitation Act 1984 is in broadly similar terms to the English equivalent. A party has six years in which to bring a claim in respect of a simple contract, including cases of fraud, concealment or mistake. However, such six-year period does not commence until such time as any fraud, concealment or mistake has been discovered or could, with reasonable diligence, have been discovered.

In common law, a promise is not, as a general rule, binding as a contract unless it is supported by consideration.

A lack of consideration is an issue that seldom arises in commercial contracts, as few commercial parties would do something for nothing. However, rarely, such issues can arise. If the parties agree that one party will do something that the party is already contractually obliged to do, so that any new obligation assumed by the other party is unsupported by fresh consideration, there will be no consideration, and therefore no binding contract.

Further, consideration may also become an issue if the parties seek to vary the contract, as a variation requires fresh consideration from each party. A defect in consideration cannot be resolved by reliance on consideration that does not exist or that has been given in the past.

In the case of McSween v. Royal London Mutual Insurance Society Limited, the court considered a case for negligent misrepresentation where the claimants had pleaded economic duress in respect of their agreement to increased insurance premiums. Therein, the deemster stated:

I am wholly unpersuaded that economic duress is a factor in this case. I need only refer to the headnote of the Privy Council decision in Pao On v Lau Ying [1979] 3 All ER 65 in which it is stated that ‘to constitute duress of any kind there had to be coercion of will so as to vitiate consent, and in relation to a contract commercial pressure alone did not constitute duress. While the Claimants may have been unhappy to pay increased premiums and may have felt under some pressure to do so, this is a long way from establishing duress.

23 SUM 2016/129 judgment dated 9 August 2018.
A contract entered into under duress is voidable.

Undue influence was introduced to deal with cases where a contract was entered into as a result of pressure, but this pressure did not amount to duress. Undue influence can arise where there is a relationship between the parties that has been exploited by one party to gain an unfair advantage.

The Manx court considered the position regarding undue influence in the case of *Jolly v. Watson*,24 where the claimant had entered into a property transaction subject to the undue influence of a figure akin to a family member. Taking into account all of the circumstances, the court determined that the claimant was subject to undue influence and therefore voided the contract.

There are numerous circumstances in which issues may arise in a contract as a result of public policy. The most common circumstances are where the contract involves illegality or restraint of trade are based on public policy. Other circumstances include contracts that are damaging to good government, in terms of domestic and foreign affairs, contracts that interfere with the machinery of justice, contracts involving the funding of litigation in exchange for a share of proceeds or where a contract would be damaging to the ideals of marriage or morality.

However, a contract cannot automatically be rescinded by virtue of involving issues that are against public policy.

In *Bank of Ireland Holdings (IOM) Limited*,25 the court considered whether it was against public policy for the Directors of Bank of Ireland to be compelled to disclose the information to the Irish Revenue:

- if all of the information was held by the Bank of Ireland in Dublin in any event but in unwieldy form;
- if some of the information was held by Bank of Ireland in Dublin in any event, but in unwieldy form; and
- if none of the information was held by Bank of Ireland in Dublin.

The deemster concluded:

In the circumstances of this case, it would be against public policy for this Court to exercise its discretion to compel the Directors to comply with the Disclosure Resolution, in each of the circumstances envisaged by the Preliminary Issues. If all, or part of the Information is held by the Bank of Ireland in Ireland then no authority has been produced that mere inconvenience on the part of the Bank of Ireland should be capable of outweighing the duty of confidentiality attaching to the accounts in the Isle of Man. If all, or part of the Information is held in the Isle of Man, then public policy dictates that it should not be disclosed.

Limitation of liability clauses are used to manage the risks associated with a contractual relationship. If there is no clause limiting liability, there is no financial limit on the damages a party can ask for in the event of a breach of contract. A party who wished to reduce the potential risks of a contract should consider an express limitation of liability clause.

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24 ORD 2010/77 judgment dated 1 March 2012.
Limitations of liability cannot be applied to claims for death or personal injury caused by negligence, cases involving fraud or fraudulent misrepresentation; breach of the implied terms in respect of certain aspects involving sale of goods and the supply of goods and services, as provided pursuant to Manx statute.

In *HSBC v. Alder and other*,\(^{26}\) the court considered a case of alleged mistake, and whether a contract provided for who bore the risk of such mistake and considered the doctrine of impossibility.

Frustration is a statutory remedy, pursuant to the Law Reform (Frustrated Contracts) Act 1944. A contract may be considered frustrated, and be consequently discharged, if something occurs after the contract is formed that renders it physically or commercially impossible for the contract to be fulfilled, or changes the contractual obligation into a radically different obligation from that envisaged when the contract was entered into. This concept ties into the concept of impossibility of performance. This was considered by the Manx court in *Lourie v. Marketstheworld*.\(^{27}\)

The court considered misrepresentation in the case of *McSween & otr v. Royal London*,\(^{28}\) and followed English precedent as part of its assessment. The issue was also considered as part of an application to strike out in the case of *Blackshaw v. Viking Renovations & otr*\(^{29}\) – such case also considered the law on negligent misstatement.

**VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS**

Manx courts will consider claims, alongside breach of contract, for fraud, misrepresentation, negligent misstatement and promissory estoppel. There is no prohibition in the Isle of Man to running these claims within the same proceedings as breach of contract; in fact, if arising from the same set of circumstances, it would be preferable.

In the case of *Old Mutual & otr v. Leonteq Securities & otrs*,\(^{30}\) the court considered a case involving misrepresentation (including fraudulent misrepresentation), conspiracy, constructive trust, breach of fiduciary duty, knowing receipt, dishonest assistance and unjust enrichment, when faced with an application for a freezing injunction and disclosure.

The law relating to promissory estoppel and undue influence was considered by the court in the case of *Westerman & otr v. McGinn & otr*,\(^{31}\) where the court held that, based upon the facts set out, the use of the same as a defence to the claim had to fail.

Cases of this nature will always turn on their own facts; however, the Manx courts follow the jurisprudence from England and Wales to assist in the determination of such matters.

\(^{26}\) ORD 2013/47 judgment dated 11 November 2016.
\(^{27}\) SUM 2017/15 judgment dated 18 October 2017.
\(^{28}\) SUM 2016/129 judgment dated 9 August 2018.
\(^{29}\) SUM 2015/91 judgment dated 20 July 2018.
\(^{30}\) ORD 2018/12 judgment dated 20 March 2018.
\(^{31}\) ORD 2013/12 judgment dated 23 January 2014.
VIII REMEDIES

i Compensatory damages

The principle remedy in the Isle of Man for a breach of contract is damages – usually compensatory damages, which are awarded to compensate a party for loss.

In Manx law, the purpose of an award of damages for breach of contract is to compensate the injured party for loss, rather than to punish the wrongdoer, and, as far as possible, to place the aggrieved party in the same position as if the contract had been performed.

When claiming damages, causation is relevant, and the onus is on the claimant to prove that the breach is linked to the loss. Damages may be directly linked to the breach, or indirectly, but in both cases the claimant must demonstrate that the loss was foreseeable in the circumstances of the case and that the link between breach and loss is sufficiently close, or risk the claim being considered too remote. This principle is materially the same in both contract and tort cases. An intervening act, unrelated to the breach, may break the chain of causation and limit or remove the availability of damages.

The level of damages is determined by the extent of the breach and the level of loss to the aggrieved party. To calculate the level of damages, it is necessary to compare the position the aggrieved party is in following the breach with the position they would have been in but for the breach. The level of damages is calculated by quantifying all the harms caused by the breach and then deducting or crediting any benefits created by the breach.

A contract may provide for indemnification, whereby one party agrees to indemnify the other in the case of the other's loss. Clauses such as this are often seen in commercial contracts dealing with loans. Such a clause is independent of, rather than the dependent on, the obligations of the borrower. This means that if the underlying transaction is set aside for any reason, the indemnity will remain valid. A claimant may seek to enforce or seek an indemnity pursuant to the Civil Liability (Contribution) Act 1981.

A court order for specific performance compels a party to perform its contractual obligations. It is a discretionary remedy that is not available in all breach of contract cases. The court has a discretion as to whether to order a specific performance. Specific performance is regarded as an exceptional remedy, and may only be available where there is a valid and enforceable contract and where damages would not be an adequate remedy.

In Lewin v. Braddan Parish Commissioners,\(^{32}\) the court considered a claim arising from an alleged breach of Mr Lewin's contract of employment, wherein specific performance was sought. This claim was ultimately struck out by the deemster.

Rescission of a contract is an option exercisable by a party to the contract in response to a defect in the formation of the contract, with the intention of unravelling the contract. Rescission effectively means that the contract is void from the beginning, and the parties are restored, so far as possible, to the position that they were in before the contract was entered into.

In Sandpiper CI Retail v. Millstreams,\(^{33}\) the Manx court considered an application to strike out the defendant's defence and counterclaim and for summary judgment, in respect of a claim arising from the sale of a retail business, in a claim for rescission.

\(^{32}\) ORD 2009/60 judgment dated 11 January 2014.
IX CONCLUSIONS

The courts in the Isle of Man largely follow the principles of England and Wales in relation to litigation involving commercial contracts. The case law and legal commentary from England and Wales is therefore extremely helpful and a good starting point in relation to any contractual based claim.

Courts are currently considering cases arising from confidentiality and non-disparagement clauses contained in commercial contracts, and it will be interesting to see how Manx courts determine these issues in the next year and whether they stay strictly in line with England and Wales. Further, the issues arising from unjust enrichment will also be considered by Manx courts.
I OVERVIEW

In light of Liechtenstein’s history, which has always been closely related to Austria’s, it does not come as a surprise that Liechtenstein’s legal system and the organisation of its courts depend heavily on Austrian law. Nonetheless, Swiss law has also left significant marks on Liechtenstein’s legal system. Liechtenstein’s summary proceedings for the recovery of debt are a typical hybrid of both legal systems; these proceedings originate from Austria and lead to proceedings implemented according to Swiss law. Therefore, an in-depth examination of both legal systems is necessary.\(^2\)

With regard to contract law in a wider context and commercial contracts in particular, generally Austrian law applies. Nevertheless, it is essential to look at the individual provisions of the contracts in order to obtain certainty as to which law applies.

However, the private law order provides the opportunity to freely shape legal relations with its environment according to will, within the bounds of good morals.

II CONTRACT FORMATION

With regard to the conclusion of contracts, reference should be made to the general principles as well as the legal requirements set forth in Section 861 et seq. of the Liechtenstein Civil Code (ABGB).

According to the general principles (Section 861 ABGB), a contract is concluded by the concordant declaration of will of (at least) two persons. The introductory declaration of intent is called an offer. This offer (promise) must be sufficiently defined in terms of content, and the applicant’s willingness to commit must be sufficiently clear. As long as negotiations are pending and the offer has not yet been made or has neither been accepted in advance nor afterwards, no contract is established.

The offer must be accepted within the period that has been determined by the offeror. In lack of such, an offer made to a person who is present or via phone from one person to another must generally be accepted immediately. An offer made to an absent person must be delivered in a reasonable time in order to receive a timely answer, failing which the offer
expires. The offer cannot be withdrawn prior to the expiry of the term of acceptance. It also
does not expire if one party dies during the term of acceptance or becomes incapable of acting
unless a different intent of the offeror is evident owing to the circumstances.3

The consent to a contract must be declared freely, seriously, determinately and clearly.
If the declaration is incomprehensible, fully undetermined or the acceptance is made subject
to other determinations as those subject to which the promise has been made, no contract
is established. Whoever uses unclear expressions to take advantage of someone else, or
undertakes a sham action, must provide satisfaction.4 In this context, for example, dissent
and error have different consequences. In the case of dissent, no contract is concluded at
all, but in the case of error it is. A contract concluded in error must therefore be challenged.

In general, contracts can be concluded verbally, in writing or implied by the behaviour
of the parties. For reasons of evidence, however, it is strongly advisable to always conclude
contracts in writing. Under Liechtenstein law, there are very few formal provisions. There
are only certain formal requirements for gift contracts, property purchase contracts or, for
example, contracts between spouses.

All of the above applies to commercial contracts as well as to other contracts.

Agreements (contracts) in favour of third parties are possible. If someone has been
promised a performance to a third party, he or she can demand that performance is delivered
to the third party.5 However, if the third party rejects the right acquired in connection with
the contract, the right is deemed not to have been acquired.6

As mentioned above, there are contracts in favour of, but not at the expense of third
parties. The latter contradict the nature of private autonomy and are therefore inadmissible.7

III CONTRACT INTERPRETATION

When interpreting contracts, one should not adhere to the literal meaning of an expression
but must determine the intention of the parties and the contract to be understood in line
with due commercial practice.8 In the case of contracts that are only obligatory for one party,
if in doubt, it is assumed that the obliged party wanted to assume the lesser rather than the
more cumbersome burden. In the case of contracts that are obligatory for both parties, an
unclear expression is interpreted to the detriment of the party who used such expression
(Section 869 ABGB).9 A declaration of intent that has been declared to someone else as sham,
be it with or without his or her consent, is void. If another transaction is concealed in such a
way, it should be assessed in accordance with its true nature. Objection to a sham transaction
cannot be raised against a third party who acquired rights in reliance on the declaration.10

According to the case law of the Liechtenstein Supreme Court,11 contractual provisions
are to be interpreted (with due caution) in such a way that they do not contain any

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3 Section 862 ABGB.
4 Section 869 ABGB.
5 Section 881 Paragraph 1 ABGB.
6 Section 882 ABGB.
7 See Austrian Supreme Court, RIS Justiz RS0084880.
8 Section 914 ABGB.
9 Section 915 ABGB.
10 Section 916 ABGB.
contradictions and remain as effective as possible (*favor negotii*). The intended meaning and purpose – the ‘intention to the parties’ to be determined by teleological interpretation – rather than the words of a contractual provision are at the forefront of the interpretation.

The interpretation of contracts and written declarations should also take into account the declarations made by the contracting parties occasionally and the resulting intention. The interpretation should be measured against the ‘recipient’s horizon’. The legal consequences to be derived from the declaration are not judged on the basis of what the declarant wanted to say or what the recipient of the declaration understood by it, but on the basis of an objective assessment on the facts by a bona fide and circumspect person. The concrete circumstances, in particular the business purpose and the interest situation, must be taken into consideration here.12

According to Liechtenstein Supreme Court rulings, a mere actual conduct of the contracting parties directed against contractual provisions is insufficient to conclude that the contractual provisions have been amended by implication with the certainty required by 863 ABGB.13

However, when interpreting contracts, it is not strictly the literal meaning of the term that should be held responsible, but it is the intention of the parties to the contract that must be explored; and the contract must be understood in accordance with the practice of fair dealing.14

**IV DISPUTE RESOLUTION**

In general, Liechtenstein has a very efficient court system. The latest reform of the Liechtenstein Code of Civil Procedure (LCCP) came into force on 1 January 2019 and aimed to enhance procedural efficiency.15 This project was a success. By enacting this reform, Liechtenstein civil procedure law follows the Austrian model more closely.

Located between Switzerland and Austria, Liechtenstein is not a common law but a civil law country. Case law does exist, but it does not play as important a role as it does in Anglo-Saxon jurisdictions. As mentioned in Section I, Liechtenstein law is a hybrid of Austrian and Swiss law. Nonetheless, the most common, and thus fatal, error committed by lawyers regularly dealing exclusively with either Austrian or Swiss law is to ignore Liechtenstein specifics, at least as far as procedural law is concerned. However, litigation in Liechtenstein is not always the first choice either for foreign parties or their legal advisors. Most parties wish to seek justice in their home country, being unaware of the efficiency and competence of Liechtenstein lawyers and courts. Compared with other jurisdictions, Liechtenstein justice is considerably swift. There is no rule requiring criminal cases to be granted priority. Once the relevant documents are filed, a hearing is scheduled within weeks. The median time from commencement of a lawsuit to a judgment of first instance is 12 months. It may take longer if the case is complex or has an international aspect to it, if foreign courts or foreign law must be applied or if witnesses who live abroad must be heard in court. In the vast majority of civil cases, a final decision can be obtained within two or three years.

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15 See *Official Liechtenstein Legal Gazette* LGBl 2018.207.
There is no specific commercial court in Liechtenstein. The following courts in Liechtenstein exercise jurisdiction in civil matters, including, *inter alia*, commercial contracts:

- **first instance**: District Court;
- **second instance**: Superior Court; and
- **final instance**: Supreme Court.

The first step for a plaintiff undertaking proceedings in Liechtenstein courts is to ascertain that the court has jurisdiction to hear the case. Presumably, as in most other jurisdictions, Liechtenstein courts first check on their duty and competence to accept the case. The case may easily be dismissed if the court has no jurisdiction. However, there are no minimum amounts in dispute or specific threshold requirements to bring a dispute before court. That means that nearly every contract dispute is litigable before courts.

As foreign judgments are usually not enforceable in Liechtenstein, plaintiffs must therefore sue Liechtenstein residents before a Liechtenstein court because of the general forum at the domicile of the defendant. In addition, there are several other aspects leading to the jurisdiction of Liechtenstein Courts, such as the location of assets, an established jurisdiction of the main proceedings or, particularly with regard to contracts, the jurisdiction of Liechtenstein Courts based on the place of performance.

Contracting parties may, by means of express agreement, submit to a specific court, which is not actually competent. However such an agreement must already be evidenced to the courts in a document in the claim. Further, such an agreement only has legal effect if it relates to a specific legal dispute or to the legal disputes arising from a specific legal relationship. However, matters that are beyond the jurisdiction of the courts cannot be brought to court by such an agreement.

Owing to the principle of freedom of contract, parties may also agree to resolve disputes outside of the court process, by alternative dispute resolution methods such as mediation or arbitration. That said, Liechtenstein as a jurisdiction is arbitration-friendly, and thus nearly every matter that could be subject to state-court proceedings may be submitted to arbitration as well. Following the standards of the United Nations Commission on International Trade Law, nearly any pecuniary claim to be decided by state courts may be subject to arbitration agreements.

### V BREACH OF CONTRACT CLAIMS

Three types of claims are distinguished:

- **action for a declaratory judgment**;
- **action for performance** (e.g., damages); and
- **action for shaping the law**

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16 There are bilateral agreements with the neighbouring states, Austria and Switzerland, when it comes to the acknowledgement and enforcement of judgments in civil law matters, provided that the decisions are in compliance with certain prerequisites and formal requirements set forth in these agreements.

17 Section 30 Court Jurisdiction Act [JN].

18 Section 50 JN.

19 Section 47 JN.

20 Section 43 JN.

21 Section 53 JN.

22 Section 599 LCCP.
The basic element of a claim for breach of contract is always a valid contract. However, culpable violation of contractual or pre-contractual obligations (culpa in contrahendo) also leads to a claim for damages. In principle, what applies in general also applies to culpability: anyone who invokes a circumstance that is more favourable to him or her in the proceedings must prove that this circumstance has actually occurred. The aggrieved party must, therefore, also prove the fault of the tortfeasor (liable party). However, there is an exception to this rule.

A highly significant reversal of the burden of proof for culpa in contrahendo exists, for example, in the event of a breach of contractual or contract-like obligations. This means that it is not the aggrieved party who must prove that the tortfeasor is at fault, but the tortfeasor who must prove that he or she is not at fault. The determination of the burden of proof in Section 1298 ABGB only applies to the area of culpability, but not to the area of causality.

In the event of a breach of contract, a party is, based on Sections 1293 et seq. of the ABGB, entitled to sue the other party or parties for damages.

However, contracts can also be challenged on usury (Section 879, Paragraph 2 Z4 ABGB) or owing to material imbalance (leasio enormis, Section 934 ABGB). A contract may also be contested on the grounds of error, cunning or threat.

In the event of defective performance of a contract, the party concerned is entitled to the statutory warranty rights, provided by Section 932 ABGB. According to the law, the transferee can demand rectification (repair of or providing the missing), the replacement of the asset, a reasonable reduction of the price (price reduction) or the rescission of the contract (redhibition). The right to the legal warranty must be claimed at court within three years if it relates to immovable assets, and within two years if it relates to movable assets. Warrant law does not apply if assets are transferred outright, in the case of obvious defects or in case of contractual exclusion. Therefore, in principle, the warranty right can be excluded contractually; in the case of a consumer contract, however, it is compulsive. In addition, contractually agreed warranty clauses can be made subject to a law suit as well.

VI DEFENCES TO ENFORCEMENT

It is within the scope of normal practice that sometimes one of the contract parties, under certain circumstances, attempts to avoid any obligation to perform a contract or to avoid enforcement of contractual obligations. In addition, this party could try to challenge claims of breach of contract.

Under Liechtenstein law, there are several options to try to defend yourself against unjust enforcement of contractual obligations. In general, every party can object that no contract has been formed at all (e.g., unenforceable agreements, indefinite or missing essential terms). Further, it can be argued that the limitation periods are over, the contract was formed under duress or there was a lack of any consideration. One could also argue that the contract is against public policy or unenforceable because of fraudulent inducement, misstatement or misrepresentation.

23 Section 1298 ABGB.
Where contractual exclusions of liability have been agreed, it may be argued that the liability out of the contract is limited – this also with regard to punitive or consequential damages, contractual agreed limits on representation or other disclaimers.

Depending on the case, the objection of *force majeure* may also be taken up.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

As mentioned in Section V, a party has many more available applications beyond breach of contract claims. These claims vary from breach of the implied covenant of good faith to quasi-contractual claims, including promissory estoppel (e.g., pre-contractual relations or contractual accessory obligations).

Further, fraud, misrepresentation or tortious interference with contract gives rise to claims in addition to claims out of breach of contract. As mentioned above, contracts can also be challenged on usury (Section 879, Paragraph 2 Z4 ABGB), owing to material imbalance (*leasio enormis*, Section 934 ABGB) or on the grounds of error, cunning or threat.

However, the most commonly asserted tort-based claims are based on Section 1293 et seq. ABGB. In this context, tort-based claims are also very relevant with regard to the piercing of the corporate veil. In accordance with Liechtenstein Supreme Court rulings, liability is governed by the provisions on liability arising from contracts. Therefore, pursuant to Article 182(1) of the Persons and Companies Act (PGR), the respective body has the duty to ensure the preservation of the legal minimum capital of a legal entity to prove that it is free from culpability.

In each case, however, the following criteria are required for the award of damages:

- *a* damage (loss);
- *b* unlawful behaviour (e.g., breach of contract, breach of law);
- *c* culpability; and
- *d* causal connection between culpability and unlawful behaviour.

In addition, creditors of contract parties have the possibility of challenging legal transactions via the challenging order. If creditors are grossly disadvantaged by a contracting party, there is, of course, the possibility of criminal prosecution according to Section 157 of the Liechtenstein Criminal Code.

Remedies vary, depending on the nature of the claim (see Section VIII).

VIII REMEDIES

There are several remedies with different ranges when it comes to a civil recovery action (Section 1323 et seq. ABGB). However, applicable remedies usually depend on the cause of action. According to Section 1323 of the ABGB, the first remedy is always restitution in kind if the cause of action allows it. If restitution in kind is not possible, damages may be awarded in cash. Regarding a breach of contract, a party may seek fulfilment of the agreement

25 Claims based on Section 1293 et seq. ABGB in connection with Article 218 et seq. PGR.
26 See OGH U 08.05.2008, 01 CG.2006.276, GE 2008,37.
27 Article 64 et seq. of the Liechtenstein Act on the Protection of Rights – Rechtssicherungsordnung (RSO).
(specific performance) or sue the other party for damages. The available remedies for a breach of contract, however, range from compensation and damages to non-monetary remedies such as specific performance, rescission and reformation of the contract.

The law also expressly states that contracting parties may reach a special agreement that, in the case of a contract that is not fulfilled, fulfilled too late or not fulfilled in a proper manner, a certain amount of money should be paid in compensation for the disadvantage (a contractual penalty). In general, it is up to the parties whether they agree on specific punitive or monetary damages. The obligation to pay such contractual penalty presupposes a valid principal obligation.

The amount of contractually agreed interest should, in principle, be determined by the parties, only being limited by the usury provisions. However, the general legal interest rate is 5 per cent. In commercial matters, the general legal interest rate is 8 per cent above the basis interest rate. Default interest does not presuppose culpability. It must be paid if there is an objective delay in performance of the contract. Under Liechtenstein law, pre- and post-judgment interests are possible.

In this context, however, it is always necessary to examine why a contract was breached. This is commonly referred to as ‘performance disruption’. This includes impossibility of performance, delay of performance, defective performance or breach of contract. Depending on whether these disruptions to performance occur accidentally or are attributable to one of the contracting parties, resulting damages should be compensated to different extents. In the case of actual indemnification, only damage actually suffered (positive damage) is subject to compensation, while ‘full compensation’ also includes the lost profit (compensation of expected profit). However, in the case of, for example, breach of contract, the scope of compensation is generally determined by the degree of culpability of the liable party:

In the case of slight culpability (slight negligence), only the damage actually suffered (positive damage) must be compensated. In the event of gross culpability (intent or gross negligence), full compensation must be provided. As mentioned above, this means that the liable party must compensate not only the loss suffered but also cover the lost or expected profit.

The success of court actions often depends on the effectiveness of interim remedies or provisional measures, conservatory measures or summary judgments taken before or in lieu of the main proceedings. Generally, for preventing (irreparable) injuries to the applicant, a party might obtain measures for interim relief from a court upon motion.

Article 277 of the Liechtenstein Enforcement Act grants provisional remedies, such as security restraining orders and official orders.

28 Section 1336 ABGB.
30 See Section 879 ABGB.
31 Section 1000 ABGB.
32 Article 336b of the General German Commercial Code (ADHGB), which also applies in Liechtenstein.
33 Welser/Zöchling-Jud, Bürgerliches Recht II14 (2015) 42; Reischauer in Rummel (eds), ABGB3 Section 1333 ABGB, minute 6 (www.rdb.at).
IX CONCLUSIONS

Based on the principle of contractual freedom and private autonomy, Liechtenstein’s contract law is very liberal. There are hardly any formal requirements, and, if there are any, they usually require written form or certified signatures. As long as it is not contrary to boni mores, anything can be subject to commercial contracts.

With regard to relevant developments, Liechtenstein law has not changed in this area for decades. This provides for legal certainty. High court case law with regard to the formation of contracts, interpretation, etc., has also largely remained the same and provides for a good understanding of the respective provisions.

In addition, Liechtenstein has been a member of the New York Convention since 2011. The forthcoming years will show which commercial disputes will increasingly shift from ordinary court proceedings to arbitral tribunals.
I  OVERVIEW

The Mexican judiciary system is divided into a federal and local jurisdictions, both dealing with commercial disputes across the country. Such commercial matters, though of federal nature, are also heard by local trial courts providing a wider access to justice. However, if challenged, all disputes will be decided by a direct amparo proceeding, the ultimate federal instance.

Commercial transactions and the agreements comprising them are regulated by both commercial and common (civil) law. Commercial obligations, like civil ones, constitute a legal bond between individuals, but the purpose thereof will be an obligation of mercantile nature, derived from a commercial contract. Consequently, the main source of commercial obligations is precisely commercial contracts and the agreements contained therein.

Likewise, disputes arising from commercial contracts will be more quickly resolved according to the rules of commercial procedure, mainly found in the Mexican Commerce Code, rather than those of a civil nature.

Hence the importance of understanding the applicable general principles and common features regarding commercial contract formation and their rules of interpretation, as well as the legal actions, defences and remedies to enforce them.

II  CONTRACT FORMATION

Mexican Commercial Law does not specifically define the concept of ‘commercial contract’ or ‘commercial obligation’, nor elaborates on the requisites for their formation. However, such provisions can be found in the civil law.

Under the Mexican Federal Civil Code (Article 1794), the essential elements for the formation of any contract are the parties’ consent and the purpose of the contract. Additionally, when required by law, certain solemn formalities should be followed. If any of these elements is missing, such contract would be deemed inexistent and thus unenforceable.

In addition (Article 1795, Mexican Federal Civil Code), a contract may be invalidated if any of the following is missing:

\begin{itemize}
  \item [a] capacity of the parties;
  \item [b] absence of vices of consent;
\end{itemize}

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1 Javier Curiel Obscura and Ernesto Palacios Juárez are partners at Martínez, Algaba, De Haro y Curiel, SC. The authors would like to thank Vicente Cuairán Chavarria, Eduardo Vinssac Navarro, Luis Felipe Álvarez Hinojosa, María José Vázquez Coronado and Fernando Jesús Gutiérrez Vázquez for their assistance in preparing this chapter.
c. a valid subject matter; and

d. the contract’s form, if required by law.

Likewise, the lack of any of such elements will result in an unenforceable contract.

The first essential element for the existence or modification of a contract is the consent of its parties; in order for consent to be perfected, ‘offer and acceptance’ must be present. The concept of ‘offer’ implicates a unilateral proposal from one party, which, if accepted in its terms by its counterparty, will constitute a contract. If such acceptance involves a change of the offer’s original terms, then a new offer will be in place that should be accepted in such new terms for the contract to be perfected. There are two ways to accept an offer, which may be either express (by a verbal or written statement) or implied (by its performance); however, the parties may also require express acceptance as a condition for the enforceability of the contract.

In addition, consent must be valid and truly intended, absent of any vices thereto. Following the civil law theory, a contract will be formed only through the valid consent of each of its parties, rendering such consent as ineffective if impaired by any of the legally recognised ‘vices of consent’, such as error, fraud, duress or unconscionable bargain.

As for the second essential element, the contract’s subject matter should always be valid, meaning that the rights and obligations therein, as well as the goods or services subject thereto, must be legal, possible and merchantable.

As for the formalities of the contract itself, as a general rule, as long as there is consent and the contract’s subject matter is legal, contracts may be agreed either verbally or in writing. However, certain types of contracts must be in writing. For example, when its value or consideration exceeds a certain amount (i.e., acquisition and transfer of real estate rights, donations or settlements). Other examples include promissory agreements, powers-of-attorney, security agreements (e.g., mortgages, pledges, securities and trust agreements), construction, lease or services agreements, association, partnership or shareholders agreements, or adhesion contracts.

In the same way, certain contracts, because of the amount of their consideration, should be prepared by and executed before a notary public and then formally filed before the applicable public registries. In such cases, the parties themselves, or their attorneys-in-fact with sufficient powers, must appear before the notary public for the process of notarisation of the contract, which is essential for its validity, even among the parties themselves.

As in most Latin American countries, in Mexico the notary public is of significant importance in the country’s legal system. They are licensed attorneys and appointed officials who have the authority to officially attest to the truth of facts occurring in their presence, or to certify documents or authenticate signatures therein. Before the notarisation, it is the notary’s duty to fully identify the parties and certify their authority and capacity, as well as the legal validity of the act itself. Therefore, there is a legal presumption that a contract executed before a notary public is valid; however, despite the notary’s certification, the parties must always comply with the contract’s legal requirements for it to be valid.

If the above-mentioned requisites are fulfilled, the parties may agree to almost any obligation they wish, as well as on their assignment or termination.

Regarding the obligations or covenants agreed in contracts, Mexican law allows the contracting parties to condition their enforcement or termination. Contracts may include conditions precedent or suspensive conditions, in the sense that an agreed obligation (or
covenant) will only rise when and whether such condition occurs. Likewise, the occurrence of subsequent conditions or resolutory conditions will terminate an obligation (or covenant) by returning things to their former condition, as though it never existed.

III CONTRACT INTERPRETATION

Similar to contract formation, the rules for the interpretation of contracts are contemplated by the civil law: the Federal Civil Code. The rules are as follows, are implicit in all commercial obligations and should be observed when interpreting any contract:

a) if the terms of a contract are clear and leave no doubt about the intention of the contracting parties, the literal meaning will prevail;

b) if the words appear contrary to the evident intention of the parties, the latter shall prevail over them;

c) notwithstanding the generality of the terms of a contract, it is not to be comprehended therein different things or cases from those on which the parties intended to contract;

d) if a clause admits several meanings, an interpretation must be provided that is most suitable in order to give the contract’s purpose;

e) the contract’s clauses must be interpreted as a whole in connection with the other clauses therein, giving an overall meaning to the group of clauses, some of which may be unclear;

f) it should be understood that words that may have different meanings refer to the one meaning that is most in accordance with the contract’s nature and purpose; and

g) customs and usages can be considered to interpret the ambiguities therein.

When the rules above are insufficient to interpret the true meaning of a provision in a contract, if it refers to accidental or secondary circumstances of a contract, and when there is no legal consideration, it shall be interpreted in favour of the lower transmission of rights. If the contract does have consideration, the interpretation should be in favour of the greater reciprocity between the contracting parties.

Finally, if the main purpose of the contract is unclear, so that the intention of the contracting parties cannot be known, the contract will be null and void.

These rules should be interpreted hermeneutically and can be summarised into three main categories: the literality of the clauses; the intention of the contracting parties; and the effects that the contract may produce.

Based on the above, it can be concluded that, under Mexican law, contract interpretation is more literal than in common (case) law. Therefore, attention must be devoted primarily to the language contained in the agreements in order to evidence the true intention of the contracting parties. In such sense, the parties’ intention, however relevant when interpreting a contract, is a secondary source of interpretation, because if the language contained therein is sufficiently clear and it leaves no doubt about the intention of the parties, there should be no other interpretation.

Notwithstanding the importance of the literal meaning of words, when in doubt, a contract should always be interpreted as a whole in order to be able to identify its true purpose. Based on the rules of interpretation set forth above, if the words of a contract seem contrary to the evident intention of the contracting parties, the latter will prevail over them.
In addition, the nature of a contract will always depend not on the title or name given to the agreement, which may be inaccurate or mistaken, but on the facts and acts consented by the parties therein.

Another example of the importance of the ‘intentional element’ when interpreting contracts is the relevance of the parties’ conduct, before, during its execution and while performing the obligations therein. With such conduct, courts can analyse and deduce their true intention. For instance, when the parties execute a series of acts in a regular or ordinary way, or when executed by a single party, there is an express or tacit acceptance by the other. Such behaviour indicates the true intention of the parties regarding the scope they wanted to give to the agreement. Likewise, it could be understood that a contract has been automatically renewed if both parties continue executing actions in connection with such contract.

IV DISPUTE RESOLUTION

Mexican commercial law has a complex system for the resolution of disputes regarding disagreements that derive from acts of commerce and responsibilities derived from commercial contracts. And so, the Commerce Code allows commercial disputes to be filed before Mexican courts – in both the federal or local courts – or to be decided through arbitration proceedings, to the extent the relevant parties agree to submit their controversy to arbitration.

It is important to point out that the Commerce Code establishes the general rules that regulate commercial proceedings. However, the involved parties may agree on the procedure to be followed for the resolution of a controversy, since they can agree on a conventional proceeding.

i Legal proceedings

Applicable law provides various types of proceedings to solve commercial disputes, among which are ordinary, executive and special. The ‘ordinary commercial proceeding’ is the most common one and, as a general rule, would be the one applicable to all disputes arising from commercial contracts.

Additionally, the Commerce Code regulates the ‘commercial executive proceeding’, which implies that the cause of action must be based on an ‘executory instrument’, which is a legal document that underlines an immediate enforcement action, which translates into the possibility that the judge, at the time of admitting the claim, can issue an ‘exequendo order’ allowing the seizure or attachment of property at the commencement of the procedure to guarantee the payment of the amounts claimed in the lawsuit. This type of proceeding is characterised by shorter terms than those of the ordinary one. In addition, the defendant’s defences and exceptions are limited to the ones specified by law.

ii Written and oral commercial proceedings

Although commercial legislation does not provide for a minimum amount in order to be able to initiate a commercial dispute, the amount of the controversy currently determines whether these should be processed in a written (traditional) manner or through an oral proceeding.

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3 id.
However, as a general rule, as from 26 January 2020, all commercial disputes will be processed through the commercial oral proceeding, no matter its amount, meaning that the Mexican legal system is intended to evolve into an oral justice system.

Until 26 January 2020, controversies that do not have a determined amount will generally be processed in a written form. However, the proceeding will be oral if the principal amount does not exceed the legal threshold –1 million Mexican pesos as of 26 January 2019; and without limitation as of 26 January 2020.

Executive proceedings will generally be processed in a written (traditional) manner, although those claims not exceeding the amount of 650,000 Mexican pesos will be orally processed – 1 million Mexican pesos as of 26 January 2019 and 4 million Mexican pesos as of 26 January 2020.

As for the ordinary and executive oral proceedings, certain actions must be carried out in written form (i.e., the lawsuit and the statement of defence), though others must be carried out orally (i.e., the offering of evidence and the formulation of pleadings), their main characteristic being speed and efficiency.

### iii Arbitral proceedings

Mexican commercial law provides that parties may enter into arbitration agreements under which they will submit to arbitration all or certain disputes that may arise between them from a certain legal, contractual or non-contractual relationship. In order to regulate the arbitration procedure, the Commerce Code establishes certain rules; however, the parties are free to determine said procedure.

Mercantile legislation provides certain judicial proceedings in order to enforce or support the effectiveness of arbitral awards (i.e., proceeding for the recognition and enforcement of arbitral awards), as well as the possibility for Mexican courts to declare the nullity of arbitration awards under certain specific assumptions.

### iv Alternative dispute resolution proceedings

In addition to the arbitral and conventional proceedings described above, the Mexican Federal Constitution mandates that legislators should provide alternative dispute resolution mechanisms in order to allow ‘mediation’ as such. In Mexico City, according to the Alternative Justice Law, judges are obliged to inform the parties about the mediation alternative, which will only proceed if mutually agreed by them.

In addition, the Federal Consumer Protection Law provides legal mechanisms through which the Consumer Protection Agency (PROFECO) can initiate a conciliatory proceeding to solve controversies that arise between consumers and suppliers of goods or services, which, if not solved with an agreement between the parties, culminates with the issuance of an ‘opinion’ that constitutes an ‘executory instrument’ in favour of the consumer. When designated by the parties, PROFECO may act as an arbitrator and solve controversies of this nature. Also, the Federal Consumer Protection Law grants similar prerogatives to the National Protection and Defence for Users of Financial Services Commission, so it can initiate conciliatory or arbitration proceedings to solve disputes between financial institutions and their users.

### v Extension of jurisdiction

In case of any controversy or need for interpretation, parties may waive the jurisdiction that the law grants them, having the right to submit themselves to any other jurisdiction
of their choice, provided that the proper legal requirements are met. This means that the parties appoint as competent courts those of the domicile of any of the parties, the place of performance of the obligations or the location of the goods subject to the dispute.

V  BREACH OF CONTRACT CLAIMS

Federal civil law regulates the fulfilment of contractual obligations, as there is no special commercial regulation on this matter. Therefore, the breach of contractual obligations must be analysed pursuant to the Federal Civil Code.

i  Breach of contractual obligations

Federal courts have established that contracts are governed by the ‘pacta sunt servanda’ principle, according to which the contracts legally celebrated must be faithfully fulfilled. The breach of contractual obligations creates civil liability, which consists of the obligation of the non-performing party to compensate its counterparty for the damage and lost profits caused by having breached the contractual obligation. Additionally, civil legislation establishes specific rules for cases in which contractual obligations are breached, based on the distinction between those obligations to ‘do’, ‘not to do’ or ‘give’ something.

In the case of obligations ‘to do’ something, civil law establishes that if the person responsible to perform fails to do so, his or her counterparty has the right to request the specific performance of the obligation, having the possibility of requesting that, at the expense of the non-performing party, another person executes such obligation when such substitution is possible. In addition, if such obligation is not performed in the agreed terms, the performing party can request the party at breach to ‘undo’ it. Finally, such obligations are enforceable at the expiration of the agreed term. In the absence of a specific term, performance must be made when required by the performing party.

Regarding obligations ‘not to do’ something, applicable legislation establishes that, if the person obliged to abstain from carrying out certain conduct fails to comply with such obligation, that mere contravention generates an obligation to compensate the damage and lost profits caused to its counterparty.

In the case of obligations ‘to give’ something, applicable legislation provides that, if the person who is obliged to ‘give’ or ‘deliver’ certain goods breaches such obligation, its counterparty has the right to claim the return of such goods or its value, in addition to the compensation for the caused damage and lost profits. These obligations are enforceable once the agreed term is met. If a deadline is not agreed, the performing party may only file a claim after a 30-day period from a payment request (either judicially or extra-judicially, through a notary public or before two witnesses).

Although Mexican legislation does not establish specific means of evidence to demonstrate compliance or breach of an obligation, judicial precedents from federal courts have established that the affected party must only demonstrate the existence of a valid contract,

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4 Article 1093 of the Commercial Code.
5 Judicial precedent issued by the Eighth Collegiate Civil Court in Mexico City, No. I.8o.C. J/14, digital record number 186972.
meaning that said contract complies with all the applicable legal requirements. However, the party at breach must prove compliance with his or her obligation, or the existence of a justified cause for his or her non-compliance, exempting him or her from liability.7

ii Damages and lost profits

As explained above, the breach of contract generates the obligation of the breaching party to pay its counterparty the damages and lost profits actually caused in connection thereto.

Civil legislation defines ‘damage’ as the loss or impairment suffered in one's patrimony because of the obligation’s lack of fulfilment and ‘lost profits’ as the deprivation of any legal future earnings that would have been obtained if the obligation was fulfilled.

iii Constitutive elements of contractual liability

Mexican doctrine considers that, in order to demonstrate the constitutive elements of contractual responsibility, it is necessary to prove the following:

a the existence of a contractual obligation;

b the breach of such obligation; and

c that the caused damage is the direct and immediate consequence of such breach.8

These elements may be proved through any of the evidence means provided by law – private or public documents, confessions, testimonies, expert evidence, legal presumptions or presumptions of fact, etc.

Also, Mexican law grants the affected party the possibility to claim damages and lost profits, either in a ‘determined’ way – specifying the claimed amount as compensation, since filing the claim – or in an ‘indeterminate’ way – meaning that the compensation quantification will be subject to a special ancillary proceeding during the enforcement of judgment stage.

iv Exemptions for contractual breach

Civil legislation establishes certain rules according to which a party may be released from its contractual obligations without generating contractual responsibility. Such is the case of ‘acts of God’ (‘fortuitous case’ or ‘force majeure’).

VI DEFENCES TO ENFORCEMENT

One of the most recurrent methods to avoid enforcement of contractual obligations is through defences related to missing essential or validity elements of a contract. For instance, the purpose of a contract cannot violate the law or public policy; otherwise, such contract would be unenforceable because of its illegal object. Additionally, contracts signed under duress would be unenforceable as well, as duress is considered a vice of consent.

It is possible to avoid enforcement of a contractual obligation under the ‘frustration of purpose’ theory. Mexican law defines the purpose of a contract as the main reason a party enters into it. As such, frustration of purpose occurs when an unforeseen event prevents said

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7 Judicial precedent issued by the Fifth Collegiate Civil Court in Mexico City, No. I.5o.C.54 C (10a.), digital record number 2004314.

purpose from being achieved. Nonetheless, Mexican courts often require the parties’ main purpose for entering a contract to be declared on the contract itself or for the party seeking this defence to provide irrefutable evidence of said purpose, which may be difficult to prove.

It is important to consider that although common law countries have adopted the Doctrine of Impracticability, Mexico has not yet fully adopted it. Historically, Mexican courts have determined that the country’s Federal Civil Code only adopts the *pacta sunt servanda* principle, which, as courts have interpreted, means that contracts must be sustained, even when there is an occurrence that makes the performance of such contract extremely difficult or burdensome for one of the parties.9

As a result of the 2011 amendment to Article 1 of the Federal Constitution, a new legal interpretation model was introduced into Mexico’s legal system. It has changed from a strictly formal and rigorist legal system to a deontological one, in which the most important goal is the effective protection of human rights and individuals.10 With this change, human rights have become the centrepiece of the Mexican legal system. Historically speaking, Mexican courts have conceived human rights as a limitation of public power and thus concluded that they were only enforceable in subordinated relationships between individuals and public authorities.11 Under this assumption, human rights were restricted to public law and almost completely excluded from commercial law and contracts. Nonetheless, since 2009, federal civil courts began to adopt the German *Drittwirkung* theory. Broadly, this theory states that human rights have a horizontal aspect to them, meaning that they are not only applicable and enforceable in relationships between individuals and public authorities, but also in relationships between private individuals.12 The Mexican Supreme Court of Justice has also recognised this horizontal aspect in different judicial precedents.13

The recognition by Mexican courts of the *Drittwirkung* theory added a completely new set of defences against the enforcement of contractual obligations. For example, the Supreme Court of Justice has interpreted that the interest rate established by the parties in a credit agreement is limited by Article 21.3 of the American Convention on Human Rights that prohibits usury.14 Based on these precedents, human rights violations defences are becoming more common in Mexico in respect of civil and commercial contractual controversies.

Regarding statutes of limitations, the Commerce Law provides for different periods according to the subject matter and type of claim, from one to 10 years. Under Article 1048 of the Commerce Code, when no particular statute of limitation period is established by law, the general period of 10 years will apply. Mercantile law does not include a statute of limitation period for claims related to missing essential or validity elements of a contract or

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9 Judicial precedent issued by the Eighth Collegiate Civil Court in Mexico City, No. I.8o.C. J/14, digital record number 186972.
11 Judicial precedent issued by the First Chamber of the Mexican Supreme Court of Justice, digital record No. 314379.
12 Judicial precedent issued by the Third Collegiate Civil Court in Mexico City, No. I.3o.C.739 C, digital record No. 166676.
13 Judicial precedent issued by the First Chamber of the Mexican Supreme Court of Justice, No. 1a./J. 15/2012 (9a.), digital record No. 159936.
14 Judicial precedent issued by the First Chamber of the Mexican Supreme Court of Justice, No. 1a./J. 132/2012 (10a.), digital record No. 2002817.
contractual breaches or claims; instead, those statute of limitation periods are established in
the Federal Civil Code. For instance, the period for claims regarding a contract entered into
under duress is of six months from the date such duress has stopped.

VII  FRAUD, MISREPRESENTATION AND OTHER CLAIMS

In addition to the defences and claims mentioned above, there are other claims based on the
tortious conduct surrounding commercial relationships before entering into a contract. For
instance, pursuant to Article 1815 of the Federal Civil Code, a contract would be deemed
invalid and thus unenforceable if one of the parties uses false pretences and deception to
induce the other party to enter into a contract.

The fraudulent inducement must be directly related to the affected party’s purpose
to execute the contract, otherwise it would not result in an invalid contract. Simply put, to
establish a claim of fraudulent inducement, the victim must prove that he or she would not
have entered into the contract if he or she had known the truth. In addition to fraudulent
inducement, the above referred provision also includes ‘fraudulent concealment’ as a cause
to invalidate a contract. Mexican law defines fraudulent concealment as a deliberate hiding
of a material fact or circumstance to deceive the other party into entering a contract. It also
requires the concealing party to be aware of the other party’s lack of belief in or unawareness
of the hidden material fact in order for the contract to be invalidated.

In addition to the latter, the implied covenant of good faith and fair dealing is
recognised in Article 1796 of the Federal Civil Code, providing that the parties entering
into a contract must act in good faith and deal with each other honestly and fairly during
its execution. Given the nature of the covenant of good faith and fair dealing, most of the
claims that arise from said principle are claims to enforce a contract or to avoid that one of the
parties might use a rigorist or technical interpretation thereto in order to refuse to perform
his or her obligations. The covenant of good faith and fair dealing is also recognised as an
interpretation rule that both parties and courts must take into account when executing or
enforcing a contract.

VIII REMEDIES

Mexican legislation on contractual matters establishes an extensive regulation to ensure the
rights of the parties in such a way that, in the event of a breach, they have at their disposal a
series of legal means to ensure the enforcement of the contractual obligation.

In this regard, applicable doctrine and legislation give the parties certain rights and
remedies to ensure the fulfilment of a contractual obligation or, at least, to seek compensation.
These rights and remedies are regulated through the following legal fundamentals:15

i  Pactum commissorium

This principle is implied in all reciprocal obligations, by which the party that fulfilled its
obligation is entitled to claim from the other either the specific performance or the termination
of the contract, and, in both cases, the payment of caused damage and lost profits.

   411-413.
Federal courts have considered that judicial intervention is necessary to enforce this principle.

**ii  Exceptio non adimpleti contractus**

In the event of breach of contract, the affected party has the right to refuse to comply or perform his or her obligations therein.

Mexican doctrine considers that the exercise of this exception does not attack the validity of contractual obligation, since the only effect it generates is the deferral of its compliance. Once the breaching party has performed his or her obligation, this defence will no longer be valid and, consequently, the former breaching party may demand immediate performance.\(^\text{16}\)

**iii  Right to retain**

Mexican legislation allows the creditor who holds a debtor’s asset to refuse its delivery until the debtor complies with his or her obligations relating to the delivery of the property.\(^\text{17}\)

This has similar characteristics to the exceptio non adimpleti contractus, since it tends to protect the fulfilment of contractual obligations, granting the affected party the ability to refuse to comply with the obligations that correspond such party – in this case, the delivery of a good.

**iv  Theory of risks**

It is possible to determine in contracts that establish reciprocal obligations ‘to give’ something, which of the parties will assume the risk of a loss in the event that one of the parties cannot comply with its obligations, in case of fortuitous event or force majeure.

**v  Indemnity by dispossession by due process of law**

Legislation regulates the right of the acquirer of a property to be compensated in the event that a third party deprives him or her of such property by means of an enforceable judgment, claiming to have a better and prior right.

For compensation to proceed, it must be a transferring domain agreement where the right of the third party arose prior to the acquisition of the property; that the acquirer is totally or partially deprived of such property; and that the reason of the deprivation of the property is based on an ‘enforceable judgment’.

**vi  Indemnity by hidden defects by due process of law**

There are certain legal provisions that grant the acquirer of a property the right to claim compensation in the event that such property presents hidden defects of the acquired property.

To enforce these rights and remedies, the parties can initiate a proceeding before Mexican courts, arbitral courts or through any other alternative dispute resolution mechanism.

**vii  Conventional penalty**

Mexican law entitles the parties to agree, in advance, to a ‘conventional penalty’ or ‘penalty clause’, which, essentially, is a benefit agreed by the parties that has the nature of a ‘penalty’

\(^{16}\) ibid, p. 426.

\(^{17}\) ibid, p. 427.
in case of breach of contract. However, if the penalty clause is enforced, the affected party cannot also claim any compensation for damages or lost profits caused by such breach. In addition, a penalty clause cannot exceed the value of the contract’s main obligation.

viii Damages and lost profits
As mentioned in Section V, Mexican legislation provides for the possibility of claiming damages and lost profits; however, it does not provide for the concepts of ‘direct’ or ‘indirect’ damages, or ‘punitive’ or ‘exemplary’ damages.

IX CONCLUSIONS
As with most Latin American countries, the Mexican Federal Civil Code is based on the Napoleonic Civil Code, meaning that Mexico follows the civil law system as opposed to the common (case) law system. Therefore, contract formation and interpretation rules, breach of contract claims, defences to enforcement and remedies are mainly codified, similar to the rest of the civil law countries.

However, in addition, the Mexican legal system also has judicial precedents issued by the Mexican Supreme Court of Justice and Federal Circuit Courts, which, together with the codified laws, provide an updated interpretation thereof, strengthening the legal commercial framework and the applicable procedural rules, providing a greater certainty to investors and commercial transactions.

Nevertheless, regarding commercial litigation, Mexico is about to adopt a fully orally driven system that will likely translate into faster and more efficient proceedings. As of 2018, the migration of commercial litigation into such oral system is still a work in progress.

As given throughout this work, Mexico offers a strong legal commercial framework that safeguards the rights of merchants and strengthens commercial relations in the country, making it suitable for both local and foreign investors.
Chapter 18

NEW YORK

Steven M Bierman and John J Kuster

I OVERVIEW

Businesses entering into agreements in the United States require a working knowledge of the fundamentals of contract law, which can be subject to the laws of one or more of the 50 US states. Contract law in New York in particular, however, is especially important for attorneys and their clients to know. Since its founding in the 1600s, New York City is one of the premier centres of economic, financial and commercial activity in the United States, as well as the world. As such, New York has one of the most developed and well-respected comprehensive bodies of commercial and contract law – one that is balanced, stable, predictable and respectful of party autonomy. New York's precedent relating to contracts often is adopted by many other US states, and parties frequently select its laws to govern their contractual relationships. What follows is an overview of the key concepts in New York contract law, starting with how legally binding contracts are formed, how they are interpreted and how parties may establish ground rules for resolving disputes.

II CONTRACT FORMATION

i Basic elements

The elements of an enforceable contract in New York are ‘an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound’. A binding contract exists where ‘there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract’. ‘An offer not given for consideration may be revoked at any time’. The price itself is also considered a key term of the contract. Acceptance must track the offer’s terms and be ‘clear, unambiguous and unequivocal’. An acceptance that is ‘qualified with conditions’ constitutes a rejection. Although silence is

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1 Steven M Bierman and John J Kuster are partners at Sidley Austin LLP. The authors would like to acknowledge the assistance of their colleagues Robert Garsson and Isaac Lara in the preparation of this chapter.
2 Generally, state law governs contract disputes in the United States, even in cases filed in federal court.
not sufficient to indicate acceptance, a counter-offer can be accepted by a party’s conduct. Thus, a party that, upon receiving a counter-offer, begins performing in accordance with that counter-offer, may be found to have demonstrated its intent to accept the terms of that counter-offer. Moreover, where a party has an ‘opportunity and duty to speak, failure to speak may constitute an assent’. Consideration must support all contracts. New York law requires either a benefit to the promisor or a detriment to the promisee, although the consideration does not necessarily have to be provided contemporaneously. Consideration is a benefit and forms the primary reason for a party’s entrance into a contract. At the same time, a mere promise to perform some action can form the basis of consideration. However, the promise by a party to perform some action must entail some kind of detriment to that party. New York courts have found that contracts that offer consideration while also maintaining a way to escape detriment do not qualify as consideration.

A counter-offer can be accepted by a party’s conduct. Thus, a party that, upon receiving a counter-offer, begins performing in accordance with that counter-offer, may be found to have demonstrated its intent to accept the terms of that counter-offer. Moreover, where a party has an ‘opportunity and duty to speak, failure to speak may constitute an assent’.

An option contract ‘is an agreement to hold an offer open’, and grants the optionee the right to purchase or sell at a later date. The party exercising the option must act in the ‘manner specified in the option’. Options, such as a right of first offer and right of first refusal, are enforceable under New York law.

**Oral contracts**

Contracts can be formed orally, but will not be enforced if they violate the statute of frauds. Under New York law, a writing is required for any agreement that ‘[b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime’. However, ‘New York courts generally construe the statute of frauds narrowly’, only voiding oral contracts for which full performance cannot be completed within one year. If an agreement falls under the statute of frauds, the writing

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11. See *Reddy v. Mihos*, 160 A.D.3d 510, 514–15 (1st Dep’t 2018) (quoting *Holt v. Feigenbaum*, 52 N.Y.2d 291, 299 (1981) (‘[C]onsideration for a promise may be ‘either a benefit to the promisor or a detriment to the promisee’.’)); see also N.Y. Gen. Oblig. Law § 5-1105 (‘A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.’).
13. See *CARI, LLC v. 415 Greenwich Fee Owner, LLC*, 91 A.D.3d 583, 583 (1st Dep’t 2012) (termination provision allowing plaintiff to cancel agreement for any reason rendered contracts unenforceable for lack of ‘mutual consideration’).
17. *N.Y. Gen. Obl. Law § 5-701(a).*
must contain the agreement’s material terms, such as the agreement’s duration.\textsuperscript{19} New York law recognises that electronic signatures and emails may constitute a writing sufficient to satisfy the statute of frauds.\textsuperscript{20} New York courts often find that emails form enforceable agreements, provided that the emails include all of the agreements’ essential terms.\textsuperscript{21}

Although New York courts have traditionally accepted promissory estoppel as an alternative contract theory, the Court of Appeals (New York’s highest court) recently limited the theory by invoking the statute of frauds. The Court of Appeals held that, where an agreement would be subject to the statute of frauds, in addition to the elements of promissory estoppel, a plaintiff would also have to show that enforcing the statute of frauds would result in an ‘unconscionable’ injury.\textsuperscript{22} The court clarified that the standard for unconscionability in this context was the same used to declare a contract void.\textsuperscript{23} However, the parties wishing to ensure they have an enforceable agreement should normally reduce their agreement to writing whenever possible.

### iii Modifications

Generally, New York law will enforce written modifications to a contract that are executed by both parties. However, New York law enforces ‘no oral modification’ clauses in contracts more strictly than many other jurisdictions in the United States. New York statutorily mandates that no-oral-modification clauses in contracts must be enforced, and contract terms generally cannot be modified unless the parties’ performance unequivocally demonstrates their assent to the alleged oral modification.\textsuperscript{24} One New York appellate court recently explained that it faced situations wherein ‘one party to a contract wrongly presumes, based on past practice, that an oral modification will be sufficient [to modify the contract]’.\textsuperscript{25} That court held that, for the real estate contract at issue, the seller was entitled to terminate the contract after the buyer missed the closing date, incorrectly relying on an alleged oral modification to adjourn.\textsuperscript{26}

\textsuperscript{20} The reader should note that although many jurisdictions in the United States have adopted the Uniform Electronic Transactions Act (UETA), which validates electronic contracts and records, including electronic signatures, New York has not done so. Naldi v. Grunberg, 80 A.D.3d 1, 9–13 (1st Dep’t 2010).
\textsuperscript{21} Kasowitz, Benson, Torres & Friedman, LLP v. Duane Reade, 98 A.D.3d 403, 405 (1st Dep’t 2012); Naldi v. Grunberg, 80 A.D.3d 1, 6–13 (1st Dep’t 2010); Agosta v. Fast Sys. Corp., 46 Misc. 3d 1217(A), 2015 WL 523344, at *6 (N.Y. Sup. 2015), aff’d, 136 A.D.3d 694 (2d Dep’t 2016).
\textsuperscript{22} Matter of Hennel, 29 N.Y.3d 487, 493 (2017).
\textsuperscript{23} id. at 495.
\textsuperscript{24} Latin Events, LLC v. Doley, 120 A.D.3d 501, 501 (2d Dep’t 2014).
\textsuperscript{25} Nassau Beekman LLC v. Ams/Nassau Realty LLC, 105 A.D.3d 33, 35 (1st Dep’t 2013).
\textsuperscript{26} id. at 39.
IIIIII III CONNRACT INTERPRETATION

Fundamentals of contract interpretation

The threshold question governing contract interpretation is whether a contract is ambiguous. If a contract is found to be clear and unambiguous, New York courts will strictly enforce the contract ‘according to the plain meaning of its terms’. 27 A contract will be considered unambiguous if the language has ‘no reasonable basis for a difference of opinion’. 28 New York’s Court of Appeals has long held that:

[When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. . . . That rule imparts stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses . . . infirmity of memory . . . [and] the fear that the jury will improperly evaluate the extrinsic evidence]. 29

This is commonly referred to as the parol evidence rule.

The question of whether a contract is ambiguous is a legal one for a court to decide. 30 If the contract is ambiguous, a court will consider evidence of what the parties intended the ambiguous provision of the contract to mean. 31 Such evidence may take the form of exchanged drafts of contracts, communications between the parties, common definitions or industry-specific usage of the terms, but generally courts will not consider the subjective intent of a party that was not communicated to the other side before the contract was executed. 32 Generally, New York courts are inclined to stringently apply the parol evidence rule when commercial contracts are negotiated by sophisticated businesspeople. 33

New York courts will follow additional rules to aid in the interpretation of contracts. For example, it is a basic principle of contract interpretation that a court should ‘examine the contract as a whole and interpret its parts with reference to the whole’. 34 Courts must also avoid interpretations that ‘render contract provisions meaningless or superfluous’. 35 Another
canon of construction provides that where ‘there is an inconsistency between a specific provision and a general provision of a contract . . . the specific provision controls’. Parties should consider these kinds of interpretation rules carefully when drafting their agreements.

IV  BREACH OF CONTRACT

Under New York law, a party establishes a breach of contract where it proves the existence of a valid contract, breach by the other party, that the non-breaching party fully performed its obligations and that the non-breaching party sustained damage as a result of the breach. The non-breaching party must demonstrate that the other party committed a material breach of the contract. A breach is material if it deprives ‘the injured party of the benefit it justifiably expected’ under the contract. Conversely, ‘[i]f the party in default has substantially performed, the other party’s performance is not excused.’

Courts will look at several factors to determine whether substantial performance has occurred, including the amount of performance completed, the magnitude of the default, whether the purpose of the contract has been frustrated and whether the non-breaching party has received a substantial benefit of the contract.

In New York, parties to a contract are also bound by the implied duty of good faith and fair dealing. This common law principle is intended to address situations where ‘there is not a breach of contract, but where one party has attempted to undermine the contract or deprive the other of the benefit of the bargain’. Despite the fact that New York generally recognises the covenant of good faith and fair dealing, courts have presented conflicting signals when applying the doctrine to contracts that afford one party sole discretion to take or refrain from taking a particular action. For example, some New York courts have held that the covenant is not violated if a party chooses to exercise its contractual right to ‘terminate the contract ‘in its sole discretion’ and for ‘any reason whatsoever’, while other courts in New York

37 This section discusses neither the sale of goods nor other similar commercial transactions governed by the Uniform Commercial Code, nor does it discuss employment law. This section solely addresses common law contract provisions, and the reader is advised to consult additional sources for information on those topics.
42 id.
45 See Transit Funding Assocs., LLC v. Capital One Equip. Fin. Corp., 149 A.D.3d 23, 29 (1st Dep’t 2017) (‘The covenant of good faith and fair dealing cannot negate express provisions of the agreement, nor is it violated where the contract terms unambiguously afford Capital One the right to exercise its absolute discretion to withhold the necessary approval.’).
have allowed claims to proceed notwithstanding such language. 46 Whether the covenant was allegedly breached, however, often is fact-specific and dependent on the nature of the act that violated it. As a general rule, courts are more likely to find a party breached an express term of an agreement rather than the implied covenant of good faith.

Anticipatory breach or repudiation of a contract is a breach ‘that occurs before performance by the breaching party is due’. 47 An anticipatory breach can be a statement by the repudiating party to the non-repudiating party that the former will breach, or a ‘voluntary affirmative act’ rendering the repudiator unable to perform without breach. 48 The repudiator’s expression of intent not to perform must be ‘positive and unequivocal’. 49 When faced with an anticipatory repudiation, the non-repudiating party may elect to ‘treat the repudiation as an anticipatory breach and seek damages for breach of contract’; or ‘continue to treat the contract as valid and await the designated time for performance before bringing suit’. 50

V DEFENCES TO ENFORCEMENT

There are also a number of defences that may be available to a defendant facing a breach of contract claim. The reader should be cautioned, however, that New York courts are generally reluctant to set aside the terms of a contract that parties have willingly entered. 51 Unfavourable terms or terms that lead to inequitable performances are insufficient bases for courts to rewrite the contract. 52 To avoid enforcement of contractual obligations or defend against a claim of breach, a party in New York generally must demonstrate that the terms were not sufficiently definite or agreed to, unless there is some other defence.

i No enforceable contract was formed

To be enforceable, a contract must contain definite assent and include clear, material terms. New York courts have determined that a mere ‘agreement to agree’ without material terms is unenforceable. 53 However, courts have found enforceable a contract that contemplates a future, more detailed agreement if the material terms of that agreement are set forth, and it can be reasonably inferred from the contract that the parties intended to be bound by it. 54 Courts also will enforce clauses in preliminary agreements such as memoranda of understanding regarding confidentiality and exclusive negotiation periods. 55

49 id.
51 See, e.g., 159 MP Corp. v. Redbridge Bedford, L.L.C., 160 A.D.3d 176, 190 (2d Dep’t 2018).
52 id.
54 See Moshan v. PMB, LLC, 141 A.D.3d 496, 496 (1st Dep’t 2016).
ii  Limitation period unenforceable
The statute of limitations to assert a breach of contract claim in New York is six years. 56  ‘[A] breach of contract cause of action accrues at the time of the breach.’ 57  Parties to a contract may, however, agree to a shorter time period within which a claim must be asserted. 58  Even if sophisticated parties have agreed to terms that are plainly stated in the agreement, New York courts may deem unenforceable a contract with an unreasonable limitation period. 59  However, if the limitations period is clear and unambiguous, is not derived from a contract of adhesion or overreaching and is not unreasonably short, New York courts may enforce the contractual limitation period. 60  By contrast, parties may not agree to extend the statute of limitations period prior to the accrual of a claim, as such contractual provisions are barred by New York’s law and public policy. 61  However, once a claim has accrued, parties may then postpone the limitations period.

iii  Lack of consideration
As explained above, agreements must contain consideration to be enforceable. 62  Though the lack of the presence of consideration may be used as a basis to dispute contract enforcement, the adequacy of the substance of that consideration is generally not reviewable, and New York courts will hold parties to the terms of the contract even where the consideration is heavily disproportionate. 63

iv  Enforcement is contrary to public policy
New York courts will not enforce contracts that are contrary to the public policies of New York. 64  Public policy is to be determined by reference to ‘laws and legal precedents’ rather than ‘general considerations of supposed public interests’. 65  Contracts that are contrary to public policy include contracts allowing a contracting party to benefit from a criminal enterprise 66 or contractual choice-of-law provisions applying foreign laws that are ‘truly obnoxious’. 67

6126014, at *2 (S.D.N.Y. Sept. 30, 2016) (holding that an MOU completed by parties at a mediation was enforceable where parties agreed on material components and the MOU contained a strict confidentiality clause).

56  N.Y. C.P.L.R. § 213.
60  See Batales v. Friedman, 144 A.D.3d 849, 850-51 (2d Dep’t 2016).
64  See Transparent Value, L.L.C. v. Johnson, 93 A.D.3d 599, 600 (1st Dep’t 2012).
65  See Lubov v. Horing & Walden, P.C., 72 A.D.3d 752, 753 (2d Dep’t 2010).
'Further, as a general rule, illegal contracts are unenforceable.' 68 However, New York courts typically endeavour to protect the clear and unambiguous terms of a mutual contract, and the burden to prove that public policy would be violated by the enforcement of a contract is high.69

v Duress

Although New York courts generally enforce contracts with clear terms, it will not do so if those terms were made while one party was under duress. Although duress is often asserted where the defendant is an individual, ‘economic duress’ can also be a viable defence to enforcement of a contract when asserted by businesses as well.70 Economic duress arises when ‘one party has unjustly taken advantage of the economic necessities of another and thereby threatened to do an unlawful injury’.71 However, if a party voluntarily entered into a payment agreement with ‘full knowledge of the facts and in the absence of fraud or mistake of material fact or law’, courts may decline to find duress and instead require enforcement under the voluntary payment doctrine.72

vi Impossibility or impracticality73

‘[I]mpossibility excuses a party’s performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.’74 Generally, the impossibility defence is limited to situations where the means of performance is destroyed, such as through an ‘act of God’, or by law.75

For example, a governmental order preventing a party from performing will typically constitute sufficient grounds for impossibility.76 In addition, in the residential mortgage-backed securities context, New York courts have found that where equitable relief is the only remedy provided for in the contract, a court may award damages where equitable relief is impracticable or impossible.77 However, New York courts have also found that parties cannot avoid enforcement where impossibility arises from ‘financial difficulty or economic hardship’.78

68 See Lanza v. Carbone, 130 A.D.3d 689, 691 (2d Dep’t 2015).
70 See, e.g., DRMAK Realty LLC v. Progressive Credit Union, 133 A.D.3d 401, 404 (1st Dep’t 2015).
71 See VKK Corp. v. Nat’l Football League, 244 F.3d 114, 122 (2d Cir. 2001) (quoting Sci. Holding Co. v. Plessey Inc., 510 F.2d 15, 22 (2d Cir.1974)).
72 See DRMAK Realty LLC v. Progressive Credit Union, 133 A.D.3d 401, 403 (1st Dep’t 2015).
73 The Restatement of Contracts uses the term impracticability to define what courts would have described as impossibility. See Lowenschuss v. Kane, 520 F.2d 255, 265 (2d Cir. 1975) (citing Restatement (First of Contracts § 454 (1932))). Therefore, the two terms are used interchangeably here.
vii  Frustration of purpose

The doctrine of frustration of purpose ‘offers a defence against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract’.79 A New York court may consider the purpose of an agreement to be frustrated where the purpose goes to the core of the contract, and without it the agreement makes little sense.80 Under New York law, a court will not excuse a party from a contract merely because performance has become an economic burden.81 For example, frustration of purpose did not apply to enforcement of a commodity swap contract following a commodity price increase because protections against instability in commodity prices were the very thing that induced the parties to enter into the contract in the first place.82

VI  FRAUD, MISREPRESENTATION AND OTHER CLAIMS

A party to a contract can also attack the enforcement of a contract if it was the product of fraud, such as when one party induced the other to enter into the contract by making material misrepresentations. Generally, fraud must be proved by the party seeking relief by clear and convincing evidence.83

A party invoking fraud as a defence in the execution of a contract must show ‘excusable ignorance’.84 If the party is ignorant because, for example, its executives failed to read the contract prior to agreement and cannot provide a sufficient excuse for why it failed to read that contract, New York courts will likely consider the party bound to the terms that it expressly agreed to in the document.85 However, if the signing of the contract was induced by fraud, it is unenforceable by the party that perpetrated the fraud.86 A fraudulent inducement claim is valid, and enforcement of a contract may be voided under New York contract law if the party can prove: (1) a false representation of a material fact was made with the intent to induce reliance; and (2) the party claiming to have been defrauded reasonably relied on that fact and suffered damage as a result.87

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83  Basis PAC-Rim Opportunity Fund (Master) v. TCW Asset Mgmt. Co., 149 A.D.3d 146, 149 (1st Dep’t 2017).
When determining whether a party reasonably relied on a representation, New York courts may hold sophisticated parties and business entities to a higher standard.\(^88\) However, such parties can sometimes establish justifiable reliance on a misrepresentation if they demonstrate they had no reason to doubt the misrepresentation and reasonable diligence would not have uncovered it.\(^89\) Parties to contracts governed by New York law can also enhance their chances of successfully opposing claims of misrepresentation if the agreements contain specific anti-reliance disclaimers.\(^90\) General merger clauses (which forewarn the existence of any terms outside of the existing contract, all of which are deemed to ‘merge’ into the final contract) or generic statements of no reliance will not be sufficient to do so, however.\(^91\) Further, if the disputed information was not ‘peculiarly’ known by the party allegedly perpetuating the fraud and could have been discovered by ordinary diligence, then New York courts will be disinclined to excuse performance of the contract, which is an exception to the enforcement of a specific anti-reliance disclaimer clause as well.\(^92\) In addition, ‘where a party is merely seeking to enforce its bargain, a [fraud] claim will not lie’.\(^93\) Thus, if a party alleging fraudulent inducement only demonstrates facts that establish a failure to perform, New York courts may find that its fraudulent inducement claim is merely duplicative of its breach claim such that it cannot succeed.\(^94\)

VII DISPUTE RESOLUTION

i Contractual provisions regarding forum selection

Under New York law, forum selection clauses are prima facie valid and ‘[i]t is the policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation.’\(^95\) A party cannot defeat a forum selection clause by resorting to an ‘artful pleading of claims not based on the contract containing the clause if those claims grow out of the contractual relationship, or if the gist of those claims is a breach of that relationship’.\(^96\) A non-party closely related to the contracting parties could also be bound by a forum selection clause.\(^97\)

Courts typically conduct a four-part analysis to determine whether to dismiss a claim based on a forum selection clause: (1) ‘whether the clause was reasonably communicated to the party resisting enforcement’; (2) ‘whether the parties are required to bring any dispute to the designated forum or simply permitted to do so’; (3) ‘whether the claims and parties

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involved in the suit are subject to the forum selection clause'; and (4) ‘whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching’.98

New York law specifically permits parties to designate New York State Courts – including the Commercial Division, a division of the state's courts specialising in commercial litigation matters – to be their selected forum of choice in which to resolve disputes. Section 5-1401 of New York's General Obligations Law (GOL) states that parties to a contract may agree that New York law will govern the contract so long as the transaction involves at least US$250,000.99 Section 5-1402 provides that a contract action may be brought in New York against a foreign individual or corporation if the contract contains a New York choice-of-law clause both parties submit to New York jurisdiction, so long as the transaction involves at least US$1 million.100 In conjunction, these statutes allow parties otherwise lacking New York contacts to select New York law to govern their contract and to litigate in New York courts.101 Additionally, if an agreement falls within GOL Section 5-1402, then a related action will not ordinarily be subject to a forum non conveniens dismissal.102

To bring a case in New York's Commercial Division, a claim must first meet the monetary threshold. For example, in New York County (Manhattan) a claim must be valued at a minimum of US$500,000.103 Once this threshold is reached, the jurisdiction of the Commercial Division includes claims involving securities transactions, business sales, breach of fiduciary duty, breach of contract, trade secrets, shareholder derivative actions, fraud, business torts and other statutory violations involving business dealings.104 Parties can also choose to select an expedited dispute resolution process, where trial will take place within nine months of when the judge first is involved in the case.105

ii Contractual agreements to resolve disputes through alternative dispute resolution

New York law provides that a written agreement to submit a dispute to arbitration is ‘enforceable without regard to the justiciable character of the controversy’ and ‘confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award’.106 New York courts will also enforce obligations to participate in mediation if the parties' agreement so requires, and stay court actions pending arbitration of the dispute.107 Under New York law, a party seeking to compel an unwilling party to arbitrate must show a ‘clear and unequivocal’ agreement to arbitrate.108 In addition, while arbitration provisions are typically severable from an agreement that contains elements otherwise voided by fraud, a court will find an arbitration clause void if

100 id. § 5-1402.
102 Honeywell Intl Inc. v. ARC Energy Servs., Inc., 152 A.D.3d 444, 444 (1st Dep't 2017).
104 id. § 202.70(b).
105 id. § 202.70(g) Rule 9. Court proceedings generally commence in New York courts when a request for judicial information is filed by one of the parties.
106 N.Y. C.P.L.R. § 7501.
107 N.Y. C.P.L.R. § 7503(a); Piller v. Tribeca Dev. Grp. LLC, 156 A.D.3d 1257, 1260 (3d Dep't 2017).
a party can show the fraud ‘was part of a grand scheme that permeated the entire contract’.\textsuperscript{109} Notably, under New York statutory law, a party may seek a court order preventing arbitration if the asserted claim is time barred.\textsuperscript{110} Agreements containing alternative dispute resolution provisions may, however, also be subject to the Federal Arbitration Act, which will pre-empt New York law wherever the two are inconsistent.\textsuperscript{111}

**VIII REMEDIES**

To prevail on a breach of contract claim a plaintiff generally must show damage caused by the breach.\textsuperscript{112} There are several categories of remedies available to a prevailing plaintiff in a breach of contract suit, and parties may also seek post-judgment interest in a breach of contract action.\textsuperscript{113} This section will discuss other remedies for breach of contract, including compensatory, consequential, punitive or exemplary monetary and liquidated damages; indemnification and limitations against indemnity; specific performance; rescission and reformation of contract; and limitations of liability.

i **Compensatory damages**

A non-breaching party generally can seek compensatory damages, which are an attempt to compensate for the injury suffered and make the party whole.\textsuperscript{114} To recover compensatory damages, a plaintiff must show the damages were a direct result of the defendant’s conduct, and also show them with reasonable certainty.\textsuperscript{115}

In addition to direct damages, a non-breaching party may recover consequential damages under New York law. Consequential damages generally are considered indirect, and are intended to compensate the non-breaching party for losses beyond the lost performance that results from the breach.\textsuperscript{116} One common example is lost profits.\textsuperscript{117} In order for a party to recover lost profits, it must demonstrate that the damage was caused by the breach, the loss can be proven with reasonable certainty and damages were contemplated by the parties.\textsuperscript{118} New York courts have classified lost profits as direct damages in instances where they are ‘the direct and immediate fruits of the contract’.\textsuperscript{119}

As an alternative to compensatory damages for a breach of contract, a plaintiff may seek to recover reliance damages. These include costs incurred while performing or preparing for breach of contract.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{109} Ferrarella v. Godt, 131 A.D.3d 563, 566 (2nd Dep't 2015).
\item \textsuperscript{110} N.Y. C.P.L.R. § 7502.
\item \textsuperscript{112} Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep’t 2010).
\item \textsuperscript{113} Post-judgment interest is awarded in breach of contract actions, at a rate of 9 per cent. C.P.L.R. § 5001–5004.
\item \textsuperscript{114} E.J. Brooks Co. v. Cambridge Sec. Seals, 31 N.Y.3d 441, 448 (2018).
\item \textsuperscript{115} id.
\item \textsuperscript{117} See Carco Group, Inc. v. Maconachy, 718 F.3d 72, 82 (2d Cir. 2013).
\item \textsuperscript{118} Uncas Int'l LLC v. Crimzon Rose, Inc., No. 16 CIV. 9610 (JSR), 2017 WL 2839668, at *6 (S.D.N.Y. June 26, 2017).
\item \textsuperscript{119} Biotronik A.G. v. Conor Medsystems Ireland, Ltd., 22 N.Y.3d 799, 806 (2014).
\end{itemize}
to perform, minus any costs the plaintiff would have incurred if the contract were fully performed. Reliance damages ‘seek to restore the injured party to the position she was in before the contract was formed’.  

Parties to a contract are generally permitted to include a liquidated damages clause so long as ‘the clause is neither unconscionable nor contrary to public policy’. An enforceable liquidated damages clause is grounded in the principle of ‘just compensation for loss’; it is an estimate ‘of the extent of the injury that would be sustained as a result of the breach’. A liquidated damages clause will be unenforceable if it functions as a penalty.

ii Punitive damages
Under New York law, punitive or exemplary damages are typically non-recoverable for breach of contract. To state a claim for punitive damages, a plaintiff must show the defendant’s conduct was independently tortious, it was egregious, directed at the plaintiff and part of a scheme directed at the general public. A plaintiff must also show that public rights are involved. Additionally, New York courts do not allow punitive damages to be awarded in arbitration.

iii Indemnification
Parties may include contractual indemnification clauses in their agreements. For example, in the United States, each side generally pays its own attorney’s fees. Some contracts contain indemnification provisions, where the winning side can be awarded attorney’s fees. New York courts are ‘distinctly inhospitable’ to indemnification claims of this sort, and will not award fees unless the language is ‘unmistakably clear’. However, a party may not seek indemnification for its own acts of gross negligence or willful misconduct under New York law.

Even in the absence of an express contractual provision, indemnification may also be implied. Common law indemnity is a form of restitution that prevents one party to a contract from being unjustly enriched. A party seeking common law indemnification must show that he or she and ‘the party from whom indemnity is sought have breached a duty to a third person’, and that a ‘duty to indemnify exists between them’.

iv Specific performance
Specific performance is an equitable remedy where one party seeks that the other perform their end of the contract. Under New York law, a party seeking specific performance must

120 World of Boxing, LLC v. King, 634 F. App’x 1, 3 (2d Cir. 2015).
121 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass’n, Inc., 24 N.Y.3d 528, 536 (2014)
125 Cadillac Res., Inc. v. DHL Exp. (USA), Inc., 84 A.D.3d 697, 699 (1st Dep’t 2011).
130 id.
show that it ‘substantially performed its contractual obligations and was ready, willing and able to perform its remaining obligations’. In order to obtain this remedy, a party generally must also show that its remedies at law (i.e., money damages) are inadequate.

A court may also enforce a contract by awarding injunctive relief. A party may seek a preliminary injunction where there would be a likelihood of irreparable harm without an injunction, as well as a likelihood of success. The injury must be ‘neither remote nor speculative, but actual and imminent’. Under New York law, injury to reputation or loss of goodwill can establish irreparable harm.

v  Recission and reformation

If a contract is induced by fraud, then rescission is an appropriate remedy. Recission prevents the party who perpetrated the fraud from enforcing the contract. Under New York law, an intentional misrepresentation is not required for rescission, and an ‘innocent misrepresentation’ is typically sufficient.

Reformation can be used to restate the terms of a contract in a way the parties originally intended. In New York, contracts are strictly construed against reformation. In order to base reformation of a contract on a claim of mistake, there must be ‘either mutual mistake or mistake on one side induced by fraud on the other’.

vi  Limitations of liability

New York courts will generally uphold liability-limitation provisions, and this is particularly true where they are negotiated between sophisticated parties. Courts typically honour these provisions because they ‘represent[] the parties’ Agreement on the allocation of the risk of economic loss’. New York courts will generally enforce clauses excluding particular types of damages, such as punitive damages and consequential damages. As New York courts are inclined to enforce contracts with clear, agreed-upon terms, they will let parties ‘lie on the bed they made’, even if liability provisions may result in unfavourable results.
Limited-liability clauses may be unenforceable if they allow for intentional wrongdoing, such as fraud.\textsuperscript{146} However, courts have declined to void a limitation of liability provision where the defendant acted in its legitimate economic self-interest, and there was no evidence of fraud or other bad acts in negotiating the agreement.\textsuperscript{147}

IX CONCLUSIONS

As the foregoing discussion shows, New York law offers commercial parties a sophisticated and highly developed body of commercial law, which is often more robust and settled than other jurisdictions in the United States and other legal systems throughout the world. In multi-jurisdictional transactions, New York law can also provide uniformity and make the outcome of disputes more predictable, precisely because it recognises the sanctity of clear contractual terms that reflect the bargain made between commercial entities, unless there truly are valid reasons not to do so. For example, New York relies not just on case law, but has adopted statutes to assure that parties are entitled to rely on their clear, written agreements, which will not be subject to oral modifications, barring exceptional circumstances. Further, New York courts routinely enforce properly drafted anti-reliance disclaimers. For these reasons, parties can expect courts in New York to continue to apply a jurisprudence that ensures New York contract law's stability and consistency remains intact – a state of affairs that is not always the case in other jurisdictions in the United States.

New York courts continue to provide new and flexible ways for litigants to resolve disputes, such that practitioners should consider including clauses in their agreements selecting courts in New York's Commercial Division as their forum for resolving all disputes. The Commercial Division allows parties to opt in to expedited procedures if desirable, and ensure that judges with the requisite experience in commercial litigation will preside over their cases. Indeed, New York invites foreign parties to use its courts as a forum to resolve significant disputes when they designate New York courts and New York law to govern their agreements. In the end, parties are well served to adopt New York law to govern their commercial agreements and rely on New York courts to resolve their disputes.

\textsuperscript{146} id. at 580–81.
\textsuperscript{147} id. at 581.
Chapter 19

PORTUGAL

Fernando Aguilar de Carvalho and Daniel Bento Alves

I OVERVIEW

Commercial contracts are undoubtedly an essential instrument for business transactions. In fact, contrary to what some authors predicted in the mid-twentieth century, the ‘demise of contracts’ is a long way away. Commercial contracts are currently the most relevant tool to create, organise and carry out business. In Portugal, on the one hand, commercial contracts are used to incorporate and organise companies and to set up commercial ties and, on the other, to organise business in terms of production, distribution and arbitrage of goods and services in the market.

In Portugal, commercial contracts are thus clearly recognised as a key instrument for business. Under Portuguese law, commercial contracts have their own category and are distinct from purely civil contracts (e.g., a standard sale and purchase contract for a house) and thus are subject to a specific legal regime (joint liability, statutory limitation periods, etc.). According to Portuguese law, the distinction between commercial and purely civil contracts is traditionally based on the criteria set out in the Portuguese Commercial Code, which was enacted in 1833. These traditional criteria were based on the concepts of:

\[ a \] an objective act of commerce; and
\[ b \] a subjective act of commerce.

However, these longstanding criteria are now being replaced by the concept of the company as the cornerstone to identify the commercial nature of any given contract.

Portuguese law regulates commercial contracts using the Portuguese Commercial Code and other specific laws. In fact, over the past 30 years, the number of laws providing legal regimes for specific contracts has grown significantly, for example:

\[ a \] agency contracts: Decree-Law 178/86 of 3 July;
\[ b \] joint ventures: Decree-Law 231/81 of 28 July;
\[ c \] real estate mediation contracts: Law No. 15/2013;
\[ d \] lease agreements: Decree-Law 149/95 of 24 June;
\[ e \] securitisation: Decree-Law 453/99; and
\[ f \] factoring: Decree-Law 171/95).

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This legislative activity has been intensified by European acts, in particular:


b. contracts negotiated away from business premises: Directive 85/577/EC of 20 December;

c. consumer credit: Directive 90/88/EC of 22 February;

d. unfair terms in consumer contracts: Directive 93/13/EC of 5 April; and


Besides specifically regulated commercial contracts, Portuguese law also recognises the principle of autonomy as a fundamental cornerstone of the Portuguese legal system. This principle allows parties to agree and create commercial contracts, even if they are not specifically regulated by law. Based on this principle, business activity in Portugal is prone to creating new types of commercial contracts and importing models from abroad, in particular from common law systems.

The Portuguese legislator has been trying to adapt the Portuguese legal system to the continuous technological developments of the information society in terms of commercial contracting. For example, Portugal has a specific legal framework regarding electronic commerce (Decree-Law 7/2004 of 7 January), which is the result of the transposition of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000.

The Portuguese legal system also provides different dispute resolution methods for commercial contract-related claims: from mediation and arbitration (ad hoc or institutional) to the specific expeditious procedure to collect commercial debts arising from commercial contracts (Decree-Law 269/98).

To sum up, Portugal recognises the importance of commercial contracts for business. It is constantly trying to adapt to the demands of the information society and offers several dispute resolution methods to bring and defend commercial contract-related claims.

II CONTRACT FORMATION

The Portuguese legal system comprises several different methods of establishing or forming commercial contracts, which both Portuguese scholars and courts recognise. The basic rules for establishing commercial contracts in Portugal are as follows.

First, the general rule under Portuguese commercial law is that commercial contracts can be entered into informally – no writing or other form is required. However, several specific Portuguese laws currently impose formal requirements on specific commercial contracts (e.g., bank contracts and lease agreements). The number of specific laws imposing written form in commercial contracts is so high that many Portuguese scholars claim that there has been a clear return to formality in commercial law. Regardless of the legal requirements in terms of form, the trend in Portugal, in particular regarding commercial contracts between high-level companies, is to voluntarily use the written form. The Portuguese legal system has also adapted formality requirements for e-commerce (Decree-Law 290-D/99 of 2 August and Decree-Law 7/2004 of 7 January).

Second, under Portuguese law, and as a general rule, commercial contracts can be drafted in any language, regardless of the nationality of the contracting parties (except for specific contracts such as insurance contracts or consumer contracts).
Third, as in many other jurisdictions, commercial contract formation in Portugal is frequently preceded by a period of intense preparation, discussion and negotiation between the contracting parties. In this period – commonly called the pre-contractual stage – the contracting parties usually enter into pre-contractual agreements.

Conversely, there are pre-contractual agreements that simply oblige the parties to make their best efforts to reach an agreement. However, the parties are entitled to not execute the contract. Examples of these agreements are: letters of intent, memoranda of understanding, agreements in principle, heads of terms, etc. In spite of the right to not execute the contract, these agreements can give rise to pre-contractual liability (Article 227 of the Portuguese Civil Code) if one of the parties breaches its obligation to make its best efforts to reach an agreement (e.g., by unjustifiably and unreasonably ending the negotiations). In this case, the non-breaching party can claim compensation.

Moreover, some pre-contractual agreements are binding and create obligations for the parties, such as promissory agreements, pre-emption agreements, option contracts and side agreements (e.g., confidentiality agreements, lock-out agreements and standstill agreements).

Fourth, during the pre-contractual stage, parties are, in general, subject to information duties, particularly in banking, consumer, insurance and financial intermediation contracts (for example, in intermediation contracts the financial intermediary must provide all the necessary information for a clear and justified decision to be made – Article 312 of the Portuguese Securities Code).

Fifth, after this pre-contractual stage, commercial contracts are formed. Traditionally, a commercial contract was formed through the traditional approach of offer and acceptance. However, in general, commercial contract formation in Portugal does not currently follow that traditional approach. In fact, there are several approaches, such as joint contracting (similar offers from the contracting parties that are inserted in a single document executed by both parties) or factual bargain (a contract that is formed exclusively based on the behaviour of the parties).

Sixth, in Portugal, commercial contract formation currently also includes mass contracting and other modern forms of contracting, such as distance contracts (Decree-Law 78/2018 of 15 October based on Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015); e-commerce (Decree-Law 290-D/99 based on Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999); automatic contracting (e.g., vending machines) and self-contracting (markets, etc.).

Seventh, under Portuguese law, a fundamental rule to contract formation is that silence cannot be considered, in general, as acceptance. However, in certain areas of commercial contracts, silence can be considered acceptance (e.g., in relation to confirmation letters). Silence should not be confused with acceptance by conduct, that is, when the conduct of the parties indicates acceptance and a clear intention to be bound by the contract. In fact, although silence has no value, a particular conduct (for example, acts towards executing a commercial contract) may be deemed equivalent to tacit acceptance. This also applies under Portuguese law.

Eighth, under Portuguese law, proof of commercial contract formation can be based, in principle, on any means of evidence, except when the law requires a specific form for a particular commercial contract. Therefore, as explained above, according to Portuguese law, a commercial contract can be executed verbally.

Ninth, in general, once created, commercial contracts cannot be modified unless the parties so agree. However, Portuguese law grants the parties the right to request the court to
modify or terminate a commercial contract in the event of an atypical change of circumstances (Articles 437 to 439 of the Portuguese Civil Code). This legal mechanism is, however, very demanding and strict. Therefore, it is not uncommon for parties to commercial contracts to include force majeure clauses and hardship clauses.

Finally, the trend in Portugal is to consider that, if a company’s business is transferred, the commercial contracts regarding said company’s business are automatically assigned to the new owner of the company’s business and the consent of the other parties to the contracts is not required.

III CONTRACT INTERPRETATION

In Portugal, choice of law principles are, hypothetically, determined by Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). According to Rome I and, as a general rule, parties are free to choose the applicable law. The law that the parties choose will govern the contract unless the right to choose the law is limited or restricted by other provisions of Rome I (e.g., Article 3 (3)). If the parties do not agree on the applicable law, the rules of Rome I will apply to determine the applicable law.

Should Portuguese law apply to a commercial contract, Portuguese rules on interpretation will also apply. According to Portuguese law, the fundamentals of contract interpretation are as follows.

In general, if the true will of the parties is known, the meaning of the contract is valid in accordance with such true will (Article 236(2) of the Portuguese Civil Code), regardless of how the parties express such will. In principle, a party can resort to any type of evidence to prove the true will of the parties (i.e., documentary evidence or witness evidence).

However, if the true will of the parties is unknown or cannot be established, then a contract has to be interpreted according to the meaning that a normal party, under the same set of circumstances, would hypothetically give to it (Article 236(1) of the Portuguese Civil Code). This standard of interpretation relies on several elements, such as:

a. the literal element (the wording of the contract);

b. the historical element (namely, pre-contractual negotiations);

c. the contextual element (the contract as a whole);

d. the purposive element (the purpose and nature of the contract); and

e. the behavioural element (the conduct of the contracting parties).

In other words, the interpreter – the courts – will rely and consider all these elements when establishing the meaning of a contract or contractual clause.

With regard to formal commercial contracts (i.e., those in written form), the purpose or intention of the contracting party must be stated in the contract with a minimum correspondence, even if in a deficient, rudimentary or imperfect way (Article 238 of the Portuguese Civil Code). This is known as the minimum correspondence test. For example, a lease agreement is subject to this interpretative standard because it constitutes a formal agreement (Article 3 of Decree-Law 149/95). However, even in formal contracts, the real intent of the parties can prevail if the grounds determining the form of the agreement do not hinder the prevalence of such a meaning (Paragraph 2 of Article 238 of the Portuguese Civil Code).
Under Article 237 of the Portuguese Civil Code, if the meaning of a commercial contract is ambiguous or dubious, it must be interpreted in a way that guarantees an adequate balance between the parties’ mutual obligations. However, there are specific rules for interpreting adhesion contracts. In fact, in the event of ambiguous general contractual terms, the prevailing meaning is that which is more favourable to the party adhering to the contract (Article 11 of Decree-Law 446/85 of 25 October).

It is not unusual for parties to commercial contracts to include a merger clause. However, under Portuguese law, this type of clause does not automatically render prior statements or agreements irrelevant and thus they may still be used as a means of interpreting the contract.

Finally, if something is not expressly regulated in the commercial contract and no special provision applies, this gap must be filled in accordance with the hypothetical intention of the parties had they foreseen such gap or according to good faith principles (Article 239 of the Portuguese Civil Code).

IV DISPUTE RESOLUTION

In Portugal, there are no specialised commercial courts with authority to adjudicate disputes related to commercial contracts. Hence, disputes regarding commercial contracts are, in principle, heard by regular civil courts.

Although there are some specialised courts in Portugal such as the chamber of commerce, the competition court and the intellectual property court, none of them have, in principle, jurisdiction to hear disputes regarding commercial contracts, except for the inexistence or nullity of memoranda of association. The competition court, in principle, only has jurisdiction to hear appeals regarding decisions by the Bank of Portugal or the Portuguese Competition Authority. The intellectual property court has jurisdiction to hear disputes related to industrial and intellectual property.

Court fees related to judicial proceedings are calculated on the basis of the value under dispute. For disputes exceeding €275,000, the parties also have to pay additional court fees, which are calculated as a percentage over the amount of the dispute exceeding the €275,000 threshold and can be very significant (for example, in a dispute of €275,000, each party will have to pay court fees in the amount of €1,632. However, if the amount in dispute adds up to €20 million, each party will have to pay €241,434 regarding court fees). The party that obtains a favourable verdict will be reimbursed for the court fees it has paid at the expense of the other party, plus 50 per cent of their legal fees, but must file an application for that purpose at the end of the proceedings.

In Portugal, there is no specific threshold to litigate commercial contract disputes in court. However, the amount in dispute is relevant to determine, on the one hand, which regular civil court has jurisdiction to hear the dispute, and on the other, whether the party has the right to appeal. In fact, parties only have the right to challenge a decision before the appeal court if the amount in dispute exceeds €5,000. The amount in dispute must exceed €30,000 to be eligible to appeal to the Portuguese Supreme Court.

Disputes regarding commercial contracts involving €2,500 or less will be heard by specific courts called Julgados de Paz. These courts were created to encourage parties (whether or not represented by a lawyer) to actively participate in the procedure and settle their disputes.

Portugal also has a special commercial debt collection procedure called *injunção* (regulated by Decree-Law 269/98 of 1 September). This procedure was designed to claim monetary debts arising from commercial contracts and starts with the claimant filing a
standard form (claiming the debt), followed by the debtor being summoned. If the debtor does not settle the debt or files an opposition brief within 15 days, the claimant is granted an enforcement title. If the debtor files an opposition brief, this procedure develops into ordinary proceedings.

In Portugal, parties to a commercial agreement can, in principle, agree on a provision granting jurisdiction to a specific court to hear any dispute related to the agreement. The validity of the provision is scrutinised in accordance with Article 95 of the Portuguese Civil Procedure Code.

However, alternative dispute resolution methods are clearly on the rise in Portugal – in particular, arbitration (either ad hoc or institutional). In fact, the Portuguese Constitution allows for the creation of arbitral tribunals as an alternative dispute resolution method. Currently, arbitration in Portugal is regulated by Law 63/2011 of 14 December, which follows, in general, the UNCITRAL Model Law on International Arbitration.

In practice, the current trend in Portugal is for commercial contracts between medium-to-large companies to contain an arbitration clause. Parties generally opt for institutional arbitration. A well-known arbitral institution in Portugal is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry. In commercial contracts with foreign investors, it is standard practice to appoint an international arbitral institution (e.g., the International Chamber of Commerce or the London Court of International Arbitration).

Finally, recourse to mediation is also being encouraged in Portugal to solve disputes related to commercial contracts (Law 29/2013 of 19 April). However, in our experience, mediation in Portugal still requires further development.

V BREACH OF CONTRACT CLAIMS

Under Portuguese law, standards of performance require, in general, that a party to a contract performs exactly what he or she undertook to do (point by point of the contract). This standard of performance is called princípio da pontualidade in Portugal. Besides this standard of performance, Portuguese law also requires that the parties to a contract, when fulfilling their contractual obligations, comply with good faith principles.

Commercial contracts are subject to this general standard of performance with some other specific features. One of these specific features is the principle of conformity. In fact, inspired by Article 35 of the United Nations Convention on Contracts for the International Sale of Goods, Portuguese scholars understand that goods delivered pursuant to a commercial contract must meet the quantities, quality and other features established in the contract. Based on this principle of conformity, Portuguese scholars also believe that the classic model of commercial contracts based on caveat emptor (i.e., the buyer alone is responsible for checking the quality and suitability of goods before a purchase is made) has evolved into a caveat venditor model (i.e., the seller is responsible for checking that the quality and suitability of goods meets the standards set out in the agreement). This evolution is especially evident in consumer contracts (Decree-Law 67/2003).

Based on the above-mentioned demanding standard of performance, there are three main forms of breach of commercial contracts:

a. non-compliance;
b. delayed performance; and
c. defective or improper performance.
Any of these breaches may – under certain circumstances – entitle the creditor to terminate the contract or claim compensation for damage.

For the non-breaching party to claim compensation for breach of contract it must prove that the following legal requirements are met:

\[ \begin{align*}
    a & \quad \text{that the breach of contract was intentional;} \\
    b & \quad \text{that the debtor was at fault;} \\
    c & \quad \text{that there was actual damage or loss; and} \\
    d & \quad \text{that there is a causal link between the (illicit and intentional) act and the loss or damage suffered by the creditor.}
\end{align*} \]

In relation to contractual liability, the defaulting party’s culpability is presumed. However, the defaulting party may rebut this presumption. The loss suffered by the non-breaching party includes both actual loss and loss of profits.

Although Portuguese law includes a rebuttal presumption in terms of culpability, the party claiming compensation has the burden of proving the existence of a breach of contract, the loss or damages and the causal link between the act and the loss or damage suffered by the creditor. All means of evidence are valid to this end. In practical terms, the most common evidentiary issue is proving the existence of loss or harm.

Under Portuguese law, if the non-defaulting party terminates the commercial contract, how compensation is to be calculated is a contested issue. The traditional view is that compensation should restore the non-breaching party to its position before the commercial contract was executed. However, the current view is that compensation should be calculated in such a way that the non-breaching party is put in the position he or she would have been in had the commercial contract been properly fulfilled. The difference between both approaches is quite substantial. Portuguese courts tend to favour the traditional approach, although relevant contemporary scholars prefer the new approach.

VI DEFENCES TO ENFORCEMENT

Parties generally present several defences to avoid the enforcement of contractual obligations or challenge claims for breach of contract.

One of the most common defence mechanisms is to argue that, based on the facts, there was no breach of contract. This is a purely factual argument that is common in Portuguese litigation.

Parties to a commercial contract usually also allege liability exemption for breach (Article 428 of the Portuguese Civil Code) as a means of defence. In fact, a party to a contract may, owing to the other party’s breach, be entitled to consider himself or herself released from all liability to perform his or her own obligations. For instance, in supply agreements, it is common for parties to raise this defence to claim that they are not obligated to pay for the goods because they are defective.

With regard to debts arising from commercial contracts, it is common for parties to resort to compensation as a means of defence in order to settle – or, at least, reduce – the debt (Article 847 of the Portuguese Civil Code).

In addition, parties to commercial contracts may also claim that the performance of their contractual obligations is impossible in order to be released from having to fulfil
them (Article 790 of the Portuguese Civil Code). However, this impossibility should not be mistaken as the debtor’s difficulty to comply with its contractual obligation. In this case, the debtor is not released from its obligations.

It is also common for parties to allege a lack of required legal form to claim that the commercial contract is unenforceable. However, upon checking certain requirements, Portuguese courts tend to consider that raising this argument constitutes an abuse of law.

Under certain circumstances, parties may also argue the existence of an unusual change in circumstances to require the court to modify or terminate the commercial contract and, therefore, release them from their contractual obligations (Article 437 of the Portuguese Civil Code).

In Portugal, it is not unusual for parties to include limitations of liability in commercial contracts. If such a clause is included, the liable party will certainly use this clause as a secondary defence mechanism. However, under Portuguese law, limitations of liability (exclusion or reduction) are only valid in cases of minor negligence.

Finally, it is not uncommon for parties to argue that the commercial contract breaches public policy, and thus that it should be declared null (Article 281 of the Portuguese Civil Code). The concept of public policy is obviously wide and, in general, Portuguese courts tend to be strict when applying it.

VII  FRAUD, MISREPRESENTATION AND OTHER CLAIMS

In Portugal, parties to commercial contracts usually file business tort claims to avoid their enforcement; that is, as a type of defence mechanism.

In such circumstances the parties claim the existence of fraud when the contract was negotiated and request that it be declared null (Article 253 of the Portuguese Civil Code). Under Portuguese law, fraud constitutes any deliberate misrepresentation of the truth or the concealment of a material fact to induce another to act to his or her detriment. Fraud claims are subject to a limitation period of one year as from the moment the party first became aware of the fraud. However, under Portuguese law, some commercial cunning is often not considered to be unlawful.

The parties may also allege the existence of a factual error to claim the nullity of a commercial contract (Article 252 of the Portuguese Civil Code). A factual error is an inaccurate fact that is material to a specific transaction. As in the event of fraud, claiming the existence of a factual error is subject to a limitation period of one year as from the moment the party became aware of the error.

The parties may also claim the existence of an error in a contractual statement, that is, a divergence between the contractual statement and the true will of a party (Article 247 of the Portuguese Civil Code). However, under Portuguese law, this misrepresentation is only relevant if the other party is aware or should have been aware of the essential nature of the element regarding which the party made an error. This figure is also subject to a limitation period of one year as from the moment the party became aware of the error.

Parties may also allege that the agreement is an absolute simulated contract and request that it be declared null (Article 240 of the Portuguese Civil Code). An agreement is considered simulated when two parties agree to execute an agreement that does not reflect their true intent with the purpose of deceiving a third party. However, simulated contracts may not be relied upon against good faith third parties (Article 243 of the Portuguese Civil Code).
Within the scope of a commercial sale and purchase contract regarding a specific object (not related to consumers), the parties are also entitled to request the annulment of the contract if it is defective. However, to this end, the party must inform the seller of the defect within 30 days of becoming aware of it and within six months of receiving the object. The claim to annul the contract must be filed within six months following notification of the defect (Article 917 of the Portuguese Civil Code). The specific legal framework regarding the sale and purchase of defective products is often considered to apply to the sale and purchase of businesses (and even to the sale and purchase of the share capital of companies). In this context, it is not unusual for parties to include anti-sandbagging clauses in contracts to ensure that the buyer cannot bring a legal action against the seller in the event of a breach of warranty of which the buyer was aware before closing.

Finally, with regard to fraud and misrepresentation, the injured party may also claim compensation for damages.

VIII REMEDIES

In the event of a breach of a commercial contract, the Portuguese legal system grants several remedies to the non-breaching party.

It may, in principle, file declarative proceedings and request specific performance in order to compel the breaching party to actually perform a contractual obligation (Article 817 of the Portuguese Civil Code). If the declarative proceedings are successful, the creditor can then file enforcement proceedings against the debtor if the latter does not voluntarily comply with the judicial decision.

The non-breaching party may also claim economic compensation for damages from the breaching party (including loss of profits) resulting from the breach of contract. However, in Portugal, damages are not punitive but compensatory.

The non-breaching party may also terminate the commercial contract in the event of a breach. However, under Portuguese law, termination is only lawful if the non-performance of the contract is serious and definitive (mere delayed performance (mora) does not, in principle, grant the right to terminate).

In the event of delayed performance, the non-breaching party will only be able to terminate the contract if it is no longer interested in the contract being performed or if it has given the defaulting party a fair warning to cure the default.

In the event of termination, the non-breaching party can claim economic compensation for damage. However, as mentioned, how compensation is calculated is a contested issue in Portugal.

Finally, non-breaching parties may also resort to interim measures – which are urgent judicial proceedings in Portugal – in order to safeguard their interests while the main proceedings are ongoing (for example, to seize the debtor’s assets).

IX CONCLUSIONS

Portugal clearly recognises the importance of commercial contracts for business. Influenced by EU legislation, the Portuguese legal system and practice in terms of commercial contracts has been constantly adapting to the new forms of contract formation (mass contracting, e-commerce, etc.).
There is clearly a trend in the standard of performance of commercial contracts from the principle of *caveat emptor* towards the principle of *caveat venditor*. This trend is especially evident in Portuguese consumer contracts law.

As regards how compensation for damage is calculated in the event of termination of the commercial contract, this is still a contested issue in Portugal. A relevant portion of contemporary scholars (but not case law) favour a calculation method under which the aggrieved party is put in the position he or she would have been in had the contract been performed in full. This new trend may influence case law in the coming years.

Finally, in terms of litigation involving commercial contracts, owing to the delay and uncertainty surrounding litigation in the civil courts, the general trend in Portugal is to resort to arbitration to solve disputes, in particular regarding agreements between medium-to-large companies (including foreign investors). We believe that this trend will become more prevalent in Portugal in the near future.
I OVERVIEW

Contract and commercial law in Singapore is, to a large extent, based on the common law of England and Wales, although there are divergences in discrete aspects as the Singapore courts continue to develop their jurisprudence.

Given the general familiarity of commercial parties with the English common law, Singapore law is increasingly chosen as the governing law for contracts between Asian parties, in conjunction with the promotion of Singapore as a neutral and efficient forum for dispute resolution in the region. The caseload of the Singapore International Arbitration Centre continues to grow. The Singapore International Commercial Court, with a bench of international judges with experience and expertise in both common law and civil law jurisdictions, offers an alternative court-based mechanism for international and commercial disputes. The Singapore High Court is itself a fast and efficient means of dispute resolution, with the courts actively managing cases through a clear procedural framework governing each aspect of the process and regular pre-trial hearings.

The Singapore courts often emphasise the need for contract law jurisprudence to be practical and address the needs of business and commerce. The courts therefore strive to develop the law on the basis of sound and consistent principles that will enhance certainty and the enforceability of contracts. The overarching objective of contract law, as seen in recent developments on the law of contract interpretation and implied terms, is to give effect to the parties’ objective intentions in a commercial manner. This gives primacy to party autonomy – and the right of businessmen to structure their dealings as they wish.

Apart from contract law, the law of economic torts has also been developed in a number of recent judgments from the Court of Appeal. As business structuring gets more complex, such causes of actions are increasingly used against third parties.

II CONTRACT FORMATION

A contract is formed where there is:

a valid offer and acceptance;

b consideration;

c intention to create legal relations; and

d certainty of terms and completeness of agreement.

Contracts may be made in writing, orally, or by conduct.
Offer and acceptance

An offer is 'an expression of willingness to contract made with the intention (actual or apparent) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed'. The intention of the offeror to be bound, upon the offeree’s acceptance, is to be objectively ascertained. An offer is to be contrasted with an ‘invitation to treat’, which is ‘an attempt to initiate negotiations, to induce offers’. An ‘invitation to treat’ includes advertisements, priced goods on display and invitations to tender.

An offer may be retracted if it has not been accepted. This may be done, amongst others, by the offeror’s express revocation, the offeree’s rejection (which includes an offeree’s counter-offer), and lapse of time.

An acceptance is a ‘final and unqualified expression of assent to the terms of an offer’ that must be communicated to the offeror. There must be exact correspondence between the terms of the offer and the terms of acceptance for the acceptance to be effective.

The Electronic Transactions Act (Cap 88) provides that offer and acceptance may be expressed by means of electronic communications.

Consideration

Unless executed as a deed, a contract must be supported by consideration to be binding. Consideration is ‘something of value’ which is requested for by the promisor and is given by the promisee in exchange for the promisor’s promise. It need not be adequate or proportionate, but it must be legally sufficient.

In general, past consideration is not valid consideration, unless there is in effect a single contemporaneous transaction where the act said to constitute the consideration was done at the promisor’s request on the understanding that the past act was to be remunerated.

A controversial issue that often arises is whether performance of a pre-existing contractual obligation is sufficient consideration. The English Court of Appeal in Williams v. Roffey Bros & Nicholls (Contractors) Ltd held that a promisor’s obtaining of a practical benefit or avoidance of a practical disbenefit from the promisee’s performance of a pre-existing contractual obligation owed to the promisor constituted good consideration for a promise to pay more for contracted-for performance. This approach was ostensibly applied by the Singapore Court of Appeal in Sea-Land Service Inc v. Cheong Fook Chee Vincent. However, the question of whether a promisee’s performance of a pre-existing contractual obligation owed to the promisor constitutes good consideration in support of the promisor’s promise to accept less is still an open one under Singapore law.

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3 Gay Choon Ing v. Loh Sze Ti Terence Peter [2009] 2 SLR(R) 332 (SGCA) at [48].
6 Stuttgart Auto Pte Ltd v. Ng Show Yong [2005] 1 SLR(R) 92 (SGHC).
7 Section 11(1) of the Electronic Transactions Act (Cap 88).
9 Gay Choon Ing v. Loh Sze Ti Terence Peter [2009] 2 SLR(R) 332 (SGCA) at [83].
iii  **Intention to create legal relations**

Parties must have objectively intended the contract to have legal effect. It is generally presumed that parties in social and domestic arrangements do not intend to create legal relations. Conversely, where parties are in business and commercial arrangements, it is presumed that they intend to create legal relations.

iv  **Certainty of terms and completeness of agreement**

For a contract to be valid and enforceable, there must be certainty as to the material terms of a contract, and the contract must be complete. Parties may, however, conclude a binding contract even if there are terms yet to be agreed, if they have demonstrated that they still intend to be bound despite the remaining unsettled terms.¹²

v  **Form**

Although contracts may be made orally, there are statutory rules which govern the form of specific categories of contracts. For example, a contract for the sale of immovable property is unenforceable unless it is evidenced in signed writing.¹³

vi  **Third party beneficiaries**

The Contract (Right of Third Parties) Act (Cap 53B) confers on a third party to a contract (entered into on or after 1 January 2002) a statutory right to enforce a term in the contract where:

- the contract expressly provides that he may do so; or
- the term purports to confer a benefit on him and a proper construction of the contract does not show that this is contrary to the intention of the parties to the contract.¹⁴

The third party must be expressly identified by name, class or description.¹⁵

vii  **Alternative methods of establishing commercial rights and obligations**

Where there is no enforceable contract between parties, depending on the facts, parties to the purported contract may still be able to assert their rights against the other.

viii  **Unjust enrichment**

A claim may be successfully brought in unjust enrichment where:

- the defendant has been enriched or benefited;
- the enrichment was at the expense of the claimant;
- one of the unjust factors is established; and
- there is no defence available.¹⁶

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¹² *Rudhra Minerals Pte Ltd v. MRI Trading* [2013] 4 SLR 1023 (SGHC) at [27].
¹³ Section 6(d) of the Civil Law Act (Cap 43).
¹⁴ Section 2(1) and (2) of the Contracts (Rights of Third Parties) Act (Cap 53B).
¹⁵ Section 2(3) of the Contracts (Rights of Third Parties) Act (Cap 53B).
¹⁶ *Wee Chiaow Sek Anna v. Ng Li-Ann Genevieve* (sole executrix of the estate of Ng Hock Seng, deceased) [2013] 3 SLR 801 (SGCA) at [98].
An example of when a claim in unjust enrichment may be brought is where a party has delivered goods or performed a service pursuant to an unenforceable contract.

**ix Promissory estoppel**
The court may also give effect to a non-contractual promise by relying on the doctrine of promissory estoppel where there is:

- **a** a clear and unequivocal promise by the promisor as to his or her future conduct, whether by words or conduct;
- **b** reliance on the promise by the promisee; and
- **c** detriment suffered by the promisee as a result of the reliance. ¹⁷

This doctrine cannot, however, be used as an independent cause of action.

**III CONTRACT INTERPRETATION**
The principles of contractual interpretation in Singapore are well-established. These principles were summarised by the Court of Appeal in *PT Bayan Resources TBK and another v. BCBC Singapore Pte Ltd* ¹⁸ as follows:

- **a** The starting point is to look at the text of the contract.
- **b** The court may have regard to the relevant context if it is clear, obvious and known to both parties.

Examples of the relevant context include the entirety of the contract and the entirety of the commercial documents entered into as part of the transaction which is the subject matter of the contract.

Generally, the meaning ascribed to the contractual terms must be one that the expressions used by the parties can reasonably bear.

**i Admissibility of extrinsic evidence**
The admissibility of evidence in Singapore is governed by the Evidence Act (Cap 97). In particular, Section 94 of the Evidence Act provides that, where the terms of a contract are reduced to a written document, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms. This is subject to a general exception in Section 94(f), which the Singapore courts have construed as allowing extrinsic evidence of the surrounding circumstances in aid of contractual interpretation, even in the absence of ambiguity. ¹⁹

However, the admission of extrinsic evidence is subject to a number of restrictions including the nature, particulars, and effect of the extrinsic evidence sought to be relied on must be pleaded with specificity. ²⁰

¹⁷ *Cupid Jewels Pte Ltd v. Orchard Central Pte Ltd* [2014] 2 SLR 156 (SGCA) at [35].
¹⁸ *PT Bayan Resources TBK and another v. BCBC Singapore Pte Ltd* [2019] 1 SLR 30 (SGCA) at [120].
¹⁹ *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 (SGCA) at [114]; *Yap Son On v. Ding Pei Zhen* [2017] 1 SLR 219 (SGCA) at [42].
²⁰ *Sembcorp Marine Ltd v. PPL Holdings* [2013] 4 SLR 193 (SGCA) at [73].
There is a general bar against the admissibility of evidence on the subjective intentions of the drafters at the time of the conclusion of the contract, except in situations where there is latent ambiguity.\(^1\)

The Singapore Court of Appeal has not expressed a concluded view on the admissibility of extrinsic evidence on pre-contractual negotiations\(^2\) or on the admissibility of extrinsic evidence on subsequent conduct.\(^3\)

### ii Implied terms

Under Singapore law, the court may imply terms into a contract, to the extent that such implied terms do not contradict express provisions.

Terms may be implied in law (e.g. by statute or policy considerations) or by custom (where the relevant usage is ‘notorious, certain and reasonable’).

Terms may also be implied in fact to give effect to the presumed intentions of the parties so as to fill a gap in their contract. The Singapore Court of Appeal in *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd*\(^4\) sets out a three-step test for implying terms in fact:

- **First**, the court will ascertain how the gap arose. The court will only consider implying a term if the gap arose because the parties did not contemplate it.
- **Second**, the court will consider whether implying a term is necessary in the business or commercial sense to give the contract efficacy.
- **Third**, the court will consider the specific term to be implied. The term must be one that the parties, having had regard to the need for business efficacy, would have responded ‘Oh, of course!’ if the proposed term had been put to them at time of the contract.

### IV DISPUTE RESOLUTION

#### i Threshold requirements

Civil claims exceeding S$250,000 in value are usually commenced in the Singapore High Court. The District Court hears claims between S$60,000 to S$250,000,\(^5\) while the Magistrates’ Court hears claims below S$60,000.

The Singapore International Commercial Court (SICC) is a sub-division of the Singapore High Court. It hears claims which are of an international and commercial nature, and where the parties have submitted to its jurisdiction under a written jurisdiction agreement.\(^6\)

#### ii Jurisdiction clauses

The Singapore courts will give effect to contractual jurisdiction clauses.

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\(^{1}\) *Sembcorp Marine Ltd v. PPL Holdings* [2013] 4 SLR 193 (SGCA) at [59].

\(^{2}\) *Xia Zhengyan v. Geng Changqing* [2015] 3 SLR 732 (SGCA) at [62]-[69].

\(^{3}\) *Simpson Marine (SEA) Pte Ltd v. Jiacipto Jiaravanon* [2019] 1 SLR 696 (SGCA) at [79].

\(^{4}\) *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd* [2013] 4 SLR 193 (SGCA).

\(^{5}\) Where the amount claimed is in excess of S$250,000, parties may nonetheless agree by a memorandum signed by them or their solicitors for the District Court to hear and try the action: Section 23 of the State Courts Act (Cap 321).

\(^{6}\) Cases may also be transferred from the High Court to the SICC: Order 110 r 12 of the Rules of Court (Cap 322, R5).
A jurisdiction clause may specify an exclusive forum in respect of disputes. If there is an exclusive jurisdiction clause in favour of Singapore, the Singapore courts will not stay the proceedings in favour of another forum unless the party seeking a stay can show exceptional circumstances amounting to a strong cause why the court should allow him to breach his promise.27

If the jurisdiction clause is non-exclusive, the effect will depend on the interpretation of the precise words used. Where the parties agree to ‘submit to the non-exclusive jurisdiction’ of the Singapore courts, the effect is that they agree to waive their objections to the Singapore courts assuming jurisdiction. The party resisting jurisdiction of the Singapore courts must therefore show strong cause why he should not be bound by his agreement to submit. Where Singapore is not the forum named in the non-exclusive forum, the party resisting jurisdiction may apply for a stay or set aside service on the basis that Singapore is *forum non conveniens*.28

Singapore is also a signatory to the Hague Convention on Choice of Court Agreements, which entered into force on 1 October 2015. Under the Choice of Court Agreements Act 2016 (No. 14 of 2016), if a party brings a claim before the Singapore court in breach of an exclusive jurisdiction agreement in favour of a Hague Convention Contracting State, the Singapore court must stay or dismiss proceedings unless certain specified circumstances exist.29

iii Alternative dispute resolution

The use of alternative dispute resolution mechanisms is common.

Parties may resolve their disputes through private and binding arbitration at the Singapore International Arbitration Centre, or pursuant to the ad hoc rules of other arbitration bodies, like the International Chamber of Commerce. Domestic arbitrations are governed by the Arbitration Act (Cap 10), while international arbitrations are governed by the International Arbitration Act (Cap 143). Singapore is widely recognised as an arbitration-friendly jurisdiction.

Mediation, or negotiations facilitated by a neutral third party with a view to settlement, are provided by the Singapore Mediation Centre and the Singapore International Mediation Centre. The courts encourage litigants to consider mediation, and may impose adverse costs consequences for an unreasonable refusal to mediate.

Under the Mediation Act 2017 (No. 1 of 2017), the court may stay proceedings where the subject matter of the proceedings is the subject of a mediation agreement,30 and may record a mediated settlement agreement as an order of court.31 Singapore has signed the Singapore Convention on Mediation,32 which provides for the cross-border enforcement of mediated settlement agreements.

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27  *The Jian He* [1999] 3 SLR(R) 432 (SGCA) at [28].
28  *Shanghai Turbo Enterprises Ltd v. Liu Ming* [2019] 1 SLR 779 (SGCA) at [82]-[88].
29  Section 12 of the Choice of Court Agreements Act 2016 (No. 14 of 2016).
30  Section 8 of the Mediation Act 2017 (No. 1 of 2017).
31  Section 12 of the Mediation Act 2017 (No. 1 of 2017).
V BREACH OF CONTRACT CLAIMS

A breach of contract is committed when a party to a contract unlawfully fails to perform his or her contractual obligation(s) or does not comply with a term of, or standard required by, the contract. A breach may also take the form of an anticipatory breach, where a party makes it clear to the other party by his words or conduct, before the time for performance is due, that he has no intention to perform all or part of his obligations under the contract. The innocent party is entitled to bring a claim for damages for losses caused by the breach.

A breach does not always entitle the innocent party to terminate the contract. But where the breach takes the form of a repudiatory breach, the innocent party may (in addition to seeking damages) elect to accept the repudiation and treat the contract as terminated. A repudiatory breach arises:

a. when the defaulting party renounces the contract in a manner that clearly conveys to the innocent party that he will not perform his contractual obligations at all;

b. where the breach is of a condition, (i.e., a term that the parties had intended to designate with such importance) so that any breach, regardless of its actual consequences, would entitle the innocent party to terminate the contract; or

c. where the breach deprives the innocent party of substantially the whole benefit which parties had intended that he should obtain from the contract.

Where a claim is brought for damages caused by the breach, the burden is on the claiming party to prove causation between the breach and the loss he has suffered.

VI DEFENCES TO ENFORCEMENT

Apart from challenging an allegation of breach on the facts, there are a number of ways in which parties may avoid enforcement of contractual obligations or challenge claims of breach of contract in Singapore. Broadly, among other things, parties may seek to argue that:

a. they have been discharged from performing their contractual obligations;

b. the contract is void;

c. the contract is voidable and that it should be rescinded or set aside; or

d. the limitation period has expired. Examples are set out below.

i Discharge of the contract

A contract may be discharged by an express force majeure clause in the contract, where parties agree that they are to be excused from performance upon the occurrence of events that are beyond the control of the parties.

By the operation of law, a contract may also be automatically discharged where it is frustrated, and the parties are no longer bound to perform contractual obligations after the frustrating event. The doctrine of frustration applies where there is a supervening event which occurs (through no fault of any party) after the formation of the contract and renders a contractual obligation radically or fundamentally different from what has been agreed in the contract. The doctrine is a narrow one that only applies in exceptional circumstances.

33 RDC Concrete Pte Ltd v. Sato Kogyo (S) Pte Ltd [2007] 4 SLR(R) 413 (SGCA).
34 Alliance Concrete Singapore Pte Ltd v. Sato Kogyo (S) Pte Ltd [2014] 3 SLR 857 (SGCA) at [33].
ii The contract is void

Mistake at common law

A contract may be void if the parties have shared a common mistake – not attributable to the fault of any party and the risk of which is not allocated to one party – as to the facts or law before the contract was concluded, and where the mistake renders the subject matter of the contract fundamentally different from the subject-matter which constituted the basis of the contract.\(^{35}\)

If only one party is mistaken, the mistaken party may rely on the doctrine of unilateral mistake to argue that the contract is void. Two types of unilateral mistake are recognised:

\(a\) a mistake as to the terms of the contract, which must be sufficiently fundamental or important, and where the other party is aware of the mistake;\(^{36}\) and

\(b\) a mistake as to the identity of the other contracting party.

Illegality and public policy

A contract may be void for illegality if it is prohibited by statute or an established category of common law public policy (which includes contracts to commit a crime, tort or fraud). If the contract is not unlawful per se under common law, but entered into with the object of committing an illegal act, it may be void if that is a proportionate response to the illegality.\(^{37}\)

A contract may also be unenforceable on the ground of foreign illegality if:

\(a\) its object or purpose involves doing an act that would violate the law of a foreign friendly state; or

\(b\) if the performance of the contract is unlawful under the law of the country where the contract is to be performed.\(^{38}\)

iii The contract is voidable

Mistake in equity

Although abolished in English law, the doctrine of common mistake in equity is presently still part of Singapore law.\(^{39}\) A contract founded on common mistake may be voidable in equity, even if it does not satisfy and is thus not void by the common law doctrine of common mistake.

The Singapore courts have recognised the existence of unilateral mistake in equity. For this doctrine to apply, the party seeking to establish it must show that:\(^{40}\)

\(a\) the unilateral mistake was fundamental;

\(b\) the non-mistaken party had constructive knowledge of the unilateral mistake; and

\(c\) there was some element of impropriety on the part of the non-mistaken party.

This differs from the doctrine of unilateral mistake at common law in that constructive, as opposed to actual, notice of the mistake may be sufficient.

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\(^{35}\) Olivine Capital Pte Ltd v. Chia Chin Yan [2014] 2 SLR 1371 (SGCA) at [67].

\(^{36}\) Chwee Kin Keong and others v. Digilandmall.com Pte Ltd [2005] 1 SLR(R) 502 (SGCA) at [53].


\(^{38}\) BCBC Singapore Pte Ltd v. PT Bayan Resources TBK [2016] 4 SLR 1 (SICC) at [175]-[176].


\(^{40}\) Chwee Kin Keong and others v. Digilandmall.com Pte Ltd [2005] 1 SLR(R) 502 (SGCA) at [80].
iv The party seeking relief in equity must do so with ‘clean hands’

Duress

A contract may be avoided on the ground that it was made under duress. Duress may be made out where there is illegitimate pressure directed at the victim which amounts to the compulsion of the victim's will, and includes physical and economic duress. Pressure is illegitimate where there is a threat of unlawful action, or where a threat of lawful action results in terms that are so manifestly disadvantageous that it is unconscionable for the defendant to retain the benefit of those terms.

Limitation

A breach of contract claim must be brought within six years from the date the cause of action accrued. In cases involving fraud or mistake, the limitation period only begins to run at the time where the claimant has discovered or could with reasonable diligence have discovered the fraud or mistake.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Fraud and misrepresentation

The elements of misrepresentation are:

a a representation of fact by words or conduct;
b the representation was false or untrue;
c the representation was made with the intention that it should be acted on by the injured party;
d the injured party acted on the representation; and
e the injured party suffered damage by doing so.

A contract may be rescinded if a defence of misrepresentation is established.

Fraudulent or negligent misrepresentation may also found independent causes of action.

To establish fraudulent misrepresentation (i.e., the tort of deceit), the claimant must prove that the representation was made dishonestly, that is, with the knowledge that the statement was false or made in the absence of any genuine belief that it was true.

To establish negligent misrepresentation (i.e., the tort of negligent misstatement), the claimant must show that he was owed a duty by the representor to take care in making a statement, and that the representor had failed to take care.

Under Section 2(1) of the Misrepresentation Act (Cap 390), a claimant is entitled to damages for misrepresentation as though the misrepresentation had been made fraudulently, unless the representor can show that he had reasonable ground to believe and did believe up

41 Tjong Very Sumito v. Chan Sing En [2012] 3 SLR 953 (SGHC) at [249].
43 Section 6(1)(a) of the Limitation Act (Cap 163).
44 Section 29 of the Limitation Act (Cap 163).
45 Panatron Pte Ltd v. Lee Cheow Lee [2001] 2 SLR(R) 435 (SGCA) at [14].
46 Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency [2007] 4 SLR(R) 100 (SGCA).
to the time the contract was made that the facts represented were true. Section 2(2) of the Misrepresentation Act (Cap 390) also gives the court the discretion to award damages in lieu of rescission for a misrepresentation other than fraudulent misrepresentation.

ii Undue influence

A contract may be avoided on the grounds of undue influence. There are two classes of undue influence, namely, actual (i.e., ‘Class 1’) undue influence and presumed (i.e., ‘Class 2’) undue influence.

Class 1 undue influence may be established where the claimant shows that he had entered into a transaction because the other party to the transaction (i.e. the defendant) actually exerted undue influence on him. The claimant bears the burden of showing that:

a. the defendant had the capacity to influence him;
b. the influence was in fact exercised;
c. the exercise of the said influence was undue; and

d. the exercise of the said influence brought about the transaction.47

Class 2 undue influence requires the claimant to show circumstances where undue influence may be presumed. It is sufficient for him to show that:

a. there was a relationship of trust and confidence between the claimant and the defendant;
b. the relationship was one which it could be presumed that the defendant abused the claimant’s trust and confidence in influencing the claimant to enter into the transaction; and

c. the transaction calls for an explanation.48

iii Unconscionability and good faith

The Singapore Court of Appeal recently confirmed that the ‘narrow’ doctrine of unconscionability applies in Singapore. To rely on the doctrine, the claimant must demonstrate that he was suffering from an infirmity that the defendant exploited in procuring the transaction. The burden then shifts to the defendant to show that the transaction was fair, just and reasonable.49

Singapore law does not presently recognise an overriding doctrine of good faith or a general implied duty of good faith,50 although the courts will enforce an express contractual duty between the parties to negotiate in good faith.51

iv Inducing breach of contract and conspiracy

A claimant alleging breach of contract may also bring a claim in tort against a third party for inducing a breach of contract. The claimant must show that the contract was actually

47 BOM v. BOK [2019] 1 SLR 349 (SGCA) at [101(a)].
48 BOM v. BOK [2019] 1 SLR 349 (SGCA) at [101(b)].
49 BOM v. BOK [2019] 1 SLR 349 (SGCA) at [142].
50 Ng Giap Hon v. Westcomb Securities Pte Ltd [2009] 3 SLR(R) 518 (SGCA). However, it remains open to argue for such a duty to be implied in fact: see PH Hydraulics & Engineering Pte Ltd v. Airtrust (Hongkong) Ltd [2017] 2 SLR 129 (SGCA) at [133].
breached, the third party knew of the contract and intended to interfere with the claimant’s contractual rights, the third party directly procured or induced the breach of contract, and the claimant suffered injury resulting from the breach of contract.\(^{52}\)

Another claim that is commonly brought in conjunction with a breach of contract claim is the tort of unlawful means conspiracy. This involves a combination of two or more persons acting together with the intention to cause injury or damage through unlawful acts that are performed in furtherance of their agreement, therefore causing loss to the claimant.\(^{53}\)

**VIII Remedies**

There are various remedies available for breach of contract.

i  **Claim in debt**

A debt claim is a claim for sums that are due and owing under the contract.

Parties may also have agreed on the amount of damages to be paid in the event of breach and included a liquidated damages clause in their contract. Such a clause is only enforceable if it is a genuine pre-estimate of loss and not a penalty.\(^{54}\)

ii  **Compensatory damages**

The principal remedy for breach of contract is an award of monetary damages to compensate for the loss suffered by the innocent party. The general principle is that the claimant should be put in the position he would have been in had the contract been performed.

The ordinary measure of damages is therefore assessed by reference to the claimant’s expectation loss – the claimant’s expected gains had the contract been performed. Where expectation losses cannot be ascertained, the claimant may seek reliance losses in the alternative – the claimant’s costs and expenses in entering into the contract and which have been wasted because of the acts of the defaulting party. Expectation losses and reliance losses cannot usually be awarded together, as this will result in overcompensation.\(^{55}\)

iii  **Punitive damages**

These generally cannot be awarded for a pure breach of contract under Singapore law.\(^{56}\)

iv  **‘Wrotham Park’ damages**

The Court of Appeal has recognised the availability of damages for the claimant’s lost opportunity to bargain with the defendant for a price for releasing the latter from his obligations, where compensation on the expectation or reliance measure is not available. This form of damages is named after the English High Court case in *Wrotham Park Estate Co Ltd v. Parkside Homes Ltd* [1974] 1 WLR 798 and is assessed by reference to a hypothetical release price.

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52 Turf Club Auto Emporium Pte Ltd v. Yeo Boong Hua [2018] 2 SLR 655 (SGCA) at [311].
53 EFT Holdings, Inc v. Marinteknik Shipbuilders (S) Pte Ltd [2014] 1 SLR 860 (SGCA) at [112].
54 Hon Chin Kong v. Yip Fook Mun [2018] 3 SLR 534 (SGHC) at [60]-[61].
55 Alvin Nicholas Nathan v. Raffles Assets (Singapore) Pte Ltd [2016] 2 SLR 1056 (SGCA) at [24]-[25].
56 PH Hydraulics & Engineering Pte Ltd v. Airtrust (Hongkong) Ltd [2017] 2 SLR 129 (SGCA).
v Non-monetary remedies
Apart from the remedy of rescission (where it can be shown on the grounds above that the contract is voidable), the claimant may also seek specific performance or injunctions. Both are equitable remedies and given at the court's discretion.

vi Limitations to recovery of losses
The claimant must show that the losses he suffered were caused by the defendant's breach and were not too remote. The damages claimed must be for losses that arise directly, naturally and in the ordinary course of events, or losses which are reasonably recoverable in the light of the defendant's actual knowledge of special or extraordinary facts and circumstances at the time of the contract.57 The claimant is also expected to take reasonable steps to mitigate the losses he suffers as a result of the breach.58

The Singapore courts will also give effect to contractual clauses which seek to limit or restrict the parties' liability for losses caused by a breach of contract, subject to contractual interpretation principles on the scope of such clauses and the operation of the Unfair Contract Terms Act (Cap 396).

IX CONCLUSIONS
Parties who wish to adjudicate their disputes in Singapore now have the option of the Singapore High Court, the Singapore International Commercial Court, or arbitration (whether under the auspices of the Singapore International Arbitration Centre or ad hoc arbitrations). Singapore has encouraged and participated in efforts to make the cross-border enforcement of rights as effective as possible – notably, with the coming into force of the Choice of Court Agreements Act 2016 (No. 14 of 2016) and the signing of the Singapore Convention on Mediation.

Singapore law is now in a phase of consolidation, following a trend which started fifteen years ago to develop and rationalise a coherent body of commercial law that allows parties to ascertain their rights and order their dealings with certainty. Parties can expect continued incremental development of law, but with the assurance of a firm foundation in place.

The dispute resolution landscape will also continue to evolve with a number of significant prospective changes. A public consultation took place in late 2018 on reforms to the civil justice system, including the introduction of a new set of rules for court proceedings with more robust court-led management of cases. Third party funding, historically viewed as champerty, is now allowed for arbitration and arbitration-related court proceedings (but not for court litigation).59 The Ministry of Law has also proposed the enactment of a similar framework for conditional fee agreements, and a public consultation is underway. All these developments are likely to increase Singapore's attractiveness as a dispute resolution centre.

57 Out of the Box Pte Ltd v Wanin Industries Pte Ltd [2013] 2 SLR 363 (SGCA) at [17]-[18].
58 The 'Asia Star' [2010] 2 SLR 1154 (SGCA) at [44].
59 Civil Law (Amendment) Act 2017 (No. 2 of 2017) and the Civil Law (Third-Party Funding) Regulations 2017.
Chapter 21

SOUTH AFRICA

Jonathan Ripley-Evans and Fiorella Noriega Del Valle

I OVERVIEW

In South Africa, a contract forms the basis of enforceable legal obligations and corresponding rights between two or more contracting parties. The South African law of contract is not codified, but finds its source in the common law, which changes and adapts over time.

Contractual claims are easier to enforce where a written contract exists. Although most oral contracts (save for contracts for the sale of land) are enforceable in South Africa, they are often far more difficult to substantiate.

This chapter will focus on an overview of the most notable aspects of the law relating to the formation, interpretation, performance, enforcement and litigation relating to commercial contracts in South Africa.

II CONTRACT FORMATION

1 The formation of contracts in South African law

In order for a contract to be considered valid and binding in South Africa, certain requirements must be met during the formation of the contract. They are the following:

Consensus

Consensus must be reached on:

- the rights and obligations created by the terms of the contract; and
- the parties to the contract.

This consensus must be expressed in an outward manner, in the form of an offer and corresponding acceptance.

The requirements for a valid offer are:

- an intention to be bound by the acceptance;
- all the material terms of the contract should be set out in the offer;
- the content of the offer cannot be vague; and
- the offer must be communicated to the offeree.

In terms of South African law, an offeror may withdraw an offer at any stage prior to acceptance.

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The requirements for a valid acceptance are:

- There must be an intention to enter into a legally binding contract;
- The acceptance must be made by the offeree;
- The acceptance of the offer must be unequivocal, otherwise it may amount to a counter-offer;
- The acceptance must be communicated to the offeror; and
- The acceptance must take place before the offer terminates or expires.

**Certainty in respect of material terms**

The contract must leave no ambiguity in respect of the material terms, which must be certain and agreed. This is in order to ensure that each of the parties know exactly what their rights and obligations are.

**Capacity**

This refers to the ability of a party to understand the nature and effect of the contract. Usually people above the age of 18 are considered to have the capacity to contract.

**Legality**

In order for a contract to be valid, it may not be contrary to the law. An illegal contract is one that contravenes either a statute, the common law or public policy.

**Possibility of performance**

The contract must be objectively capable of performance at the time of entering into it. If the contract is subjectively impossible (e.g., a specific party cannot perform a specific obligation owing to their personal circumstances) or if it becomes objectively impossible after it has been entered into, there will still be a valid contract at inception.

**Formalities, if applicable, must be observed**

Certain statutes prescribe formalities in respect of particular types of contracts; these will be discussed in more detail below. In some instances, parties may also include their own formalities.

ii **Oral versus written contracts**

There is no general requirement in South Africa that a contract must be in writing. Oral contracts are enforceable, as long as the requirements for the formation of a valid contract have been met. However, in the case of an oral contract, it is often difficult to prove that the requirements for formation have been met.

The burden rests on the party alleging the existence of the contract to show, on a balance of probabilities, that the contract was formed. South African courts will usually look at the conduct of the parties, in order to establish whether a contract has been formed and what its terms are.

Despite the above, there are certain statutes that require contracts to be in writing in order to be enforceable, such as the Alienation of Land Act 68 of 1961, which requires all contracts for the sale, donation and exchange of land to be in writing and signed by the parties.
iii Suspensive conditions
A ‘suspensive condition’ in a contract suspends the coming into existence of the contract until the condition is fulfilled. The contract will not be binding until those formalities have been met or, if possible, waived by the party for whose benefit the condition was inserted.

Once these requirements are met, a binding contract is said to come into existence. A defendant can challenge a contractual claim by alleging that the above elements were not satisfied.

iv Variation of contracts
Under South African law, a party can usually, informally, vary a contract. However, it is common to find ‘non-variation clauses’ included in contracts.

In the case of *SA Sentrale Ko-op Graan maatskappy Bpk v. Shifren,* the then Appellate Division held that a verbal variation of a contract containing a non-variation clause is of no effect.

III CONTRACT INTERPRETATION
i Governing law of the contract
Parties are free to choose the substantive law that they wish to govern the contract. That law will then govern substantive aspects relating to the contract such as its formation, interpretation, validity and termination.

In the event of a dispute, a court will determine the governing law (also known as the proper law) of the contract at the outset and will give effect to the law chosen by the parties, subject to certain exceptions (such as the fact that the chosen law will not override local statutes that are directly applicable).

If the parties have not expressly chosen the substantive law of the contract, a South African court will determine if there is a tacit choice of law. This is done by trying to determine the parties’ intention at the time of concluding the contract, through a consideration of factors such as the surrounding circumstances and any references in the contract to statutes of a specific country.

If no tacit choice can be found, the court will assign a law to the contract by determining which legal system is most closely connected to the contract. This is usually either the place where the contract was concluded or performed.

A conceptual difficulty arises in instances where the conclusion of a binding agreement is in dispute. If there is no binding agreement, then no proper law has been chosen and the question is then what law must a court apply in order to determine the validity of the contract? A leading South African author (CF Forsyth, *Private International Law*) suggests that the approach adopted in English law ought to be applied in South Africa; namely, the question must be determined by applying the law that would have been the proper law, had a valid contract been concluded. This question has not yet been answered by South African courts.

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The terms of a contract: express, implied and tacit

In South African law, when interpreting a contract, it is first necessary to determine what terms form part of the contract.

A party who alleges that a term forms part of a contract bears the onus of proving that the parties intended it to form part of the contract.

South African law recognises three types of terms, given below.

Express terms

This is a term that the parties expressly agreed to include. There are four rules that the courts utilise in order to determine whether an express term forms part of the contract.

Incorporation by reference

If a contract refers to a separate document with sufficient certainty, it incorporates the terms of that separate document.

Parol evidence rule

This rule states that when a contract has been reduced to writing, a court will assume that the parties intended the document to reflect all of the express terms of the contract and will not consider external (parol) evidence, such as verbal evidence of what passed between the parties before the agreement was signed, that differs from the written contract.3

The rule has been heavily criticised over time, particularly owing to the fact that it contains various exceptions, which can become confusing and defeat the purpose of the rule. Notwithstanding this criticism, the Supreme Court of Appeal has recently confirmed that the rule remains applicable under South African law.4

Caveat subscriptor rule

This rule states that a person who signs a contract is bound to all of the terms contained therein, even if he or she did not read them or intend to be bound by them. The rule is an exception to the principle that parties must reach subjective agreement on the terms of the contract.

Ticket case rules

This rule states that a party is bound to a contract, even if he or she did not sign the document, if:

a they were willing to be bound by them; or
b if the other party took reasonable steps to bring the terms to his or her attention.

An example of such a contract is an indemnity contained at the entrance to a building.

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3 Union Government v Vianini Pipes 1941 AD 43 at Paragraph 47.
4 Tshwane Cuty v Blair Atholl Homeowners Association 2019 (3) A 398 (SCA)
Implied terms

Terms implied by law
An implied term is a term that forms part of the contract by operation of law (either by statute or through the common law). These terms automatically apply to a contract, even if agreement on the terms was not reached by the parties. However, parties may, in some cases, choose to change or exclude an implied term, by express agreement.

Terms implied by trade usage
These terms are implied where a practice in a trade is so established that it is assumed to form part of the contract.

Tacit terms
A tacit term is a term that was not expressly agreed to, but that can be read into the contract because of the intentions of the parties. These take the form of unexpressed terms and imputed terms.

   The test to establish whether a tacit term should be read into a contract is the ‘necessary implication test’, which looks at whether the term is a necessary implication of the contract. The test has two elements:
   a  business efficacy test: a court will look at whether the term is required to make the contract commercially viable;\(^5\) and
   b  officious bystander test: a court will ask what would have happened if an ‘officious bystander’ was present at the time of entering into the contract and he or she had asked the parties whether they wished to include the term.\(^6\)

iii  Rules of construction
Once it has been determined what terms are applicable to the contract, their meaning must sometimes also be interpreted. The law in this aspect has recently evolved; however, it is useful to explain the ‘three-stage approach’ that previously applied, given below.

Stage one: the written terms of the contract
As stated above, the parol evidence rule states that the court may only look at the contract to ascertain the meaning of the express terms, as this reflects the intention of the parties.

   A court would first look at the written words used by the parties when entering into the contract. The written words would then be applied, even if an unfair result was reached.

Stage two: the surrounding circumstances
Additional factors could be taken into account only where the meaning of the term was not clear from the contract itself.

   These surrounding circumstances related to evidence of matters that the parties probably had in mind when contracting.\(^7\)

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\(^5\) West End Diamonds Ltd v. Johannesburg Stock Exchange 1946 AD 910.

\(^6\) Reigate v. Union Manufacturing Co [1918] 1 KB 592 at 605.

\(^7\) Van der Westhuizen v. Arnold 2002 (6) SA 453 (SCA).
If the above two stages still resulted in ambiguity, then the court would allow evidence of what was said during negotiations.

Stage three: the rules of construction
If a clear meaning still could not be found after Stages 1 and 2, the court would apply certain rules of interpretation. Some of these rules include the following:

a. the court will find the fairest interpretation of the term, so that neither party is unreasonably disadvantaged;
b. if the clause is capable of more than one meaning, one of which leads to invalidity and one of which leads to validity, the meaning favouring validity will be chosen; and

c. the contra preferentem rule is used as a last resort and states that a term will be interpreted against the party who was responsible for the drafting of the clause.

iv Developments in South African law relating to contractual interpretation
The above-mentioned ‘staged’ approach has been severely criticised in the past, and recent developments have seen a move towards a less formalistic approach to the interpretation of contracts.

In this regard, South African courts recognise the concept of ‘substance over form’, and a move towards a method of interpretation that gives effect to the intention of the parties has been seen in recent jurisprudence.

The recent Supreme Court of Appeal judgment in Bothma-Batho Transport (Edms) Bpk v. S Bothma & Seun Transport (Edms) (Bpk)8 emphasised that, although the starting point of contractual interpretation remains in the words of the document (as this is the only medium through which the parties have expressed their contractual intention), the process of interpretation does not stop there. The literal words should be considered in the light of its admissible context; this includes the circumstances in which the document came into being.

As such, it seems that interpretation is no longer a process that occurs in stages but is ‘essentially one unitary exercise’. This approach is now being followed in South African courts, including in the Constitutional Court, which is South Africa’s apex court.9

v Rectification of contracts
Rectification takes place when a written contract, which incorrectly reflects the parties’ common intention, is rectified to reflect their intention. The party claiming rectification must prove the common intention of the parties, that the document incorrectly reflects the intention and that the incorrect recordal was the result of a mistake of the parties.

IV DISPUTE RESOLUTION
Contractual disputes are usually determined in the following courts:

a. small claims court: disputes with a value below 15,000 South African rand;
b. magistrates courts: disputes with a value below 400,000 South African rand; and

c. high court: disputes with a value above 400,000 South African rand or appeals from the magistrates court.

9 Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others 2019 (5) SA 1 (CC)
A party may subsequently appeal to the Supreme Court of Appeal and/or the Constitutional Court.

South African courts will give effect to the parties’ chosen method of dispute resolution and to their chosen jurisdiction.

i Alternative dispute resolution

South African courts will usually decline to hear a dispute in the event that the parties have expressly agreed to arbitration (or some other form of dispute resolution mechanism), in order to give effect to the parties’ agreement.

There are, however, instances where a party may approach a court for interim relief, pending the conclusion of the arbitration or alternative dispute resolution mechanism.

ii Jurisdiction clauses

Jurisdiction clauses, in terms of which parties expressly agree that a contractual dispute will be determined in a particular jurisdiction, are also enforced by South African courts.

A South African court will defer to the jurisdiction of a foreign court in instances where the parties have agreed to submit to the jurisdiction of a foreign court. It is important to note that these clauses do not oust the jurisdiction of the South African courts per se. Instead, a South African court will elect not to hear the matter, in order to give effect to the agreement between the parties.

In order for a jurisdiction clause conferring jurisdiction on a South African court to be valid in South Africa, South African courts require the presence of a ‘link’ between the territory where the court operates and the parties, or the facts of the dispute. If no link exists, a South African court will not generally entertain the dispute even if the parties agreed to litigate in South Africa. It should be noted, however, that South African courts are beginning to adopt a more relaxed view in regard to jurisdiction; this can be seen from the fact that considerations of convenience and appropriateness are also now being taken into account.¹⁰

V BREACH OF CONTRACT CLAIMS

i Types of breach

South African law recognises four different types of breach, given below.

Late performance or mora

A party is in mora when:

a the debt is due and enforceable, but performance is not delivered on time;
b the breach is due to their fault; and
c the performance remains objectively possible.

¹⁰ Fleet Africa (Pty) Ltd v Cargill Cotton Ginners Ltd 2010 JDR 1253 (GSJ)
**Repudiation**

Repudiation is behaviour by a party that clearly and unequivocally indicates that the party is not going to honour its obligations under the contract and does not intend to be bound by the contract.\(^\text{11}\)

Repudiation occurs when:

\(a\) there is conduct indicating a refusal to perform;

\(b\) there is no justification for a refusal to perform; and

\(c\) the other party has performed.

The innocent party must then make an election as to whether it intends to accept the repudiation and cancel the contract, or to hold the breaching party to the contract (in which case the innocent party will also need to indicate that it is willing to perform).\(^\text{12}\) As will be explained further below, the innocent party may also claim for any damage it has suffered, regardless of this election.

**Prevention of performance**

This breach occurs in instances where a party makes performance of the obligations under the contract impossible. The requirements for such a breach are:

\(a\) the performance must be objectively impossible; and

\(b\) the breaching party must be at fault.

**Defective performance**

This occurs when defective performance is delivered by a party to the contract.

The party alleging that a breach has occurred bears the onus of proving, on a balance of probabilities, that the other party has breached the contract.

**VI  DEFENCES TO ENFORCEMENT**

- **Void contracts**

As has been set out above, certain formalities must be met before a valid, binding contract can be said to have been formed. One of the most common ways that defendants seek to avoid the enforcement of contractual obligations is to argue that there is no valid contract.

In the event that the formalities are not met, the following consequences result:

\(a\) the contract is unenforceable; and

\(b\) any performance already made must be returned.

The following defences to the enforcement of contracts are most common.

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\(^{12}\) *Moodley v. Moodley* 1990 (1) SA 427 (D).
No contractual capacity

In order to reach consensus, all parties to the contract must have the necessary capacity to understand the nature of the contract and the consequences of entering into the contract.

Examples of circumstances that negate contractual capacity include:

a intoxication: it is not always the case that an intoxicated person does not have contractual capacity. This is often decided on the facts of each case;

b mental illness: a mentally ill person is not automatically presumed to lack contractual capacity (this must be determined on the facts), unless they have been officially declared mentally ill; and

c minors: the age of majority in South Africa is 18 years. Anyone below this age does not have full contractual capacity and minors below the age of seven years have no contractual capacity.

Illegality

Illegal contracts are not capable of enforcement. A contract may be illegal owing to contravention of a statute or the common law.

Statutory illegality

Statutory illegality does not always lead to the invalidity of the contract; this depends on the intention of the statute itself. If the statute is not clear, it is necessary to ascertain the intention of the legislature by interpreting the specific statutory provision.13

Common law illegality

A contract is contrary to the common law where it contravenes public policy and is contrary to the ‘good moral standards’ of society.14

Uncertainty

If the terms of a contract are not certain (or ascertainable), that contract will be void for vagueness.

As long as performance is ascertainable, for example, if performance can be determined by the application of a formula or method, the contract will not be void for vagueness.

In the case of Southernport Developments (Pty) Ltd v. Transnet Ltd,15 it was held that a contract where the parties agree to negotiate a second contract is not void for vagueness in the event that there is a ‘deadlock breaking mechanism’, in the event that the parties cannot reach agreement on the second contract.

13 In Metro Western Cape (Pty) Ltd v. Ross 1986 (3) SA 181 (A), the court looked at the mischief that the statute was attempting to prevent, in order to determine whether it was necessary to invalidate the contract, as well as the balance of convenience in order to determine whether invalidating the contract would cause considerable unfairness to members of the public.

14 In Pricewaterhouse Coopers v. National Potato Co-operative Ltd 2004 (9) BCLR 930 (SCA), the Supreme Court of Appeal held that ‘since the advent of the Constitution public policy is rooted in the Constitution and the fundamental values it enshrines.’

15 Southernport Developments (Pty) Ltd v. Transnet Ltd 2005 (2) SA 202 (SCA).
Impossibility

There are three types of impossibility in South African law:

a. objective impossibility: this means that performance would be impossible for everyone;

b. subjective impossibility: this occurs when performance is possible for some people, but not for the debtor specifically; and

c. legal impossibility: this occurs when parties are prevented from performing by virtue of a statute or legal rule (however, the contract is not necessarily illegal).

A contract can only be avoided by a defendant in the event that there is an objective impossibility that exists, prior to entering into the contract.

In some instances, performance becomes impossible after the contract has been entered into. This does not mean that the contract is void; however, such circumstances do lead to other remedies that are dependent on who bore the risk at the time that the impossibility occurred.

Non-compliance with formalities

Formalities in respect of contracts can be prescribed by statute, or self-imposed. Non-compliance with these formalities will usually render the contract null and void.

Suspensive conditions have not been met

As has been stated above, a contract will not come into existence unless the suspensive conditions, to which it is subject, have been met. A suspensive condition may also be waived by the party for whose benefit the clause was inserted.

The exceptio non adimpleti contractus

This defence allows an innocent party to a reciprocal contract to withhold performance in order to force a guilty party, who has breached the contract, to perform properly.\(^{17}\)

In the event that the guilty party brings a claim against the innocent party, the innocent party may raise the *exceptio* as a defence.

Prescription or time-barring of contractual claims

South African law recognises a prescription period or time limitation period of three years for the enforcement of an ordinary debt. A defendant can therefore raise the defence that a claim has prescribed, after the lapse of three years from the date when the debt arose.

What exactly is meant by the word ‘debt’ has been a subject of debate over the years. A claim for damages, for example, can no longer be enforced after a period of three years has lapsed from the date that the damage was suffered.

It has, however, been recently held that a claim for return of property is not a debt that is subject to prescription.

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16 Wilson *v.* Smith 1956 (1) SA 393 (W).
17 Wynn’s Car Care Products *v.* First National Bank 1991 (2) SA 754 (A).
VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

In certain instances, the requirements for a valid contract may have been met; however, it may be the case that one of the parties acted improperly in obtaining the consensus of the other party. These contracts are not void, but ‘voidable’ at the election of the innocent party. Such improper conduct includes misrepresentation, duress and undue influence. These will be dealt with below.

i Misrepresentation

This occurs when a guilty party induces an innocent party to enter into a contract by making a false representation of fact, by way of a pre-contractual statement or conduct.\(^{18}\)

The misrepresentation must be a material one, in the sense that a reasonable person would also have been induced to contract by the misrepresentation.\(^{19}\) Silence or a failure to disclose information will not usually amount to a misrepresentation unless there was a legal duty to disclose the information.

Misrepresentation can take three forms:

- fraudulent;
- negligent; and
- innocent.

Although fault on the part of the misrepresenting party is not a requirement for misrepresentation to be present, the degree of fault will play a role in what remedies are available to the other party.

The following remedies are available:

- rescission of the contract: this is available even in the event of an innocent misrepresentation. Once this election is made, all performances must be restored;
- delictual (tortious) damages: this is only available in the event of a fraudulent or negligent misrepresentation;
- the buyer may set aside the contract of sale; and
- the buyer may claim that the purchase price be reduced to the true value of the goods.

ii Duress

In this instance, an innocent party is induced to enter into a contract by threats of harm. The duress must consist of a threat of actual (or a reasonable fear of) violence directed at the innocent person, his or her property or his or her family. The violence must also be imminent or inevitable and must have the potential to cause damage.

The remedies for a contract concluded under duress are:

- rescission of the contract; and
- delictual damages.

iii Undue influence

This occurs when a guilty party exploits the influence that it has over an innocent party, in order to induce the party to enter into the contract.

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\(^{18}\) Novick v. Comair Holdings 1979 (2) SA 116 (W).

\(^{19}\) Lourens v. Genis 1962 (1) SA 431 (T).
The wrongdoer must have an influence over the innocent party, which is unconscionably used to reduce the innocent party’s resistance and induces the innocent party to contract, to his or her detriment.

The remedies for a contract concluded under undue influence are:

a. rescission of the contract; and
b. delictual damages.

VIII REMEDIES

When a party materially breaches a contract, the innocent party must make an election as to whether it wishes to cancel or enforce the contract. If the breach is not material, the innocent party may only elect to enforce the contract. A claim for damages is available to the innocent party regardless of this election.

An innocent party may choose from the following remedies.

i. Specific performance

An innocent party is entitled to insist upon performance under the contract, save in the event that performance is no longer possible.

A claim for specific performance entails requesting a court to order that the breaching party deliver the performance that it has agreed to. However, the innocent party must at least tender full and proper performance of his or her reciprocal obligations.

In South Africa, a court has the discretion to award specific performance. In the event that it does not view specific performance as the most appropriate remedy, it will not grant the order. In the event that performance is impossible or illegal as a result of the breach, this remedy is also not available and the innocent party can only choose to cancel the contract.

ii. Interdict

If a breach is imminent, but has not yet occurred, an innocent party may obtain an interdict against the counterparty to prevent the breach from occurring.

An interdict may also be a form of ‘negative’ specific performance, in the case of the breach of a negative obligation.

iii. Cancellation

In South Africa, cancellation of a contract is an extraordinary remedy that requires a right to cancel. A right to cancel is usually obtained in instances where:

a. the contract contains a cancellation clause;
b. the breach is a material one that warrants cancellation; and
c. in the case of mora, if the innocent party has placed the breaching party on terms to deliver the performance by a specified date.

This is because the legal effect of cancellation is that the contract is extinguished and all performance already made must be restored. In the event that a party attempts to cancel a contract where there is no ‘right’ to cancel, that party will be guilty of repudiation.

iv  Damages

Contractual damages are usually claimed in conjunction with other relief (such as cancellation or specific performance).

Punitive damages are not awarded in South Africa and a party is only entitled to the damages that it has actually suffered as a result of the breach.

The following elements must be proved, in order for a claim for damages to be successful:

a  breach of contract;

b  patrimonial loss: the breach must cause a financial loss to the innocent party.\(^{21}\) It is extremely difficult, and in some instances impossible, to calculate damages with mathematical precision. For this reason, South African courts merely require the plaintiff’s ‘best evidence’ to prove the quantum of the loss;

c  a causal connection between the breach and the loss: a court will look at whether the loss would have been suffered ‘but for’ the breach of the contract. If not, then the breach is the cause of the loss. In the case of *Thoroughbred Breeders’ Association v. Price Waterhouse*,\(^ {22}\) it was held that the concept of ‘contributory negligence’ is foreign to the law of contract and damages cannot be reduced as a result of the plaintiff’s contributory negligence;

d  the loss is not too remote: this requires that the damage must have been reasonably foreseeable at the time that the parties entered into the contract, had such a breach occurred.

South African courts draw a distinction between:

a  general damage: harm that is expected to flow from such a breach of contract and can always be claimed; and

b  special damage: harm that is unusual and arises owing to special circumstances of the parties. This type of loss is not generally recoverable, unless it can be shown that it was reasonably foreseeable, on the facts of each specific case.

The onus to prove the above elements lies with the party claiming the damages. However, the plaintiff has a duty to mitigate his or her damages and cannot claim damages that have been suffered as a result of having neglected to do so.

v  Penalty clauses

Parties can choose to include their own remedies for breach of contract in the form of a ‘penalty clause’ included in the contract. Such a clause generally states that the guilty party will pay a liquidated amount of agreed damages in the event of a breach. Penalty clauses are not contrary to public policy in South Africa.

However, such a clause must comply with the Conventional Penalties Act 15 of 1962, which was enacted in order to protect parties from unfair penalty clauses. The Conventional Penalties Act states, among other things, that the penalty cannot be out of proportion to the loss actually suffered. The court has the power to reduce any penalty to such an extent as it may consider equitable in the circumstances.

\(^{21}\) *Administrator, Natal v. Edouard* 1990 (3) SA 581 (A).

IX CONCLUSIONS

Over the decades, South African law of contract has evolved in order to adapt to the realities of modern commerce. Recent years have been no different, with forward-thinking judgments having been handed down, particularly relating to the move away from a formalistic approach to the interpretation of contracts and the manner in which South African courts approach the topic of jurisdiction.

South African law of contract is now more focused on the intention of the parties and recognises that the manner in which the contract has been written may not always reflect the reality of the agreement.

It is anticipated that the concept of ‘fairness’ and the emphasis on the ‘intention’ of the parties will continue to become more prominent in the South African law of contract over the next year.
I OVERVIEW

Switzerland has a civil law system. The Swiss Federal Code of Obligations (CO) regulates the contractual relationships between legal subjects and is structured in five main chapters. The first chapter contains general provisions (Articles 1 to 183) that are valid for all types of contracts while the second chapter regulates the different types of contractual relationships (Articles 184 to 551). Chapter three to five regulate companies and cooperatives, the commercial register, business names, commercial accounting and negotiable securities.

The Swiss Civil Procedure Code (CPC) regulates civil proceedings. The Civil Procedure Code dates from 1 January 2011 and contains a set of rules that regulates civil proceedings comprehensively from filing the claim until the appeal in first cantonal instance. Switzerland has specialised commercial courts as well as a long and well-established tradition in commercial litigation and arbitration. As a result, Switzerland offers an effective and highly specialised judiciary and alternative dispute resolution system for commercial disputes which is the reason why many foreign parties subject their contractual relationship to Swiss law and jurisdiction of Swiss courts.

II CONTRACT FORMATION

The Swiss Code of Obligations is based on the principle of contractual freedom. Part of the freedom of content is also freedom of types. Freedom of types means that the parties are not bound to the contract types regulated in the special part of the Code of Obligations (Articles 184 to 530), but have the freedom to deviate from them and to mix them or to invent completely new contract types (innominate contracts).\(^2\)

The conclusion of a contract requires a mutual expression of intent by the parties. The expression of intent may be express or implied. According to the chronological sequence of the declarations, the first is referred to as the offer, the second as acceptance. The offer is a declaration of intent, which needs to be received by the other party and the conclusion of a

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1 Patrick Rohn is a partner, and Carolina Keller Jupitz is a counsel at Thouvenin Rechtsanwälte KLG.
contract depends on a simple agreement of the receiving party.\textsuperscript{3} The offer must be sufficiently determined or at least determinable with regard to the type of contract to be concluded, the essential elements of the contract (essentialia negotii) and the contracting parties.\textsuperscript{4}

As a rule, contract negotiations precede the conclusion of a contract. The parties are generally not bound by contract in this phase of their relationship. Nonetheless, pre-contractual duties arise during this period, which differ from those that are non-contractual duties. If these pre-contractual duties are violated, this may lead to liability for \textit{culpa in contrahendo}. The liability for the breach of pre-contractual duties (\textit{culpa in contrahendo}) is not regulated in the Code of Obligations but originates from case law.\textsuperscript{5}

### III CONTRACT INTERPRETATION

The law chosen by the parties governs the contract (Article 116 Paragraph 1 of the Code on International Private Law), whereby the choice of law must be express or clearly result from the contract or the circumstances. A choice of law may also be tacitly agreed upon.\textsuperscript{6} The law chosen is, in principle, relevant to all substantive and formal questions relating to the contract (principle of the uniform contract statute). In other words, the \textit{lex causae} determines the existence, content and effect of the main contract.\textsuperscript{7}

If it is certain that a contract has been concluded between the parties, the parties may nevertheless have different understandings of the relevant contractual content. In this case, the court must seek to determine the actual and mutual intentions of the parties (Article 18 Paragraph 1 CO). In order to determine the real intention of the parties, the wording of the contract and the context in which it is used is the starting point of any interpretation and plays a predominant role in the process of contractual interpretation.\textsuperscript{8} Additional factors are to be considered to determine whether or not the meaning of the wording is consistent with the extrinsic evidence regarding the intentions of the parties. Such additional factors are, for example, the purpose of the contract and the parties’ interest in its performance, the parties’ conduct before and after execution the contract, and relevant trade customs in the parties’ specific industry or field of commerce. The party claiming that there is a discrepancy between the wording and the real intent of the parties bears the burden of proof to show that the mutual real intent of the parties was different from the actual wording of the contract.\textsuperscript{9}

If the actual and mutual intentions of the parties cannot be established, the court has to resort to an ‘objective’ interpretation of the contract based on the ‘principle of reliance’.\textsuperscript{10} The test for objectivity is how a reasonable party, considering all circumstances, could and should have understood a specific contract clause in good faith. The starting point of the objective interpretation and the predominant factor is again the contractual wording.\textsuperscript{11} In addition

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\textsuperscript{3} Schwenzer, Schweizerisches Obligationenrecht Allgemeiner Teil, Seventh Edition, Paragraph 28.05.
\textsuperscript{5} BGE 140 III 200 consid. 5.2; BGE 124 III 363 consid. II.5.b; BGE 116 II 695 consid. 2 et seq.
\textsuperscript{8} BGE 128 III 265, 267 consid. 3a.
\textsuperscript{9} BGE 121 III 118, consid. 4 b/aa.
\textsuperscript{10} BGE 129 III 118, 122 consid. 2.5.
\textsuperscript{11} BGE 128 III 265, 267 consid. 3a.
\end{flushright}

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to the wording of the contract and the additional interpretative factors described above, there are a number of well-established principles governing the ‘objective’ interpretation of contracts, such as interpretation in accordance with good faith, interpretation *ex tunc*, and interpretation of the contract as a whole.

The parties may lay down their own rules of interpretation in their contract, such as definitions of terms.

**IV DISPUTE RESOLUTION**

**i Jurisdiction**

The Swiss Code of Civil Procedure regulates territorial jurisdiction and the procedure on a federal level, while the cantons regulate material and functional jurisdiction and the organisation of courts and conciliatory authorities. In international disputes, territorial jurisdiction is not governed by the Swiss Code of Civil Procedure, but by the International Private Law Act. However, international treaties have priority over the International Private Law Act, such as the so-called Lugano Convention (Convention on jurisdiction and the enforcement of judgments in civil and commercial matters). This Convention has established a comprehensive jurisdiction system regarding contractual and commercial disputes within the EU and EFTA States that have ratified this Convention. The Lugano Convention serves to extend the jurisdiction and recognition regime of the Brussels Regulation to EFTA member states, including Switzerland.

The competence of Swiss courts depends on the amount in dispute and the nature of the dispute. The cantons may designate a specialised court for commercial disputes and disputes relating to intellectual property rights and unfair competition. There are currently four such specialised commercial courts in Switzerland, in Zurich, St. Gallen, Bern and Aargau. A dispute is deemed to be a commercial dispute if the business activities of at least one party are involved, the amount in dispute is at least 30,000 Swiss francs and the parties are entered in the Swiss Commercial Register or in a comparable foreign register.

In most cantons, pecuniary claims up to a value of 30,000 Swiss francs are heard by a single judge, and claims of 30,001 Swiss francs or more are heard and decided by a court composed of three judges. The parties may establish the jurisdiction of a court either by an agreement on jurisdiction or by appearance.

**ii Conciliatory procedure**

In Switzerland, dispute resolution by conciliatory authorities has a long tradition. The task of the conciliation authority is to try to reconcile the parties in the conciliation procedure, and to settle the dispute amicably. If a settlement cannot be reached, the conciliation authority issues the plaintiff a permission to bring an action.

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Apart from actions that have to be filed with the commercial court, the conciliation procedure which precedes the court proceedings is generally mandatory. Under certain conditions, it is permissible for one or both parties to waive the conciliation procedure.\textsuperscript{15}

iii Court procedure

Civil proceedings begin either with the submission of a request for conciliation or with the direct filing of an action with the court. In both cases, the filing of the submission has the effect of meeting the deadline for legal action and establishes the \textit{lis pendens}.\textsuperscript{16}

There are different types of proceedings depending on the type of dispute, namely the ordinary procedure, the simplified procedure, and the summary procedure. Apart from the nature of the dispute also the amount in dispute is relevant for determining which type of proceedings is applicable. Amounts in dispute over 30,000 Swiss francs are dealt with in ordinary proceedings. The ordinary procedure is the basic type of judicial procedure at first instance and the most common for commercial disputes.

The proceedings are mainly in writing. After the first exchange of written submissions, the courts sometimes summon the parties to a settlement hearing. Before commercial courts, such settlement hearings are a common practice. In this hearing, the court gives a preliminary non-binding legal assessment of the dispute on the basis of the file before it, and the court actively tries to facilitate a settlement. If no settlement can be reached, the parties submit the written reply, which is then followed by the written rejoinder. The pleading phase is followed by the evidence taking phase in which the court may order disclosure, hear witnesses and examine the parties or appoint and instruct an independent expert, or both. In contrast to common law jurisdictions, cross-examination is not common in Switzerland. Consequently, documents are the most important evidence before the court. In particular, the commercial courts often decide a case based on the files submitted (i.e., without hearing any witnesses).

iv Court fees and party indemnity

Plaintiffs must pay an advance on court costs, which is usually dependent on the amount in dispute. In addition and upon defendant’s request, foreign plaintiffs are required to provide security for defendant’s legal cost if the plaintiff is domiciled in a country that is not a signatory to the relevant Hague Conventions.

The costs are determined in the court’s decision and usually the losing party must pay the costs and compensate the winning party (costs follow the event). If no party is entirely successful, the costs are allocated in proportion to the outcome of the case.\textsuperscript{17}

v Alternative dispute resolution (arbitration, mediation)

Switzerland offers excellent conditions for international arbitration proceedings. Swiss arbitration law combines the autonomy of the parties in the organisation of proceedings with the guarantee of a judicially secured framework. Arbitration is widespread, especially for the settlement of disputes between associations and their members (association arbitration, mediation, ad hoc arbitration, and institutional arbitration).

\begin{footnotes}
\item[16] Sutter-Somm/Hedinger, \textit{Kommentar zur Schweizerischen Zivilprozessordnung (ZPO) Third Edition}, Article 62 Paragraph 9 et seq.
\item[17] Article 106 Paragraph 2 of the Civil Procedure Code.
\end{footnotes}
especially in sports law) and in international commercial contracts (international commercial arbitration). The third part of the Civil Procedure Code (Article 353 et seq.) regulates domestic arbitration, while international arbitration falls within the scope of Chapter 12 of the International Private Law (Article 176 et seq.).

The parties may agree to conduct mediation at any time in judicial proceedings. Mediation is a matter of private law both among the parties and between them and the mediator. Neither the conciliation authority nor the court are responsible for the organisation and conduct of the mediation. Mediation is completely independent of conciliation or judicial proceedings.

V BREACH OF CONTRACT CLAIMS

The Swiss Code of Obligations distinguishes between the following forms of default: non-performance (impossibility), delay in performance (default) and defective performance (breach of contract).

i Non-performance (impossibility)

Non-performance occurs when the performance to be rendered by the debtor can no longer be rendered because it has become impossible. In such situations, pursuant to Article 97 Paragraph 1 CO the debtor has to compensate the other party for the damage arising from the non-performance, unless the debtor proves that no fault is attributable to him. To the extent that a debtor's performance has become impossible because of circumstances for which he is not responsible, the obligation is deemed to be extinguished (Article 119 CO).

ii Delay in performance (default)

Default on the part of the debtor applies if the debtor does not fulfil his obligation to perform on time. The prerequisites for debtor’s default are non-performance despite the possibility of performance, maturity and, as a rule, a formal reminder of the creditor.

The debtor is liable for damages if he does not prove that he is not responsible for the delay. Damage compensation means compensation for the damage caused by the delay, (i.e., the financial loss caused by the delay). He is also liable for accidental damage.

If the debtor is in default with a payment, he shall generally pay default interest. This legal consequence occurs irrespective of whether the debtor is responsible for the default and whether the creditor has suffered a loss as a result of the late payment.

24 BGE 130 III 159 consid. 3.
Pursuant to Article 107 Paragraph 1 CO, the creditor may set the debtor a reasonable time limit for subsequent performance. Such a grace period is necessary if the creditor wishes to exercise a remedy that is different from specific performance.\textsuperscript{25} If the debtor fails to perform within the grace period set, the creditor has three options under Article 107 Paragraph 2 CO:

\begin{enumerate}
\item the creditor may continue requesting performance of the contract and compensation for the damage caused by the delay;
\item the creditor may waive performance and claim expectation damages for non-performance instead; or
\item the creditor may withdraw from the contract and claim restitution damages.\textsuperscript{26}
\end{enumerate}

### iii Defective performance and warranties

If the performance provided does not correspond to the one the parties contractually agreed upon, the creditor may claim damages. Whether he is also entitled to repair or replacement or other remedies depends on the type of contract. The laws on sales and contracts for work and services stipulate warranty claims. The purchaser or customer can report defects and have them remedied within a certain period of time.

The legal consequences of defective performance are often regulated specifically for the individual contract types. In addition, Article 97 Paragraph 1 CO deals with defective performance in general terms and provides for damages as the general remedy. In some cases, the creditor may also withdraw from the contract.

In an action for damages, the creditor must prove the damage, the breach of contract and the causal link between the breach of contract and the damage incurred. The debtor’s fault is presumed.\textsuperscript{27}

### VI DEFENCES TO ENFORCEMENT

Swiss law knows several defences to enforcement of a claim; some are directed against the existence of the claim as such and are to be considered by the court \textit{ex officio} (e.g., impossibility). Other defences only prevent the enforceability of the claim and are thus only considered by the court if they are raised by the party (e.g., objection of limitation). Some common examples of defenses to enforcement of a claim are discussed below:

#### i Illegality, immorality

Freedom of content exists only within the limits of the law. A contract is unlawful and therefore not enforceable if it violates mandatory private or public law provisions of Swiss law.\textsuperscript{28} The unlawfulness may result from the object of the contract, the content agreed upon

\textsuperscript{26} Wiegand, Basler Kommentar - \textit{Obligationenrecht I, Art. 1 - 529 OR Sixth Edition}, Article 107 Paragraph 6 et seq.
\textsuperscript{27} BGer 4A_472/2010 (26.11.19) consid. 3.2.
\textsuperscript{28} Huguenin/Meise, Basler Kommentar - \textit{Obligationenrechts I, Art. 1 - 529 OR Sixth Edition}, Article 19/20 Paragraph 15 et seq.
or the indirect contractual purpose. Further limits with regard to freedom of content are good morals and personal freedom (i.e., no one may deprive himself of his freedom or restrict his use to an extent that violates the law or morality).

If the parties provide for the application of a foreign law in their contract, the provisions of that foreign law are not applied and enforced by a Swiss court if it would lead to a result which is incompatible with Swiss public policy. The threshold of public policy however is high and it happens very rarely that a Swiss court refuses to apply foreign law based on that ground.

ii  Impossibility

The doctrine of impossibility applies if the debtor is unable or no longer able to perform his obligations.

According to Article 20 Paragraph 1 CO, a contract that has impossible content is null and void and therefore not enforceable. However, this only includes the initial, objective and permanent impossibility, meaning an impossibility that already existed at the time the contract was concluded (initial) and that is comprehensive in the sense that nobody would be able to perform (objective). All other cases of impossibility are cases of non-performance (see above).

iii  Limitation of liability

In accordance with the principle of contractual freedom, the debtor can exclude or limit his liability. Such a limitation of liability, however, requires in any case a contractual agreement. According to Article 100 Paragraph 1 CO, the exclusion of liability for intent and gross negligence is inadmissible. An agreement according to which liability for wilful intent or gross negligence is excluded or limited is null and void and not enforceable. On the other hand, according to Article 101 Paragraph 2 CO the parties to an agreement may limit or completely exclude their liability for auxiliary persons, such as employees.

iv  Limitation

Claims that are time-barred cannot be enforced if the debtor raises an objection of limitation.

The regular limitation period is ten years. It applies to all claims for which the law does not expressly provide otherwise. Article 128 CO establishes a five-year limitation period for certain claims that are regularly settled fast, namely rental, lease, capital interest as well as other periodic payments. Actions for breach of a seller’s warranty become time-barred two years after delivery of the object to the buyer, even if the buyer does not discover the defects until later, unless the seller has assumed liability under warranty for a longer period.

VII  FRAUD, MISREPRESENTATION AND OTHER CLAIMS

Failure of intent regarding contracts can be distinguished into two major groups: the cases in which the declaration does not correspond to the (correctly) formed will (error of explanation); and cases in which the intent to make a certain declaration was formed incorrectly, whether as

29  BGE 134 III 438 consid. 2.2; BGE 119 II 222, 224.
30  Schwenzer, Schweizerisches Obligationenrecht - Allgemeiner Teil Seventh Edition, Paragraph 64.01 et seq.
31  BGE 111 II 471, 480.
a result of error (error of motive, fundamental error) or caused by the other contracting party or a third party (fraud, duress). A party acting under error, fraud or duress is entitled to annul the contract and seek restitution. This has to be done within one year from the time that the error or the fraud was discovered or from the time that the duress ended.

An error is a misconception of the facts. There is no error in the actual sense if the declarant had no notion of the facts. The error is always unconscious. If there are doubts about the correctness of one’s own notion, an error is excluded. An error is fundamental if, according to the circumstances, it can be assumed that the person acting under error would not have made the declaration or would not have made it with this content if he had known the true facts.

A fraudulent behaviour consists in the pretence of false facts or the non-disclosure of existing facts. The fraud must cause or perpetuate an error on the part of the person deceived. This in turn must have been causal for the declaration of intent. This is not the case if the person deceived has recognised the true facts of the case or if he would have made the declaration of intent even if he had known the true facts.

Fraud, misrepresentation, deception and other unlawful interference may also give rise to claims in tort and damages. If the trust of the other party is abused in the course of contract negotiations, this may lead to a liability for culpa in contrahendo and also give rise to claims for damages.

VIII REMEDIES

If a contract has been breached, the entitled party has, as a rule, the possibility to either demand specific performance or to sue for damages. Depending on the type of contract and breach, the party may also have the right to terminate or rescind the contract, to enforce warranty rights (e.g., repair or subsequent delivery), or to seek injunctive or other relief.

The most frequent consequence of breach of contract is damages. As a basic principal under Swiss law, damage is understood to be every involuntarily and therefore unintentional loss which consist in either a decrease of assets, an increase of liabilities, or a loss of profit. The purpose of damages is compensatory rather than punitive. The aggrieved party, as a rule, has a claim for damages in an amount that equals the difference between its actual economic situation and the hypothetical economic situation it would be in had the contract been fully and properly performed (expectation damages). Considering this, the aggrieved party is entitled to recover any actual financial loss, including any indirect and consequential damage such as loss of profit. The burden of proof however lies with the aggrieved party which has to establish that such profit would in all likelihood have been realised in the ordinary course of business. When determining the lost profits, a court will have regard to the ordinary course of events and assume that the claimant would not have missed reasonable business opportunities available under the specific circumstances, and that such ordinary profits would not have been diminished by unexpected adverse circumstances. The remedy of expectation damages is usually available in cases of non-performance or defective performance (see above).

33 BGE 95 II 407 consid. 1.
34 BGE 103 II 129.
35 BGE 136 III 528 consid. 3.4.2; BGE 132 II 161 consid. 4.1.
On the other hand, restitution damages are usually owed if a party's trust in the validity of a contract is disappointed, for example in cases of liability for *culpa in contrahendo* or if the contract is rescinded because of error, fraud or duress. If restitution damages are due, the aggrieved party must be placed in the position as if he or she had never been involved in the negotiations and the transaction. In particular, all useless expenses incurred in connection with the contract are reimbursable. In exceptional circumstances, lost profit may also be eligible for compensation.37

IX CONCLUSIONS

Swiss contract and commercial law has a long tradition and usually gives the parties great freedom to design their contractual relations. Its basic legal principles have not changed in years, and no major changes are planned for the foreseeable future. This contributes to legal certainty and predictability for the parties.

The civil and commercial courts in Switzerland are usually specialised and endeavour to settle disputes in a competent, pragmatic and efficient manner. In addition, international commercial arbitration is very widespread and efficient in Switzerland. Due to Switzerland’s independence and stability of the legal system as well as its high level of contractual freedom, international parties often choose Swiss law as the applicable law of their contracts and they provide for jurisdiction in Switzerland.

Chapter 23

WASHINGTON, DC AND VIRGINIA

Mark P Guerrera and Robert D Keeling

I OVERVIEW

In this chapter we endeavour to describe many of the foundational, common law contractual doctrines in Virginia and Washington, DC (DC). We consider DC and Virginia together not just because of their geographical proximity, but also because there is substantial similarity between the two jurisdictions. In fact, their core doctrines are often identical – or, at least, nearly so. We have noted differences where they exist, but differences are the exception, not the rule.

This substantial commonality is, at first glance, surprising: DC is a small jurisdiction that does not have a detailed body of contract law, whereas Virginia is a large jurisdiction with a longstanding, well-developed body of contract law. The overlap we found is likely due in part to the fact that both jurisdictions have embraced the objective view of contracts – a development that colors a number of their contractual doctrines. The similarity is also partially due to the fact that courts in DC supplement their case law by relying heavily on the Restatement (Second) of Contracts and the laws of nearby jurisdictions. Because DC courts routinely rely on the Restatement, when Virginia has embraced a position taken in the Restatement (a relatively common occurrence), its views typically line up with those taken by DC.

One of the most notable similarities between the two jurisdictions bears mentioning at the outset. Both jurisdictions robustly enforce contractual duties and limit the availability of defenses that can be used to set aside the terms of a valid agreement. As our discussion shows, this has significant consequences for parties litigating in DC and Virginia.

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II CONTRACT FORMATION

i Elements

To enter into an enforceable contract in DC, the ‘parties must (1) express an intent to be bound, (2) agree to all material terms, and (3) assume mutual obligations’. Like many jurisdictions, including Virginia, DC follows the objective view of contracts. Thus, both intent to be bound, and agreement to material terms, are objective inquiries.

Intent to be bound hinges on whether the parties’ choice of language . . . manifested a mutual intent to be bound contractually – a requirement that is established through offer and acceptance. Agreement to material terms is met when each party assents to ‘the essential terms of the contract’. Courts performing this analysis consider whether the parties’ ‘acts manifested agreement as to each material aspect of the [contract],’ i.e., whether there was a ‘meeting of the minds’.

The third element, mutual obligations, ‘exists when each party agrees to do something it otherwise is under no legal obligation to do, or to refrain from doing something it has a legal right to do’. ‘An exchange of promises provides sufficient consideration, evidencing mutual obligation’.

The elements in Virginia are similar: ‘there must be a complete agreement including acceptance of an offer as well as valuable consideration’. ‘Complete agreement’ is the Virginia equivalent of ‘meeting of the minds’. Under Virginia’s objective approach, whether there was mutual assent (i.e., meeting of the minds) rests on the words and actions of the parties, not their ‘unexpressed state[s] of mind’.

ii Oral contracts

In both DC and Virginia, the ‘proponent of an oral contract has the burden of proving all the elements of a valid and enforceable contract’. Both jurisdictions will enforce an oral contract so long as it does not violate the statute of frauds and the essential elements of a contract

3 DSP Venture Grp., Inc. v. Allen, 830 A.2d 850, 852 (DC 2003); Phillips v. Mazycz, 643 S.E.2d 172, 175 (Va. 2007) (‘We ascertain whether a party assented to the terms of a contract from that party’s words or acts, not from his or her unexpressed state of mind.’); Commonwealth v. Stewart, 66 Va. Cir. 135 (2004) (‘[u]nder the objective theory of contract, which controls in Virginia’).
5 Dyer, 983 A.2d at 357 (quoting 1836 S. St. Tenants Ass’n, Inc. v. Estate of B. Battle, 965 A.2d 832, 837 (DC 2009)).
7 Id. (alteration to original).
8 Dyer, 983 A.2d at 357.
11 See Phillips, 643 S.E.2d at 175.
13 Phillips, 643 S.E.2d at 175-76; Stewart, 66 Va. Cir. 135.
14 Stewart, 66 Va. Cir. 135; see Dean v. Morris, 756 S.E.2d 430, 433 (Va. 2014); see also Ashraft v. Fernandez, 193 A.3d 129, 131 (DC 2018).
are satisfied. Notably, courts considering whether an oral contract was formed frequently reference the burden of proof – often to the detriment of the party seeking enforcement. They also vigilantly ensure 'all material terms' were agreed upon.

iii  Implied-in-fact contracts, unjust enrichment, and promissory estoppel

'An implied-in-fact contract is a true contract, containing all necessary elements of a binding agreement; it differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but rather is inferred from the conduct of the parties in the milieu in which they dealt.' DC law provides for recovery under an implied-in-fact-contract theory when '(1) valuable services [were] rendered [by the plaintiff]; (2) for the person sought to be charged; (3) which services were accepted by the person sought to be charged, and enjoyed by him or her; and (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff, in performing such services, expected to be paid'. Virginia applies a slightly different standard: it will enforce an implied-in-fact contract if 'the typical requirements to form a contract are present,' and a contractual relationship can be inferred from 'consideration of [the parties'] acts and conduct'.

Additionally, although it is not a contractual remedy, both jurisdictions provide that an aggrieved party may be able to recover under a theory of unjust enrichment. In DC, the plaintiff must show that he or she '(1) . . . conferred a benefit on the defendant; (2) the defendant retain[ed] the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust.' In Virginia, a plaintiff must show that '(1) he conferred a benefit on [the defendant]; (2) [the defendant] knew of the benefit and should reasonably have expected to repay [the plaintiff]; and (3) [the defendant] accepted or retained the benefit without

15 See Ashrafi, 193 A.3d at 131; Kramer Assocs., Inc. v. Iham, Ltd., 888 A.2d 247, 251-52 (DC 2005); see also Va. Code Ann. § 11-2; C. Porter Vaughan, Inc. v. DiLorenzo, 689 S.E.2d 656, 660 (Va. 2010); Dean, 756 S.E.2d at 432.
16 See, e.g., Kramer, 888 A.2d at 251; Dean, 756 S.E.2d at 433. In certain contexts, such as trusts and estates and contracts to provide insurance, Virginia courts will require the proponent of an oral contract to show the existence of the contract through 'clear and convincing' evidence. See Horace Mann Ins. Co. v. Gov't Emps. Ins. Co., 344 S.E.2d 906, 909 (Va. 1986) (holding burden was preponderance of evidence because contract was for settlement, not to provide insurance). Compare Dean, 756 S.E.2d at 434 (applying a clear and convincing standard), with Stewart, 66 Va. Cir. 135 (not applying a clear and convincing standard).
19 Fred Ezra Co. v. Pedas, 682 A.2d 173, 176 (DC 1996) (second alteration in original) (internal quotations omitted); Boyd, 164 A.3d at 81. Somewhat confusingly, courts in DC often refer to implied-in-fact contract claims as quantum meruit claims. See, e.g., Fred Ezra, 682 A.2d at 176. They are referenced interchangeably because quantum meruit encompasses both implied-in-fact contracts and quasi-contractual duties, such as unjust enrichment, which is discussed later in this section. See id.; see also New Econ. Capital, LLC, 881 A.2d at 1095.
20 Spectra-4, 772 S.E.2d at 295 (alteration in original) (internal quotations omitted).
21 Peart v. DC Hous. Auth., 972 A.2d 810, 813 (DC 2009) (internal quotations omitted).
purchasing for its value.’ In other words, in Virginia, ‘[o]ne may not recover under a theory of implied contract simply by showing a benefit to the defendant, without adducing other facts to raise an implication that the defendant promised to pay the plaintiff for such benefit.’

Unjust enrichment claims operate in the absence of a valid contract. ‘One who has entered into a valid contract cannot be heard to complain that the contract is unjust, or that it unjustly enriches the party with whom he or she has reached agreement.’ As an equitable remedy, unjust enrichment’s use generally ‘depends on whether it is fair and just for the recipient to retain the benefit, not on whether the person or persons who bestowed the benefit had any duty to do so.’

Of the two, only DC recognises the doctrine of promissory estoppel. In DC, the doctrine applies when a promise has been made to the plaintiff that (1) the plaintiff detrimentally relied on, and (2) that reasonably induced the plaintiff’s reliance. Like unjust enrichment, promissory estoppel is an equitable remedy. Courts will only apply it if ‘injustice otherwise [would] not [be] avoidable.’ Although ‘injustice’ is an inherently malleable standard, past decisions have shed some light on its contours. For example, the DC Court of Appeals has held that injustice is not otherwise unavoidable when a plaintiff has already been ‘fully compensated’ for the alleged injury. Similarly, DC has also held that justice does not require use of a promissory estoppel claim when the estoppel claim merely ‘restates’ a breach of contract claim. A promissory estoppel claim must therefore rely on a non-contractual promise to succeed.
III DISPUTE RESOLUTION

i Forum selection clauses
Both jurisdictions have embraced the modern rule for enforcement of forum selection clauses: forum selection clauses are ‘prima facie valid and [will] be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances’. DC courts will generally treat dismissals on the basis of a forum selection clause as a ‘non-merits ruling[] which do[es] not preclude filing in the proper jurisdiction.’ Because it is a non-merits ruling, DC courts may ‘bypass [] questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.’

ii Arbitration clauses
In 2008, DC adopted the Revised Uniform Arbitration Act (RUAA). Under the RUAA, DC courts will enforce an agreement to arbitrate unless ‘a ground . . . exists at law or in equity for the revocation of a contract’. The party seeking arbitration bears the burden of showing the agreement is valid. Challenges to the validity of an arbitration clause are typically for a court to decide. But challenges to the contract generally will likely be resolved by an arbitrator. Notably, the RUAA ‘preserves the . . . severability doctrine’. ‘Under that doctrine, even if another provision of the contract, or . . . the contract as a whole, is invalid, unenforceable, voidable, or void, that does not prevent a court from enforcing a specific agreement to arbitrate’.

Virginia, on the other hand, has not adopted the RUAA. Virginia’s arbitration statute (the Virginia Uniform Arbitration Act, or VUAA) is an adoption of the Uniform Arbitration Act. Additionally, in Virginia, ‘[t]he law of contracts governs the question whether there exists a valid and enforceable agreement to arbitrate’. A valid agreement to arbitrate must

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35 See Yazdani, 941 A.2d at 433.
36 id. (alteration in original) (quoting Sinochem Int’l Co. v. Malay. Int’l Shipping Corp., 549 U.S. 422, 432 (2007)).
37 This section does not address the Federal Arbitration Act, which covers a broad range of arbitration proceedings.
39 DC Code § 16-4406(a).
41 DC Code § 16-4406(b) (‘The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.’).
42 See Menna, 987 A.2d at 465 n.30 (noting that because an arbitration provision is severable, ‘even the validity of a contract containing an arbitration clause is for the arbitrator to decide unless the challenge is directed specifically at the validity of the arbitration clause itself’); see also DC Code § 16-4406(c).
43 Menna, 987 A.2d at 465 n.30 (internal quotations omitted).
44 Johanson, 320 F. Supp. 3d at 221 (omission in original) (internal quotations omitted).
45 See generally Va. Code Ann. § 8.01-581.01.
contain ‘the essential elements of a valid contract at common law’. Moreover, Virginia applies ‘no presumption in favour of arbitrability’. ‘Rather, the party seeking arbitration has the burden of proving the existence of the agreement’.

IV CONTRACT INTERPRETATION

Because DC and Virginia follow the objective view of contracts, ‘[w]here the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning,’ ‘unless it is repugnant to some rule of law or public policy’. A threshold issue then is whether the contract is ambiguous. If the contract is unambiguous, it ‘speaks for itself and binds the parties without the necessity of extrinsic evidence’.

Ambiguity is often a central issue at summary judgment. Because unambiguous contracts ‘bind[] the parties without the necessity of [considering] extrinsic evidence,’ courts frequently award summary judgment if the contract is unambiguous. Conversely, because ambiguous contracts often require considering ‘the credibility of extrinsic evidence,’ courts will usually reserve summary judgment if the contract is ambiguous.

Contractual ambiguity is a question of law. Courts in Virginia and DC give contractual language its plain meaning and hold that a contract is ambiguous only when it is ‘reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings’. It is unambiguous when ‘the court can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends’.

Courts use the parol evidence rule to cabin the use of extrinsic evidence. Generally, the rule establishes that when an agreement has been put into writing, extrinsic evidence is inadmissible if the contract is unambiguous. It also prohibits courts from resorting to extrinsic evidence that would contradict the ‘the terms of a valid, and plain and unambiguous, written contract’.

48 id.
49 id.
50 id.
51 Plunkett v. Plunkett, 624 S.E.2d 39, 42 (Va. 2006) (quoting TM Delmarva Power, L.L.C., 557 S.E.2d at 200); see Tauber v. Quan, 938 A.2d 724, 729 (DC 2007).
52 Palmer & Palmer Co. v. Waterfront Marine Constr., Inc., 662 S.E.2d 77, 80 (Va. 2008); Tauber, 938 A.2d at 729.
53 Tauber, 938 A.2d at 729 (internal quotations omitted); see Babcock & Wilcox Co. v. Areva NP, Inc., 788 S.E.2d 237, 249 (Va. 2016) (noting that when the contract is unambiguous, ‘[i]tsp meanin g [is] . . . thus a question of law for the court, not a question of fact for the jury’).
54 Tauber, 938 A.2d at 729 (internal quotations omitted); see Babcock, 788 S.E.2d at 249.
55 See Holland v. Hannan, 456 A.2d 807, 815 (DC 1983); Babcock, 788 S.E.2d at 249.
56 See Holland, 456 A.2d at 815; cf. Babcock, 788 S.E.2d at 249.
57 Holland, 456 A.2d at 815 (internal quotations omitted); James River Ins. Co. v. Dowell Truck Stop, LLC, 827 S.E.2d 374, 376 (Va. 2019).
59 See Abdulrahman, 76 A.3d at 888 (internal quotations omitted); Virginia Elec., 618 S.E.2d at 326-27.
60
Notably, DC courts have struggled to consistently define what qualifies as extrinsic evidence.\textsuperscript{61} Language from some cases indicates that anything outside of the contractual language is extrinsic, while other cases allow evidence of ‘context’.\textsuperscript{62} The cases that allow contextual evidence do so by defining context as non-extrinsic evidence.\textsuperscript{63} In the view of those cases, context is ‘evidence of the general situation, [such as] the relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.’\textsuperscript{64} They then define extrinsic evidence narrowly, as ‘direct evidence as to what a particular party intended the language to mean, a subjective question.’\textsuperscript{65} At least one recent case indicates that the DC Court of Appeals is likely to take this approach, of distinguishing context from extrinsic evidence, in the future.\textsuperscript{66}

Lastly, both jurisdictions courts apply contra proferentem—the canon that ambiguities in a contract are construed against the drafter.\textsuperscript{67} In the DC hierarchy of interpretative tools, the canon is low on the list: it is ‘inferior to extrinsic proof of the parties’ agreement, or to other authority revealing that understanding’.\textsuperscript{68} Virginia courts will apply the canon only ‘[i]f the plain meaning is undiscoverable.’\textsuperscript{69} The canon is commonly referenced by Virginia courts in insurance cases.\textsuperscript{70}

\section*{V Breach of Contract Claims}

To establish a breach of contract claim, a plaintiff must show (1) a valid contract, (2) a contractual duty, (3) a breach of that duty, and (4) damages.\textsuperscript{71} The third element – breach – is satisfied if ‘a party fails to perform when performance is due’.\textsuperscript{72} When a contract fails to specify a time for performance, DC law implies that performance must be made within a ‘reasonable time’.\textsuperscript{73} Additionally, DC and Virginia recognise the doctrine of anticipatory

\textsuperscript{61} See Abdelrhman, 76 A.3d at 888-89 (discussing this difficulty).
\textsuperscript{62} See id.
\textsuperscript{63} See id.
\textsuperscript{64} See id. (alteration to original) (internal quotations omitted).
\textsuperscript{65} See id. (internal quotations omitted).
\textsuperscript{66} See, e.g., Nest & Total Venture, LLC v. Deutsch, 31 A.3d 1211, 1219-20, 1227 (DC 2011); see also Abdelrhman, 76 A.3d at 889 (‘It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context.’ (quoting Ozerol v. Howard Univ., 545 A.2d 638, 642 (DC 1988))).
\textsuperscript{68} Am. Bldg. Maint., 655 A.2d at 863 (internal quotations omitted).
\textsuperscript{69} Erie Ins. Exch., 822 S.E.2d at 355.
\textsuperscript{70} See, e.g., id.
\textsuperscript{71} See Tsintolas Realty Co. v. Mendez, 984 A.2d 181, 187 (DC 2009); Sunrise Continuing Care, LLC v. Wright, 671 S.E.2d 132, 135 (Va. 2009); Caperton v. A.T. Massey Coal Co., 740 S.E.2d 1, 8 (Va. 2013).
\textsuperscript{73} Murray v. Wells Fargo Home Mortg., 953 A.2d 308, 320 (DC 2008) (quotations omitted).
repudiation, under which ‘[a]n aggrieved party . . . may be entitled to sue prior to breach if the other party has . . . communicated, by word or conduct, unequivocally and positively its intention not to perform’.74

VI DEFENCES TO ENFORCEMENT

i Indefinite material terms

A contract ‘must be sufficiently definite as to its material terms (which include, e.g., subject matter, . . . payment terms, quantity, and duration) that the promises and performance to be rendered by each party are reasonably certain’.75 But courts are wary not to push this requirement to ‘extreme limits’.76 They recognise that ‘[a]ll agreements have some degree of indefiniteness and some degree of uncertainty’.77 Thus, the material terms need not be ‘fixed with complete and perfect certainty’.78 Rather, an enforceable contract need only have ‘[r]easonable definiteness in [its] essential terms’79 – essential terms must be sufficiently concrete for a ‘court to determine whether a breach has occurred and to identify an appropriate remedy’.80

ii Statute of limitations

The statute of limitations is frequently raised as a defense in contract litigation.81 Subject to exceptions, the limitations period begins to run when the breach of contract occurs.82 In DC, an aggrieved party generally has three years from that time to file a lawsuit.83 Virginia applies a three-year limit to unwritten contracts, and a five-year limit to written contracts ‘signed by the party to be charged’.84

iii Duress

Proving duress is challenging. The party seeking the benefit of a duress theory must show ‘(1) an improper threat and (2) the lack of a reasonable alternative.’85 Both jurisdictions will

74 Wash. Nat’ls, 192 A.2d at 586 (internal quotations omitted); see generally Bennett v. Sage Payment Solns., Inc., 710 S.E.2d 736, 740-41 (Va. 2011).
76 Rosenthal v. Nat’l Produce Co., 573 A.2d 365, 370 (DC 1990); see Dean, 756 S.E.2d at 433 (’[R]easonable certainty is all that is required.’ (alteration to original) (internal quotations omitted)).
77 EastBanc, Inc., 940 A.2d at 1002 (internal quotations omitted); see Dean, 756 S.E.2d at 433.
78 EastBanc, Inc., 940 A.2d at 1002 (internal quotations omitted); see Dean, 756 S.E.2d at 433.
80 EastBanc, Inc., 940 A.2d at 1002 (internal quotations omitted); see Dean, 756 S.E.2d at 433.
82 See EastBanc, Inc., 940 A.2d at 1004; Kerns, 818 S.E.2d at 783.
83 See DC Code § 12-301(7).
85 Osborne v. Howard Univ. Physicians, Inc., 904 A.2d 335, 339-40 (DC 2006); Goode v. Burke Town Plaza, Inc., 436 S.E.2d 450, 452 (Va. 1993) (’Duress exists when a defendant commits a wrongful act sufficient to prevent a plaintiff from exercising his free will, thereby coercing the plaintiff’s consent.’); see also ITS
limit the range of conduct that constitutes an improper threat. Additionally, DC courts will typically hold that litigation is a reasonable alternative. Parties in DC seeking to show that it was not must provide ‘facts establishing specific financial harm’ that made it an unreasonable alternative.

iv  Contracts against public policy

Absent a situation where a contract is in direct violation of the law, DC courts are extremely reluctant to void contracts on public policy grounds. Indeed, two main instances in which DC courts have been willing to void contracts on the basis of public policy could be characterised as violation-of-the-law cases.

In Virginia, '[t]he meaning of the phrase public policy is vague and variable; courts have not exactly defined it'. Virginia courts have in the past defined it as ‘the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare’ – an approach that is significantly broader than DC’s. However, this broad approach is not without limits, and modern Virginia courts caution that they are not likely to void an agreement unless the ‘illegality’ of it ‘is clear and certain’. For example, although Virginia courts have held that ‘pre-injury release provisions relating to personal injury’ are void, they have not been willing to void provisions that indemnify a party from personal injury liability.

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86 See Osborne, 904 A.2d at 339-40 (endorsing the Restatement (Second) of Contract’s limited category of improper threats); see Goode, 436 S.E.2d at 452-53 (noting that ‘the application of economic pressure by threatening to enforce a legal right’ does not ‘constitute duress’).
87 See id. at 341.
88 See Osborne, 904 A.2d at 340-41.
89 See, e.g., Brown v. 1301 K St. Ltd. P’ship, 31 A.3d 902, 906-07 (DC 2011) (refusing to ‘expand the narrow class of releases deemed violative of public policy to include the disclaimer at issue’); Moore v. Waller, 930 A.2d 176, 183 (DC 2007) (expressing ‘agreement’ with the Maryland Court of Special Appeals and with numerous other courts which have held that it does not violate public policy to enforce exculpatory clauses contained in membership contracts of health clubs and fitness centers’ (alteration to original)).
90 See George Washington Univ. v. Weintraub, 458 A.2d 43, 47 (DC 1983) (refusing to enforce exculpatory clause that sought to waive or modify a tenant’s rights ‘under the implied warranty of habitability’); Godette v. Estate of Cox, 592 A.2d 1028, 1033-36 (DC 1991) (refusing to enforce, in estate context, ‘a[n] exculpatory clause that excuses self-dealing or attempts to limit liability for breaches of duty’ because some of those duties were statutorily imposed).
92 id. (quoting Wallihan, 82 S.E.2d at 558).
94 Estes Express, 641 S.E.2d at 478-79.
95 See id. at 478-80.
v  Impossibility

Impossibility is rarely applied in either jurisdiction. Generally though, it provides that if ‘a promisor’s contractual performance is made impossible by a change in character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he . . . expressly agreed in the contract to assume the risk of performance.’ 97 The defense will be successful only in limited circumstances: a ‘mere inconvenience or unexpected difficulty’ is not enough to excuse contractual obligations under this defense. 98

vi  Accord and satisfaction

The last defense we highlight is accord and satisfaction. Accord and satisfaction occurs after formation. When parties to a contract have a dispute but agree to resolve their differences through payment of an amount other than what was originally agreed upon, the ‘new’ payment ‘satisfies’ the debtor’s original obligation under the contract. 99 A common example of this doctrine is cashing a check that says ‘payment in full’. 100 In that situation, the creditor’s decision to cash the check may operate as acceptance of the alternative payment. 101 Importantly though, a genuine dispute is a prerequisite. 102 An accord and satisfaction defense will not be successful if a creditor cashes a check that says payment in full, but the parties have not legitimately disputed the amount due before the creditor cashes the check. 103 When an accord and satisfaction claim fails, courts will likely deduct the amount paid from the plaintiff’s damages. 104

96  DC courts generally treat impossibility and impracticability as interchangeable. E. Capitol View Cmty. Dev. Corp. v. Robinson, 941 A.2d 1036, 1040 n.6 (DC 2008) (‘Impossibility and commercial impracticability involve the same considerations.’). ‘To establish impossibility or commercial impracticability, a party must show (1) the unexpected occurrence of an intervening act; (2) the risk of the unexpected occurrence was not allocated by agreement or custom; and (3) the occurrence made performance impractical.’ Id. at 1040 (internal quotations and footnote omitted).

97  Long Signature Homes, Inc. v. Fairfield Woods, Inc., 445 S.E.2d 489, 491 (Va. 1994) (omission in original) (internal quotations omitted); see Hampton Rds. Bankshares, Inc. v. Harvard, 781 S.E.2d 172, 177-78 (Va. 2016). DC phrases its rule slightly differently, swapping ‘impossible’ for ‘impractical’—a difference that is probably the result of the fact that DC courts treat impossibility and impracticality as interchangeable, using both terms in their case law. See E. Capitol View, 941 A.2d at 1040 & n.6.

98  Island Dev. Corp. v. District of Columbia, 933 A.2d 340, 350 (DC 2007) (internal quotations omitted); see Long Signature Homes, 445 S.E.2d at 491 (noting that a temporary impossibility is insufficient); see generally Hampton Rds., 781 S.E.2d at 177-78 (discussing the standard for establishing impossibility).


100  See Pierola, 687 A.2d at 947-48; see also Helton, 672 S.E.2d at 843.

101  See Pierola, 687 A.2d at 947-48; see also Helton, 672 S.E.2d at 843.

102  See Pierola, 687 A.2d at 947-48; see also Helton, 672 S.E.2d at 843.

103  See Pierola, 687 A.2d at 947-48; see also Va. Code Ann. § 8.3A-311.

104  See, e.g., Hooten ex rel. GEICO v. Reed, 77 Va. Cir. 161 (2008) (stating, after concluding that the accord and satisfaction claim failed, that ‘judgment will be entered on the claim of the plaintiff, plus costs, less the amount paid by the defendant’); see also Ludwig & Robinson, PLLC v. BiotechPharma, LLC, 186 A.3d 105, 117 (DC 2018) (noting duplicative recovery is prohibited and stating that ‘[a] plaintiff is entitled to be made whole, but not more than whole’ (internal quotations omitted)).
VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

The general rule for fraud in the inducement is that ‘[i]f a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.’\(^\text{105}\) DC courts impose a ‘very high standard on sophisticated business entities claiming fraudulent inducement in arms-length transactions’.\(^\text{106}\) Such parties must ‘establish by clear and convincing evidence that the defendant made a false representation, in reference to material fact, with knowledge of its falsity, and an intent to deceive, and that the plaintiff’s reliance [on the alleged material misrepresentations] was reasonable.’\(^\text{107}\)

VIII REMEDIES

i Compensatory damages, restitution, and punitive damages

Both states recognise restitution and compensatory damages. Generally, restitution is ‘available as an alternative to an action for damages on the contract’.\(^\text{108}\) Restitution ‘is based upon the principle of unjust enrichment’ and ‘require[s] the wrongdoer to restore what he has received’.\(^\text{109}\) Compensatory damages, on the other hand, do not focus on the unfair gain the wrongdoer received, but rather on the loss the innocent party has incurred.\(^\text{110}\) Compensatory damages are generally limited to those damages that ‘are the natural consequence and proximate result of [the breaching party’s] conduct’.\(^\text{111}\) Additionally, although ‘mathematical certainty’ is not required, ‘there must be some reasonable basis on which to estimate damages’.\(^\text{112}\)

\(^{105}\) Steiner v. Am. Friends of Lubavitch (Chabad), 177 A.3d 1246, 1255-56 (DC 2018) (alteration in original) (quoting Restatement (Second) of Contracts § 164 (1981)); see Meuse v. Henry, 819 S.E.2d 220, 230 n.3 (Va. 2012); Jared & Donna Maruyama 1997 Tr. v. NISC Holdings, LLC, 727 S.E.2d 80, 86 (Va. 2012). In DC, ‘a breach of contract claim may not be recast as a tort claim.’ Ludwig, 186 A.3d at 112 (internal quotations omitted). The duty on which a tort claim, such as fraud or misrepresentation, is based must be ‘a duty independent of that arising out of the contract itself.’ Choharis v. State Farm Fire & Cas. Co., 961 A.2d 1080, 1089 (DC 2008). This rule often creates problems for tort claims arising out of conduct occurring during performance of a contract, but it does not create problems for fraud in the inducement claims. See Ludwig, 185 A.3d at 111. Fraud in the inducement seeks to rescind a contract based on conduct that happened before the parties entered into the contract. See id. These claims, consequently, do not risk resting on a contractual duty because no contractual duties existed at the time of the conduct in question. See generally id.


\(^{107}\) Id. at 576 (alteration in original) (emphasis omitted) (internal quotations omitted).

\(^{108}\) See Lee v. Foote, 481 A.2d 484, 485 (DC 1984) (per curiam); see also Ingber v. Ross, 479 A.2d 1256, 1263 (DC 1984) (identifying equitable nature of restitution); cf. Wilkins v. Peninsula Motor Cars, Inc., 587 S.E.2d 581, 583 (Va. 2003) (‘[C]ourt must assure that a verdict, while fully and fairly compensating a plaintiff for loss, does not include duplicative damages.’).

\(^{109}\) Lee, 481 A.2d at 486 (alteration to original); see Devine v. Buki, 767 S.E.2d 459, 467 (Va. 2015).


\(^{112}\) Exec. Sandwich Shoppe, 749 A.2d at 737 (internal quotations omitted); Nichols Constr. Corp., 661 S.E.2d at 472.
Punitive damages are ‘rare, [but] they may be recovered in’ Virginia and DC.113 They carry a demanding showing: ‘the acts of the breaching party’ must have been ‘malicious, wanton, oppressive or with criminal indifference to civil obligations and have ‘merge[d] with and assume[d] the character of a willful tort.’114 The second half of this test will likely be strictly enforced: if the breach of contract did not merge with (i.e., constitute) a willful tort, no claim for punitive damages lies.115

ii Liquidated damages

DC and Virginia recognise liquidated damages provisions and will enforce them if they do not constitute a ‘penalty’.116 In Virginia, courts will hold that a provision is a penalty if the ‘damage resulting from a breach of contract is susceptible of definite measurement, or where the stipulated amount would be grossly in excess of actual damages’.117 In DC, the primary inquiry is whether the provision was reasonable ‘compensation for breach, viewed as of the time and under the circumstances when it was agreed’.118 The trend in DC is for courts to recognise liquidated damages provisions so long as ‘they do not clearly disregard the principle of compensation’.119 This is especially true ‘[w]hen a liquidated damages provision is the product of fair arm’s length bargaining, particularly between sophisticated parties’.120 Lastly, both DC and Virginia have joined the jurisdictions that hold ‘the party challenging the enforceability of a liquidated damages clause has the burden of proving that it is a penalty’.121

iii Specific performance

Specific performance is an ‘extraordinary equitable remedy’ that ‘rests in the discretion of the court.’122 It is most often employed in land-sale transactions,123 and is generally not available in

115 See Bernstein, 649 A.2d at 1073-74 (denying punitive liability because ‘[n]o such merger occurred’);
Kamlar Corp., 299 S.E.2d at 518.
117 Boots, 649 S.E.2d at 697 (internal quotations omitted).
118 Proulx, 199 A.3d at 673.
119 id. (internal quotations omitted).
120 id. at 674 (alteration in original) (internal quotations omitted).
121 S. Brooke Purll, Inc. v. Vailes, 850 A.2d 1135, 1138 (DC 2004) (internal quotations omitted); Boots, 649 S.E.2d at 697.
122 Indep. Mgmt. Co. v. Anderson & Summers, LLC, 874 A.2d 862, 867, 870 (DC 2005) (internal quotations omitted); see generally Callison v. Glick, 826 S.E.2d 310, 318 (Va. 2019) (‘The specific performance of a contract is not a matter of absolute right, but rests in a sound, judicial discretion.’ (quoting Millman v. Swan, 127 S.E. 166 (Va. 1925)).
123 See Saunders v. Hudgens, 184 A.3d 345, 349 n.5 (DC 2018) (‘[T]he remedy of specific performance is almost routinely available to enforce contracts for the purchase of land.’ (alteration to original) (internal quotations omitted)); see, e.g., Callison, 826 S.E.2d at 320.
addition to damages. Moreover, courts require that the party seeking specific performance ‘must show that he was ready, willing and able to perform the contractual obligations,’ or that he already performed his obligations.

IX CONCLUSIONS

As we noted at the outset, there is significant overlap between DC and Virginia’s core contractual doctrines. These jurisdictions take similar approaches to contract interpretation and enforcement. They take an objective view and are extremely reluctant to allow a party to escape contractual obligations simply because performance is inconvenient or burdensome. They have also limited the circumstances in which classic common law defenses such as impossibility, public policy, and duress apply. Parties litigating in these forums should therefore be cautious when seeking to set aside contractual duties; Virginia and DC courts will likely enforce them if they are valid.

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124 See Sanders, 184 A.3d at 350; Nichols Constr. Corp., 661 S.E.2d at 471 (‘Unless specific performance is sought and available, the proper measure of unliquidated damages for breach of a contract is the sum that would put [the plaintiff] in the same position, as far as money can do it, as if the contract had been performed.’ (alteration in original) (internal quotations omitted)).

125 Indep. Mgmt. Co., 874 A.2d 870 (internal quotations omitted); see generally Callison, 826 S.E.2d at 320 (‘He who seeks specific performance bears the burden of proving [] that there is a definite contract and that he has performed all that is required of him . . . and that all conditions precedent have been fulfilled.’ (alteration and omission in original) (internal quotations omitted)).
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Claire has advised a wide variety of clients on contentious matters, with a particular focus on the areas of financial services disputes, contractual disputes and corporate offences. Claire has also been involved in a number of judicial review proceedings, acting both for and against statutory bodies.

Claire is highly experienced in advising clients on all aspects of High Court, Commercial Court and Supreme Court litigation. The majority of Claire’s cases consist of High Court and Commercial Court litigation matters. In this regard, Claire has developed experience in case management, disclosure and discovery requirements, including privilege and confidentiality issues, the instruction of experts and preliminary issues and modular trials procedure. From a practical perspective, Claire has particular expertise in coordinating and managing large-scale discovery exercises.

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Melissa is a partner at Allen & Gledhill, and her practice focuses on commercial litigation and international arbitration, including cross-border disputes. Melissa has acted in complex banking claims, shareholder and trust disputes, and professional negligence matters. She has also advised statutory boards and regulatory agencies. Prior to joining Allen & Gledhill, Melissa was a Justices’ Law Clerk and an Assistant Registrar at the Supreme Court of Singapore, where she was involved in the establishment of the Singapore International Commercial Court. Melissa graduated from the University of Cambridge with a BA (Hons.) law degree (double first class) in 2009, and holds a BCL (distinction) from the University of Oxford and an LLM from Harvard University. She was called to the Singapore Bar in 2015.
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Alan Mark is a partner in the litigation and class actions groups and co-heads the securities and energy law litigation Groups at Goodmans.

Alan has a diversified advocacy practice, specialising in corporate and commercial litigation, class actions and electricity law and regulation. Alan's corporate and commercial litigation practice encompasses all manner of business disputes with a focus on corporate governance, corporate finance, securities, financial services, and restructuring and insolvency. Alan's class action practice includes securities, product liability and environmental claims. Alan also carries on a substantial electricity and regulatory practice, regularly representing clients in the electricity sector before the Ontario Energy Board and the courts.

Alan has appeared at all levels of the Ontario, and other provincial, courts, and the Federal Courts, including the Supreme Court of Canada. Alan has represented many Fortune 500 companies and has been lead counsel on a number of high profile domestic and cross-border cases. Leading businesses and organisations look to Alan for his sound judgment and strategic advice as well as his renowned courtroom skills. Alan has a loyal following of clients who rely on him to handle their most significant legal disputes.

Alan is widely recognised as a leading counsel. He is listed as recommended counsel in numerous leading guides and directories, including *Chambers Global*, *The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, the *Lexpert Special Edition on Canada's Leading Lawyers* in the *Globe & Mail's* Report on Business Magazine for energy and litigation, *Best Lawyers in Canada*, *Benchmark Canada* and *Euromoney's Guide to the World's Leading Litigation Lawyers*. In 2013, Alan was recognised as ‘Canada's Energy/Resource Litigator of the Year’ by *Benchmark Canada*.

Alan is a fellow of the American College of Trial Lawyers and a former director and past president of The Advocates' Society. Alan has been a dedicated trial advocacy instructor for many years at both Osgoode Hall Law School and 'The Advocates’ Society. He speaks regularly at CLE Programs and is a frequent contributor to legal publications.

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Julie is a partner at Matheson. She has over 20 years’ experience in financial services litigation, contentious and non-contentious corporate restructuring and insolvency cases, as well as high-stake complex corporate disputes. She regularly advises shareholders, directors and private equity investors in relation to their rights, remedies and duties. She also has extensive experience of advising financial institutions, insolvency practitioners and investment funds in relation to debt restructuring, enforcement and security issues.

Julie holds a Ministerial appointment to the board of semi-state company, Coillte. She was on the Council of the Irish Society of Insolvency Practitioners from 2011–2014, acting as secretary and as chair of its educational subcommittee during that period. Julie is also a member of INSOL Europe and the American Bankruptcy Institute. She is co-author of the Commercial Litigation Association of Ireland's practitioner's handbook for the Commercial Court in Ireland and of the Law Society of Ireland’s insolvency law textbook.
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Andreas Natterer has been a partner at Schoenherr since 2008, where he specialises in litigation, food and pharmaceutical law. He is one of Austria’s leading experts in food and pharma law and has 25 years of experience in several areas of litigation, with a focus on claims arising out of product liability, compensation for damage and distribution agreements, representing Austrian and international corporates out of and before court. Andreas Natterer advises many major companies from the food and pharmaceutical industry.

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Thomas Nigg is a Liechtenstein lawyer and citizen, currently practising in Vaduz. He studied law at the University of St Gallen (Switzerland), where he obtained his Master of Arts in legal studies HSG (MA HSG) in 2008. In 2008 he started his professional career as a lawyer in Liechtenstein and was admitted to the Liechtenstein Bar in 2010. In 2014 he was appointed partner in Batliner Gasser Attorneys at Law (now Gasser Partner Attorneys at Law). In 2016 he was appointed a senior partner at Gasser Partner Attorneys at Law. In 2018 he obtained his executive Master of Laws (LLM) in corporate, foundation and trust law at the University of Liechtenstein. The greater part of his work involves representing clients, mostly corporations or high-net-worth individuals, before courts in civil, criminal and administrative matters, and assisting clients in commercial, corporate and criminal law, pertaining to both national and international affairs. In addition, he is the author of the Liechtenstein chapter in The Asset Tracing and Recovery Review and has authored articles on various legal topics.

FIORELLA NORIEGA DEL VALLE
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Fiorella joined Herbert Smith Freehills as an associate in March 2018. Fiorella has experience in commercial litigation, including cross-border dispute resolution (specifically in Africa) and alternative dispute resolution, such as arbitrations and mediations.

Fiorella is fluent in English and Spanish and holds an Advanced Certificate in International Arbitration from the Chartered Institute of Arbitrators, and is also a board member of the Young Members Group of the CIArb (Johannesburg branch).

She is part of a team that specialises in various aspects of commercial litigation.

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Mr Palacios was admitted to practise law by the Panamerican University (2004), with a speciality degree in procedural institutions and *amparo* (2005) from the same university. He has been a member of Martínez, Algaba, De Haro y Curiel since 2006, and became a partner in 2013.

Mr Palacios’ practice is mainly focused on commercial and administrative litigation. His commercial litigation practice includes banking, insurance and other financial disputes. Meanwhile, in the administrative field, part of his practice involves privacy and data protection, expropriations, regulatory, telecommunications, public bids, antitrust and railroad affairs.
Mr Palacios has strong experience in challenging administrative regulations before federal courts, and handling complex commercial and administrative litigations with constitutional relevance before the Mexican Supreme Court of Justice.

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Moses Wanki Park is a dispute resolution lawyer practising as a barrister based in Hong Kong. His practice mainly focuses on conduct and resolution of cross-border and international commercial arbitration and litigation. He has successfully handled a broad spectrum of commercial work, including commercial fraud, asset tracing and recovery and enforcement of foreign arbitral awards and judgments, as well as shareholder disputes.

Moses has expertise concerning recovery strategies and emergency relief measures related to fraud, including *Mareva* injunctions, *Norwich Pharmacal* orders and asset tracing proceedings. He is well versed in the enforcement of foreign judgments and arbitral awards in Hong Kong. His clients have included international corporations and businesses as well as high- and ultra-high-net-worth individuals.

Moses has recently contributed a chapter to *Construction Contract Essentials in Hong Kong*, published by the University of Hong Kong Press. He is a Fellow of the Hong Kong Institute of Arbitrators and a Member of the Chartered Institute of Arbitrators. He is currently serving in the Committee of Arbitration at the Hong Kong Bar and the Committee of Commercial Law and Practice at the International Chamber of Commerce Hong Kong as well as the Steering Committee of HK45 of the HKIAC.

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Stavros Pavlou is the senior and managing partner of Patrikios Pavlou & Associates LLC. He is an extensively experienced litigator and arbitrator, regularly praised as one of the top litigators in Cyprus, with an impressive portfolio of representing major international organisations, groups of companies, banks and high-net-worth individuals in complex commercial and other dispute resolution matters, including judicial and arbitration proceedings in the courts of Cyprus and abroad. He is a Fellow of the Chartered Institute of Arbitrators (CIArb) and he has led the firm in becoming a member of the Russian Arbitration Association and the International Law Association. He actively participates in and speaks at highly regarded international seminars and conferences, and he is the author of numerous articles in international publications.
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Rollin Ransom serves as co-leader of Sidley’s global commercial litigation and disputes practice. He is managing partner of the Los Angeles office and also head of the Greater Los Angeles litigation group. Representing both individuals and corporations, Rollin has extensive experience prosecuting and defending lawsuits involving a wide variety of intellectual property claims, including copyright and theft of ideas, trademarks, false advertising, trade secrets and unfair competition actions. Rollin’s clients cover an array of industries, including media and entertainment, technology and financial services companies. He also regularly counsels clients outside litigation on a variety of intellectual property, advertising and internet-related matters.

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Karen Reynolds is a partner in the commercial litigation and dispute resolution department at Matheson, and co-head of the firm’s regulatory and investigations group.

Karen has a broad financial services and commercial dispute resolution practice. She has over 10 years’ experience of providing strategic advice and dispute resolution to financial institutions, financial services providers, domestic and internationally focused companies and regulated entities and persons. She advises clients in relation to contentious regulatory matters, investigations, inquiries, compliance and governance related matters, white-collar crime and corporate offences, commercial and financial services disputes, anti-corruption and bribery legislation, and document disclosure issues.

Karen has substantial experience in corporate restructuring and insolvency law matters, having had a lead role in some of the most high-profile corporate rescue transactions of the past 10 years. She advises liquidators, regulators, directors and insolvency practitioners in relation to corporate offences and investigations, shareholder rights and remedies, directors’ duties, including in relation to fraudulent and reckless trading and disqualification and restriction proceedings.

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Eva-Maria Rhomberg is an associate at Gasser Partner Attorneys at Law, currently practising in Vaduz. Before joining Gasser Partner in 2017, she studied law at the universities in Vienna and Innsbruck, where she earned her master's degree in law (Mag.iur.) in 2013. After graduating from Innsbruck University, she worked as a patient representative for an extrajudicial mediator and as a legal trainee at a supervisory authority in Liechtenstein. Her main areas of practice include civil law, criminal law, compliance, litigation and arbitration.

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Jonathan Ripley-Evans is a director based in the Johannesburg office of Herbert Smith Freehills. Jonathan has extensive experience in alternative dispute resolution and general commercial litigation. He has acted as mediator and as advisor in both mediations and arbitrations, domestic and international.

Jonathan is an accredited Fellow and local board member of the Chartered Institute of Arbitrators and a committee member of both AFSA International and AFSA Construction. He is an AFSA accredited mediator and arbitrator.

Jonathan's practice is geared towards alternative dispute resolution, in particular arbitration and mediation. He specialises in the resolution of commercial disputes in a wide range of sectors including energy, mining, tourism, hospitality, property and engineering.

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Patrick Rohn is a partner at Thouvenin Rechtsanwälte, and specialises in domestic and international commercial litigation and arbitration, with a particular focus on disputes relating to distribution, licensing, commercial and corporate transactions and relations. Patrick has advised and acted as counsel for companies from various sectors, including life sciences, technology, financial services, real estate, and trade sectors. He frequently represents parties in complex contractual and corporate disputes (including M&A, joint venture, and insolvency-related matters), and he has considerable expertise related to cross-border asset tracing and recovery and the enforcement of foreign judgments and arbitral awards. Legal 500: EMEA recommends Patrick for litigation (‘brilliant mind’, ‘exceptional analyst and tactician’), and Who’s Who Legal: Litigation recognises Patrick for his work as a ‘Future Leader’ in the partner category (‘strong analytical and strategic skills’, ‘very thorough indeed and has a complete grasp of the law involved’). Leaders League recommends Patrick for both commercial litigation and international arbitration. Patrick is also listed by the International Distribution Institute and the Swiss Chambers’ Arbitration Institution as an arbitrator with specific experience in the field of distribution (IDArb list of specialised arbitrators).

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Kevin Rubino is a partner in Sidley’s San Francisco office, where he handles civil litigation and international commercial arbitration, with a focus on technology-related disputes. Kevin
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Myria Saarinen is a partner in the litigation and trial department of Latham & Watkins' Paris office. Her practice focuses on complex commercial litigation, data privacy, and compliance. She is the global co-chair of the technology industry group.

Ms Saarinen’s practice focuses on resolving a broad range of complex disputes through litigation proceedings, mostly in an international context and in various areas of business (healthcare, aeronautics, information technology, construction works, insurance, etc.). She is very active in litigation relating to major industrial operations and is involved in a broad range of general commercial disputes (contract and liability) and corporate litigation.

Ms Saarinen has expertise on cross-border issues raised in connection with discovery and similar requests in France. In addition, she has developed specific expertise, for 20 years now, in the privacy/personal data area, advising international clients. She supports her clients in their compliance programs regarding GDPR. She is also active in corporate governance and compliance and assists clients in drafting and implementing grant of powers, delegation of liability, and other compliance schemes.

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Charles (‘Chad’) Schafer is a partner in the litigation group of Sidley Austin’s Chicago office. He has handled both at trial and on appeal a diverse range of civil litigation matters in state and federal courts throughout the country. He has represented companies and individuals in significant trade secrets misappropriation, technology and software implementation litigation. He also represents both corporations and individuals in a variety of tax controversies, covering sales tax (retailer’s occupation tax and use tax), corporate and individual income tax, estate tax, franchise tax and utility tax, including a case that he handled from trial victory through affirmation in the Illinois Supreme Court in a decision that invalidated Illinois sales tax regulations that had been in place for more than 50 years. He has represented banks and other financial institutions against claims of securities fraud and violations of the Fair Credit Reporting Act, as well as breaches of significant contracts in state and federal courts throughout the country. He has significant experience in conducting a variety of corporate internal investigations throughout the United States and multiple foreign countries, involving allegations of tax fraud, theft and embezzlement by executives, inquiries from regulators and law enforcement and alleged violations of the Foreign Corrupt Practices Act.

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Eider Avelino Silva is a partner at Pinheiro Neto Advogados within the litigation practice and focuses his practice on corporate, civil, commercial, insurance and reinsurance litigation, dealing with complex, leading domestic and international cases. He holds a master’s law degree from the Pontifical Catholic University of São Paulo (PUC-SP), Brazil, and an LLB in law from PUC-SP, where he graduated with the highest grade point average of all graduating classes (the Paulista Law School award), and the highest grade point average in civil law (the Professor Agostinho Neves de Arruda Alvim award) and criminal procedural law (the Professor Doutor José Frederico Marques award). From 2015 to 2016, Eider worked as foreign associate at Quinn Emanuel Urquhart & Sullivan, LLP in New York.

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Prudence Smith is a partner in Jones Day’s Sydney office. Prudence has a particular interest in complex litigation involving expert evidence and regulatory bodies. She has been involved in disputes in the Federal Court of Australia, the Australian Competition Tribunal, state supreme courts and also in regulatory matters involving the Australian Competition and Consumer Commission (ACCC), the Therapeutic Goods Administration, the Australian Energy Regulator, and the Department of Health.

Prudence holds a Bachelor of Arts, Master of Commerce, Masters of Arts and Bachelor of Laws from the University of New South Wales. She is also presently studying a master’s law degree at the University of Melbourne. Prudence holds practising certificates in New South Wales, the High Court of Australia and the High Court of New Zealand.
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Dan is a partner at Lundgrens and is engaged in all aspects of litigation and arbitration. He is highly experienced in domestic as well as international arbitration and litigation matters.

In addition, Dan is often appointed arbitrator and has experience from all leading arbitration institutes. Furthermore, he has acted as an expert witness on Danish law before different international courts, primarily in the United States.

Dan was admitted to the Danish Supreme Court in 1998.

Dan has been assistant professor in international arbitration law at the University of Copenhagen and is now teaching international commercial law at Copenhagen Business School.

Dan is a member of the International Bar Association (board member of the Litigation Committee), Group 73 in the Danish Management Society, the Danish Arbitration Association, the Association of Litigators appearing before the Supreme Court (a Danish association of experienced Supreme Court litigators) and the Danish Bar and Law Society.

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Vicki Unsworth is a director at Advocates Smith Taubitz Unsworth Ltd. She is a civil and commercial litigator with experience in a whole host of high-value cross-jurisdictional cases. Vicki has acted as lead counsel in relation to cross-border insolvency cases, international trust disputes and high-value commercial claims with both local and international connections. Vicki acts routinely for both claimants and defendants and is also involved in regulatory breach cases for global organisations and data protection cases. In addition to being an experienced and qualified advocate, Vicki has also undertaken and passed the Institute of Directors Diploma in Company Direction with distinction and is a certified data protection practitioner. Vicki is recommended by *The Legal 500* in the field of dispute resolution, and has held this recommendation consistently since she was a very junior advocate. Vicki routinely works with a number of high-ranking London and international law firms and barristers.

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Paul Veith leads the software and trade secret practice within the litigation group in Sidley Austin’s Chicago office. He is a versatile commercial litigator with experience in a wide range of subject areas and industries. He was lead counsel for a national insurance company that secured an arbitration award of over $140 million in a dispute concerning the failed implementation of a critical policy administration and billing system. He has substantial experience trying cases in a variety of forums. He earned a bachelor’s degree from the University of Illinois in 1987, and a law degree from Harvard Law School in 1990.

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Mair Williams is an associate in the London office of Latham & Watkins and a member of the firm’s litigation department. Mair is qualified as both a barrister in England and Wales.
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Athena Wong is a dispute resolution lawyer practising as a barrister in Hong Kong. She was also admitted as an attorney in New York in 2016. She graduated from the University of Oxford, with a degree in law.

Her practice focuses on cross-border and international commercial litigation and arbitration. She has handled a broad spectrum of commercial cases, including commercial fraud, company, contract, land and construction disputes.

Before joining the Bar, Athena specialised in negotiating price and commercial terms for international firms, including Coca-Cola and Hutchison Telecommunications.

She is a fellow of the Hong Kong Institute of Arbitrators, a CEDR accredited mediator and an accredited Chinese commercial mediator. She was appointed as legal consultant to Zhong Yin Law Firm (Nanjing) in 2016.

She currently serves in the Adjudication & Construction Committee of the Hong Kong Institute of Arbitrators (HKIArb), the Standing Committee on Greater China Affairs of the Hong Kong Bar Association (HKBA), and the legal committee of the Hong Kong General Chamber of Commerce (HKGCC).

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Xeauwei is a partner at Allen & Gledhill, and her areas of expertise encompass corporate litigation and international arbitration. She has substantial experience in handling banking disputes, shareholders’ disputes, trust and property disputes and commodities disputes. She is effectively bilingual in English and Chinese and has rendered expert opinions for proceedings in England and the People’s Republic of China. Xeauwei has been recognised for her work in *The Legal 500: Asia Pacific*, and is cited as ‘clear and concise’ and as taking ‘a well-rounded approach when looking for solutions’. She graduated from the National University of Singapore with an LLB (Hons.) degree and passed the Singapore Bar examinations, ranked among the top 10 individuals of her year’s cohort.

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Shen Yi is a partner at Grandall Law Firm. Shen has more than 20 years of practice experience and mainly focuses on commercial dispute resolution, mergers and acquisitions, securities offerings, corporate restructurings and foreign direct investment.

In the field of litigation and arbitration, Shen has represented numerous clients and successfully handled a number of complex corporate and commercial cases, including banking, finance lease, corporate equity, PE investment and intellectual property disputes.

Shen obtained his LLB from Northwest University of Political Science and Law and his LLM from Temple University. Shen is also a member of the Chinese Society of International Law.

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Pedro Zanetti holds a law degree from the University of São Paulo and a postgraduate degree in contract law from Insper – Institute of Education and Research, with an extension in law and economics from the University of St Gallen, in Switzerland, offered in partnership with the Lemann Foundation. He now focuses his academic studies on private rules of procedure and on the economic analysis of procedural law. He joined the Pinheiro Neto Advogados litigation practice in 2011 and works with complex commercial, aviation, and civil litigation and pre-litigation cases.

YANG ZHENGYU
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Yang Zhengyu is now a partner at Grandall Law Firm, specialised in the fields of commercial dispute resolution and corporate restructuring. Yang has undertaken the reorganisation of various financial institutions, listed companies and large-scale enterprises, such as Jinxin Trust LLC, Xianyang Pianzhuan Co Ltd, Greencool Companies, Cangzhou Chemical Ind Co Ltd and HuaYin International Trust LLC. Yang worked in the Second Civil Tribunal of the Supreme People's Court as a presiding judge for more than 20 years. During his term of office, Yang heard over 600 cases in the fields of contracts, debts, guarantees, torts, corporate matters and bankruptcy with total amounts at issue over 200 billion yuan. Yang has participated in the drafting of the Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People's Republic of China, Interpretation of the Supreme People's Court on the Application of the Contract Law of the People’s Republic of China, Interpretation of the Supreme People's Court on the Application of Law in the Hearing of Cases of Disputes over Financial Leasing Contracts and other judicial interpretations. Yang also participated in the drafting of the United Nations Model Law on cross-border insolvency. Yang is an expert in the research of application of commercial practice rules in commercial arbitration sponsored by the China University of Political Science and Law.

Yang is also an arbitrator for many arbitration institutions, including the China International Economic and Trade Arbitration Commission (CIETAC) and the Beijing Arbitration Commission (BAC).
Appendix 2

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